

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
CLEVELAND DISTRICT OFFICE

Class Complaint of)
WILLIAM H. TSCHAPPAT,)
Complainant) Appeal No. 07A40074)
v.) EEOC Case No. 100-98-8066X)
ELAINE CHAO,) Agency No. 8-05-15)
Secretary,)
Department of Labor,)
Agency.)

REQUEST FOR CLARIFICATION OF CLASS DESCRIPTION
AND STAY OF NOTICE

Introduction

The United States Department of Labor, Occupational Safety and Health Administration (OSHA), respectfully requests clarification of the class description in the above referenced class action and tolling of the Department's obligation regarding notice to the class pending resolution of this issue. By Order of September 15, 2005, the Equal Employment Opportunity Commission's (EEOC) Office of Federal Operations (OFO) ordered the Department to commence providing notice to the class of the certification of the class complaint. *See Id.* at 2. While the Department is fully prepared to initiate notice to the class, it cannot do so without clarification of the scope of the class. There has not been a consistent description of the class contained in the various decisions issued in the case nor in the pleadings filed by Complainant. For this reason the Department requests clarification of the class description.

Background

This case concerns a complaint of class wide discrimination filed by Mr. William Tschappat, an OSHA employee, on November 8, 1994. At all times relevant to this case, Complainant has held the position of a Safety and Health Specialist, GS-018-13. In his original complaint, Complainant alleges that OSHA engaged in discrimination against employees over the age of 45 in connection with promotions to the position of Safety and Occupational Health Manager, GS-018-14. Complaint at 1. He alleges that he applied unsuccessfully for a GS-018-14 Safety and Occupational Health Manager position in OSHA headquarters sometime in 1993 or 1994 and that this was “[the] latest action, in a long list”. *Id.* That “long list” includes 38 GS-14 selections “in all parts of the country” since 1989. *Id.*

Informal EEO counseling was provided to Complainant in 1996. The counselor’s report contains a description of the class that is in all respects identical to the description contained in the initial complaint. *See* Counselor’s Report of April 17, 1996. Upon the completion of counseling, the case was referred to the EEOC’s Cleveland District Office for further processing in 1998. The case was assigned to Administrative Judge Christine Dibble. *See* letter of January 11, 1999, from Administrative Judge Dibble. Judge Dibble asked the parties for information and assistance in determining the efficacy of the class. *Id.*

In February 1999, in response to Judge Dibble’s request, Complainant presented a different class description from that contained in the original complaint:

Class Action of Age Discrimination by the Occupational Safety and Health Administration (OSHA) of the U.S. Department of Labor in promotion of employees to the position of Safety and Occupational Safety and Health Specialist GS-018 Grade Level 13, and 14 and Safety and

Occupational Health Manager GS-018 Grade Level 13, and 14 from November 1984 to the present.

Letter from William Tschappat to Administrative Judge Dibble, February 1, 1999.

The reference to November 1984 appears to be a typographical error committed by Complainant.

Complainant's inclusion of promotions to grade 13 positions in his complaint was based upon his non-selection in 1997 for a grade 13 position in Columbus, Ohio. That non-selection was challenged by Complainant as an individual claim alleging age discrimination. The Department issued a final agency decision denying the claim. Complainant appealed the Department's decision to the EEOC's Office of Federal Operations (OFO) which affirmed the Department's decision. *Tschappat v. Herman*, 2001 WL 1201198 (E.E.O.C.).

In response to Judge Dibble's request, the Department filed a Motion to Dismiss the Complaint for failure to meet the prerequisites for a class complaint on February 25, 1999. The case was transferred from Judge Dibble to Administrative Judge Porter. Judge Porter denied certification on the grounds that the class failed in numerosity, and commonality, and that Complainant was not an adequate representative of the class. Decision and Order of Judgment, December 6, 2000.

In his decision, Judge Porter reiterated the descriptions of the class proffered by Complainant in both the original 1994 complaint as well as his amended version of the class contained in his February 1999 letter, including the erroneous reference to 1984. *See* Decision at 3. The Department implemented the decision of Judge Porter and Complainant appealed the decision to the Commission.

The Commission vacated the Department's decision on October 9, 2002, and remanded the case to the Department to supplement the record with respect to the issue of numerosity. Decision at 2-4. In the decision, the Commission described the class complaint as alleging discrimination against a purported class of persons over the age of 45 that have applied unsuccessfully for positions and promotions since 1989. *Id.* at 1. The Commission further described the alleged discrimination as occurring in connection with the "failure to promote to Occupational and Safety Health Specialist, GS-018, grade levels 13 and 14, and Safety and Occupational Health Manager, GS-018, grade levels 13 and 14 from November 1984 to the present." *Id.*

Upon remand, the Department asked Complainant for additional information in response to the remand order of the Commission. *See* letter of Annabelle Lockhart, October 31, 2002, to William Tschappat. By letter of November 27, 2002, Complainant identified 30 class members by name and indicated that a review of previously filed individual complaints of discrimination obtained through discovery might result in identifying a class of up to 100 individuals. *Id.* Complainant's response did not contain a class description. Upon receipt of Complainant's response, the Department forwarded the record to the Cleveland District Office of the EEOC.

In September, 2003, Judge Porter issued a decision conditionally certifying the class pending the class agent securing adequate representation for the class. Decision of Judge Porter, September 29, 2003, at 5. Judge Porter described the class as consisting of "persons over the age of forty-five who have applied unsuccessfully for positions and promotions since 1989", to grades 13 and 14 Occupational Safety and Health Specialists positions. Decision, at 2. Inexplicably he also refers to the erroneous 1984 date. *Id.* at 2.

In December, 2003, attorneys representing the class filed Notices of Appearance of Counsel in the case with Judge Porter. See Decision of January 27, 2004 at 3. Judge Porter certified the class having been satisfied that the requirement of adequacy of representation had been fulfilled. Judge Porter repeated his description of the class that was contained in his decision of September, 2003.

The Department filed an appeal of Judge Porter's decision with the OFO on April 12, 2004. In response, Complainant filed an opposition to the appeal on May 12, 2004. See Statement of William H. Tschappat in Opposition to Agency Appeal (Opposition). In the Opposition, Complainant describes the class as consisting of OSHA employees over the age of 45 that have applied for grade 13 and 14 supervisory positions since 1989. The Opposition makes no reference to 1984. Opposition at 2.

OFO issued a decision on May 10, 2005, denying the Department's appeal and affirming the decision of Judge Porter certifying the class. OFO Decision at 1. In its decision, OFO provided two conflicting descriptions of the class. First, OFO reiterated the previously stated description of the class as being employees of OSHA over the age of 45 that have applied for grade 13 and 14 GS-018 Safety and Occupational Health Manager and Occupational and Safety Health Specialist positions since 1984. *Id.* In its discussion of the question of fact common to the class, OFO framed the issue as “. . . . whether the agency discriminates against individuals over the age of 40 in promotions. . . .” *Id.* at 3.

The Department petitioned OFO for reconsideration of its decision, expressly raising the need for clarification of the class. Statement in Support of Agency's Request for Reconsideration, at 2, 13-18. OFO denied the Department's Request. In its decision

OFO provided only a cursory description of the class stating that the complaint alleged that the agency has discriminated against employees over the age of 45 in employment and promotions, quoting the original complaint filed in 1994. *Id.* In its Order OFO directed the Department to transmit the record to the Cleveland District Office. Denial, at 2. The Order also directed the Department to commence notification of the class of the acceptance of the class complaint. *Id.*

Discussion

As the foregoing illustrates, throughout the procedural history of this case there has been confusion regarding the class description. Complainant has presented three separate dates for the alleged discrimination. While the original complaint claims a policy of discrimination since 1989, in his February 1, 1999 letter, Complainant requested the Administrative Judge define the class to include certain employees from November 1984 to the present. February 1, 1999 reply letter, at 1. However, in the same letter, Complainant asked that the complaint include incidents of discrimination "for the time period going back to November 1994." *Id.* Since the latter date coincides with the filing of the complaint, it may well be that "November 1984" was a typographical error, and that the Complainant instead intended "November 1994" to be the beginning date. Nonetheless, continual reference to the erroneous 1984 date in the various decisions issued in this case has contributed to the lack of clarity of the class description.

There is no factual or legal basis to support a date of November 1984 or November 1989. The Complainant first raised the November 1984 date in February 1999, well after he filed his November 1994 complaint. Commission rules require dismissal of such belatedly-raised issues when, as here, the Complainant provides no

justification for not raising them earlier. See 29 C.F.R. 1614.204(d) (3). Commission rules also provide that Complainants must initiate EEO counseling within 45 days of the most recent occurrence of the allegedly discriminatory incident, or in the case of a personnel action, within 45 days of the effective date of the action. 29 C.F.R.

1614.105(a) (1). Because the November 1994 complaint alleges discrimination since 1989, and the Complainant has provided no good reason for the Commission to ignore the 45-day time limit, allegations of discrimination outside the 45-day limit should be rejected. See 29 C.F.R. 1614.204(d) (2) (45-day time limit applies to class complaints); Wood v. Department of Energy, Appeal No. 01943756, 1998 WL 1944224, at *6 (Oct. 5, 1998) (same). See also, *National Railroad Corp. v. Morgan*, 536 U.S. 1010, 113-115 (2002). (Discrete acts such as non-selection require filing within limitations period).

Conclusion

The Department is prepared to provide notice to a class of employees in this case and is undertaking good faith efforts in preparation of doing so. These steps include, among other things, conducting a search for the last known addresses of potential class members that are no longer employed by OSHA. Counsel for the Department received Complainant's Motion for Conference Re: Notice to Class, on October 4, 2005. The Department is in agreement that a conference on the subject of notice would be useful and is fully prepared to participate.

For the foregoing reasons the Department respectfully requests clarification of the class description.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing REQUEST FOR CLARIFICATION OF CLASS DESCRIPTION AND STAY OF NOTICE was sent by first class mail on October 6, 2005, and telefaxed on the 5th day of October, 2005 to:

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