

# Certified Class Actions at the Hearing Stage

EXCEL Conference  
New Orleans, LA  
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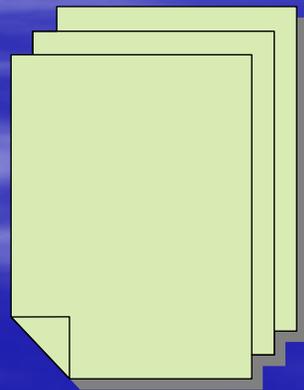
Department of Labor



# Presentation Outline

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- Litigating a Class Complaint
  - Class Complaint Theories
  - Statistical Evidence and Proof
- Procedural Aspects of Post-Certification
  - Post-Certification Discovery
  - Expert Discovery
  - Hearing (Phase I and II)
  - Settlement



## Disparate Treatment in Class Cases

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- 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 (cont.)

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- 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 Appeal No. 01A04725 (Sept. 27, 2002) (reversing AJs 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 Appeal No. 0120050745 (2007).

## Proof of Statistical Significance

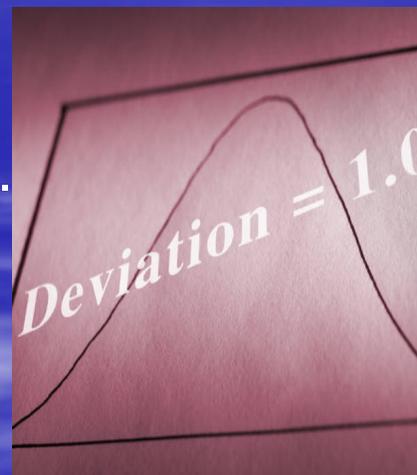
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- Do the results **MATCH** the predicted result based on a neutral decision policy?
- If they do not match how far apart can they be?
- What is the probability that the difference was within the realm of **CHANCE**?

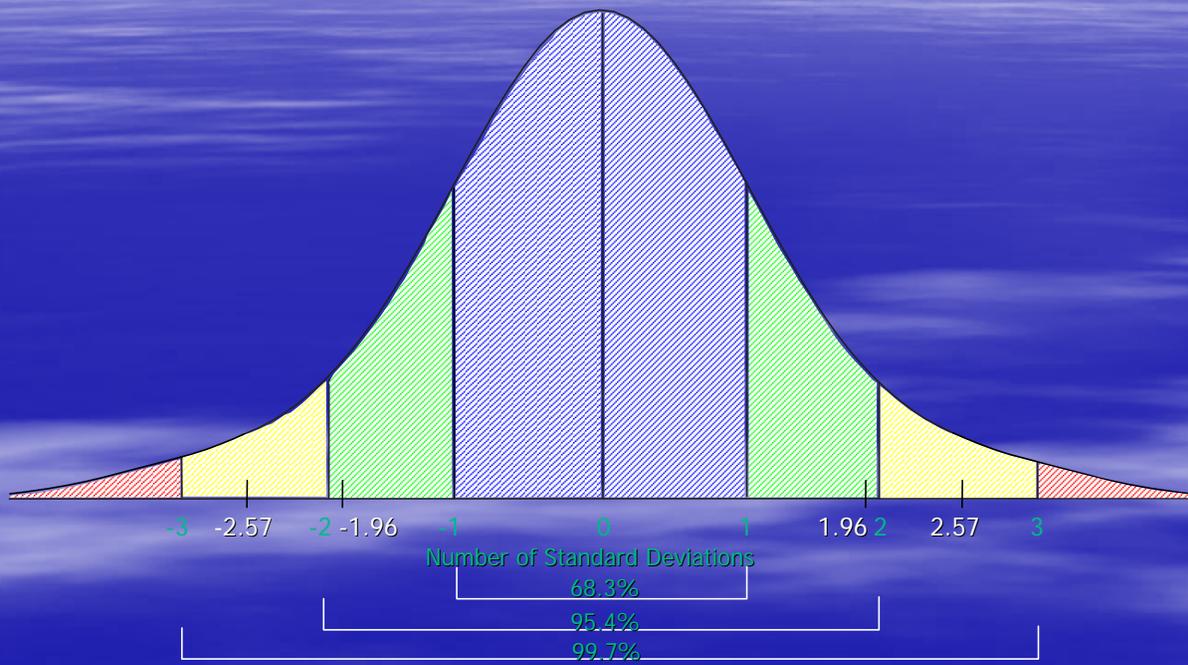
# Statistical Evidence

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- Generally, differences are considered statistically significant if:
  - 2 standard deviations or more.
  - Probability of 0.05 or less.



# Standard Normal Distribution



## The 4/5 Rule

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- EEOC Uniform Guidelines use the 4/5 rule (also called the 80% rule) not an inferential statistic.
- This rule only gives a ratio.
- No probability associated with it.
- Some argue it is good for large numbers where small percentage differences can be significant.

# Disparate Impact in Class Cases

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- Disparate Impact:
  - Class Agent alleges that a neutral Agency policy or practice adversely affects a protected Class.
  - The burden shifts to the Agency to show business necessity.
  - Class Agent may rebut business necessity defense by showing that other means are available to achieve the same objective with less discriminatory impact.

## Disparate Impact (cont.)

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- Disparate Impact requirements:
  - No fixed statistical value for establishing a prima facie case.
    - Hazelwood School District v. United States, 433 U.S. 299 (1977).
  - Establishing under-representation insufficient without the Class demonstrating that a particular employment practice created a disparate impact.
    - Wards Cove Packing Co. v. Antonio, 490 U.S. 642 (1989).

## Post-Certification Discovery in Class Actions

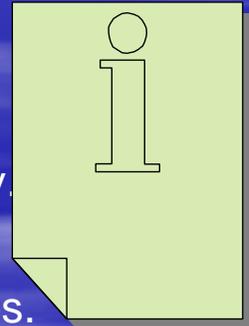
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- AJ oversees development of the record pursuant to 1614.204(f).
- Regulations and EEOC MD-110 provide minimal guidance, so discretion rests with parties and AJ how to conduct discovery.
  - AJ has sanction authority: 1614.204(f)(2)(i)-(iv);
  - AJ may direct Agency to conduct investigation: 1614.204(f)(3);
  - AJ may hold hearing: 1614.204(h).
  - Consider use of special scheduling orders.

## Discovery In Class Actions (cont.)

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- Example of special scheduling order (Harrison-Gray v. VA).
- 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.



# Post-Certification Processing Issues

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- 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.



## Class Member/Agent Discovery

- Scope of discovery of absent class members.
  - Can absent class members be deposed?
  - Must absent class members respond to written discovery requests?
- Necessity to prove Class Agent's individual case at Stage I liability hearing.

# How to Select the Expert

- Employment-related experts are a critical part of employment litigation in trials and mediation.
- Consider the Expert's Work.
  - Field and Credentials.
  - Prior Testimony.
  - Written Work.
  - Communication Skills.
- Consider the Expert's Capacity (match to case).
  - Available Resources.
  - Methodology.





## Expert Discovery (cont.)

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### Defendant

- Talk to people at the Agency who know about the process – promotions, pay, hiring, RIF.
  - Should your expert work with you on this?
  - Should you participate in expert and Agency conversations?
- Providing data to plaintiffs.
  - Who should prepare it?
  - How helpful should you be?
- Share 30(b)(6) depositions with your expert.
- Share relevant policy documents.

## Expert Discovery (cont.)

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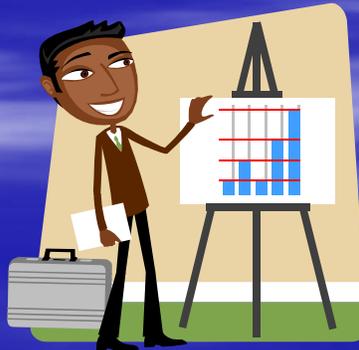
- Review your expert's report (or the opponent's expert report).
- What do you need to look for:
  - Are the issues addressed?
  - Does it have sources for its conclusions?
  - Do you understand it?
  - Does it read like an advocate's report?



## Expert Discovery (cont.)

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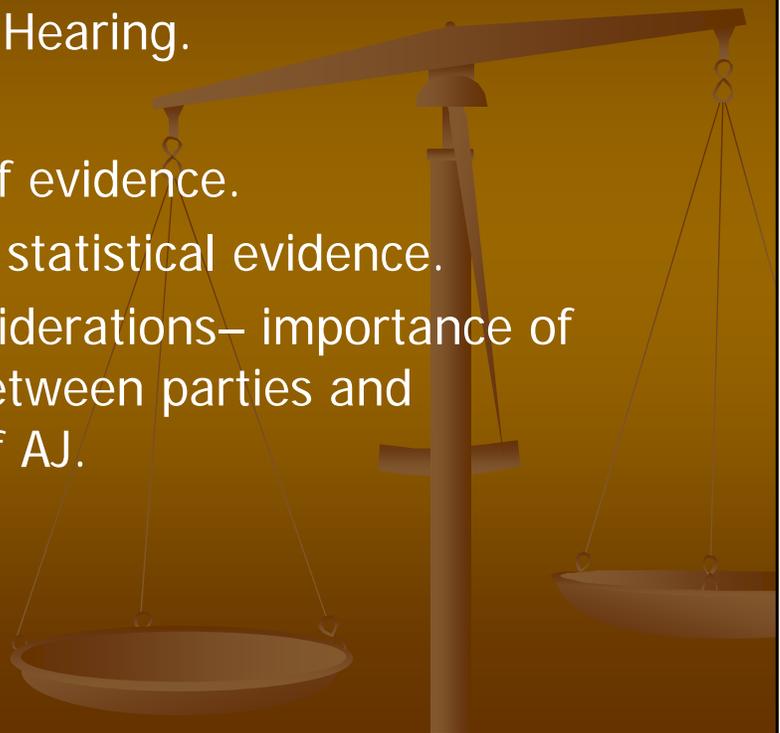
- What statistical techniques were used?
  - Do they seem appropriate?
  - Can your expert explain them to you?
  - Do you see any obvious errors?
  - Do the tables/charts/graphs help explain the conclusions?



# Hearing Phases of Class Complaints

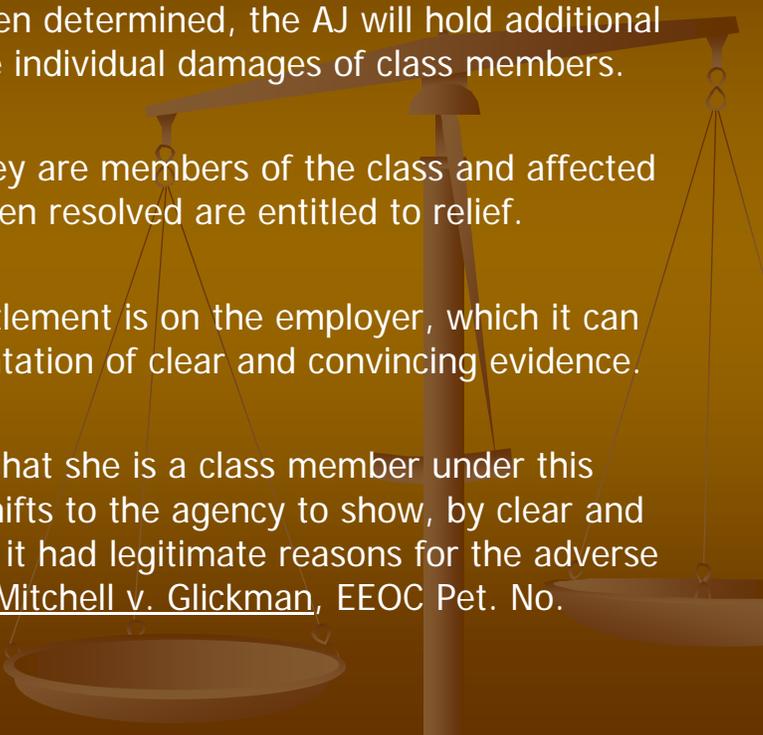
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- Phase I: Liability Hearing.
  - Presentation of evidence.
  - Importance of statistical evidence.
  - Logistical considerations– importance of cooperation between parties and involvement of AJ.



## Phase II: Individual Teamsters Hearings

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- After class liability has been determined, the AJ will 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.
  - Where a claimant shows that she is a class member under this agreement, the burden shifts to the agency to show, by clear and convincing evidence, that it had legitimate reasons for the adverse action at issue. See e.g., Mitchell v. Glickman, EEOC Pet. No. 04970021 (1997).
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# AJ Decision

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- Liability findings: AJ decision on merits of a Class Complaint is a “recommended decision.” 1614.204(i)(1).
- Notice of Proposed Rulemaking dated June 3, 2008, provides that an AJ decision will be a final decision that the Agency can either fully implement or not & appeal.
- If no Class relief is appropriate, AJ shall determine if a finding and relief in any individual claim is warranted. 1614.204(i)(2).
- AJ shall notify Class agent when recommendations are forwarded to the Agency. 1614.204(i)(3).

# Agency Action After AJ Issues Decision

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- Agency Requirements:
  - Agency has 60 days to issue a Final Agency Decision (FAD) on the merits of the Class claim either accepting, rejecting or modifying the AJ's recommended decision.
    - Requirements for FAD Set forth in 1614.204(j)(1)-(7),
    - Requirements to communicate FAD to Class members set forth in 1614.204(k).
- Ultimately, if relief is ordered, Agency requirements and processes are set forth in 1614.204(l)(1)-(3).

## Class Action 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 .
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EEOC DOC 0120050745, 2007 WL 506684 (E.E.O.C.)

E.E.O.C.

\*1 ARTIMESE A.

EPPS

, ET AL.

[\[FN1\]](#)

CLASS AGENT AND COMPLAINANT,

v.

MIKE JOHANNNS, SECRETARY, DEPARTMENT OF AGRICULTURE, AGENCY.

APPEAL 0120050745

[\[FN2\]](#)

Hearing No. 270-A1-9038X

Agency No. 96-0326

February 9, 2007

#### DECISION

On October 29, 2004, complainant filed a timely [\[FN3\]](#) appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the agency's September 10, 2004 final order concerning her equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, [42 U.S.C. § 2000e et seq.](#) The appeal is accepted pursuant to [29 C.F.R. § 1614.405\(a\)](#).

#### ISSUE PRESENTED

Whether the AJ's decision, which was implemented by the agency's final order, properly found that the class was not discriminated against based on race (black) regarding promotions.

#### BACKGROUND

On December 21, 1995, the class agents filed a class complaint. In *Epps et al. v. Department of Agriculture*, EEOC Appeal No. 01984006 (March 20, 2000), the Commission certified the class complaint as:

All current and former black employees of the agency's National Finance Center (NFC) who

have applied for but not received promotions; the class also may include any current or former NFC employee who did not apply for promotion because of the perception that they would not be promoted because of their race, but otherwise would have applied.

The agency's request to reconsider EEOC Appeal No. 01984006 was denied. [\*Epps et al. v. Department of Agriculture\*, EEOC Request No. 05A00627 \(January 4, 2002\)](#). The NFC is located in New Orleans, Louisiana.

The class complaint was remanded to an EEOC Administrative Judge (AJ). The AJ determined that the class claim covered the period of December 21, 1993 (two years prior to the date on which the class complaint was filed) through January 4, 2002 (the date of the denial of request for reconsideration which finalized the certification). The parties did not object to this. The class alleged discrimination regarding promotions from grades GS-3 to GS-15 levels in a large variety of positions, including telecommunications specialist, supervisory visual information specialist, fiscal assistant, administrative payments technician, processing assistant, accounting technician, systems accountant, supervisory systems accountant, supervisory auditor, budget analyst, computer assistant, computer specialist, computer programmer analyst, supervisory computer specialist, contact representative, supervisory contact representative, program analyst, supervisory program analyst, personnel assistant, personnel officer, paralegal specialist, associate director, and so forth.

**\*2** The parties engaged in extensive discovery. The class gathered what it described as voluminous documentation. As described by class counsel, this included “enormous” amounts of machine readable data produced by the agency, excerpts from over 150 boxes of promotion files and 140 EEO claims filed by both black and white employees at the NFC, as well as depositions of class agents and several management officials. According to class counsel, there are over 1,200 class members and class agents were given access to 2,400 boxes of promotion files.

In December 2002, class counsel filed a motion with the AJ to have the EEOC appoint two expert witnesses on behalf of the class, *i.e.*, an employment expert to analyze the promotion and hiring practices of the agency regarding black employees, and a statistician to provide detailed information pertaining to the racial composition of individuals hired and promoted. The motion did not identify any experts. In the alternative, the motion requested that the class be permitted to choose two experts at the agency's expense. The motion explained that the class was without appropriate financial resources. The motion argued that statistical analysis using applicant flow data was very relevant and the most direct route to proof of discrimination in hiring and promotion cases, and experts could provide this absolutely critical analysis and testimony.

Prior to the AJ ruling on the matter, class counsel filed a motion in February 2003 withdrawing the above motion on the grounds that an expert was retained. This motion did not identify the expert.

On July 9, 2003, agency counsel issued a timely notice to depose the class expert on July 23,

2003. At that time, agency counsel requested identifying information on the expert, a curriculum vitae, and the expert's report. In a July 15, 2003 letter to the AJ copied to class counsel, the agency noted it did not receive the above information from the class, wondered whether the class retained an expert, and requested a status conference. By letter dated July 21, 2003, agency counsel again requested that the class attorney provide the information previously requested, or state the class had not retained an expert. In a letter to the agency dated July 22, 2003, class counsel, referring to the class expert as "her," declined to have the expert deposed on July 23, 2003. He did not write that the expert was unavailable. Agency counsel immediately replied that he did not intend to honor the class counsel's unilateral cancellation of the deposition. Agency counsel attended the scheduled deposition on July 23, 2003. Neither the expert nor class counsel appeared. At a July 23, 2003 telephone status conference, the AJ ordered that class counsel provide the name, address, and curriculum vitae of the expert by July 25, 2003, and reiterated this in a July 24, 2003 order. All the above communications were sent by facsimile.

On July 25, 2003, class counsel filed a motion to extend the time to name a class expert on the grounds that upon review of the expert's curriculum vitae on July 25, 2003, the class realized the expert was not qualified. The agency filed a motion to oppose the extension and to sanction the class from offering expert statistical testimony at the hearing. It questioned whether the class ever retained an expert, noting that in a June 4, 2003 telephone status conference, class counsel referred to its expert by a male name, and soon thereafter referred to the expert as "her."

**\*3** In response to the motion, the AJ sanctioned the class by precluding it from offering expert testimony or expert evidence at the hearing with respect to class claims. In so doing, the AJ recounted much of the above. The AJ noted that prior to the July 23, 2003 telephone conference; the hearing was scheduled for August 18, 2003. The AJ found that it defied belief that with less than a month before the hearing, class counsel had not reviewed the qualifications of a class expert, and it was more difficult to believe one was ever secured. The AJ noted that the class counsel used a male name and female pronoun for the expert, respectively, in June and July 2003, and expressed the belief that the real reason an expert did not appear at the deposition on July 23, 2003 was because one was never secured. Finding all this to be deceptive and dilatory, and that class counsel did not act responsibly to locate and retain an expert after the class complaint was certified on January 4, 2002, the AJ sanctioned the class as above.

Thereafter, the agency filed a motion for summary judgment. It argued that there were no genuine issues of material fact as to whether the class could establish a class wide claim of race discrimination regarding promotions at the NFC, and moved for summary judgment on individual class claims made by class agents on 20 positions filled by other African-American employees. It argued that the class failed to make a *prima facie* case of disparate impact discrimination because it failed to identify a facially neutral practice to challenge. Rather, it argued, class agents raised numerous practices, and failed to identify an overarching policy to challenge. The agency also argued that the class failed to present any expert statistical evidence of a disparity, and due to its dilatory and deceptive actions, was precluded from doing so. It also noted that the class had not produced any expert report analyzing the relevant NFC promotion and applicant

flow data.

In opposition to the agency's motion for summary judgment, class counsel conceded that the class was not making a disparate impact claim. Rather, class counsel explained, the class was alleging class wide intentional disparate treatment discrimination. The opposition did not specifically challenge the agency's argument that summary judgment was appropriate on the individual class claims made by class agents on 20 positions filled by African-American employees.

In his opposition to summary judgment, class counsel argued that statistical evidence supported a finding of class wide discrimination. In support thereof, he submitted an affidavit he signed averring various statistical facts and analyses. For example, class counsel affirmed that of the 1,219 competitive promotions made since January 1, 1992, [FN4] blacks received 461 or 38.1%, whites received 678 or 55.6%, and three other ethnic groups received 76 or 6.2%. Class counsel affirmed that there were 1,626 employees in the NFC, made up of 702 blacks (43.2%), 824 whites, 59 Hispanics, 27 Native Americans, and 14 Asians. Class counsel affirmed that, given that black employees made up 43.2 % of the NFC, one would expect them to have received 43.2% of the promotions, or 527, but they received only 38.1%. Citing a formula in *Castaneda v. Partida*, 430 U.S. 482, 496 n. 17 (1977) for calculating standard deviations, class counsel affirmed this was statistically significant. Class counsel conducted analyses for grouped upper level grades. He affirmed that since black employees are 43.2 % of the whole workforce in the NFC, they should also be 43.2% of the workforce in the upper grades, but were a statistically significant lower percentage. In arriving at his conclusions, class counsel affirmed that he used simple mathematical calculations taught to elementary school students and analyses approved in *Castaneda*. Class counsel argued that because of this, no expert was necessary to demonstrate class wide disparities.

**\*4** With his opposition to summary judgment, class counsel also submitted affidavits from seven people who were class agents at the time summarily affirming that they received discriminatory ratings lower than “Outstanding” resulting in denial of quality step increases.

Prior to the scheduled date of the hearing, the AJ ordered the parties to exchange and file their final witness lists, with a synopsis of expected testimony for each witness. In response, class counsel submitted a witness list with well over 200 names and no description of expected testimonies. [FN5] Upon receiving the list, the AJ ordered class counsel to comply with the order by supplying a synopsis for the expected testimony of each witness. In response, class counsel re-submitted a witness list categorizing witnesses in groups, *i.e.*, by applicants not selected under specified vacancy announcements, by selectees for certain positions, by selecting officials, by managers with input into selections, and by employees who could testify about the selection of whites over “more qualified” black applicants. No synopsis of testimony was given. Despite another order by the AJ to class counsel to provide a revised witness list with synopses by a specified date, no revised witness list was submitted.

The AJ granted the agency's motion for summary judgment. Regarding the individual class

claims made by class agents on 20 positions filled by other African-American employees, the AJ's decision noted that the class did not dispute they were filled by persons in their own protected class, and hence dismissed these claims. The AJ's decision also recounted the class statement that it was pursuing the theory of disparate treatment, not disparate impact.

The AJ's decision stated that class counsel would have the Commission accept his own deviation analysis of NFC data provided in class counsel's affidavit, which in effect styled him as both the class counsel and class expert, and this was highly improper and irregular. The AJ's decision rejected class counsel's argument that expert statistical analysis and applicant flow data were not required to prove a *prima facie* case of class wide disparate treatment discrimination in promotions, and rejected the use of the *Castaneda* model in this case. Citing Commission precedent, the AJ's decision reasoned that applicant data flow analysis was the most direct route to proof of discrimination in class wide disparate treatment promotion cases, and noted class counsel argued that expert testimony was critical in his Motion to Appoint an Expert Witness. Determining that expert testimony was critical, the AJ found that the class had no probative means of demonstrating class wide disparate treatment in promotions of blacks at the NFC.

On appeal, class agent Epps states that the class attorney misled the class on his ability to represent it, and was clearly incompetent. The class agent states the class cannot afford an attorney, and requests the Commission to appoint one. In response to the appeal, the agency argues the appeal was untimely filed and is without merit.

#### ANALYSIS AND FINDINGS

\*5 We must first determine whether it was appropriate for the AJ to have issued a decision without a hearing on this record. The Commission's regulations allow an AJ to issue a decision without a hearing when he or she finds that there is no genuine issue of material fact. [29 C.F.R. § 1614.109\(g\)](#). This regulation is patterned after the summary judgment procedure set forth in [Rule 56 of the Federal Rules of Civil Procedure](#). The U.S. Supreme Court has held that summary judgment is appropriate where a court determines that, given the substantive legal and evidentiary standards that apply to the case, there exists no genuine issue of material fact. [Anderson v. Liberty Lobby, Inc.](#), 477 U.S. 242, 255 (1986). In ruling on a motion for summary judgment, a court's function is not to weigh the evidence but rather to determine whether there are genuine issues for trial. [Id. at 249](#). The evidence of the non-moving party must be believed at the summary judgment stage and all justifiable inferences must be drawn in the non-moving party's favor. [Id. at 255](#). An issue of fact is "genuine" if the evidence is such that a reasonable fact finder could find in favor of the non-moving party. [Celotex v. Catrett](#), 477 U.S. 317, 322-23 (1986); [Oliver v. Digital Equip. Corp.](#), 846 F.2d 103, 105 (1st Cir. 1988). A fact is "material" if it has the potential to affect the outcome of the case.

If a case can only be resolved by weighing conflicting evidence, issuing a decision without holding a hearing is not appropriate.

In a disparate treatment class action claim, the ultimate issue is whether an employer regularly and purposefully treats or has treated blacks less favorably than others and whether this disparate treatment is racially motivated. The class bears the initial burden of making out a *prima facie* case of discrimination. The *prima facie* showing may in a proper case be made out by statistics alone; or by a cumulation of evidence, including statistics, patterns, practices, general policies, or specific instances of discrimination. [Equal Employment Opportunity Commission v. American National Bank](#), 652 F.2d 1176, 1188 (4<sup>th</sup> Cir. 1981); [Phillips v. Joint Legislative Committee](#), 637 F.2d 1014, 1026 (5<sup>th</sup> Cir. 1981); [Osolinik v. Secretary of the Interior](#), EEOC Request No. 05870101 (May 31, 1988);

Because the class alleges a system wide pattern or practice of resistance to the full enjoyment of Title VII promotion rights, it ultimately has to prove more than the mere occurrence of isolated or “accidental” or sporadic discriminatory acts. It has to establish by a preponderance of the evidence that racial discrimination was the NFC's standard operating procedure -- the regular rather than the unusual practice. *International Brotherhood of Teamsters v. United States*, 432 U.S. 324, 336 (1977).

\*6 As an initial matter, we find that the AJ properly sanctioned the class by prohibiting it from presenting expert testimony or expert evidence at a hearing for the reasons stated by the AJ. Another factor making sanctioning the class appropriate was that despite being given repeated opportunities to do so, and being ordered to do so, the class did not submit a witness list with a synopsis of what witnesses were expected to testify. We agree with the AJ's assessment, in any event, that the class never retained an expert, despite its prior claim to the contrary and the opportunity to do so. The record reflects that the class engaged in extensive discovery and obtained large amounts of documentation and data. However, there is no genuine issue of material fact that it was unable to present the information in a statistically probative manner without an expert.

The AJ correctly found that the statistical information presented by the class counsel was not probative. First, as found by the AJ, class counsel would have the Commission accept his own deviation analysis of NFC data provided in his affidavit, in effect styling himself as both the class counsel and class expert. Moreover, even if we considered this evidence, it was not otherwise probative. The analysis contained no applicant flow data or other statistical information about an available workforce that was qualified for promotions by race. The analysis was generic and unpersuasive. Applicant flow data is a very relevant statistical model in class action promotion cases. [Herron v. Department of Agriculture](#), EEOC Appeal No. 01A04725 (September 27, 2002). [Castaneda v. Partida](#), 430 U.S. 482 (1977), cited by the class counsel, regarded a county failing, in a statistically significant fashion, to summon Mexican-Americans for grand jury service in proportion to their county population. In this case, however, statistics regarding applicants and who was qualified for promotions is highly relevant.

Given the failure to provide probative statistical or other cumulative evidence of class-based discrimination regarding promotions, the AJ properly ruled that the class failed to establish a *prima facie* case of disparate treatment class discrimination. As previously stated, the Commission's

regulations allow an AJ to issue a decision without a hearing when he or she finds that there is no genuine issue of material fact. Such is the case here.

We also affirm the finding of the AJ dismissing class agents' individual claims in which 20 position vacancies in question were filled by other black employees. We do this for the reason stated by the AJ and because the class did not specifically oppose the agency's request for summary judgment against the class regarding this matter.

The class argues that its counsel was ineffective. This argument is raised for the first time on appeal. The class utilized its counsel for years, and had the opportunity to assess his quality of representation and switch counsel. Moreover, the Commission does not appoint counsel to represent parties in the administrative process.

\*7 In August 2002, class counsel filed a motion to subsume individual complaints that were within the scope of the class action complaint. An exhibit submitted by class counsel showed there were about 90 such cases, and class counsel wrote that the exhibit was incomplete. The AJ granted the motion regarding individual complaints filed from December 21, 1993 to January 4, 2002.

EEOC's *Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614* (EEO-MD-110), Chap. 8, ¶ XI.E at page 8-15 (November 9, 1999) provides that within 60 calendar days of the final decision finding no class discrimination, each individual complaint received that was subsumed into the class complaint shall be acknowledged by the agency and processed in accordance with Part 1614. To the extent that the agency has not already done so, it must comply with this provision.

## CONCLUSION

The decision of the AJ, which was implemented by the agency's final action, finding no class wide discrimination is affirmed.

## ORDER

The agency is directed to acknowledge and/or re-acknowledge receipt of all individual complaints or portions thereof that were received that were subsumed into the *Epps* class complaint (meaning held in abeyance). The acknowledgments and/or re-acknowledgments shall be made to the individual complainants and be accomplished within 60 calendar days after this decision becomes final. [\[FN6\]](#) The *Epps* class complaint covered the period of December 21, 1993 through January 4, 2004. Thereafter, the complaints shall be processed in accordance with 29 C.F.R. Part 1614. [\[FN7\]](#)

Copies of the agency's letters of acknowledgment and/or re-acknowledgments to complainants must be sent to the Compliance Officer as referenced below.

### IMPLEMENTATION OF THE COMMISSION'S DECISION (K0501)

Compliance with the Commission's corrective action is mandatory. The agency shall submit its compliance report within thirty (30) calendar days of the completion of all ordered corrective action. The report shall be submitted to the Compliance Officer, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 19848, Washington, D.C. 20036. The agency's report must contain supporting documentation, and the agency must send a copy of all submissions to the complainant. If the agency does not comply with the Commission's order, the complainant may petition the Commission for enforcement of the order. [29 C.F.R. § 1614.503\(a\)](#). The complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. *See* [29 C.F.R. §§ 1614.407, 1614.408](#), and [29 C.F.R. § 1614.503\(g\)](#). Alternatively, the complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File A Civil Action." [29 C.F.R. §§ 1614.407 and 1614.408](#). A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in [42 U.S.C. 2000e-16\(c\)](#) (1994 & Supp. IV 1999). If the complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated. *See* [29 C.F.R. § 1614.409](#).

### STATEMENT OF RIGHTS - ON APPEAL RECONSIDERATION (M0701)

**\*8** The Commission may, in its discretion, reconsider the decision in this case if the complainant or the agency submits a written request containing arguments or evidence which tend to establish that:

1. The appellate decision involved a clearly erroneous interpretation of material fact or law; or
2. The appellate decision will have a substantial impact on the policies, practices, or operations of the agency.

Requests to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision or **within twenty (20) calendar days** of receipt of another party's timely request for reconsideration. *See* [29 C.F.R. § 1614.405](#); Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), 9-18 (November 9, 1999). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 19848, Washington, D.C. 20036. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. *See* [29 C.F.R. § 1614.604](#). The request or opposition must also include proof of service on the other party.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any

supporting documentation must be submitted with your request for reconsideration. The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. See [29 C.F.R. § 1614.604\(c\)](#).

#### COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (S0900)

You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. If you file a civil action, you must name as the defendant in the complaint the person who is the official agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. If you file a request to reconsider and also file a civil action, **filing a civil action will terminate the administrative processing of your complaint.**

#### RIGHT TO REQUEST COUNSEL (Z1199)

If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request that the Court appoint an attorney to represent you and that the Court permit you to file the action without payment of fees, costs, or other security. See Title VII of the Civil Rights Act of 1964, as amended, [42 U.S.C. § 2000e et seq.](#); the Rehabilitation Act of 1973, as amended, [29 U.S.C. §§ 791, 794\(c\)](#). **The grant or denial of the request is within the sole discretion of the Court.** Filing a request for an attorney does not extend your time in which to file a civil action. Both the request and the civil action must be filed within the time limits as stated in the paragraph above ("Right to File A Civil Action").

For the Commission:

\*9 Stephen Llewellyn  
Acting Executive Officer  
Executive Secretariat

[FN1](#). The other class agents are Nelree Richards, Linda J. Simmons, Sheila Soniat-Riley, Karol Sanders, Andria Milton, Lorraine Washington, Patri Tropez, Sherry Bournes, Vivian Piper, Frederick Fields, Sabrina Blanchard, and Mercedes Bardell.

[FN2](#). The Commission's November 3, 2004 letters to the parties acknowledging the appeal identified it as docket number 01A50745. Due to changes in our computerized records tracking system, the appeal docket number has been restyled to 0120050745.

[FN3](#). The appeal was filed by class agent Artimese A. Epps on October 29, 2004. She received the final agency decision on September 28, 2004. The time limit to file an appeal is 30 days from receipt of the final order. [29 C.F.R. § 1614.402\(a\)](#). However, if a complainant is represented by

an attorney of record, then the 30 day time limit is calculated from receipt of the final order by the attorney. [29 C.F.R. § 1614.402\(b\)](#). In December 2003, the attorney then representing the class notified the EEOC Administrative Judge (AJ) and two agency attorney representatives that he had a new mailing address (Maryland Avenue in Washington, D.C.) While the AJ sent her decision to the new mailing address, the final agency order was sent by certified mail to the outdated address. As the record does not show when the attorney received the final order, we deem the appeal as being timely filed.

[FN4](#). This improperly covered a period outside the scope of the class, which covered the period starting on December 21, 1993. The affidavit also did not indicate the ending date for the data class counsel analyzed. The period covered by the class was from December 21, 1993 through January 4, 2002.

[FN5](#). In argument, the agency averred that all named class agents were given 16 hours of official time to work on the preparation of the class witness and exhibit lists.

[FN6](#). If the agency has difficulty meeting this deadline given the amount of time that has elapsed since the class complaint was certified and the NFC being located in New Orleans, the site of natural disasters, it may request extensions from the EEOC Office of Federal Operations Compliance Officer.

[FN7](#). This order does not apply to the individual claims by class agents that regarded 20 position vacancies that were filled by other black employees which were dismissed by the AJ.

EEOC DOC 0120050745, 2007 WL 506684 (E.E.O.C.)  
END OF DOCUMENT

EEOC DOC 01A04644, EEOC DOC 01A02597, EEOC DOC 01A20732, EEOC DOC 01A05202, EEOC DOC 01A05031, EEOC DOC 01A05034, EEOC DOC 01A04941, EEOC DOC 01A04725, 2002 WL 31232209 (E.E.O.C.)

**H**

EEOC DOC 01A04644, EEOC DOC 01A02597, EEOC DOC 01A20732, EEOC DOC 01A05202, EEOC DOC 01A05031, EEOC DOC 01A05034, EEOC DOC 01A04941, EEOC DOC 01A04725, 2002 WL 31232209 (E.E.O.C.)

E.E.O.C.

\*1 Office of Federal Operations

CLIFFORD HERRON ET.  
AL., CLASS AGENT,

v.

ANN M. VENEMAN, SECRETARY, DEPARTMENT OF AGRICULTURE, AGENCY.

Appeal Nos.

01A04725

; 01A02597; 01A05202; 01A04644; 01A05031; 01A05034; 01A04941; 01A20731;  
01A20732; 01A20733; 01A20734; 01A20735;

[FN1]

Agency Nos. 97-1290, 99-0055, 99-0326, 99-0509, 99-0630, 99-0148, 98-0416, 95-0817, 95-0706, 96-0607, 97-0707, 97-0089, 96-0712; 000514; 000517; 000518

Hearing Nos. 100-98-7120X, 100-98-7658X; 100-99-7837X; 100-99-7838X; 100-99-7839X; 100-99-7840X; 100-99-7841X; 100-99-7842X; 100-99-7843X; 100-99-7844X; 100-99-7845X; 100-99-7851X; 100-99-7852X; 100-99-7853X; 100-99-7282X

September 27, 2002

DECISION

Class agents timely initiated an appeal<sup>[FN2]</sup> from the agency's final order concerning their equal employment opportunity (EEO) complaint of unlawful employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, [42 U.S.C. § 2000e](#) *et seq.* The appeal is accepted pursuant to [29 C.F.R. § 1614.405](#). For the following reasons, the Commission VACATES AND REMANDS the agency's final order.

This is a class complaint filed on February 27, 1997 against the Department of Agriculture, Farm Services Agency (FSA) offices in Washington, D.C. and throughout the nation. The complaint alleges that the agency engaged in a pattern and practice of discrimination by failing to promote its African American employees to the GS-13, 14 and 15 levels from 1995 and thereafter, and that it employed certain facially neutral practices which had a disparate impact on African Amer-

ican employees at these levels.

The agency accepted the recommendation of the Administrative Judge (AJ) to certify the class which was defined as all African American FSA employees denied promotion or opportunity for promotions to positions to the GS-13, 14, and 15 grade levels since February 27, 1995. After a hearing, the AJ concluded that the class failed to prove that the agency's promotion practices have a disparate impact on African Americans because the statistical evidence did not demonstrate a statistically significant under-representation of African Americans in FSA. She also found that the class did not establish a *prima facie* case of pattern and practice discrimination based on this same statistical evidence.

The AJ then considered the individual claims of discrimination and determined that in the case of class agent, Clifford Herron, the agency discriminated against him in not selecting him for the position of Program Manager GS-15, Consolidated Farm Service Agency<sup>[FN3]</sup>, in the division of Emergency and Non-insured Assistance Program (ENAP). The AJ awarded back pay with interest, compensatory damages and attorney's fees associated with Herron's successful claim.

She also found the agency had discriminated against class member Harold Connor in not selecting him for the position of Director, Audits and Investigations Group, FSA, GS-14/15. The AJ awarded Connor back pay with interest, compensatory damages and attorney's fees.

\*2 The AJ concluded that, in the remainder of the individual complaints filed, the agency gave legitimate non-discriminatory reasons for not selecting them which complainants failed to demonstrate were a pretext for race discrimination. As a result, as to these individual complainants, the AJ found no proof of discrimination by a preponderance of the evidence.

The agency's final order dated May 30, 2000 fully implemented the AJ's decision.

#### CLASS CONTENTIONS ON APPEAL

The class contends that the AJ erred in finding no class-wide discrimination because she based her decision on what she knew to be unreliable and inadequate data provided by the agency. The class claims that the AJ erred in instructing the expert not to consider 216 non-competitive promotions for District Director in his statistical analysis. This was error, the class argued, because it accounted for 46.3% of the relevant total promotions during the time period in issue and based on the analysis done by the class, indicated a 4.04 standard deviation, a statistically significant shortfall of African American promotions at the GS-13 level.

The class argued that despite the AJ's finding that the most appropriate statistical analysis to be used in a promotion case required the use of applicant flow data, the AJ's expert<sup>[FN5]</sup> did not perform such an analysis and such data was not used. The class claimed it was error for the AJ not to require the agency to produce more reliable data once the EEOC expert apprised her of the deficiencies in the data produced. According to the class, because the agency did not keep and produce adequate records concerning selections it made pending an EEO complaint and in gen-

eral as required by [29 C.F.R. §§ 1602.14](#) and [1607.4](#), the Commission should draw an adverse inference that the records contained information favorable to the class.

The class claimed that its expert produced the most reliable statistical analysis because he included all promotions including promotions of 216 District Directors in 1996 and because his analysis factored in past discriminatory influences on the available applicant pool. In the alternative, the class urged the Commission to disregard the statistical analysis altogether and to base a finding of class-wide discrimination on the testimony and documentary evidence.

Assuming that the Commission found no class-wide discrimination, the class argues that the AJ erred in not deciding many of the claims of non-selection brought by the individual complainants and in not ultimately finding discrimination as to the claims of individual complainants. The class also argues that the AJ erred in her calculation of the relief and the amount of the attorney's fees awarded to those class agents found to have been victims of discrimination.<sup>[FN6]</sup>

#### AGENCY REPLY

The agency argued that the AJ was correct in finding no *prima facie* case of disparate treatment because out of 18 claims of discrimination, the class was only able to prove discrimination in 2 instances. The agency contended that the AJ's conclusion that there was no proof of a disparate impact was supported by substantial evidence in the record. According to the agency, even assuming that the additional 216 promotions the class alleged should have been included in the statistical analysis were considered, there was still no showing of a disparity in promotions of African Americans if such were compared to the percentage of African Americans in the available work force.

**\*3** The agency argued that the Class' claim that it did not keep adequate records was not true and there was no evidence to support the contention. The agency stated that the Class never requested additional information regarding applicant flow data during the 8 months of discovery and that the Class expert testified that he realized there was information he did not have but he failed to request it. Even so, the agency argued that courts have recognized that alternative statistics may be used, such as that used by the AJ's expert, in instances where labor market statistics will be difficult to obtain. There was no showing, according to the agency, that the alternative statistics were not appropriate.

Addressing the AJ's findings on the individual claims, the agency contends that the Class did not contest the AJ's rulings on the individual claims of non-selection aside from attacking her credibility findings and that her findings of no discrimination should be affirmed. The agency contends that those individual claims not specifically addressed by the AJ either did not fall within the parameters of the Class claims or were not addressed because the complainants failed to file formal complaints.

#### ANALYSIS AND FINDINGS

Pursuant to [29 C.F.R. § 1614.405\(a\)](#), all post-hearing factual findings by an AJ will be upheld if supported by substantial evidence in the record. Substantial evidence is defined as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” [Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 477 \(1951\)](#) (citation omitted). A finding regarding whether or not discriminatory intent existed is a factual finding. See [Pullman-Standard Co. v. Swint, 456 U.S. 273, 293 \(1982\)](#). An AJ's conclusions of law are subject to a *de novo* standard of review, whether or not a hearing was held.

After a careful review of the record, the Commission finds that the AJ's findings regarding the Class claims are not supported by substantial evidence in that they are based on unreliable and inadequate or inconclusive data and because the most reliable statistical analysis typically used in a non-promotion/hiring case was not performed. The Commission further finds that there is no indication that the AJ's decision considered the anecdotal testimony of Class agents and other witnesses regarding specifically alleged discriminatory incidents and hiring practices in reaching her conclusion that there was no discrimination perpetuated against the class. See [International Brotherhood of Teamsters v. United States, 431 U.S. 324 \(1977\)](#).

First, we address the unreliability of the data presented. According to the AJ's decision, much of the information generally referred to as applicant flow data, usually analyzed in promotion cases, was missing or not available. She noted that the agency did not provide applicant flow or machine readable data on the vacancy announcements or on the successful candidates' prior position. Because the applicant flow data was not made available and because she expressed no confidence in the reliability of the parties' expert witness reports, the AJ retained her own expert witness.

**\*4** The AJ's expert witness (E1) report indicated that he was instructed to analyze the FSA workforce and promotion data already available to the other experts. The agency was not directed to produce applicant flow data or any other additional data. Regarding the data he analyzed, E1 testified that there were problems in interpreting the data that the agency did produce and that he made “educated guesses” in reaching assumptions about the agency's data. Testimony at p. 1974. More specifically, E1 noted that there was no explanation about how the work force files were created or how the term “promotion” was defined in the data he examined. AJ Exhibit 2 at p. 9. He also testified that the lack of computer documentation created some ambiguity in his interpretations of the variables the agency used. Testimony at p. 1976. He further observed that he was unable to specifically determine the change in organizational units over time in order to track the movement of some employees.<sup>[FN6]</sup>

Further, we cannot glean from the record whether the analysis E1 performed gave sufficiently reliable results given the problems noted above. According to his report, E1 compared the proportion of African American promotions to various estimates of “availability” of African Americans provided by the parties' experts. Even with this method, E1 stated that the workforce data supplied by the agency was not sufficient to justify a statistical availability analysis, particularly

at different points in time. Thus, although the agency urged the Commission to accept this alternative method, there were numerous problems noted in the record that called into question the reliability of the data analyzed.

In addition, the class argues that it was error for the AJ to exclude over 200 “promotions” of District Directors in E1's analysis. Although the AJ did not specifically rule that these promotions should be included it is clear that they were not part of E1's analysis. According to E1, he was instructed to assume that “promotions should be defined as permanent promotions to grades 13, 14, and 15 during the period October 1, 1995 to the present”. The class counted the total number of promotions including the promotion of District Directors in 1996 to be 467. E1 testified that he concluded there were a total of 243 promotions roughly 200 less than the class count. The agency's Director of the Human Resources Division testified that District Director promotions were an upgrade of their positions from GS-12 to GS-13 through the merit promotion process and that many of them, in fact, became permanent. The agency gave no persuasive argument why these promotions should not be counted as permanent promotions, therefore, we conclude that they should have been counted and considered in E1's analysis. Their omission from his analysis casts further doubt on the reliability of his results and his ultimate conclusions.

\*5 In addition, the AJ was aware on review of E1's report and during E1's cross-examination, that there were deficiencies in the data he analyzed. His report specifically outlines his observations about “the adequacy and sufficiency of the available data sources.” AJ Exhibit 2 at p. 3. The AJ's decision makes specific reference to E1's statements about the lack of adequate data. Our regulations provide the AJ with specific authority to require the parties to produce such documentary evidence as deemed necessary, and may even direct an investigation of facts by another agency certified by the Commission. [29 C.F.R. §§1614.204\(f\)\(3\) and\(h\)](#); 1614.109a-f. The AJ had the authority to order the agency to address and remedy any deficiencies or to supplement the record as needed. Thus, we find it was an abuse of discretion for the AJ to proceed without addressing the deficiencies and shortcomings noted in the evidence.

Since we conclude that the analysis performed was based on unreliable and incomplete data and that another analysis based on a more widely acceptable method should be done, we draw no conclusion whether these omitted promotions are relevant to an analysis based on applicant flow data.

#### Applicant Flow Data

As the AJ aptly noted, “the most appropriate analysis [in this case would be] the composition of the employees promoted and the applicant pool from which potential promotees come.”<sup>[FN7]</sup> Decision p. 5. Even with this observation, the AJ did not ensure that the record was adequately developed in terms of determining how the agency's hiring process operated during the time period in question. There is no indication that the AJ required the agency to produce the data that was missing from the record and deemed by her to be the most probative in the case before her. The AJ explained that neither party's expert requested additional data. However, we conclude that this was an insufficient basis for not requiring that the appropriate data be produced. Relying

solely on the failings of the parties as a basis for not pursuing the best method of analyzing the agency's hiring practices, was error because the hearing process is intended to be an extension of the investigative process in a class complaint as in any other complaint brought pursuant to our regulations. See [29 C.F.R. § 1614.204\(h\)](#) referencing §1614.109(a) through (f); See also *EEOC Management Directive (MD) 110*, as revised, November 9, 1999, Chapter 7, page 7-1. We decline to impose a sanction as the class urges, for the agency's failure to produce applicant flow data. Our review of the record indicates that E1 testified that the class did not specifically request the data.

The Supreme Court has stated that statistical analysis using applicant flow data is a “very relevant” statistical model in discrimination cases involving promotion and hiring. [Hazelwood School District v. United States, 433 U.S. 299, 309, n. 13 \(1977\)](#); [Wards Cove Packing Co. Inc. v. Atonio, 490 U.S. 642, 650-1 \(1989\)](#). The analysis requires a comparison of the racial composition of persons who applied for a position with the racial identity of persons who hold the at issue jobs. [Bullington v. United Airlines, 186 F.3d 1301 \(10<sup>th</sup> Cir. 1999\)](#). In cases involving hiring and promotion, an analysis of applicant flow data is “the most direct route” to proof of discrimination. [EEOC v. Olson's Dairy Queens, 989 F.2d 165, 169 \(5<sup>th</sup> Cir. 1993\)](#). [Mister v. Illinois Central Gulf Railroad Co., 832 F.2d 1427, 1435 \(7<sup>th</sup> Cir. 1987\)](#) (Applicant studies are preferable as a rule because Title VII governs the treatment of applicants.) Such data has probative force because it reflects how the employer's hiring procedures actually operated as well as the actual percentage of Caucasian versus African American applicants for the positions in question. *Bullington supra* at 1313. [Wards Cove Packing Co. Inc. v. Atonio, 490 U.S. 642, 651 \(1989\)](#) (The Supreme Court recognized that where labor market statistics will be difficult if not impossible to ascertain, certain other statistics - such as the racial composition of “otherwise qualified applicants” are equally probative.); See [Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 995 n. 3,997 \(1988\)](#).(The reliability or usefulness of any particular analysis will depend on the surrounding facts and circumstances.); see also [New York City Transit Authority v. Beazer, 440 U.S. 568 \(1979\)](#); and [Dothard v. Rawlinson, 433 U.S. 321 \(1977\)](#) (Court recognized certain alternative statistics).

\*6 As discussed above, E1 observed that there was no data provided about the applicants to FSA vacancy announcements or on the vacancy announcements themselves. Also not produced was data indicating the successful candidates' prior position such that it could be determined whether candidates were hired or promoted across organizational units. As we stated before, based on the expert's own expressed reservations about the data, the reliability of the analysis of that data is diminished. We see no reason to find E1's analysis more reliable since it was based on the very same unreliable data used by the parties' experts.

On remand, the parties as well as the AJ should be guided by the Supreme Court's decision in [Bazemore v. Friday, 478 U.S. 385 \(1986\)](#). There, the court set forth the parameters for evaluating the probative value of statistical evidence in deciding the question whether discrimination was proven by a preponderance of the evidence. That is, even a statistical analysis (in *Bazemore*, multiple regression analyses) that includes less than all measured variables may serve to prove

the complainant's case because a Title VII suit need not prove discrimination with scientific certainty only by a preponderance of the evidence. *Id.* at 400. In *Bazemore*, there was proof that the employer engaged in discriminatory conduct prior to the enactment of the statute which the court found might support the inference that such discrimination continued where the certain aspects of the decision making process had undergone little change. *Id.* at 402 *citing Hazelwood supra* at 309-310, n.15. The Court also held that it was error not to consider the evidence in the record as a whole, in addition to the statistical evidence, in determining whether there was sufficient proof of a pattern and practice of discrimination. [Id at 387 & 403.](#)<sup>[FN8]</sup> In *Bazemore*, the court cited the probative value of evidence of individual comparisons between salaries of African Americans versus Caucasians and witness testimony which confirmed the continued existence of such disparities. *Id.* at 403.

Because we remand this case for the statistical analysis to be redone based on the more probative applicant flow data, we reach no decision at this time on the class claim of disparate impact except to emphasize that the burden of proof requires that the class identify a neutral practice which resulted in a disparate impact on the protected class. If a statistical disparity is shown, it must also be demonstrated that there is a causal connection between the statistical disparity and the specific employment practice alleged to have created a disparate impact. [Watson v. Fort Worth Bank & Trust, 487 U.S. 977 \(1988\).](#)

### Individual Complaints

\*7 We also remand each individual appeal decided by the AJ as well as those not specifically decided by the AJ but presently before us on appeal, pending a decision on the class claims. Individual complaints filed before or after the class complaint is filed and that come within the definition of the class claim(s) will be subsumed within the class complaint. *MD 110* at Chapt. 8-4.

Individual complaints alleging reprisal must be addressed on an individual basis regardless of the AJ's decision on the class complaint. *MD 110* at Chapt. 8-6. As there is no decision in the record addressing Mr. Herron's claim of reprisal or any other individual claim of reprisal properly raised, we remand the issue for a decision on the merits.

### CONCLUSION

Based on the foregoing and after due consideration of the parties statements on appeal and the record transmitted by the agency, the Commission VACATES the agency's final action and REMANDS this matter for further proceedings consistent with this decision and as ordered below.

### ORDER

The agency is hereby directed to take the following action:

1. The agency is directed to submit a copy of the complaint file to the EEOC Washington Field Office within fifteen (15) calendar days of the date this decision becomes final. The agency shall provide written notification to the Compliance Officer at the address set forth below that the complaint file has been transmitted to the Hearings Unit.
2. The agency is directed to supplement the record with applicant flow data for a statistical analysis including but not limited to:
  - a) Machine readable data (hereinafter in a format deemed acceptable by the AJ) on the applicants to FSA vacancy announcements during the relevant time period as established by the AJ;
  - b) Machine-readable data on the vacancy announcements issued during the relevant time period as established by the AJ and;
  - c) Machine readable data on the successful candidate's prior position for each vacancy.
3. The agency is directed to provide standard computer documentation describing the meaning of any variables used in any data produced and how the agency's files were prepared.
4. The AJ may in his/her discretion reopen the period for discovery to allow the parties to take depositions or other forms of discovery regarding any additional analyses performed or to further clarify the additional data produced by the agency.
5. The AJ shall take evidence and issue a finding and decision on the issue of reprisal.

Thereafter the Administrative Judge shall issue a decision on the complaint in accordance with [29 C.F.R. § 1614.204\(h\)](#) and the agency shall issue a final action in accordance with [29 C.F.R. § 1614.204\(j\)](#).

#### IMPLEMENTATION OF THE COMMISSION'S DECISION (K0501)

Compliance with the Commission's corrective action is mandatory. The agency shall submit its compliance report within thirty (30) calendar days of the completion of all ordered corrective action. The report shall be submitted to the Compliance Officer, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 19848, Washington, D.C. 20036. The agency's report must contain supporting documentation, and the agency must send a copy of all submissions to the complainant. If the agency does not comply with the Commission's order, the complainant may petition the Commission for enforcement of the order. [29 C.F.R. § 1614.503\(a\)](#). The complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. *See* [29 C.F.R. §§ 1614.407, 1614.408](#), and [29 C.F.R. § 1614.503\(g\)](#). Alternatively, the complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File A Civil Action." [29 C.F.R. §§ 1614.407](#) and [1614.408](#). A civil action

for enforcement or a civil action on the underlying complaint is subject to the deadline stated in [42 U.S.C. 2000e-16\(c\) \(1994 & Supp. IV 1999\)](#). If the complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated. See [29 C.F.R. § 1614.409](#).

#### COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0900)

**\*8** This is a decision requiring the agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. In the alternative, you may file a civil action **after one hundred and eighty (180) calendar days** of the date you filed your complaint with the agency, or filed your appeal with the Commission. If you file a civil action, you must name as the defendant in the complaint the person who is the official agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. **Filing a civil action will terminate the administrative processing of your complaint.**

#### RIGHT TO REQUEST COUNSEL (Z1199)

If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request that the Court appoint an attorney to represent you and that the Court permit you to file the action without payment of fees, costs, or other security. See Title VII of the Civil Rights Act of 1964, as amended, [42 U.S.C. § 2000e et seq.](#); the Rehabilitation Act of 1973, as amended, [29 U.S.C. §§ 791, 794\(c\)](#). **The grant or denial of the request is within the sole discretion of the Court.** Filing a request for an attorney does not extend your time in which to file a civil action. Both the request and the civil action must be filed within the time limits as stated in the paragraph above ("Right to File A Civil Action").

For the Commission:

Carlton M. Hadden  
Director  
Office of Federal Operations

FN1. Clifford Herron, Appeal No. 01A20735; Starendal Bryant Appeal No. 01A02597; Jim Lawson Appeal No. 01A20733; Carnell McAlpine 01A05034; Matthew Miller Appeal No. 01A04941; Harry Milner Appeal No. 01A20732; Charles Smith Appeal No. 01A20734; Helen Smith Appeal No. 01A20731; Johnnie Blackwell Appeal No. 01A04644; Jerome Jeffries Appeal No. 01A05202; Ozetta Thomas Appeal No. 01A05031.

FN2. The Commission consolidates the individual appeals filed by class members and class

agents with the Class appeal pursuant to [29 C.F.R. §1614.606](#).

FN3. The Consolidated Farm Service Agency, Federal Crop Insurance Corporation and part of the Farmers Home Administration were combined to form the Farm Services Agency in 1995.

FN5. The AJ decided that based on the lack of reliability of the data presented, she would appoint an expert to assist her in her evaluation of the case. The person she appointed is a Social Science Analyst with the EEOC's Office of General Counsel, Research and Analytic Services.

FN6. Since the filing of the Class appeal, the individual appeal of Harold Connor was settled and withdrawn.

FN6. The AJ observed that this was a problem in accepting the conclusions of the agency's expert where various reorganizations occurred changing the identity of various administrative units thereby making it unclear from where an employee had been promoted.

FN7. The AJ's expert gave a cautionary footnote in his report that "it is possible that a well designed applicant flow study, examining qualified applicants for each promotion separately, would reach different conclusions." Memorandum from E1 to Administrative Judge dated June 11, 1999 at p. 2.

FN8. Such evidence might include *inter alia* Class Exhibit C-6, admitted into evidence, consisting of a report issued by the agency entitled "Civil Rights at the United States Department of Agriculture - A Report by the Civil Rights Action Team" (February 1997) which refers to a 1995 Government Accounting Office report. In the agency's report it acknowledges, in effect, that women and minorities in comparison to white men, were still represented in lower relative numbers in the agencies' key job categories and that white men continued to dominate the higher ranks of USDA's top positions in 1996. *Id* at p. 33. The dates of the selections at issue in this case occurred between February 1995 and 1998, closely coinciding with the findings in the agency's report.

The agency's report also acknowledged that minority farmers and recipients of FSA program benefits were denied ready access because of discrimination on the part of county office staff and that minority participation rates in the commodities and disaster relief programs was disproportionately low. At least two of the selections at issue in this case were in the Emergency Non-Insured Assistance Program which administered the disaster relief programs. *Id* at p. 21

EEOC DOC 01A04644, EEOC DOC 01A02597, EEOC DOC 01A20732, EEOC DOC 01A05202, EEOC DOC 01A05031, EEOC DOC 01A05034, EEOC DOC 01A04941, EEOC DOC 01A04725, 2002 WL 31232209 (E.E.O.C.)  
END OF DOCUMENT

**H**

EEOC DOC 05A30645, 2003 WL 1955234 (E.E.O.C.)

E.E.O.C.

\*1 Office of Federal Operations

CLIFFORD J. HERRON ET.  
AL, CLASS AGENT,

v.

ANN M. VENEMAN, SECRETARY, DEPARTMENT OF AGRICULTURE, AGENCY.

Request No. 05A30645

Appeal Nos.

01A04725

et. al

Agency Nos. 97-1290 et. al

Hearing Nos. 100-98-7120x et. al

April 21, 2003

DENIAL OF REQUEST FOR RECONSIDERATION

Clifford J. Herron (class agent) through counsel and on behalf of Harold Connor (class agent) timely initiated a request to the Equal Employment Opportunity Commission (EEOC or Commission) to reconsider the decision in [Clifford J. Herron v. Department of Agriculture, EEOC Appeal No. 01A04725 \(September 27, 2001\)](#). EEOC Regulations provide that the Commission may, in its discretion, reconsider any previous Commission decision where the requesting party demonstrates that: (1) the appellate decision involved a clearly erroneous interpretation of material fact or law; or (2) the appellate decision will have a substantial impact on the policies, practices, or operations of the agency. See [29 C.F.R. § 1614.405\(b\)](#).

After a review of the class request for reconsideration, the previous decision, and the entire record, the Commission finds that the request fails to meet the criteria of [29 C.F.R. § 1614.405\(b\)](#), and it is the decision of the Commission to deny the request. The decision in [EEOC Appeal No. 01A04725](#) remains the Commission's final decision. There is no further right of administrative appeal on the decision of the Commission on this request for reconsideration. The Commission's Order set forth in its previous decision continues in full force and effect and is restated in full below.

ORDER

The agency is hereby directed to take the following action:

1. The agency is directed to submit a copy of the complaint file to the EEOC Washington Field Office within fifteen (15) calendar days of the date this decision becomes final. The agency shall provide written notification to the Compliance Officer at the address set forth below that the complaint file has been transmitted to the Hearings Unit.
2. The agency is directed to supplement the record with applicant flow data for a statistical analysis including but not limited to:
  - a) Machine readable data (hereinafter in a format deemed acceptable by the AJ) on the applicants to FSA vacancy announcements during the relevant time period as established by the AJ;
  - b) Machine-readable data on the vacancy announcements issued during the relevant time period as established by the AJ and;
  - c) Machine readable data on the successful candidate's prior position for each vacancy.
3. The agency is directed to provide standard computer documentation describing the meaning of any variables used in any data produced and how the agency's files were prepared.
- \*2 4. The AJ may in his/her discretion reopen the period for discovery to allow the parties to take depositions or other forms of discovery regarding any additional analyses performed or to further clarify the additional data produced by the agency.
5. The AJ shall take evidence and issue a finding and decision on the issue of reprisal.

Thereafter the Administrative Judge shall issue a decision on the complaint in accordance with [29 C.F.R. § 1614.204\(h\)](#) and the agency shall issue a final action in accordance with [29 C.F.R. § 1614.204\(j\)](#).

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0501)

Compliance with the Commission's corrective action is mandatory. The agency shall submit its compliance report within thirty (30) calendar days of the completion of all ordered corrective action. The report shall be submitted to the Compliance Officer, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 19848, Washington, D.C. 20036. The agency's report must contain supporting documentation, and the agency must send a copy of all submissions to the complainant. If the agency does not comply with the Commission's order, the complainant may petition the Commission for enforcement of the order. [29 C.F.R. § 1614.503\(a\)](#). The complainant also has the right to file a civil action to enforce compliance with

the Commission's order prior to or following an administrative petition for enforcement. *See* [29 C.F.R. §§ 1614.407, 1614.408](#), and [29 C.F.R. § 1614.503\(g\)](#). Alternatively, the complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled “Right to File A Civil Action.” [29 C.F.R. §§ 1614.407](#) and [1614.408](#). A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in [42 U.S.C. 2000e-16\(c\) \(1994 & Supp. IV 1999\)](#). If the complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated. *See* [29 C.F.R. § 1614.409](#).

#### COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (P0900)

This decision of the Commission is final, and there is no further right of administrative appeal from the Commission's decision. You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. If you file a civil action, you must name as the defendant in the complaint the person who is the official agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. “Agency” or “department” means the national organization, and not the local office, facility or department in which you work.

#### RIGHT TO REQUEST COUNSEL (Z1199)

**\*3** If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request that the Court appoint an attorney to represent you and that the Court permit you to file the action without payment of fees, costs, or other security. *See* Title VII of the Civil Rights Act of 1964, as amended, [42 U.S.C. § 2000e et seq.](#); the Rehabilitation Act of 1973, as amended, [29 U.S.C. §§ 791, 794\(c\)](#). **The grant or denial of the request is within the sole discretion of the Court.** Filing a request for an attorney does not extend your time in which to file a civil action. Both the request and the civil action must be filed within the time limits as stated in the paragraph above (“Right to File A Civil Action”).

For the Commission:

Carlton M. Hadden  
Director  
Office of Federal Operations

EEOC DOC 05A30645, 2003 WL 1955234 (E.E.O.C.)  
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expert discovery as set forth in numbered paragraph 3 herein, shall be completed 180 days after the issuance of this order; (b) no more than 40 interrogatories, 75 requests for production of documents and 40 requests for admissions, including subparts, may be propounded to any party, except that this clause shall not prejudice either party's leave to file additional discovery requests for good cause shown; (c) no more than 10 depositions (except for expert depositions) may be taken by either party, and no single deposition (other than of experts) may take more than 5 hours, except that this clause shall not prejudice either party's leave to take additional depositions or extend the length of a deposition for good cause shown; (d) depositions must be conducted during workdays between 9 a.m. and 5 p.m., except with consent of both parties; (e) to the extent applicable, the agency is responsible for arranging for official time for current employees to attend their own deposition, and the agency will allow reasonable official time for class members to prepare for their own depositions; (f) all depositions will take place at the Richmond VA Medical Center, unless other arrangements are mutually agreed to; (g) counsel may elect, but may not be forced, to participate at any deposition by telephone and/or to have another attorney from their office participate by phone or in person.

2) Hearing Date for Liability Hearing and Prehearing Schedule. The initial liability phase hearing, limited to the common issues of the Class, will be scheduled after the close of discovery. *See* 29 C.F.R. § 1614.204(h). On or before February 1, 2006, the parties will submit an Initial Witness List (for non-expert witnesses), which may be modified or supplemented by the close of discovery. Prehearing Statements will include final Witness Lists and a copy of all documents the parties intend to rely on at the hearing.

3) Experts. Thirty (30) days after the close of non-expert discovery, the parties will identify, briefly describe the anticipated testimony of, and describe the subject matter expertise

of the expert witness (including all evidence and documentation to support whether the witness should be considered an "expert") they propose to call at the liability hearing, including statistical experts and personnel system experts, if any, excluding rebuttal experts. The parties will have an additional 30 days to modify or supplement their expert witness list, based on opposing counsel's submissions. Forty-five (45) days after the identification of experts, the Complainant shall submit copies of all expert reports and all documentation intended to be used at the hearing by, or in support of, the experts' testimony and reports. The Agency must submit its expert reports 30 days after receipt of the Complainant's expert reports. Except as provided herein, expert disclosures and reports shall comply fully with the requirements of Federal Rule of Civil Procedure 26(a)(2).

Within 30 days of the disclosure of the Agency's expert reports, the parties will identify, briefly describe the anticipated testimony of, and describe the subject matter expertise of any rebuttal expert witness (including all evidence and documentation to support whether the witness should be considered an "expert") they propose to call at the liability hearing, including statistical experts and personnel system rebuttal experts, if any. Thirty days after the identification of rebuttal experts, the parties shall submit copies of all rebuttal expert reports and all documentation intended to be used at the hearing by, or in support of, the rebuttal expert testimony and reports. Except as provided herein, Rebuttal Expert disclosures and reports shall comply fully with the requirements of Federal Rule of Civil Procedure 26(a)(2). All expert depositions shall be taken no later than 30 days after the submission of rebuttal expert reports.

4) Expansion of Time frames. The following time frames will apply: a) the parties will have 30 days by which to respond to discovery requests; b) any motions to compel discovery may be filed within 25 days of receipt of such discovery, and must include a statement reflecting

that opposing counsel was contacted 10 days prior to the motion to compel being filed in an attempt to resolve the discovery dispute informally; c) the non-moving party will have 20 days after receipt, by which to respond to any non-dispositive motion filed, and 30 days after receipt, by which to respond to any dispositive motion; and d) objections to specific discovery requests shall be made no later than at the time of the discovery responses.

5) Filing and Service Times. The parties are encouraged to electronically transmit all pleadings, files and correspondence. For purposes of the computation of time, any document delivered by hand delivery or by electronic means (FAX or e-mail) after 5:30 p.m. Eastern Standard Time shall be deemed to have been received on the following business day. Filings with the Commission exceeding twenty (20) pages shall not be sent by facsimile without prior permission.

6) Regular Status Conferences. The administrative judge will hold monthly status calls to discuss progress in the case and to resolve any outstanding disputes. The parties will make every effort to give one another prior notice of all issues that will be raised during the monthly status conferences. The next status conference shall be held on **JANUARY 6, 2006, at 1:30 P.M.**

It is SO ORDERED.

For the Commission:

  
Administrative Judge