EEOC DOC 01952486, 1998 WL 25234 (E.E.O.C.)

E.E.O.C.
***1** Office of Federal Operations

CHRIS J. CONANAN, APPELLANT,
v.
ANDREW C. HOVE, ACTING CHAIRMAN, FEDERAL DEPOSIT INSURANCE CORPORATION, AGENCY.

Appeal No. 01952486
Agency No. FDIC-93-74
Hearing No. 100-94-7231X

January 13, 1998

DECISION

INTRODUCTION

On February 17, 1995, Chris J. Conanan ("Class Agent 1") timely filed an appeal with this Commission from a final agency decision ("FAD"), received on January 18, 1995. The decision concerned Class Agent 1's EEO class complaint which alleged discrimination based on race (Black) in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e et seq. The appeal is accepted by the Commission in accordance with the provisions of EEOC Order No. 960.001.

ISSUE PRESENTED

The issue presented herein is whether the agency properly dismissed Class Agent 1's class complaint.

CONTENTIONS ON APPEAL

Both parties have raised numerous contentions on appeal which shall be considered herein.

BACKGROUND

At the time of the events in question, Class Agent 1 was employed as a Counsel, GG-15, in the Resolutions Section of the agency's Legal Department in Washington, D.C. Appellant initiated EEO counseling in June 1992, and he thereafter filed a class complaint on December 8, 1993, in which he alleged that Black employees, as well as Black applicants, had been discriminated against by the agency in a variety of ways. This complaint was signed by Class Agent 1 as well as two other agency employees, including an Asset Disposition Specialist, LG-9 (Class Agent 2), employed in South Brunswick, New Jersey, and a Computer Assistant, GG-8 (Class Agent 3), who worked in the Division of Resource Management. The record reveals that neither Class Agent 2 nor Class Agent 3 received EEO counseling, although both

participated in a mediation effort employed by the agency after Class Agent 1 sought informal EEO counseling. (Class Agent 1 agreed to suspend the administrative processing during the mediation process, which ultimately proved unsuccessful.)

After the formal class complaint was filed, the agency forwarded it to an EEOC Administrative Judge ("AJ") for consideration. See 29 C.F.R. §1614.204(d). In her recommended decision ("RD") dated December 14, 1994, the AJ recommended that the agency accept the complaint for processing, and also found that the proposed class should be divided into two subclasses. In its FAD dated January 17, 1995, the agency rejected the AJ's recommendation and dismissed the complaint. It is from this decision that the Class Agents now appeal.

The Class Agents' position, as set forth in the class complaint and several other submissions, is that specific practices and policies of the agency have served to discriminate against both Black employees and Black applicants for employment. In particular, the Class Agents contend that such individuals have "suffered from differences in treatment in the areas of hiring, selection, competitive and noncompetitive promotions, performance appraisals, job assignments, [and the] issuance of awards and discipline." In the class complaint, the Class Agents have defined the proposed class "as including all Black employees or applicants who at any time since May 13, 1992, have been eligible under valid, nondiscriminatory criteria for professional positions at the [agency]."

***2** The class complaint primarily addresses the area of promotions. In this regard, the complaint states that the manner in which competitive and noncompetitive promotions are awarded relies in large part on the broad, unrestricted discretion of mostly White supervisors. The complaint states that this serves to discriminate against Black employees. In particular, the Class Agents argue that agency officials frequently employ a number of ways to bypass and circumvent the agency's Merit Promotion Plan. First, they state that White employees are frequently pre-selected by being detailed into a position prior to its being posted. The Class Agents claim that supervisors will then draft position descriptions for the vacancy in question which encompasses the skills possessed by the detailed employee. The Class Agents assert that, in addition to resulting in pre-selection, the practice of tailoring the job descriptions permits the supervisor to reduce the size of the pool of Black applicants.

Second, the Class Agents contend that Black individuals are discriminated against by the cancellation of vacancy announcements, alleging that this typically occurs when a pre-selected White individual does not appear on the best-qualified list of candidates certified by the Office of Personnel Management (OPM). The Class Agents claim that the vacancy is then reannounced after the pre-selected candidate has obtained sufficient experience to merit inclusion on the best qualified list or to otherwise allow the agency to fill the position with the pre-selected candidate at a more opportune time.

Third, the Class Agents contend that positions are frequently filled by White employees who have experienced an accretion in their duties. Conversely, they allege that Black employees, despite frequently performing additional tasks at a higher level than their assigned grade level, do not fill positions in this manner. Finally, the Class Agents state that vacancy announcements are posted for short periods of time, which they contend serves to discriminate against Black individuals.

The Class Agents' allegations regarding the other challenged employment practices are less specific. With regard to performance appraisals, they allege that they are arbitrary and discriminatory, overly subjective, allow impermissible considerations, and are not timely issued. Regarding job assignments, the Class Agents contend that they are made in a discriminatory manner insofar as White supervisors fail to recognize the capabilities of Black employees and do not afford them opportunities to demonstrate their abilities. Finally, with regard to cash awards, training opportunities, and discipline, the Class Agents state little more than that Black employees are discriminated against in each of these areas.

In offering specific examples in support of the aforementioned allegations, Class Agent 1 cited his non-selection for the position of Senior Counsel in 1992 as well as the rating he received on his 1991 performance appraisal. Regarding the former, Class Agent 1 states that, although he was placed on the best-qualified list for the Senior Counsel position, the vacancy announcement was allowed to expire while agency officials were making attempts to have one of his co-workers (Employee A, White) placed on the best qualified list. Class Agent 1 states that the position was reposted six months later, at which point Employee A and another White applicant were selected. Class Agent 1 alleges that both Employee A and the other selectee were groomed for the position by management officials. With regard to his 1991 performance appraisal, Class Agent 1 states that although both he and Employee A received the same rating, Employee A's appraisal contained more positive comments in the narrative section.

***3** Although Class Agent 1 did not specifically identify any employees who have experienced the problems he cited, he did state:

> In communicating with various Blacks within the [agency], I have discovered that the practices and patterns of racial discrimination that I allege are similar or identical to practices and patterns of racial discrimination that have impeded all Black employees....

The record also reflects that, during the period Class Agent 1 was being counseled, the EEO Counselor met with approximately 10 Black individuals, all of whom raised concerns about the performance appraisal system, the racially polarized workforce, cronyism, and racial hostilities in the work environment. According to Class Agent 1, these individuals recounted personal instances where they were denied advancement because of cronyism and widespread pre-selection.

In support of their respective positions, Class Agents 2 and 3 also raised several specific examples. Class Agent 2 states that he has been denied training opportunities, that his 1993 performance appraisal was both discriminatory and retaliatory, and that he was discriminatorily placed on a performance improvement plan. Class Agent 2 also states he has applied for numerous LG and GG positions but has not been selected.

Class Agent 3 cites three instances where she was non-selected for the position of Computer Specialist, stating that, in the first instance, she was told she was not selected because she lacked specialized experience. She states further that she made the best qualified list for the second vacancy, but notes that the position was not filled because the selecting official did not like any of the candidates on the best qualified list. Class Agent 3 states that she made the best qualified list for the third vacancy, but was not selected in favor of a White individual.

The Class Agents argue that their complaint should be certified insofar as the four requirements for certification (numerosity, commonality, typicality, and adequacy of representation) have been satisfied. Regarding numerosity, the Class Agents state that, as of December 1991, there were approximately 400 permanent Black employees at grades GG-9 through GG-15, as well as 170 temporary Black employees at grades LG-9 through LG-15. With regard to commonality, the Class Agents argue that the actions in question were taken by a common group of supervisors, the majority of whom are White, and administered by the Office of Personnel in Washington, D.C. Regarding typicality, the Class Agents state that they have advanced claims in each area covered by the class complaint, noting, “There is nothing about the nature of the agents' claims, nor the circumstances surrounding them, that suggests they are atypical or peculiar to the agents personally. The bases of their claims are shared widely by the Black employees at the [agency].”

The AJ's Decision

In recommending that the class complaint be certified, the AJ initially noted that the raised allegations appeared to be across-the-board allegations. The AJ noted, however, that specific instances had been set forth which demonstrated that the Class Agents “share more than the same race.” In this regard, the AJ found that the Class Agents had set forth specific examples of denial of promotions and career training, and unfair performance evaluations. The AJ also noted that, according to a letter from Class Agent 1 to the agency's Director of EEO, at least 10 other proposed class members

informed the agency of alleged widespread discriminatory policies and practices analogous to those identified by the Class Agents.

***4** Based on the foregoing, the AJ concluded that commonality and typicality had been established. She noted, however, that there seemed to be potential factual differences regarding the treatment of the permanent agency employees (GGs) as opposed to the temporary agency employees (LGs). For this reason, the AJ found that the interests of the class would be better served by dividing the class into two subclasses. The AJ determined that Class Agents 1 and 3, as permanent employees, could serve as agents for the class of GG employees, and that Class Agent 2, as a temporary employee, could serve as the agent for the class of LG employees.

With regard to numerosity, the AJ initially found that the proposed class should be redefined to exclude outside applicants, noting the general rule that incumbent employees cannot represent a class that includes applicants. The AJ found that both subclasses were numerous enough to make consolidation of the individual complaints impractical. Finally, the AJ concluded that the adequacy of representation criterion had been satisfied, noting that the Class Agents had retained an attorney who is experienced in Title VII litigation and who appeared capable of adequately representing the interests of the class.

Accordingly, the AJ recommended certification of the class complaint.

The FAD

In rejecting the AJ's recommendation, the agency initially found that Class Agents 2 and 3 were not eligible to act as class agents because they had not initiated and/or received EEO counseling, and because they had not identified themselves as class agents at any time during the informal counseling stage of the complaint. The agency then determined that commonality had not been established insofar as the class, as defined, would include every Black employee throughout the agency. In this regard, the agency observed that there were clearly differences in the job situations of these individuals, including different responsibilities, different training needs, and a different supervisory chain. The agency concluded that, for these reasons, the class failed to satisfy the requirement that all class members share common questions of law and fact. The agency also noted that the class, complaint sought certification for individuals who were "eligible [for promotion] under valid, nondiscriminatory criteria for professional positions." The agency found that this definition was extremely vague and would require extensive individual eligibility determinations for numerous positions, employee by employee, before the specific class members could be identified.

Regarding typicality, the agency found that Class Agent 1's claims were not typical of the claims of the class. Specifically, the agency noted that, although Class Agent 1's claims might be typical of those of other attorneys or permanent employees in the Legal Division, he had not demonstrated how his claims were typical of those of employees in other positions.[FN1]

***5** With regard to numerosity, the agency found that the proposed class was severely restricted by the aforementioned problems, and that, for this reason, the complaint did not adequately retain a sufficiently high number of putative class members to warrant acceptance. Finally, the agency agreed with the AJ's determination that the adequacy of representation provision had been met.

ANALYSIS AND FINDINGS

As an initial matter, we find it is necessary to determine whether Class Agents 2 and 3 are eligible to serve in that capacity. As discussed, the agency determined that they are not eligible because they did not receive EEO counseling. In considering the agency's position, we note that there is nothing in the regulations contained at 29 C.F.R. Part 1614

which states that an individual must undergo EEO counseling in order to serve as a class agent, and we find that Class Agents 2 and 3 can serve in that capacity. See Penk v. Oregon State Board of Higher Education, 93 F.R.D. 45, 53 (1981) (individuals who have not complied with Title VII's filing requirements can still serve as class agents for a subclass, with the limitation that the claims which can be asserted are limited to those asserted by the plaintiff[s] who timely filed). However, we find that their eligibility to serve as class agents is limited to those issues which Class Agent 1 raised with the EEO Counselor. Id. In determining the proper scope of the class complaint, we find, based on the foregoing, that it is limited to the specific issues raised by Class Agent 1. As discussed, these included his non-selection for the Senior Counsel position and his 1991 performance appraisal. In reaching this conclusion, we are cognizant that the class complaint challenged a number of other areas (i.e., cash awards, training, discipline, and assignments) which the Class Agents allege serve to discriminate against Black employees and applicants. However, because the only areas in which Class Agent 1 alleges he was personally discriminated against were promotions and performance appraisals, we find that the scope of the class complaint is properly limited to those areas.

Here, the class complaint attacks specific agency actions alleged to favor Whites at the expense of Black employees. As such, we find that the allegations of race discrimination with regard to promotions and performance appraisals constitute allegations of across-the-board discrimination.

The United States Supreme Court has held that an allegation of across-the-board discrimination is not, by itself, sufficient to justify its acceptance as a class claim. General Telephone Co. of Southwest v. Falcon, 457 U.S. 147, 157 (1982). Rather, an individual litigant seeking to maintain a class action must meet the "prerequisites of numerosity, commonality, typicality, and adequacy of representation" specified in EEOC Regulations 29 C.F.R. §1614.204 et seq. This regulation, which is an adaptation of Rule 23(a) of the Federal Rules of Civil Procedure, provides that the agency may reject a class complaint if any one of these prerequisites is not met. 29 C.F.R. §1614.204(d)(2). This position is reflected in court decisions. Falcon, Supra. See also, Martin, et al., v. United States Postal Service, EEOC Appeal No. 01911662 (August 28, 1991).

***6** Moreover the Class Agent, as the party seeking certification of the class, bears the burden of proof in establishing that the proposed class meets the numerosity, typicality, commonality and adequacy of representation criteria. Smith v. Merchants & Farmers Bank, 574 F.2d 982, 983 (8th Cir. 1978).

With respect to the prerequisites of commonality and typicality, the courts have held that factual differences among class members are superseded by the alleged operation of a pervasive discriminatory policy that operates "across the board." Reed v. Arlington Hotel, 476 F.2d 721 (8th Cir. 1973).

However, the United States Supreme Court in Falcon criticized certification of cases of across the board discrimination without any evidentiary basis from which one could reasonably infer the operation of an overriding policy of discrimination. In Falcon, the Supreme Court stated: "Conceptually, there is a wide gap between (a) an individual's claim that he/she has been denied a promotional opportunity on discriminatory grounds, and his/her otherwise unsupported allegation that the company has a policy of discrimination, and (b) the existence of a class of persons who have suffered the same injury as that individual, such that the individual's claim and the class claims will share common questions of law or fact and that the individual's claim will be typical of the class claims."

Since Falcon, while courts have not required complainants to prove the merits of their claims at the class certification stage, complainants have been required to provide more than bare allegations that they satisfy the requirements of Rule 23(a). The Class Agent must show some nexus with the alleged class. Morrison v. Booth, 763 F.2d 1366, 1371 (11th Cir. 1985). What is necessary is a specific showing of underlying facts which might raise an inference of a common question of pattern and practice through allegations of specific incidents of discrimination, supporting affidavits containing anecdotal testimony by other employees that there is a class of persons who was discriminated against in the same manner as the individual, evidence of a biased testing procedure, or evidence of entirely subjective decision-making

and evaluation processes. Griffin v. Dugger, 823 F.2d 1476, 1487 (11th Cir. 1987); Cox v. American Cast Iron Pipe Co., 784 F.2d 1546 (11th Cir. 1986).

Commonality is established when a common thread of discrimination confronts all members of a class. This requires a showing of some uniformity among the class members and the fact that the claims of class members involve common issues of fact. Commonality requires that there be questions of fact common to the class members, and "across-the-board" actions which involve allegations of discrimination in different practices such as hiring, promotion, termination, compensation, and the like, will not be certified merely because the class members share the same race, national origin, or sex. Falcon, 457 U.S. at 150-52 n.4, 158-59 n. 15. Instead, the individual must show that there are underlying facts which might raise an inference of a common question of pattern and practice through allegations of specific incidents of discrimination. This can be accomplished in a number of ways, including the submission of affidavits containing anecdotal testimony by other employees that there is a class of individuals who were discriminated against in the same manner as the Class Agent; evidence of a biased testing procedure; or evidence of entirely subjective decision-making and evaluation processes. Griffin v. Dugger, supra.

***7** Typicality, which is similar to commonality, requires a showing that the claims of the agent be typical of the claims of the class. Although they need not be identical, the claims must be sufficiently typical to encompass the general claims of the class members so that it will be fair to bind the class members by what happens with the agent's claims. Further, the Supreme Court has repeatedly held that a class representative must be part of the class and "possess the same interest and suffer the same injury" as the class members in order to establish commonality and typicality. Falcon, 457 U.S. at 156; East Texas Motor Freight System, Inc. v. Rodriguez, 431 U.S. 395, 403 (1977); Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208, 216 (1974).

With respect to the requirement of numerosity, the Commission notes that no set number of class members is required to meet the numerosity prerequisite and each case must be evaluated based on the particular circumstances involved. Several factors are used to determine whether a class is too numerous to make joinder practical such as the size of the proposed class, the ease of identifying class members and determining their addresses, as well as the geographic dispersion of the class. While no specific number of class members is required, the courts are generally reluctant to certify classes with fewer than forty-five (45) class members. In such cases, other factors become increasingly important.

Promotions

In applying these standards to the allegation regarding promotions, case, the Commission notes that the Class Agents stated that there are approximately 400 Black GG employees in grades GG-9 through GG-15 within the agency. Noting the class complaint spoke of Blacks who were "eligible under valid, nondiscriminatory criteria for professional positions,"[FN2] the FAD determined that "extensive individual eligibility determinations [would be required] for numerous positions, employee by employee, before the specific class members could even be identified and notified." The Commission disagrees with this interpretation of the language used in the class complaint. Rather, the Commission believes that such language was merely intended to reference Blacks meeting standard criteria for promotional opportunities, such as time-in-grade. Further, the Commission is not persuaded that any quibbling over the definition of "professional" for Black employees in grades GG-9 and above would substantially reduce the number of class members. Accordingly, the Commission finds that the numerosity requirement has been satisfied.

The Commission further finds that the class complaint satisfies the requirements of typicality and commonality. The class complaint sets forth specific discriminatory practices which allegedly negatively affect the promotions of Blacks within the agency, e.g. the pre-selection of White candidates, the cancellation of vacancy announcements when the pre-selected White candidate is not included by OPM, the use of accretion of duties as a justification for the promotion of White employees, etc.

***8** The Commission notes that the FAD did not challenge the AJ's determination that adequate representation of the class

had been demonstrated. Accordingly, based on the record as a whole, the Commission discerns no basis to disturb the AJ's certification of the class of Black employees at grade GG-9 and above who were denied promotions. See Howard, et al. V. Department of Commerce, EEOC Appeal No. 01956455 (June 4, 1997, request for reconsideration denied, EEOC Request No. 05970855 (October 24, 1997) (certification of class complaint using an "across-the-board" approach).

Performance Appraisals

With regard to this issue, we find that the Class Agents have not satisfied the commonality or typicality. First, the class complaint merely alleges in a conclusory fashion that performance evaluations are "arbitrary and discriminatory," as well as based on "overly subjective standards" and that the agency does not base performance criteria on "observable behaviors, as required by industrial psychology principles." While the Commission notes that the Class Agents are concerned that the issue of performance evaluations is closely tied to the issue of promotions, the Commission nonetheless finds the record insufficient to permit certification of this issue. In this respect, the Commission notes that Class Agent 1 specifically states that his numerical rating on his performance evaluation was in fact identical to that of Employee A, but that Employee A received more favorable comments in the narrative section. The Commission does not find that under the facts of this matter, the comparison of performance appraisals for at least some 500 Black and White employees to determine whether or not numerous and various supervisors made "more favorable" comments would be conductive to a class action. Accordingly, we find that this issue was properly dismissed by the agency.

CONCLUSION

It is the decision of the Commission to **AFFIRM** the agency's decision to dismiss the allegations relating to performance appraisals, cash awards, assignments, training and discipline; and to **REVERSE** the agency's rejection of the allegation relating to promotions and to **REMAND** this allegation to the agency for further processing in accordance with the following Order. The agency is also advised that pursuant to the provisions of 29 C.F.R. § 1614.204(d) (7), it shall process as an individual complaint those allegations of Class Agent 1 which were dismissed from the class complaint.

ORDER

The agency is **ORDERED** to continue processing the remanded allegation of the class complaint in accordance with 29 C.F.R. §1614.204(e) et seq. The agency shall acknowledge to the Class Agents that it has received the remanded allegation within fifteen (15) calendar days of the date this decision becomes final. The agency shall further process as an individual complaint those allegations of Class Agent 1 which were dismissed from the class complaint.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0595)

***9** 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 appellant. If the agency does not comply with the Commission's order, the appellant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503 (a). The appellant 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. §§ 1614.408, 1614.409, and 1614.503 (g). Alternatively, the appellant 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. §§ 1614.408 and 1614.409. 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) (Supp. V 1993). If the appellant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated. See 29 C.F.R.

§ 1614.410.

STATEMENT OF RIGHTS - ON APPEAL

RECONSIDERATION (M0795)

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

1. New and material evidence is available that was not readily available when the previous decision was issued; or
2. The previous decision involved an erroneous interpretation of law, regulation or material fact, or misapplication of established policy; or
3. The decision is of such exceptional nature as to have substantial precedential implications.

Requests to reconsider, with supporting arguments or evidence, MUST BE FILED WITHIN THIRTY (30) CALENDAR DAYS of the date you receive this decision, or WITHIN TWENTY (20) CALENDAR DAYS of the date you receive a timely request to reconsider filed by another party. Any argument in opposition to the request to reconsider or cross request to reconsider MUST be submitted to the Commission and to the requesting party WITHIN TWENTY (20) CALENDAR DAYS of the date you receive the request to reconsider. See 29 C.F.R. §1614.407. All requests and arguments must bear proof of postmark and 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 filed on the date it is received by the Commission.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely. If extenuating circumstances have prevented the timely filing of a request for reconsideration, a written statement setting forth the circumstances which caused the delay and 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).

RIGHT TO FILE A CIVIL ACTION (T0993)

***10** This decision affirms the agency's final decision in part, but it also requires the agency to continue its administrative processing of a portion of your complaint. You have the right to file a civil action in an appropriate United States District Court on both that portion of your complaint which the Commission has affirmed **AND** that portion of the complaint which has been remanded for continued administrative processing. It is the position of the Commission that 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. You should be aware, however, that courts in some jurisdictions have interpreted the Civil Rights Act of 1991 in a manner suggesting that a civil action must be filed WITHIN THIRTY (30) CALENDAR DAYS from the date that you receive this decision. To ensure that your civil action is considered timely, you are advised to file it WITHIN THIRTY (30) CALENDAR DAYS from the date that you receive this decision or to consult an attorney concerning the applicable time period in the jurisdiction in which your action would be filed. 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 your appeal with the Commission, until such time as the agency issues its final decision on your complaint. 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 (Z1092)

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:

Ronnie Blumenthal
Director
Office of Federal Operations

FN1. Class Agent 1 initially sought counseling in June 1992. In March 1994, Class Agent 1 contacted agency officials and noted that various persons with personal knowledge of the facts concerning his individual allegations of discrimination regarding his nonselection for the Senior Counsel position had or were about to leave the agency. Class Agent 1 also expressed concern about the agency's retention of various documents. He inquired as to whether the agency would conduct an investigation of his individual claims pending a decision on certification. In its FAD, the agency claimed that Class Agent 1's interest in having his nonselection investigated raised a question as to whose interests he was seeking to benefit. However, the Commission is not persuaded that Class Agent 1's concerns raise such a question.

FN2. While the class complaint actually referenced "employees or applicants," we note that we agree with the AJ's determination that the proposed class should be limited to employees and that the Class Agents, as evidenced by their appeal statement, agree with that determination.

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