U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Office of Federal Operations
P.O. Box 77960
Washington, DC 20013

Sandra M. McConnell, *et al.*
Complainant,

v.

John E. Potter,
Postmaster General,
United States Postal Service
(Northeast Area),
Agency.

Appeal No. 0720080054
Hearing No. 520-2008-00053X
Agency No. 4B-140-0062-06

DECISION

Following its July 28, 2008, final order, the agency filed a timely appeal which the Commission accepts pursuant to 29 C.F.R. § 1614.405(a). On appeal, the agency requests that the Commission affirm its rejection of an EEOC Administrative Judge's (AJ) decision to certify the above-captioned matter as a class complaint. The agency asks that the Commission affirm its final action rejecting the AJ decision. For the following reasons, the Commission REVERSES the agency's final order.

ISSUE PRESENTED

The issue presented in this appeal is whether, in her May 30, 2008 recommended decision, the EEOC Administrative Judge (AJ) properly certified a class-action on behalf of all permanent rehabilitation employees and limited-duty employees at the agency who have been subjected to the National Reassessment Program (NRP) from May 5, 2006 to present, allegedly in violation of Section 501 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 791 *et seq*.

BACKGROUND

The record reveals that the class agent (CA) is a former Mail Carrier in the Rochester, New York area. On January 2, 1997, she slipped and fell on stairs while delivering mail. She sustained an injury to her back. Following an operation, she was diagnosed with "lumbar discogenic disease" and "lumbar spinal stenosis" with "severe breaking and facet arthropathy." (CA's Motion to Certify, 19; Agency's Opposition, 14.) As a result of the fall,

the class agent was unable to perform any kind of work for approximately one year. When she returned to work, her treating physician placed her on strict medical limitations. The class agent's restrictions included working up to 4 hours, sitting up to 4 hours, walking up to 1 hour, standing up to 1 hour, and repetitive wrist or elbow movements up to 1 hour. (CA's Motion to Certify, Ex.. 15, 5.) The class agent was also limited in her ability to push, pull, or lift more than 10 pounds and she was limited in reaching, reaching above her shoulders, twisting, bending/stooping, or driving at work. The class agent initially was assigned to a limited-duty modified Carrier Technician position at the Henrietta, New York Post Office. In September 1999, she was offered a modified Carrier Technician position at the Ridgemont Station. The class agent accepted this position and worked in the modified position until May 2006. Her duties included: AMS duties, Safety Captain, Carrier casing duties within physical limitation, Carrier case labels, 3982 maintenance, checking vehicles, warming up vehicles in winter, delivering late-arriving Express Mail and mis-sent Priority Mail, answering the telephone and customer assistance by answering questions, handling and forwarding customer complaints and providing information, and other duties as assigned or requested by her supervisor. The class agent was able to perform the essential functions of her modified position. The class agent asserts that on May 19, 2006, she was separated from her position due to the discriminatory impact of the NRP.

The class agent filed a class complaint alleging that the agency had discriminated against all rehabilitation employees and limited-duty employees on the basis of disability when it implemented the NRP. Specifically, she asserted that: (1) the NRP failed to reasonably accommodate employees; (2) the NRP targeted disabled employees; (3) the NRP created a hostile work environment; (4) the NRP failed to include an interactive process; (5) the NRP failed to include an individualized assessment; (6) the NRP wrongfully disclosed medical information; and (7) the NRP had an adverse impact on disabled employees.

The class agent's claims were categorized into four broader complaints by the Administrative Judge (AJ): (1) the NRP failed to provide a reasonable accommodation; (2) the NRP created a hostile work environment; (3) the NRP wrongfully disclosed medical information; and (4) the NRP had an adverse impact on disabled employees.

The agency began development of the NRP in 2004. The goal of the NRP was to "standardize" the process used to assign work to injured-on-duty employees. (CA's Motion to Certify, at 9; agency's opposition, at 10.) Employees subject to the NRP were those who sustained an approved compensable injury as determined by the Department of Labor and who were determined to be either limited-duty employees or rehabilitation employees. Limited-duty employees are defined as injured-on-duty employees whom the agency expects will be able to return to their pre-injury positions as their medical conditions improve (CA's Motion to Certify, at 8, citing agency's discovery responses), while rehabilitation employees are defined as employees who were injured-on-duty and have reached a level of maximum medical improvement (MMI), and are not expected to be able to return to their pre-injury positions (CA's Motion to Certify, 8, citing agency's discovery responses.)

The agency initially implemented the NRP via pilot programs in different districts in 2006. The NRP was rolled out nationally at the beginning of fiscal year 2007. The NRP was divided into two phases. At the time the agency submitted its Opposition to Class Certification, Phase 1 had been implemented nationwide, with 30 districts having completed the validation stage, while Phase 2 is currently underway in 26 of the 30 districts. (Agency's Opposition, 11.)

Phase 1

In phase 1, headquarters instructed District Injury Compensation Specialists to tab the files of all limited-duty and rehabilitation employees. Headquarters personnel then met with senior management at the district level to present the NRP process. District level personnel were instructed to review the medical records of all employees who were in a limited-duty or rehabilitation assignment to ensure that the medical documentation was current. If an employee's file was lacking current medical documentation, district level medical or injury compensation staff where to request an update from the employee. Headquarters provided a form letter to request the medical documentation. Any medical updates were noted in an NRP "worksheet," which was used throughout the entire NRP process to track each employee. At this stage employees are unaware of the NRP process.

Next, management verified that, for every limited-duty and rehabilitation employee, the current job offer matched the tasks actually being performed. An NRP "workbook" or "activity file" was created for each employee tracked under the NRP. The workbook contained records relating to the employee's medical condition, modified job assignment, OWCP claims, and information related to any EEO/grievance/MSPB settlements or any other decisions pertinent to the employee. After Phase 1 has been validated, the district is given authorization by headquarters to begin Phase 2.

Phase 2

In Phase 2, a headquarters team leader meets with district personnel to train them on Phase 2 of the NRP process. The union is also informed of the NRP process at this time. The district level is instructed to update the NRP workbook to have all employees who have reached MMI listed on the rehabilitation tab and the non-MMI employees listed on the limited-duty worksheet. The "Area NRP Team" meets with the "District Operations NRP Team" and instructs them to canvas all offices/facilities within their area of responsibility and list all identified necessary work. According to the agency, "Necessary Work is defined as any tasks that are determined by management as necessary for an operation and/or function. Necessary tasks are office or facility specific and must be approved by senior management." (AJ's Decision, 6, *citing* CA's Motion to Certify, Ex. 8,12.)

The Area and District NRP teams then identify the local commuting areas for each installation. The Area and District NRP teams meet to identify potential rehabilitation modified positions for all MMI employees within the local commuting area. NRP documentation states that "[e]very reasonable effort must be made to identify" these potential positions. If a district is unsuccessful in locating a rehabilitation modified position in a local commuting area, the district must contact the Area and Headquarters NRP Team Leaders for assistance in expanding the search beyond the district boundaries. The operations team member submits the "Proposed Duties for Rehabilitation Modified Position" worksheet to the employee's supervisor to identify a potential rehabilitation modified position. The operations team member then instructs the supervisor to complete and return the worksheet to the operations team member. Next, the supervisor must list the "identified necessary tasks and the average approximate time" for each identified task. The supervisors are instructed to include "as much information as possible" to aid the district NRP team when it completes the formal rehabilitation modified position job offer. (AJ's Decision, 7 *citing* CA's Motion to Certify, Ex 8, 14.)

The operations team member verifies the "proposed duties against necessary tasks" identified by the supervisor against an installation/facility necessary tasks master list. (*Id.*) If any changes are made, the operations team member informs the employee's supervisor of the changes. If a rehabilitation modified position is found, the district NRP team holds an interview with the affected employee. "The interactive interview must be conducted exactly per the interactive interview script for job offers." (*Id.*) Headquarters directs who will be present at the meeting. At the meeting, in addition to the employee there is a note taker, an Injury Compensation representative, an "Operations Team member assigned to the function of each employee," and a "District NRP Labor Relations Representative." (*Id.*) At the meeting the employee is presented with a position that fits within his or her restrictions. If the employee has questions or chooses to use the 14 day timeframe before signing the modified position offer, a second interview will be held. The NRP workbook will be updated to reflect any information obtained during the interviews. (CA's Motion to Certify, Ex. 8, 17.)

If, however, the agency is unable to find a rehabilitation modified position to offer, the employee is brought in for a meeting where he or she is told that there is "no work available (NWA)." (CA's Motion to Certify, Ex. 8, 17). This is what happened to the class agent. In the class agent's case, a broader search was not performed because, according to the agency, the class agent "did not respond verbally or in writing that she wanted the agency to look for available work in a different search area." The agency noted that the second interview was added to the national process, and was not part of the pilot program.

Headquarters issues a very specific script that is supposed to be followed during the "no work available" meeting. (AJ's Decision, 8 *citing* CA's Motion to Certify, Ex. 8, 18 -21.) During this first meeting, the employee is told about the NRP. Also during this first meeting, the employee is told that the Reassessment Team has determined that the employee is in a "no work available" status. The employee is told that there will be a second meeting in two weeks

to "finalize" the Reassessment Process. Again, headquarters directs that the District NRP team, monitored by the Area Injury Compensation Team member, to have a second meeting "in compliance with the script for the second interview." (AJ's Decision, 8 citing CA's Motion to Certify, Ex. 8, 29.) The employee is advised that if he or she brings back updated medical documentation within the next two weeks, the Reassessment Team will review it and make a determination if the documentation will change anything. If the employee does not bring in any new medical documentation, the second meeting is only to inform the employee of the final determination of "no work available." Once an employee is placed in "no work available" status, the employee will be paid for the remainder of the week and then will be placed on Leave Without Pay/Injured-On-Duty (LWOP/IOD) status. (*Id.*) "All internal agency activity due to the NWA determinations are to be tracked." The results will be "verified quarterly and reported to the Area NRP Operations and Injury Compensation Team Leaders." (CA's Motion to Certify, Ex. 8, 30.)

NRP Effects

As a result of the NRP in the three pilot districts of New York-Metro, San Diego, and Western New York, 1,077 individual employees were reviewed. Of these, 290 (26%) returned to full duty, 413 (39%) changed assignments, and 182 (16%) had no work available. (Agency's Opposition, Ex. 9.) A summary from the tracking reports for the Northeast Area shows that, of the 2,423 limited-duty and rehabilitation position employees, 71 were sent home, no job offer was made, or there was no work available to them.

The Administrative Judge's Findings

In the AJ's determination regarding class certification, the AJ addressed several issues before addressing whether the proposed class met the class certification requirements. The first issue addressed was whether the class agent stated an actionable claim of a violation of the Rehabilitation Act. The AJ found that the class agent stated a claim because she alleged that the agency, by removing her reasonable accommodation, forced her, for discriminatory reasons to terminate her position. The AJ then addressed the agency's argument that it was not obligated to continue providing "make up" work for the class agent. The AJ found that the class agent had presented sufficient evidence that, if taken as true, showed that the class agent was performing necessary work. The AJ noted that the complainant had stated in a declaration that her "modified position kept her very busy." Additionally, a co-worker added that after the class agent was terminated, "many of the tasks she performed did not get done, because no one had time to do them." The co-worker indicated that the waste mail stack got so high, "it became difficult to move around the office and ultimately the office received a reprimand from the postmaster." The AJ therefore, found that the evidence of record conflicted with the agency's position that the class agent's duties consisted of mere made-up work and unnecessary work.

Additionally, the AJ noted that agencies have an obligation to provide a reasonable accommodation and that the duty to accommodate is absolute and continuing unless and until the agency can show that the accommodation would be an undue hardship. At the same time, the AJ acknowledged that the agency was not required to make work for a disabled employee. Nevertheless, the AJ indicated that if an employee has been working in a position for years, it becomes more difficult for an agency to argue that the work assigned has been made up the entire time. The AJ noted that Commission case law has held that where a complainant has been working in a modified position for years, the agency is prevented from arguing that the complainant is not qualified because that employee has not been performing the essential functions of the original position.

The AJ next addressed the agency's argument that failure to engage in the interactive process alone was not a violation of the Rehabilitation Act. The AJ found that the agency was correct in making this statement but found that, in the instant complaint, the class agent is alleging that the agency removed a reasonable accommodation – or in other words, failed to provide a reasonable accommodation by removing an existing accommodation. The AJ found that the class agent's argument stated a claim because the agency's interactive process (or lack thereof) resulted in the removal of a reasonable accommodation. The AJ noted that because the agency was dramatically affecting an employee's previously-granted accommodation, the agency cannot argue that it did not need to be involved in the interactive process.[1] The AJ also addressed the agency's argument that the process was interactive. The agency argued that, in the instant case, the process was interactive because: medical information was requested and updated, the class agent's medical documentation was used to conduct a thorough search for available operationally-necessary work that comported with her medical restrictions, and the class agent was told that the agency would search for a new assignment in a different local commuting area if she identified the area, but class agent did not respond verbally or in writing. The AJ found that this was not adequate. Based upon the foregoing, the AJ found that the class agent had stated a claim and had demonstrated that she was a qualified individual with a disability.

The AJ next analyzed whether the class met the class-certification requirements, which include numerosity, commonality, typicality and adequacy of representation. With respect to commonality and typicality, the AJ found that the class agent had shown that the agency had a nationwide practice of targeting employees in rehabilitation or limited-duty positions, adversely affecting their reasonable accommodations via the NRP. The AJ also noted that the specific alleged harm may be different for the various employees involved, but the common link was that all of these people were asserting that they were negatively affected by the NRP. The AJ found that the numerosity requirement was met in this case because the NRP was developed as a national program. Finally, the AJ found that the class agent could adequately represent the

[1] The AJ indicated that the whether the removal of the accommodation was a failure to provide a reasonable accommodation was a question of fact more appropriate for the merits-based portion of the class-certification process.

class because she was a qualified individual with a disability and she had shown at this stage that her position and some of the scrutinized positions involved necessary work.

The AJ also determined that the proposed class met the class-certification requirements under a harassment theory. The AJ found that the class agent had successfully argued that the NRP created a hostile work environment for the class as a whole. Specifically, the AJ found that the class agent had shown that the agency had a nationwide practice of subjecting rehabilitation and limited-duty employees to similar scrutiny, pre-scripted meetings, and alleged belittlement in their efforts to seek a way to remain employed at the agency. The AJ therefore found that the class agent had met the requirements of commonality, typicality, numerosity, and adequacy of representation.

The AJ also found that the class agent met the class-certification requirements for a wrongful disclosure theory. The class agent argued that the NRP violated the Rehabilitation Act because confidential medical treatment information was used for "cost savings" purposes rather than to review necessary restrictions on the work or duties of the employee and necessary accommodations. The AJ again indicated that the class agent had met the requirements of commonality because the NRP was a national process that affected the whole class of rehabilitation and limited-duty employees and not only a few employees. Additionally, evidence showed that there was centralized administration involved as opposed to local autonomy. The AJ found that there were common questions of fact because all of the employees involved were subjected to similar treatment under the nationalized process. Finally, the AJ found that the class agent met the numerosity and adequacy of representation factors for the reasons discussed above.

The AJ recommended that the class be defined as:

> All permanent rehabilitation employees and limited-duty employees at the agency who have been subjected to the NRP from May 5, 2006 to the present, allegedly in violation of the Rehabilitation Act of 1973.

CONTENTIONS ON APPEAL

On appeal, the agency contends that the AJ's decision contains, in significant part, three erroneous findings: (1) that the class agent has standing to assert a Rehabilitation Act claim because she is a qualified individual with a disability; (2) that the class agent has stated actionable claims; and (3) that the class agent's claims can, and should, proceed as a national class action. The agency asserts that the decision, as written, is in conflict with applicable legal authority based upon the facts presented.

The agency also asserts that the class complaint does not meet the class prerequisites of commonality, typicality, and adequacy of representation as to any of the claims presented. The agency argues that the only commonality in this case is that all class members have or will

undergo a reassessment – one designed to properly weigh all legally relevant factors. The agency maintains that any claim of a denial of reasonable accommodation by an individual class member can only be tried and determined on a case-by-case basis. Moreover, the agency argues that the AJ's analysis further ignores the fact that the majority of employees assessed under the NRP are provided reasonable accommodation, and only 16% of the reassessments completed in the three NRP pilots resulted in a determination of "no work available" (NWA). Thus, the agency contends the class agent shares a "typical claim with a common outcome only with the few others who were told that there is no work available for them, and even then, there is no commonality of facts." Likewise, the agency indicates that a theoretical claim of hostile work environment would likewise lack commonality and require a case-by-case determination in the absence of any policy or practice promoting "severe and pervasive" workplace harassment. The agency also states that no policy or practice has been identified regarding the argument that the NRP wrongfully discloses medical information.

In the alternative, the agency requests that if the Commission finds that the class agent has stated a proper claim challenging the NRP under the Rehabilitation Act, the class be limited to: (1) current and former employees assigned to permanent rehabilitation positions; (2) for whom an NWA determination has been made; and (3) those within the Western New York pilot NRP.

The agency explains that in recent years, it has undergone a major transformation in the way it does business in the face of a changing economic and commercial environment. The agency indicates that the rise in internet commerce has led to a significant decrease in first-class mail volume. At the same time, dramatic improvements in standardized mail processing, sequencing technology, letter and flat processing, and high-speed robotics have resulted in dramatic improvements in productivity and efficiency. The agency maintains that at the station where the class agent worked, automation "essentially eliminated the need for employees to manually hold, forward, and sequence the mail." The agency contends that the duties that the class agent performed in her rehabilitation assignment "evaporated" due to automation and decreased mail volume, and that the incidental duties that remained, such as answering occasional inquiries from customers, have been absorbed by the remaining Letter Carriers and Clerks. The agency indicated that the district where the class agent was located has experienced a 15% drop in work hours from 1999 to today and, because the NRP is slated to be a national program the agency explains that nationally, the agency now uses 465 million fewer work-hours per year than it did in 1985.

In response to the agency's contentions on appeal, the class agent asserts that the AJ's recommendation to certify the class should be affirmed. The class agent also requests, among other things, that the agency not be allowed to submit new evidence.

ANALYSIS AND FINDINGS

EEOC Regulation 29 C.F.R. § 1614.204(a)(2) states that a class complaint is a written complaint of discrimination filed on behalf of a class by the agent 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 are typical of the claims of the class; and (iv) the agent of the class, or if represented, the representative will fairly and adequately represent the interests of the class. EEOC Regulation 29 C.F.R. § 1614.204(d)(2) provides that a class complaint may be dismissed if it does not meet the four requirements of a class complaint or for any of the procedural grounds for dismissal set forth in 29 C.F.R. §1614.107.

The numerosity prerequisite states that the potential class must be sufficiently numerous so that a consolidated complaint by the members of the class, or individual, separate complaints from members of the class is impractical. See 29 C.F.R. § 1614.204(a)(2)(i). The focus in determining whether the class is sufficiently numerous for certification is the number of persons affected by the agency's alleged discriminatory practice(s). *See White, et al. v. Department of the Air Force*, EEOC Appeal No. 01A42449 (September 1, 2005). The Commission has held that the relevant factors to determine whether the numerosity requirement has been met are the size of the class, the geographical dispersion of the class, the ease with which class members may be identified, the nature of the action at issue, and the size of each member's claim. *Carter, et al v. USPS*, EEOC Appeal No. 01A24926 (November 14, 2003). The United States Supreme Court has held that the numerosity requirement of Federal Rule of Civil Procedure 23 does not impose a numerical minimum or cut-off point for the size of the class but, instead, requires an examination of the facts of each case. *Harris v. Pan American World Airways*, 74 F.R.D. 24 (N.D. Cal. 1977).

The purpose of the commonality and typicality requirements is to ensure that a class agent possesses the same interests and has experienced the same injury as the members of the proposed class. *See General Telephone Company of Southwest v. Falcon*, 457 U.S. 147 (1982). While these two criteria tend to merge and are often indistinguishable, they are separate requirements. *Id.* Commonality requires that there be questions of fact common to the class; that is, that the same agency action or policy affected all members of the class. Typicality, on the other hand, requires that the bases of the class agent be typical of the claimed bases of the class. The underlying rationale of the typicality and commonality requirement is that the interests of the class members be fairly encompassed within the class agent's claim. *Id.*

The final requirement is that the class agent, or his or her representative, adequately represent the class. To satisfy this criterion, the agent or representative must demonstrate that he or she has sufficient legal training and experience to pursue the claim as a class action, and will fairly and adequately protect the interests of the class. *Besler, et al. v. Department of the Army*, EEOC Appeal No. 01A05565 (December 6, 2001); *Woods v. Department of Housing and Urban Development,* EEOC Appeal No. 01961033 (February 13, 1998). In this regard, it is necessary for the class agent, or the representative, to demonstrate sufficient ability to protect the interests of the class so that the claims of the class members do not fail for reasons other than their merits. *Id.*

In the instant case, the AJ found that the proposed class met all four of the requirements for class certification. With respect to commonality and typicality, the AJ found that the class agent had shown that the agency had a nationwide practice of targeting employees in rehabilitation or limited-duty positions, adversely affecting their reasonable accommodations via the NRP. The AJ also noted that the specific alleged harm may be different for the various employees involved, but the common link was that all of these people were asserting that they were negatively affected by the NRP. The AJ found that the numerosity requirement was met in this case because the NRP was developed as a national program. Finally, the AJ found that the class agent could adequately represent the class because she was a qualified individual with a disability and she had shown at this stage that her position and some of the scrutinized positions involved necessary work.

We note that the AJ properly determined that the class agent stated a claim for a violation of the Rehabilitation Act because the class agent presented evidence which showed that she was aggrieved, *i.e.*, she lost her position as a result of the NRP process. Further, we also find that the AJ was correct in finding that the class agent was a qualified individual with a disability. The Commission has held that were an employee has performed a modified position for an extended amount of time, it is that position which is considered for the purposes of determining whether the employee is a qualified individual with a disability. *See Jambora v. United States Postal Service,* EEOC Appeal No. 07A40128 (May 16, 2006) and *Pruneda v. United States Postal Service,* EEOC Appeal No. 0720050014 (June 4, 2007). Moreover, we find that the class agent was able to show that the work that she was doing was necessary work and not a make-work assignment, as the agency has alleged is the case for many putative class members.

Further, with respect to the class agent's contention that the NRP created a hostile work environment, the class agent asserted that the NRP created a hostile work environment for the class as a whole. (CA's Response to Agency's Opposition, 7.) The class agent argued that the NRP:

> ... is hostile to disabled employees in many ways: it targets a very large category of disabled employees for scrutiny and adverse job actions, reviews their medical records, troops them into pre-scripted 'show trials' with management teams to tell them their jobs have been eliminated, and belittles their efforts to seek a way to remain employed at the agency. Indeed, the evidence shows that the top agency officials broadly generalized about injured-on-duty employees sitting idle, performing only 'make-work,' or that modified positions consisted of 'cobbled together' tasks.

The Commission finds that the class agent's allegations are sufficient to state a claim of hostile work environment harassment. We find the issue of whether the NRP meetings actually were severe or pervasive enough to establish a hostile work environment or harassment is a question that is to be determined on the merits.

Additionally, the Commission finds that the class agent has met the class-certification requirements for a wrongful medical disclosure theory. We find that the class agent has adequately asserted that all rehabilitation employees and limited-duty employees were subjected to the gathering and review of their medical documentation and were subjected to similar treatment under the nationalized process. The record shows that the requirement of commonality, typicality, and numerosity, have been met because medical documentation was reviewed for the class agent in the same or similar manner that the agency reviewed medical documentation for all other rehabilitation and limited-duty employees.

Based upon the foregoing, the Commission agrees with the AJ's determination that the class should be defined as "all permanent rehabilitation employees and limited duty employees at the agency who have been subjected to the NRP from May 5, 2006, to the present, allegedly in violation of the Rehabilitation Act of 1973." Moreover, we agree that the class agent's claims should be categorized into the following broader issues:

(1) The NRP fails to provide a reasonable accommodation;[2]
(2) The NRP wrongfully discloses medical information;
(3) The NRP creates a hostile work environment; and
(4) The NRP has an adverse impact on disabled employees.

Finally, the Commission notes that the agency's contentions on appeal were previously presented before the AJ. We note that the AJ addressed these contentions in her Recommendation Granting Class Certification and Order Denying the Agency's Motion to Dismiss. We find the agency has not submitted evidence which demonstrates that the AJ's decision was incorrect.[3]

CONCLUSION

After a careful review of the record, and for the reasons discussed above, we find that the AJ's definition of the class is supported by the record, and we discern no basis to disturb the AJ's ultimate certification of the class complaint.

Therefore, the Commission REVERSES the agency's final order rejecting the AJ's certification of the class and we REMAND this matter to the agency to take action in accordance with this decision and the ORDER of the Commission, below.

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[2] This is to include the question of the effect the NRP has on the interactive process and providing an individual assessment.

[3] The Commission also notes that both parties argued the merits of this case in their briefs. As the issue on appeal is whether the class should be certified, the issues raised regarding the merits are not discussed in this decision.

ORDER

The agency is ORDERED to perform the following:

1. Notify potential class members of the accepted class claim within fifteen (15) calendar days of the date this decision becomes final, in accordance with 29 C.F.R. § 1614.204(e).

2. Forward a copy of the class complaint file and. a copy of the notice to the Hearings Unit of the New York Office within thirty (30) calendar days of the date this decision becomes final. The agency must request that an Administrative Judge be appointed to hear the certified class claim, including any discovery that may be warranted, in accordance with 29 C.F.R. § 1614.204(f).

The agency is further directed to submit a report of compliance, as provided in the statement entitled "Implementation of the Commission's Decision." The report shall include supporting documentation of the agency's actions.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0408)

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

STATEMENT OF RIGHTS - ON APPEAL

RECONSIDERATION (M1208)

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

1. The appellate decision involved a clearly erroneous interpretation of material fact or law; or

2. The appellate decision will have a substantial impact on the policies, practices, or operations of the agency.

Requests to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision or **within twenty (20) calendar days** of receipt of another party's timely request for reconsideration. *See* 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), 9-18 (November 9, 1999). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 77960, Washington, DC 20013. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. *See* 29 C.F.R. § 1614.604. The request or opposition must also include proof of service on the other party.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your request for reconsideration. The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. *See* 29 C.F.R. § 1614.604(c).

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0408)

This is a decision requiring the agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. In the alternative, you may file a civil action **after one hundred and eighty (180) calendar days** of the date you filed your complaint with the agency, or filed your appeal with the Commission. If you file a civil action, you must name as the defendant in the complaint the person who is the official agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national

organization, and not the local office, facility or department in which you work. **Filing a civil action will terminate the administrative processing of your complaint.**

RIGHT TO REQUEST COUNSEL (Z1008)

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 from the Court that the Court appoint an attorney to represent you and that the Court also 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 with the Court does not extend your time in which to file a civil action. Both the request and the civil action must be filed within the time limits as stated in the paragraph above ("Right to File a Civil Action").

FOR THE COMMISSION:

Carlton M. Hadden

Carlton M. Hadden, Director
Office of Federal Operations

JAN 14 2010

Date

CERTIFICATE OF MAILING

For timeliness purposes, the Commission will presume that this decision was received within five (5) calendar days after it was mailed. I certify that this decision was mailed to the following recipients on the date below:

Sandra M. McConnell
28 Ross St
Rochester, NY 14615

Michael J. Lingle, ESQ
693 East Ave
Rochester, NY 14607

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JAN 1 4 2010
Date

Equal Opportunity Assistant