

NOV 29 1977

ACR:mlp

Ms. Martha J. Lanphear
EEO Complaints Examiner
United States Civil Service Commission
Federal Employee Appeals Authority
Washington, D. C. 20415

Dear Ms. Lanphear:

This letter concerns the EEO class complaint made by Ms. Christine Hansen against the Federal Bureau of Investigation and is in response to your letter on this subject of October 28, 1977, and the matters raised in our telephone conversation of November 15, 1977.

It appears to me that the most significant problem raised by your letter (as clarified in our conversation) stems from your position that the list of incidents of discrimination happening to other women contained in Ms. Hansen's complaint cannot be considered by you unless those incidents took place less than 90 days before Ms. Hansen first lodged her complaint with the EO counselor; that is to say you cannot consider them in deciding whether or not to recommend to the agency that it accept the class complaint. I believe that this position misconstrues the nature of a class action and fails to give proper consideration to the reasons for which incidents happening to other members of the proposed class are enumerated. In this letter I shall attempt to explain why you ought to take these incidents into account; I will also respond to other specific questions and, without making this a legal brief, refer to some case law which supports the propriety of Ms. Hansen's representing the class she attempts to represent.

Employment discrimination is by its very nature an unlawful activity directed at a class. There may be rare instances when an individual is denied employment benefits because of membership in one of the protected categories but the employer has a general practice of treating all employees fairly. During our discussion, I received the impression that you viewed a class action as limited to those narrow situations where all members of a class of employees are similarly affected by the same employment practice (e.g. denial of sick pay for maternity leave). The complaint Ms. Hansen seeks to bring is broader than this; it alleges that the employer has an overall, pervasive and continuing practice of discriminating against female employees. The incidents alleged are evidence of class discrimination and not necessarily events demanding specific remedies.

Moreover, relief from certain discriminatory acts may be time-barred but that does not prevent you from considering these allegations in determining whether an overall pattern of discrimination against women has been adequately described in the detail called for by your regulations. In considering the timeliness of these allegations, I believe you should keep in mind that Ms. Hansen has alleged that the incidents she has enumerated are exemplary of a continuing discriminatory policy directed at all members of the class she seeks to represent. Even the specific incident she alleges concerning her own transfer shows more than an isolated discriminatory action; it presents documentation that women, as a class, are treated differently and to their detriment.

I believe that one of the strongest pieces of evidence of the FBI's continuing policy of discrimination against women as a class is found in the counselor's report on the persons who have washed out of the training school at Quantico. You will note that over 75% of the women who failed did so because of firearms or physical requirements. On the other hand, slightly more than 20% of the men left at the training stage for these reasons. The FBI's response that they are doing a "new study" on this matter is inadequate to defeat the presumption that women as a class are being discriminated against in this aspect of employment.

A class action is especially appropriate where, as here, the incidents complained of were preceded by an overt discriminatory policy affecting the entire class. I think it should be apparent from the allegations of this complaint that the FBI as an organization has not responded adequately to the challenge it faced when Title VII was amended in 1972. It is clear that female applicants face greater hurdles than male applicants do; that once accepted for training, women are put at a disadvantage; and that once in the Bureau they are not treated equally. This complaint seeks remedial action directed toward future improvement -- relief most obviously needed if one assumes the validity of these charges, which I believe you must do in considering whether to recommend that the class action be accepted. The very heart of a class action should be its provision of the machinery for achieving general prospective relief rather than the correction of specific incidents that occurred 90 days or less before counseling.

In your letter you ask about alleged discriminatory matters contained in the complaint but not dealt with in the counselor's report. I do not know why the counselor omitted these matters but all matters contained in the complaint were raised by Ms. Hansen with the counselor. You should note that inadequate counseling is alleged as part of the class complaint as it is related to the FBI's failure to take adequate steps to overcome its past overt discriminatory policies.

In your letter you question whether or not the complaint Ms. Hansen seeks to assert includes the elements of the definition of a class complaint as specified in Section 713.601 of the Civil Service Regulations. With respect to numerosity, I am sure you will agree that the number of present agents, rejected applicants and trainee failures combined is large enough to meet this requirement. Potential applicants may also be represented by Ms. Hansen. The courts have recognized a class composed of present and potential members of a union, Young v. International T & T Co., 438 F. 2d 757 (3rd Cir. 1971) as well as the right of a retired employee to represent "potential and actual Negro employees," Hackett v. McGuire Brothers, Inc., 445 F. 2d 442 (3rd Cir. 1971). See Morrow v. Crisler, 479 F. 2d 960 (5th Cir. 1973), 491 F. 2d 1053 (1974) (en banc) which espouses the principle that a class agent may represent persons who have applied or will apply as well as those who have been deterred from applying.

With respect to questions of fact common to the class, the Fifth Circuit rule is that any employment discrimination case has a common question of fact and law -- was there a pattern or practice of discrimination? Johnson v. Georgia Highway Express, 417 F. 2d 1122 (5th Cir. 1969). With respect to typicality, it would seem that if a retired employee can represent a class (as pointed out above), certainly Ms. Hansen can represent present and potential women employees of the FBI. Courts have also allowed discharged employees and rejected applicants to represent the class, including people who have been unable to sustain their own claims. Chance v. Board of Examiners, 458 F. 2d 1167 (2nd Cir. 1972) also takes a permissive view on these issues. Lastly, I have no doubt that Ms. Hansen will fairly and adequately protect the interests of the class and I know of no claim that she would not.

If you believe that a further discussion of the case law in this area would be helpful or if you have any other questions you would like to raise, please give me a call at 739-4092. Thank you very much for your consideration of this matter.

Sincerely,

Alexander C. Ross
Chief
Education Section
Civil Rights Division