



**LITIGATING CLASS ACTIONS
BEFORE THE EEOC**
EXCEL CONFERENCE 2014

FILING OF A CLASS COMPLAINT

No EEO investigation

Within 30 days of an agency's receipt of class complaint , agency must forward the complaint, along with a copy of the Counselor's report and “any other information pertaining to timeliness or other relevant circumstances related to the complaint,” to EEOC

TURNING EEO COMPLAINT INTO CLASS ACTION

Individual EEO Complaint Can Be Amended to Become Class Complaint

- “at any reasonable point in the process”

AJ Can Deny Class Certification “when the complainant has unduly delayed in moving for certification”

PRECERTIFICATION PROCESS

AJ may require Class to submit specific and detailed information about complaint

AJ may dismiss class complaint, or subdivide class

Class is entitled to precertification discovery

- *Jones v. USPS*, EEOC No. 01200603671 (2008)

CLASS CERTIFICATION REQUIREMENTS

Numerosity

- “The numerosity prerequisite requires that the class be sufficiently numerous that a consolidated complaint by the members of the class is impractical.”
George v. Reno, EEOC No. 01944098 (1996)
- “the number of persons who possibly could have been affected by the agency’s allegedly discriminatory practices and who, thus, may assert claims.” *Tschappat v. Dept. of Labor*, EEOC No. 07A40074 (2005)

CLASS CERTIFICATION REQUIREMENTS

Adequacy of Representation

- Class Agent and/or Class representative “ will fairly and adequately protect the interests of the class”
- Provisional class certification by EEOC
 - *Clopton v. EPA*, EEOC No. 01A2478 (2004)

CLASS CERTIFICATION REQUIREMENTS

Commonality and Typicality

- “In application, the commonality and typicality prerequisites tend to merge, and are often indistinguishable.”

McGuire v. SSA, EEOC No. 01985492 (2000)

- Ensure that named plaintiffs and class representatives have a real stake in the outcome of the case, and that they present no conflict with the goals of the other putative class members

COMMONALITY AND TYPICALITY

“Commonality is established when a common thread of discrimination confronts all members of a class and the class claims will share common questions of law and fact.”
Young v. Slater, EEOC No. 01993583 (2000)

Class agent’s claims “need not be identical[;] the claims must be sufficiently typical to encompass the general claims of the class members so that it will be fair to bind the class member by what happens with the agent’s claims.” *Young v. Slater*, EEOC No. 01993583 (2000)

COMMONALITY AND TYPICALITY

“[W]hen common facts exist, such as a centralized promotion policy and practice, a class agent may represent people from more than one job group.”

Jeffries v. Treasury, EEOC No. 01A02227 (2003)

“While we note that each division has separate selecting individuals, ... all are subject to the same agency promotion policy and oversight by the central servicing Human Resources Department which provides guidelines for all divisions.”

Lewis v. Dept. of Transp'n, EEOC No. 01A40442 (2005)



CLASS CERTIFICATION DECISION

Agency final action within 40 days of AJ class certification decision

If AJ decision not implemented, then agency must file simultaneous appeal with OFO

Class may appeal agency final action adopting AJ decision denying class certification

Notification of Class Members

- Within 15 days of class certification

No Class member may “opt out”

POST-CERTIFICATION

AJ oversees development of the record pursuant to 1614.204(f).

Regulations and EEOC MD-110 provide minimal guidance, so discretion rests with parties and AJ how to conduct discovery.

- AJ has sanctions authority: 1614.204(f)(2)
- AJ may direct Agency to conduct investigation: 1614.204(f)(3)
- AJ may hold hearing: 1614.204(h)
- Consider use of special scheduling orders

CLASS COMPLAINT MERITS DISCOVERY

Importance of developing a joint discovery plan

Issues to consider in discovery plan:

- Bifurcation of non-expert and expert discovery
- Bifurcation of liability and damages discovery
- Mechanism for resolution of discovery disputes
- Scheduling of periodic status calls with AJ

DISCOVERY OF CLASS MEMBERS

Scope of discovery of absent class-members

- Can absent class members be deposed?
- Must absent class members respond to written discovery requests?
- Generally, **NO**.
 - MD-110 Ch. 8 § V(C): absent class members “do not have to participate in the class.”
 - “Discovery from absent class members is ordinarily not permitted.” *On the House Syndication, Inc. v. Federal Express Corp.*, 203 F.R.D. 452, 453 (S.D. Cal. 2001)

Necessity to prove Class Agent’s individual case at Stage I liability hearing



MERITS PROCESSING ISSUES

EEO Office should hold related cases in abeyance pending adjudication of Class Complaints

- **AJs and agencies shall exercise discretion when holding Class Complaint allegations in abeyance and processing the remainder of a Complainant's EEO Complaint**

Agency should provide appropriate official time, including use of Agency facilities, for Class Agent

Class Agent must first obtain prior approval of the Agency Representative



DISPARATE TREATMENT ANALYSIS

To establish a prima facie case, a Class must show that the employer regularly and purposefully treated protected Class members less favorably than the majority group members

Teamsters v. U.S., 431 U.S. 324 (1977)

- Isolated, sporadic incidents not sufficient
- Use of anecdotal evidence demonstrating “standard operating procedure” of Agency was to discriminate

DISPARATE TREATMENT (CON'T)

Class can also establish a prima facie case through statistical data demonstrating disparate treatment, and such evidence may be sufficient to establish a prima facie case

Statistics must be both relevant and significant.

- *Herron v. Dept. of Agriculture*, EEOC No. 01A04725 (2002) (reversing AJ decision where improper statistical analysis by expert was relied on by AJ). The Commission provided a detailed explanation of proper applicant flow data
- Importance of Statistical Proof: *Epps v. Dept. of Agriculture*, EEOC No. 0120050745 (2007)

ADVERSE IMPACT ANALYSIS

Class alleges that a neutral Agency policy or practice adversely affects a protected Class

The burden shifts to the Agency to show business necessity

Class may rebut business necessity defense by showing that other means are available to achieve the same objective with less discriminatory impact



ADVERSE IMPACT (CON'T)

No fixed statistical value for establishing a prima facie case.

- *Hazelwood School District v. US*
433 U.S. 299 (1977)
 - Establishing under-representation insufficient without the Class demonstrating that a particular employment practice created a disparate impact
 - 4/5 Rule: EEOC Uniform Guidelines
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ROLE OF EXPERT WITNESSES

Statistical evidence

Industry expertise

Not ultimate question of law

Expert Discovery



PHASE I LIABILITY HEARING

Presentation of evidence

- Anecdotal witnesses
- Expert witnesses

Importance of statistical evidence

Logistical considerations– importance of cooperation between parties and involvement of AJ



PHASE II INDIVIDUAL RELIEF PROCESS

After class liability has been determined, AJ can hold additional hearings to determine the individual damages of class members

Individuals must show they are members of the class and affected by the matter that has been resolved are entitled to relief

Burden of disproving entitlement is on the employer, which it can meet only through presentation of clear and convincing evidence



CLASS SETTLEMENTS

Benefits of Class Settlements

ADR options

- Mediation– private mediator vs. EEOC mediator
- Discovery for settlement purposes
- Use of experts in settlement negotiations
- Phase I vs. Phase II settlements

Timing of settlement discussions

Examples of Class Settlements



SETTLEMENTS (CON'T)

Fairness Hearing process

- Notice to Class members
- 30 days to submit objections
- Settlement must be “fair, adequate and reasonable to the class as a whole”