EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
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DOERING MEYER, ET AL CLASS AGENT v. HILLARY CLINTON , SECRETARY U.S. DEPARTMENT OF STATE Office of Civil Rights Washington, DC 20520-4216 AGENCY	EEOC CASE NO.: 570-2008-00018X AGENCY CASE NO.: DOS-F-034-07 DOS-F-091-08

DECISION TO ACCEPT, REJECT OR CANCEL CLASS COMPLAINT

APPEARANCES:

COMPLAINANT'S REPRESENTATIVE: Bryan J. Schwartz

AGENCY'S REPRESENTATIVE: David B. Sullivan

BEFORE: MARY ELIZABETH PALMER
ADMINISTRATIVE JUDGE

I. INTRODUCTION

This matter came before the United States Equal Employment Opportunity Commission pursuant to §717 of Title VII of the Civil Rights Act of 1964, as amended, §501 of the Rehabilitation Act of 1973, as amended (Rehabilitation Act), and §15 of the Age Discrimination in Employment Act of 1967, as amended.[1] The issue is whether this complaint should be accepted as a class complaint of discrimination in accordance with EEOC Regulations, 29 C.F.R. Section 1614.204(d). For the reasons set forth below, it is recommended that the Agency accept the above captioned matter as a class complaint in part and dismiss it in part.

II. BACKGROUND

Putative Class Agent Doering Meyer has multiple sclerosis (MS).[2] Her date of birth is March 29, 1960. The Class Agent applied for the Foreign Service, State Department in April 2004.

She passed the oral and written exam and on June 28 or 29, 2005, the Agency gave her a conditional offer of appointment, contingent on the satisfactory completion of the medical, security and suitability clearance processes. The Class Agent submitted a medical history examination dated September 20, 2005. Additional medical information was requested and the Class Agent submitted a board certified neurologist's report relating to her multiple sclerosis on October 23, 2006. On October 30 or 31, 2006, the Agency issued the Class Agent a medical clearance indicating that she was not worldwide available and thus found her ineligible for the Foreign Service unless she was granted a waiver. The Class Agent applied for a waiver. On February 7, 2007, the Employment Review Committee met and its chair, Deputy Assistant Secretary Teddy Taylor, granted her a waiver. The Class Agent was placed on the register of applicants eligible for consular positions on February 23, 2007. On July 15, 2008, the Class Agent was selected from the register and was offered a Foreign Service Position which she accepted. The Class Agent started work with the State Department as a Foreign Service Officer on September 15, 2008.

The Class Agent sought EEO counseling on her individual complaint on November 21, 2006 and filed an individual Formal Complaint of Discrimination on January 8, 2007. She alleged that she was discriminated against on the basis of her disability and in reprisal for protected EEO activity when she was denied employment as

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[1] Reference Codes
C Motion – The Class Agent's August 21, 2008 Motion for Class Certification
A Opposition – Agency's December 5, 2008 Opposition to Class Certification
C Reply – The Class Agent's December 22, 2008 Reply to Agency's Opposition

[2] At various times, the parties refer to Meyer as having MS or having a record of having MS or being regarded as having a disability. This determination is not relevant at this stage of the proceedings as the question of whether she has a disability under the law is more appropriately addressed at a decision on the merits. For purposes of class certification, it is sufficient that she claims to have a disability, and as set forth in the facts her claim to have a disability is not without merit.

a Junior Officer in the Foreign Service.[3] The Class Agent requested a hearing before the EEOC and an Acknowledgment and Order was issued on January 10, 2008. While discovery was ongoing, on August 21, 2008, the Class Agent filed a Motion for Class Certification to convert her individual complaint to a class complaint. The Agency objected to the conversion but by Order of October 20, 2008, the individual complaint was converted to a class complaint. See, 29 C.F.R. § 1614.204(3)(b) ("A complainant may move for class certification at any reasonable point in the process when it becomes apparent that there are class implications to the claim raised in an individual complaint").

By Order dated October 20, 2008, the Administrative Judge directed the parties to provide any and all additional information they wished to present concerning the class complaint, especially with regard to the following:

> (1) Whether the complaint is within the purview of Subpart B - class complaints of discrimination, 29 C.F.R. § 1614.204;
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> (2) Whether the complaint was timely filed;
>
> (3) Whether the complaint consists of an allegation identical to an allegation contained in a previous complaint filed on behalf of the same class which is pending in the Agency or which has been resolved or decided by the Agency;
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> (4) Whether the agent(s) consulted an EEO counselor in a timely manner;
>
> (5) Whether the complaint lacks specificity and detail;
>
> (6) Whether the complaint meets the following prerequisites:
>
> > (a) The class is so numerous that a consolidated complaint of the members of the class is impractical;
> >
> > (b) There are questions of fact common to the class;
> >
> > (c) The claims of the agent(s) of the class are typical of the claims of the class;
> >
> > (d) The agent(s) of the class or his representative will fairly and adequately protect the interests of the class.

On August 21, 2008, the Class Agent filed a Motion for Class Certification. In response to the Administrative Judge's October 20, 2008 Order, the Class Agent stated that the August 21, 2008 Motion constituted her response. The Agency filed its

[3] Complainant did not initially allege reprisal but filed an amendment in February 2008 to add the basis of reprisal. Complainant did not allege age discrimination in her individual complaint but moved to add it as a basis in her Motion for Class Certification. (See Footnote 7).

Opposition to Class Certification on December 5, 2008. On December 22, 2008, the Class Agent filed a Reply to Agency's Opposition to Motion for Class Certification.[4]

III. APPLICABLE LAW

Equal Employment Opportunity Commission regulation, 29 C.F.R. §1614.204(a)(2), provides that:

> (2) A "class complaint" is a written complaint of discrimination filed on behalf of a class by the agency of the class alleging that:
>
> (i) The class is so numerous that a consolidated complaint of the members of the class is impractical;
>
> (ii) There are questions of fact common to the class;
>
> (iii) The claims of the agent of the class are typical of the claims of the class;
>
> (iv) The agent of the class, or his/her representative, if any, will fairly and adequately protect the interests of the class.

A class complaint may be dismissed if it does not meet the prerequisites of a class complaint under 29 C.F.R. §1614.204(a)(2) or §1614.107.

EEOC regulation 29 C.F.R. §1614.107, provides that a complaint may be rejected for any of the following reasons:

> (1) It fails to state a claim;
>
> (2) It fails to comply with the applicable time limits;
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> (3) It is the basis of a pending civil action in a United States District Court or was the basis of a civil action decided by a United States District Court;

[4] On April 1, 2009, the Class Agent filed a supplemental authority to support her class complaint. She submitted the decision in the matter of Katz v. U.S. Dept. of State and Agency for International Development, EEOC Appeals Nos. 0720060024 and 0720060025 (March 26, 2009). The Agency submitted a Response to the Class Agent's Supplement on April 7, 2009 and the Class Agent submitted a Reply to Agency's Response on April 16, 2009. In Katz, the Commission found that Complainant Katz was discriminated against on the basis of disability when she was denied a Class 1 Medical Clearance by the Department of State and when USAID refused to hire her or grant her a medical waiver. While the submissions were read, they are not relevant to the decision on class certification as the Katz decision relates to an individual complaint of discrimination. Complainant's argument that the Katz case makes it likely that the Class Agent and the class will prevail on liability is not relevant as the consideration at this stage of the proceedings is whether the class should be certified and meets the prerequisites for certification and not whether the class is likely to prevail.

(4) The Complainant has raised the matter in a negotiated grievance procedure;

(5) It is moot or alleges a proposal to take a personnel action or other preliminary step to taking a personnel action;

(6) The Complainant cannot be located;

(7) The Complainant has failed to respond to a written request to provide relevant information;

(8) The Complainant refuses to accept an offer of full relief.

IV. FINDINGS OF FACT

1. The Class Agent has multiple sclerosis.
2. Based on her medical records, when she was first diagnosed and during a period from 1994 to 1999, the Class Agent has been substantially limited in various life activities including giving birth (not being able to have children), walking, seeing, thinking, concentrating and work.
3. The Class Agent has a record of having multiple sclerosis.
4. The U.S. Department of State (hereinafter Agency) has 267 diplomatic posts around the world which are staffed by its Foreign Service personnel staff.
5. The Foreign Service Act mandates that Foreign Service personnel must be able to serve around the world. Foreign Service Act § 101(a)(4), 504(a); 22 U.S.C. § 3901(a)(4)), 3984(a).
6. The Foreign Service personnel system is used by several government agencies: the Departments of State, Commerce and Agriculture, the U.S. Agency for International Development (USAID) and the Broadcast Board of Governors. Foreign Service Act § 201,201; 22U.S.C. § 3921-22.
7. Foreign Service applicants must pass a rigorous and multi stage application procedure, which includes an oral assessment. They then must receive medical, security and suitability clearances.

8. After a State Department Foreign Service applicant receives medical, security and suitability clearances, he or she is placed on a hiring register. There are different registers for different types of positions. Candidates are placed on the register in rank order, based on their oral assessment scores, with adjustments for bonus points for language skills or veterans preference.
9. A candidate who has been on a register for eighteen months without being hired is removed from the register and not eligible to be hired.
10. The Agency's Office of Medical Services (MED) is responsible for medical examinations and clearances for all of the agencies who use the Foreign Service personnel system.
11. Foreign Service candidates are generally required to have "worldwide availability".[5] This is a medical determination that the candidate can serve at any of the Agency's approximately 270 foreign posts, including hardship posts with limited medical facilities.
12. A candidate must be able to work at every post without a need for ongoing medical treatment or the applicant is denied worldwide availability.
13. A candidate who may be able to work at 80% of the Agency locations without accommodations or at 100% of the locations with an accommodation cannot receive a worldwide availability rating and cannot be on the register.
14. A candidate who is found to not have worldwide availability may seek an administrative waiver. This waiver does not change the medical determination that the candidate is not worldwide available but rather is a human resources decision that a candidate should be appointed despite the medical disqualification.

[5] The Class Agent refers to the worldwide availability as having a Class 1 clearance. The Agency states that in May 2007, the terminology for Class 1, Class 2 and Class 5 changed such that Class 1 is worldwide available, Class 2 is post-specific and Class 5 is domestic only. However, it is undisputed that even under the new terminology an applicant cannot be placed on the register unless they receive a worldwide availability or Class 1 rating or subsequently receive a waiver. (See attachment 3 to A Opposition at p. 30).

15. In the State Department, the waiver decision is made by a senior Human Resources official, either the Director General of the Foreign Service or a Deputy Assistant Secretary serving as the Director General's delegate, chairing the Employment Review Committee (ERC). The State Department grants a waiver if it is in the best interests of the Foreign Service.
16. Other Agencies such as USAID and Commerce use different processes to make waiver determinations.
17. If a waiver is granted by the State Department, the application moves forward and the candidate is ranked on the roster in the same manner as if he or she had been determined to be worldwide available.
18. The Class Agent applied for the Foreign Service in April 2004. She passed the oral and written exam and on June 28 or 29, 2005, the Agency gave her a conditional offer of appointment, contingent on the satisfactory completion of the medical, security and suitability clearance processes.
19. The Class Agent submitted a medical history examination dated September 20, 2005. Additional medical information was requested and The Class Agent submitted a board certified neurologist's report relating to her multiple sclerosis on October 23, 2006.
20. On October 30 or 31, 2006, the Agency issued the Class Agent a medical clearance indicating that she was not worldwide available and thus found her ineligible for the Foreign Service unless she was granted a waiver.
21. The Office of Medical Services found the Class Agent not worldwide available based on her multiple sclerosis (MS). The Agency considered that her MS was a "medical condition which was incapacitating or for which there was necessary specialized medical care best obtained in the United States." (C. Motion, citing Taylor Deposition at 69). The Agency considered that her condition could be exacerbated by "stress, generalized infections, heat, humidity, and emotional upset, to name a few. While most of those factors are part of Foreign Service life, the limiting factor in the opinion of medical services, [is] residence in a tropical environment."

(C.M. citing Taylor Deposition at 69). The Agency concluded that the Class Agent could not work in any position without air conditioning, in any tropical climate, or anywhere outside the United States.

22. No individualized assessment was done of the Class Agent's impairment or how it would limit her ability to do the duties of the position(s) she sought in particular countries around the world. Rather when the Office of Medical Services determined (or perceived) that she had a permanent or long-lasting medical condition or a record of such a condition, she was denied medical clearance.
23. The Class Agent applied for a waiver. On February 7, 2007, the ERC met and its chair, Deputy Assistant Secretary Teddy Taylor, granted her a waiver.
24. The Class Agent was placed on the register of applicants eligible for consular positions on February 23, 2007.
25. On July 15, 2008, the Class Agent was selected from the register and was offered a Foreign Service Position which she accepted.
26. The Class Agent started work with the State Department as a Foreign Service Officer on September 15, 2008.
27. From October 7, 2006 through October 8, 2008, MED denied worldwide availability clearances for 49 Foreign Service career candidates. 46 of the candidates were in the State Department, 2 were in USAID and one was in the Department of Agriculture.
28. Of the 46 State Department candidates, 21 sought waivers and 25 did not. Of the 21 who sought waivers, four, including the Class Agent, received waivers, and three of the four, again including the Class Agent, were hired. The fourth is eligible to be hired. Of the 25 who did not seek waivers, two were hired into the Foreign Service.[6]
29. All three non-State Department candidates sought waivers and were denied waivers.

[6] There is no indication of how or why they were hired without having sought a waiver.

30. The candidates had a variety of medical conditions including, amongst others, cancer, diabetes, anxiety disorders, HIV, sickle cell disease and coronary artery disease. (See attachment 15 to Agency Opposition).
31. Of the 49 candidates who were initially denied a worldwide availability clearance, 20 were over the age of 40 and 29 were under the age of 40.
32. Of the twenty-three State Department employees who did not seek waivers and were not hired, nine were over the age of 40. The two who were hired without seeking a waiver were both under the age of 40. Of the seventeen who had waiver requests denied, six were over the age of 40. All three candidates who had their waiver requests granted and were hired were over the age of 40. The one candidate who had a waiver request granted and is eligible to be hired is under the age of 40. Of the three non-State Department candidates, two were over the age of 40.

V. ANALYSIS AND FINDINGS

A. Introduction

There is no dispute over the timeliness of the Class Agent's class allegations or of her notice to the Agency of her class claims. The Class Agent has met all other regulatory guidelines and fulfilled all other administrative requirements to permit the case to proceed as a class action.

The Class Agent desires to represent a

class under the Rehabilitation Act of 1973 ("the Rehab. Act") and the Age Discrimination in Employment Act of 1967 ("ADEA")[7] as follows: all applicants for Federal employment overseas who have been or will be denied employment, from October 7, 2006 until the conclusion of litigation of this complaint, because the State Department's Office of Medical Services denied them "Class 1 – Unlimited Clearance for Worldwide Assignment" – type clearance. C Motion at p. 1.

[7] The Class Agent did not allege age discrimination in her individual complaint but moved to add it as a basis in her Motion for Class Certification. The Commission has held that a Complainant may add a basis at any time. See, Sanchez v. Standards Brands, Inc. 431 F.2d 455 (5th Cir.1970). While this may not always be the case with respect to a class complaint as adding a basis might well impact the processing of the case, the Class Agent will be allowed to assert the additional basis at this stage of the proceeding as it is pre-certification.

The Class Agent alleges that the worldwide availability requirement, previously known as Class 1 clearance, requires that any applicant for the Foreign Service be able to work, without accommodations, in every location where the State Department, or other Foreign Service Agency, has a post. The Class Agent alleges that this requirement discriminates against individuals with a disability because they are disparately treated and that they are also disparately impacted by the policy. The Class Agent also claims that the worldwide availability requirement has a discriminatory disparate impact upon applicants over the age of 40.

B. Rule 23 Prerequisites

Introduction

The requirements contained in Sections 1614.204 of the EEOC regulations are based on Rule 23 of the Federal Rules of Civil Procedure, and the definitions, scope, and criteria for rejection of class complaints under Part 1614 are intended to conform as closely as possible with Rule 23. 42 Fed. Reg. 11808 (1977). In East Texas Motor Freight v. Rodriguez, 431 U.S. 395 (1977), the United States Supreme Court declared categorically that for a discrimination suit to qualify for class certification, it must, like any other type of action, satisfy the requirements of Rule 23. Therefore, decisions interpreting Rule 23 are clearly relevant and should be considered in interpreting the regulations.

Notwithstanding the above, the putative Class Agent in the EEOC administrative process is not held to same standard of proof to which a Rule 23 plaintiff in United States District Court is held. As the Commission stated in Curtis Hines, Jr., et al. v. Sheila Widnall, Secretary of the Air Force, EEOC Appeal No. 01931776 (July 7, 1994), aff'd, Curtis Hines, Jr., et al. v. Sheila Widnall, Secretary of the Air Force, EEOC Request No. 05940917 (Jan. 29, 1996):

> [T]he Commission is mindful that our decisions in class certification cases must take into consideration the fact that a class agent does not get access to precertification discovery in the same manner and extent that a Rule 23 plaintiff does.

Rather, the EEOC regulations provide for development of the evidence by the parties once a class complaint has been accepted. In addition, an Administrative Judge may issue orders for the investigation of a class complaint. The Administrative Judge may then take appropriate action if the evidence reveals that the class should be redefined, subdivided or dismissed. 29 C.F.R Section 1614.204.

In this case, there has been substantial precertification discovery which took place while the Class Agent's individual complaint was being processed. This discovery provided information concerning the numbers of individuals who were affected by the policy at issue.

Typicality and Commonality

In order for a Class Agent to represent a class, he must show that his claims are typical and common to the members of the class.[8] He can do so by presenting a claim which could be used as a "prototype for resolution of the common claims of the class. . ." Stastny v. Southern Bell Telephone and Telegraph Company, 628 F.2d 267 (4th Cir. 1980). As the Commission stated in Curtis Hines, Jr., et al. v. Sheila Widnall, Secretary of the Air Force, EEOC Appeal No. 01931776 (July 7, 1994):

> These prerequisites [typicality and commonality] require the class agent to possess the same interest and suffer the same injury as the members of the proposed class. While the class agent need not prove the merits of the class claims, he must identify specific facts that are common to the class. In this regard, the appellant's individual claim must show some nexus with the claims of the putative class. In other words, as presented, the appellant's individual claim and claims of the members of the proposed class must be sufficient to raise common questions of fact and law. Hines, supra, at pp. 6 & 7.

Commonality

To demonstrate commonality, the Class Agent must demonstrate there is a question of fact common to the class. 29 C.F.R. 1614.204(a)(ii). In other words, the Class Agent must establish an evidentiary basis from which one could reasonably infer the operation of an overriding policy or practice of discrimination. See Mastren v. USPS, EEOC Request No. 05930253 (October 27, 1993); Garcia v. Interior, EEOC Appeal No. 07A10107 (May 8, 2003). See also Hines, EEOC Request No. 05940917 (evidence to establish commonality may include statistical evidence, anecdotal testimony by other employees showing that there is a class of persons who were discriminated against in the same manner as the individuals and evidence of specific adverse actions).

Factors to consider in determining commonality include whether the practice at issue affects the whole class or only a few employees, the degree of centralized administration involved, and the uniformity of the membership of the class, in terms of the likelihood that the members' treatment will involve common questions of fact. Garcia, *supra* (citing Mastren, supra).

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[8] As the Supreme Court stated in General Telephone Company of the Southwest v. Falcon, 457 U.S. 147 (1982):

> The commonality and typicality requirements of Rule 23(a) tend to merge. Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interest of the class members will be fairly and adequately protected in their absence. 457 U.S. at 157, n.13.

With respect to commonality in this case, the Class Agent presents evidence that the overriding practice of discrimination is the Agency's policy of requiring worldwide availability. This policy affects all members of the class on the basis of disability. Individuals who cannot work in all locations without accommodations are denied worldwide availability.[9] The policy and practice is administered centrally for the State Department's Foreign Service, USAID, the Foreign Service Corps at the US Department of Agriculture and Commerce and the Broadcast Board of Governors by the State Department's Office of Medical Services. The Office of Medical Services conducts the medical review of each applicant to all of the agencies and determines whether the applicant is worldwide available. There is no interactive process to determine whether an individual can work at a specific location or needs an accommodation which would allow the individuals to work at a location. There is also no analysis of whether it would be an undue hardship for the Agency to provide an accommodation on an individual basis.

The class members' treatment involves common questions of fact. Each class member applied to one of the overseas agencies and each received a conditional offer of assignment conditioned on medical clearance. Each was denied worldwide available status by the Office of Medical Service on the basis of the individuals' disability, record of disability or regarded as being disabled. Each class member was then denied employment based on the determination by the Office of Medical Services.[10]

The Agency argued that there was a lack of commonality because denial of employment may involve up to three steps: MED's determination of worldwide availability; the employing agency's determination of whether to waive the worldwide availability requirement; and its determination of whether an eligible candidate receives a position. The Agency argued that only the first of the three steps is common among the agencies and class members. The Class Agent in her reply conceded that the waiver and ultimate hiring process at agencies other than the State Department were not typical or common to the claims of the class. Thus, the sole policy at issue is the denial of worldwide availability and this is common to all class members. The application of the waiver process and the ultimate hiring process is not common to class members. The Class Agent also has not identified an Agency action or policy which affects members of the class, whether State Department applicants or applicants of other agencies, with regard to waivers or ultimate hiring decisions. Rather as stated, the Class Agent has challenged only one policy at issue, the worldwide availability requirement which results in the initial denial of employment.

The Agency then argues that since some of the State Department employees requested waivers and some were granted waivers there are not common questions of fact. Again, it must be stressed that the policy at issue is the ultimate denial based on

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[9] As noted by the Class Agent the only exception may be for individuals who are hearing or visually impaired as a result of the Commission's decision in McCraw v. Dept. of State, EEOC Request No. 05940903 (September 29, 1995).

[10] Some class members then sought a waiver and were granted a waiver and ultimately were hired. (At this time, there are merely three such members). However, as discussed infra with regard to typicality this is not relevant. The alleged discriminatory practice is the denial of worldwide availability and the lack of employment which results from this denial and not the subsequent application of the waiver process.

worldwide availability and thus all State Department employees do have common issues of fact whether or not they subsequently sought waivers.

Next, the Agency contends that each member of the putative class has individual sets of medical issues that result in the determination by MED that he or she is not worldwide available. The Agency states that medical conditions must be considered and that they are not common to all members of the class. The fact that class members have different disabilities and thus different medical conditions does not prevent certification of a class. The Commission has previously held that classes can be certified where class members have different disabilities. (See, McConnell v. U.S. Postal Serv., EEOC Appeal No. 0720080054 (January 14, 2010) (granting class certification to a class of employees defined as "all permanent rehabilitation employees and limited duty employees"); Cyncar v. U.S. Postal Serv., EEOC Appeal No. 0720030111 (February 1, 2007) (certifying a class action in which members of the class had a variety of disabilities including asthma, cancer, and an abnormal blood clotting disorder); Jantz v. Social Security Administration, EEOC Appeal No. 0720090019 (August 25, 2010)(certifying a class of all current and former employees with targeted disabilities).

The Agency also argued that not all individuals found to be non-worldwide available have conditions which are disabilities under the law. They also contended that some individuals with a disability would not have a medical condition which would limit service. (A Opposition at 5, 6). However, these arguments are more appropriately addressed after certification as they go to the merits of the complaint, in general, or an individual's membership in the class, in particular.

Consequently, the Class Agent has established that there is a centralized policy, the denial of worldwide availability based on medical conditions, which is common to all class members. Thus, the Class Agent has established that commonality exists with regard to the class of individuals with a disability.

The Class Agent has failed to meet the commonality requirement for age discrimination. The Class Agent argued that the policy at issue has a disparate impact on individuals over the age of 40. Unlike with the allegation of disparate treatment and disparate impact based on disability, there is no causal connection or nexus between the policy and the age of individuals who are denied worldwide availability. The Class Agent did not introduce any statistical evidence to show a disparate impact based on age. Nor did the Class Agent introduce any anecdotal evidence to show that there was disparate impact based on age. While there is limited discovery during the pre-certification stage, there is provision for the administrative judge to allow discovery necessary to meet the prerequisites.[11] In this case, there is no proffer of any statistics or

[11]In fact the parties did engage in discovery prior to the motion to convert the individual complaint to a class complaint.

other evidence to show that the policy disparately impacts individuals over 40 and the policy on its face does not target individuals over 40.[12]

Typicality

Under 29 C.F.R. § 1614.204(a)(iii), Complainant must demonstrate that her claims are typical of the class. The overriding typicality principle is that the interest of the class members must be fairly encompassed within the class agent's claims. Typicality exists where the class agent demonstrates some "nexus" with the claims of the class, such as the similarity in the conditions of employment and similarity in the alleged discrimination affecting the agent and the class. Thompson v. USPS, EEOC Appeal No. 01A03195 (March 22, 2001).

The claims of the Class Agent Doering Meyer are typical of the class. The Class Agent has a disability, MS. As stated, it is immaterial at this point to the determination whether her condition is a disability, or she has a record of a disability or is regarded as having a disability. She was denied hire to a Junior Foreign Service position with the State Department because she was denied worldwide availability based on her MS. Thus, her claim is typical of the claims of the class, individuals who were discriminated against on the basis of disability when they were denied a job based on being found not to have worldwide availability.

The Agency argues that the Class Agent's claims are not typical of those of the proposed class because she is not a member of the class. The Agency bases this argument on the definition of the proposed class as those "who have been or will be denied employment." (A Opposition at 13, citing C Motion at 1). Since the Class Agent is now employed by the Agency as a Foreign Service Officer, the Agency argues that she has not been denied employment. However, the Class Agent was denied worldwide availability based on her MS and thus was denied employment. The fact that she subsequently successfully sought a waiver of the worldwide availability requirement (which is not based on medical determinations) does not vitiate the fact that she was initially denied hire. Should this be the case, Agencies could always avoid a class complaint by providing full relief to class agents. The Commission has found that an individual award of relief to a class representative prior to the disposition of a class complaint does not nullify the typicality of a class representative as long as his or her interest does not become antagonistic to the interest of the other class members. (See, Washington v. Dept. of Agriculture, EEOC Request No. 05890052 (May 12, 1989); Tarrats, Rivera, et al. v. Federal Deposit Insurance Corporation, EEOC Appeal No. 01960433 (January 12, 1998); Torres v. Dept. of Transportation, Appeal No. 01982649 (March 22, 2001). Furthermore, the Class Agent was twice denied hire and suffered damages even after being hired in terms of back pay, compensatory damages and attorney fees. Thus, her claims are typical of the class.

[12] On the contrary, the only numbers proffered by the Class Agent rebuts any evidence of disparate impact. Of the 49 individuals who were denied positions as a result of the policy at issue, 20 of them were over the age of 40 and 29 were under the age of 40.

The Agency also argued that her claims were not typical of the class because her disability is different than the disabilities of other class members. This argument is not persuasive as it would result in there rarely being a class certified based on disability. As stated above, the Commission has previously held that classes can be certified where class members have different disabilities. (See, McConnell, Cyngar, Jantz, supra).

The Agency also argued that the Class Agent's claim is not typical because she received a waiver from the ERC and was the only one of eleven applicants seeking a waiver to receive one in 2007 and was one of only four of the 49 applicants who received one during the identified two year time period. However, as discussed above, the fact that the Class Agent successfully sought a waiver does not negate the fact that she was denied worldwide availability based on her disability and thus her claim is typical. As discussed in connection with commonality, the policy is the denial of worldwide availability and the definition of the class reflects that policy.

The Agency also argues that the Class Agent's claim is not typical because of the relief that would be available to her since she now has a position and this is different from the claims of other applicants who were found not worldwide available. However, this argument goes to the relief that would be awarded the Class Agent and other class members and does not show that her claims lack typicality. In any class case, there is a potential for different relief to be awarded to different class members.

The Class Agent's claims are typical of the class members as she also was denied worldwide availability and denied a position, albeit for a limited period of time. There is no conflict of interest between the Class Agent's claims and those of the other class members.

Numerosity

As cited earlier, the criterion of numerosity requires that the class be sufficiently numerous that a consolidated complaint by the members is impractical. 29 C.F.R. § 1614.204(a)(2)(I). It is clear from a review of the case law that numerosity is a fluid concept which requires examination of the facts in each case so that as a general rule, the number of class members is not, in and of itself, determinative. Nevertheless, the sheer number of members that a proposed class comprises may create a presumption that the joinder of their claims is impracticable. See, EEOC v. Printing Industry of Metropolitan Washington, D.C., Inc., 92 F.R.D. 51 (D.D.C. 1981); Brady v. Thurston Motor Lines, 726 F.2d 136 (4th Cir. 1984). The Commission has held that relevant factors to determine whether the numerosity requirement has been met are the size of the class, the geographical dispersement of the class and the ease with which class member may be identified. (See, Carter et al. v. U.S. Postal Serv., EEOC Appeal No. 01A24926 (November 14, 2003); Jantz, supra).

The Class Agent satisfies the numerosity requirement for the proposed class of individuals with a disability who were not granted worldwide availability. There are a minimum of 49 individuals who were denied worldwide availability from October 7,

2006 to October 8, 2008. The Agency argues that there were only 43 individuals during this time frame as it does not include the six individuals who were granted waivers, five of whom were hired. However, these six individuals are members of the class for the reasons discussed above in connection with typicality. The proposed class includes individuals who were not granted worldwide availability based on their disability. The fact that they may have subsequently been granted a waiver for non-medical reasons does not exclude them from the class. In any event, a class of 43 individuals who are geographically dispersed, as is the case here, is sufficient to meet the numerosity requirements. Also, as pointed out by the Class Agent, this number is expected to increase and in fact has probably doubled since the time period for which the statistics were obtained.

The Class Agent does not meet the numerosity requirement for the proposed class of individuals over the age of 40 who were not granted worldwide availability. For the two year time frame from October 2006 to October 2008 there are only 20 individuals over the age of 40 who were denied worldwide availability. The Class Agent argues that this number will increase. However, at this time there are only 20 putative class members and this number is not sufficient for a class complaint. Furthermore, as discussed above, the Class Agent has not met the commonality requirement for a class based on age discrimination.

Adequacy of Representation

Adequacy of representation is the most crucial requirement because the judgment will determine the rights of absent class members. Bailey, et al. v. DVA, EEOC Request No. 05930156 (July 30, 1993). Adequacy requires that the agent of the class, or, if represented, the representative, will fairly and adequately protect the interests of the class. 29 C.F.R. § 1614.204(iv). The class representative should have no conflicts with the class and any attorney representing the class agent and class must have the requisite skill and experience. Sedillo v. Agriculture, EEOC Appeal No. 07A20071 (August 7, 2002).

Class Agent Meyer, as discussed in the section on typicality, has no conflicts with the class she seeks to represent and her interests are squarely aligned with other applicants who were denied employment based on being denied Class 1 Unlimited clearance for Worldwide Assignment clearance. As discussed above, the fact that Meyer was ultimately granted a waiver and a position does not make her claims untypical nor does it create a conflict with the claims of the rest of the class.

At this point, the Class Agent is represented by Bryan Schwartz, a sole practitioner. His affidavits outline his extensive experience in matters before the EEOC and representing thousands of employees nationwide in class actions. Class counsel states that he has committed his resources to fully and professionally prosecute the claims of the class. Furthermore, class counsel states that he has already consulted his former law firm, Passman & Kaplan, PC about becoming co-consul in this matter. Because of the complexity of processing a class complaint, it is not feasible for a sole practitioner to

handle a class case. However, the Commission has held that lack of adequacy can be cured. Hines, supra. As stated, class counsel has already discussed obtaining co-counsel and will be required to do so once processing the case on the merits commences. Thus, I find that there is adequacy of representation both with respect to the class agents and class counsel.

VI. DECISION

Based upon full consideration of the complaint and record before me, for the reasons stated above, individually and cumulatively, pursuant to 29 C.F.R. § 1614.204(d)(7), I hereby accept and certify The Class Agent's class complaint with respect to certain issues. The class is defined as:

> All applicants for career Foreign Service employment[13] with a disability who have been or will be denied employment from October 7, 2006 until the present because the State Department's Office of Medical Services denied them "Class 1 – Unlimited Clearance for Worldwide Assignment" type clearance.

Based upon full consideration of the complaint and record before me, I reject as a class complaint all other aspects because they do not meet the commonality and typicality requirement, specifically as they relate to the application of the waiver process and individuals over the age of 40.

The partial rejection of this complaint as a class complaint does not preclude the utilization of the individual complaint procedures.

9/30/12

DATE

MARY ELIZABETH PALMER

ADMINISTRATIVE JUDGE

[13] The Class Agent proffered that the class should be composed of all applicants for Federal employment overseas ... The Agency pointed out that this definition could be interpreted to include non-Foreign Service positions such as candidates for limited-term positions in Iraq or elsewhere or Civil Service employees of the State Department and other agencies scheduled for limited-term foreign postings. These positions do not require worldwide availability but only country-specific medical clearance. The Class Agent did not address this point in her Reply but since the Motion for certification is directed at the worldwide availability requirement, the class will be limited to career Foreign Service candidates who are applicants who must meet the worldwide availability requirement as a condition of employment.

NOTICE TO THE PARTIES

1. *TO THE AGENCY:*

Within forty (40) days of receiving this decision and the hearing record, you are required to issue a final order notifying the complainant whether or not you will fully implement this decision. You should also send a copy of your final order to the Administrative Judge.

Your final order must contain a notice of the complainant's right to appeal to the Office of Federal Operations, the right to file a civil action in a federal district court, the name of the proper defendant in any such lawsuit, the right to request the appointment of counsel and waiver of court costs or fees, and the applicable time limits for such appeal or lawsuit. A copy of EEOC Form 573 (Notice of Appeal/Petition) must be attached to your final order.

If your final order does not fully implement this decision, you must simultaneously file an appeal with the Office of Federal Operations in accordance with 29 C.F.R.§§ 1614.204(d)(7) and 1614.403, and append a copy of your appeal to your final order. See EEOC Management Directive 110, November 9, 1999, Appendix O.

2. *TO THE COMPLAINANT:*

You may file an appeal with the Commission's Office of Federal Operations when you receive a final order from the agency informing you whether the agency will or will not fully implement this decision. 29 C.F.R. §§ 1614.401(c) and 1614.402(a). From the time you receive the agency's final order, you will have thirty (30) days to file an appeal. If the agency fails to issue a final order, you have the right to file your own appeal any time after the conclusion of the agency's (40) day period for issuing a final order. See EEO MD-110, pp. 9-2, 9-3. In either case, please attach a copy of this decision with your appeal.

Do not send your appeal to the Administrative Judge. Your appeal must be filed with the Office of Federal Operations at the address set forth below, and you must send a copy of your appeal to the agency at the same time that you file it with the Office of Federal Operations. In or attached to your appeal to the Office of Federal Operations, you must certify the date and method by which you sent a copy of your appeal to the agency.

CERTIFICATE OF SERVICE

For timeliness purposes, it shall be presumed that the parties received the foregoing ***DECISION TO ACCEPT, REJECT OR CANCEL CLASS COMPLAINT*** within five (5) calendar days after the date it was sent via first class mail. I certify that on September 30, 2010 the foregoing ***ORDERS*** were sent via first class mail to the following:

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