

UNITED STATES OF AMERICA  
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
PHILADELPHIA DISTRICT OFFICE  
801 Market Street, Suite 1000  
Philadelphia, PA 19107

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KAREN SABA,	)	EEOC No. 530-2021-00389X
	)	Agency No. DOS-F-120-11
Complainant	)	
	)	Allyson S. Jozwik
vs.	)	Administrative Judge
	)	
ANTHONY J. BLINKEN, Secretary,	)	February 25, 2022
U.S. Department of State	)	
Agency	)	

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**DECISION AND ORDER DENYING AGENCY’S MOTION TO DISMISS**

Relevant Procedural History

The complicated procedural history of this case spans more than a decade with multiple EEOC Administrative Judges presiding over the years<sup>1</sup> — a brief recitation of relevant matters will be set forth here. Complainant Saba’s original claims in 2011 were based on “non-hiring of disabled employees by USAID and the State Department Office of Medical Services employing a non-individualized ‘Class 1/Class 2’ ‘worldwide availability’ medical clearance system, which denied employees like Saba the individualized consideration and reasonable accommodations they are entitled to receive under the Rehabilitation Act.” (See Formal Complaint in the Report of Investigation at unnumbered page 70).

Saba settled with USAID in 2019; the settlement did not release the Department of State (DOS). With USAID no longer in the case, Administrative Judge David Norken approved an amended definition of the proposed class in July 2020 as: “all applicants to and employees of the U.S. Government denied post-specific medical clearance by the U.S. Department of State from May 16, 2011 to present.” (See Transcript of July 13, 2020 Meyer/Saba Teleconference). Of note, references to “non-hiring” were removed from the class definition.

Motion to Dismiss

Before me is DOS’s Renewed Motion to Dismiss filed on August 24, 2021, wherein DOS contends it is not a proper party to the litigation, and if it is considered a proper party, that the

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<sup>1</sup> For a detailed procedural history, see Saba’s Motion for Class Certification at pages 19 – 22.

class members’ employing agencies must be joined. I have considered DOS’s motion, Saba’s Opposition filed on October 5, 2021, and DOS’s Reply to Saba’s Opposition filed on November 3, 2021.

DOS’s arguments concern the lack of an employment relationship between DOS and Saba; whereas, Saba focuses on the Commission’s determinations in prior cases that DOS is the “offending party.” These cases are set forth in the grid below in boxes “1A” and “2B.” The combination of factors to consider for the issue at hand warrants use of this grid for clarity. The Commission has found DOS to be a proper party in cases that share one or another factor with Saba, but has not addressed the same combination as Saba. The *Meyer* case in grid box “1A” concerns the factors of the existence of an employment relationship with DOS and a class action. The cases in grid box “2B” concern the factors of no employment relationship with DOS and not a class action. The Commission has yet to consider the combination of factors that Saba presents in “2A” – no employment relationship, and a class action.

**EMPLOYMENT STATUS (1 OR 2)**

**/ CASE TYPE (A or B)**

1. DOS Employee	2. Non-DOS Employee	
<p><i>Meyer, et. al. v. Kerry (Dep’t of State)</i>, EEOC Appeal No. 0720110007, 2014 WL 2647177 (June 6, 2014)</p>	<p><i>Saba</i></p>	<p><b>A. Class Action</b></p>
<p>[No factors shared with Saba]</p>	<p><i>Katz v. Clinton (Dep’t of State)</i>, EEOC Appeal No. 0720060024, 2009 WL 900711 (Mar. 26, 2009)</p> <p><i>Madeline G. v. Tillerson (Dep’t of State)</i>, EEOC Appeal No. 0120141877 (Sept. 2, 2020)</p> <p><i>Bart M. v. Blinken (Dep’t of State)</i>, EEOC Appeal No. 2021001832 (June 2, 2021)</p> <p><i>Elroy K. v. Blinken (Dep’t of State)</i>, EEOC Appeal No. 2020000778 (Sept. 28, 2021)</p>	<p><b>B. Individual Claim</b></p>

DOS’s argument seems to be that the cases Saba relies in grid box “2B” do not confer proper party status in the instant matter because they are not class cases; and presumably, the argument, then, is that not having an employment relationship with DOS only confers proper

party status in non-class action, individual classes. Moreover, DOS seems to assert that because class cases must comport with the regulatory definition of a “class,” Saba’s reliance on the “individual complaint” regulation concerning which agency should receive the complaint is misplaced.

Saba asserts that DOS is a proper party because the regulations state, “A complaint must be filed with the agency that allegedly discriminated against the complainant.” 29 C.F.R. § 1614.106 (a). The heading for section 1614.106 is “Individual Complaints.” Saba contends that given the class definition here of “all applicants to and employees of the U.S. Government denied post-specific medical clearance *by the U.S. Department of State* from May 16, 2011 to present” (emphasis added), DOS must be a proper party because it is the only agency that allegedly discriminated against the proposed class. It, alone, processes requests for medical clearances.

DOS counters the application of this regulation because it concerns “Individual Complaints.” DOS relies on the definition of a “class” in the “Class Complaints” section of the regulations: “A class is a group of employees, former employees or applicants for employment who, it is alleged, have been or are being adversely affected by an agency personnel management policy or practice that discriminates against the group on the basis of their race, ....” 29 C.F.R. § 1614.204(a)(1). DOS essentially contends that the class definition regulation requires that the class members have an employment relationship with the offending party because the first part of the definition references “employees, former employees or applicants for employment.” DOS has cited to no case that supports its interpretation of the class definition requiring an employment relationship with the offending party, and Saba has not cited to any case that specifically states otherwise.

This conundrum has been addressed, however, by the Commission in EEO Management Directive 110 (MD-110). Pursuant to MD-110, “**As with an individual complaint, a class complaint must be filed with the agency that allegedly discriminated against the putative class. 29 C.F.R. § 1614.106(a).**” See MD-110, “Complaints of Class Discrimination” Chapter 8, II. B (emphasis added). Therefore, the Commission has concluded that 29 C.F.R. § 1614.106(a), which Saba relies upon, applies to class cases and clears the way for class complaints against the offending party without regard for an employment relationship. As stated previously, the class definition can be interpreted in no other way than asserting liability against DOS, and DOS alone. Therefore, I find that DOS is a proper party to this litigation.

#### Joinder of the Class Members’ Employing Agencies is Not Necessary

DOS argues that even if it is a proper party, that other agencies who were employers or prospective employers of the class members must be joined as indispensable parties. DOS’s contention is without merit. The current class definition no longer concerns any secondary

liability that flowed from the alleged discriminatory medical clearance denials from DOS. DOS's continued focus on "non-hiring" is misplaced. DOS is essentially contending that no emotional or other harm can arise directly from an alleged discriminatory denial of a medical clearance, in and of itself. The law does not support this position, as make-whole relief for the liability issue here can be made with compensatory damages. Class members could certainly show that they experienced sustained humiliation, frustration, and despair over adverse treatment by DOS because of their disabilities. To the extent DOS's joinder argument requires further attention, I adopt and incorporate herein by reference Saba's well-reasoned analysis of this issue at pages 5 through 7 of her opposition to DOS's motion.

For these reasons, DOS's Motion to Dismiss is DENIED.

IT IS SO ORDERED.



For the Commission:

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Allyson S. Jozwik  
Administrative Judge