IN THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
BALTIMORE DISTRICT OFFICE

RONALD JANTZ, T. JAMEEL MUHAMMAD, DONNA RING, ELLEN ALTEMOSE and KARL BALDWIN, Class Agents, v. CAROLYN W. COLVIN, Acting Commissioner, Social Security Administration,	EEOC Case No.: 531-2006-00276X Agency No: HQ-O6-2518-SSA

MAR 10 2014

MEMORANDUM AND ORDER RULING ON AGENCY'S MOTION FOR CLASS DECERTIFICATION

Before the Commission is the Agency's July 11, 2011 Motion for Class Decertification (Motion) on the basis of Wal-Mart Stores, Inc. v. Dukes, et al., 131 S.Ct. 2541 (2011). On May 23, 2012, after a period of mostly statistical-based discovery, the Class Agents filed their Memorandum of Law in Opposition to the Motion (Opposition). Due to the Agency's failure to include all certificates for each vacancy in its statistical document production until a second production corrected the problem, Class Agents were given leave to file a Supplemental Opposition to the Motion (Supplemental Opposition), which it filed on November 9, 2012. On January 21, 2013, the Agency filed its Reply to the Oppositions (Reply). The Class Agents were given leave to file a response to the new statistical analysis attached to and discussed in the Reply. Accordingly, on February 6, 2013, the Class Agents filed their Sur-Reply to the Reply (Sur-Reply).

The approved class is as follows:

> All current and former employees with targeted disabilities at the Social Security Administration who, on or after August 22, 2003, have applied for and made a Best Qualified List for promotion, but were not selected for promotion.

Certification Decision, p. 22. The policy at issue is the Agency practice of providing its managers almost unfettered subjective decision-making authority on whom to select for promotion vacancies. Id., pp. 8, 10-11. The Agency argues that the Dukes decision prohibits the use of such unfettered discretion as a policy sufficient to bind a class case together for commonality purposes and, instead, requires the identification of a specific employment practice holding the class together in terms of finding common answers to common class questions. As the Agency noted, tens of thousands of promotion decisions by more than a thousand managers

is the opposite of a uniform policy unless the managers were given direction to act in a common way. 131 S.Ct. at 2554-55. As the Agency argues, Dukes prohibits use of unfettered discretion as a uniform policy in certain circumstances, but Dukes by no means overruled prior decisions which allow class certification to challenge unfettered discretion. This is clear with respect to its citation and approval of language in General Telephone Co. of Southwest v. Falcon, 457 U.S. 147, 157–159, n. 15 (1982) stating that

> [S]ignificant proof that an employer operated under a general policy of discrimination conceivably could justify a class of both applicants and employees if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decisionmaking processes.

Id. ; quoted in Dukes, 131 S.Ct. at 2153.

The Agency argued on appeal that the Commission's standard for class certification should be that:

> [A] putative class agent seeking class treatment for an alleged general policy of discrimination must offer "significant proof" that the alleged policy manifested itself in the 'same general fashion' as to all putative class members.

Agency's Request for Reconsideration in Jantz at 3 (citing General Telephone v. Falcon, 457 U.S. 147 (1982)). In denying reconsideration in Jantz, the Commission's Office of Federal Operations (OFO) did not disagree that the Supreme Court maintains a "significant proof" standard for certification under Fed. R. Civ. P. 23(a)(2), but OFO refused to accept that the same rule constitutes the applicable standard under 29 C.F.R. § 1614.204(a)(2)(ii). Rather, OFO explained that the correct standard to be applied under 29 C.F.R. § 1614.204(a)(2)(ii) is whether the class agent submits "sufficient probative evidence" that the elements of certification are met. Jantz v. SSA, EEOC Request No. 0520110045, *2 (January 4, 2011), denying reconsideration of EEOC Appeal No. 0720090019 (August 25, 2010).

Dukes interprets both Fed. R. Civ. P. 23(a) and 23(b). The Commission's class regulations at 29 C.F.R. § 1614.203(a)(2) are closely patterned after Fed. R. Civ. P. 23(a). However, there is no corresponding reference to Fed. R. Civ. P. 23(b) and that section generally does not apply in federal sector class cases. Thus, the interpretation of Rule 23(b) contained in Dukes has no applicability in this case. However, to the extent that Dukes interprets Fed. R. Civ. P. 23(a), it must be applied in federal sector class cases whenever such application can reasonably be made. Nonetheless, the "significant proof" standard set forth in Falcon and Dukes must be tempered somewhat in the federal sector since, in Commission proceedings, unlike federal court, the Class Agents may not take wide ranging precertification discovery on the merits of the claim (such as the discovery taken in Dukes); that limitation correspondingly

requires a lesser burden of proof for satisfying 29 C.F.R. § 1614.204(a)(ii) than federal courts utilize to satisfy Rule 23(a)(2). Dukes, 131 S.Ct. at 2545 (citing Falcon, 457 U.S. at 159, n. 15). This is true even in this case where there was significant discovery since that discovery was limited mainly to developing statistical analyses.

Nonetheless, Dukes provides important guidance in determining what kinds of proof are sufficient to justify class certification. The main problem in Dukes was that the class consisted of more than a million potential members involving many thousands of management decision makers and only a grant of unfettered discretion to those managers to bind the purported class together. 131 S.Ct. at 1553-54. Several cases since Dukes have considered and some have approved classes where one of the main policies allegedly holding the class together was the grant of unfettered discretion to selecting officials. Whether a court approves or denies certification depends on how close the facts of the case are to Dukes including whether there is significant control by a small group of decision makers or any additional overarching policies to bind the class together. These cases provide an illustrative range of cases which provides guidance on how to evaluate this case.

In McReynolds v. Merrill Lynch, 672 F.3d 482 (7th Cir. 2012), the court allowed a disparate impact class to proceed in light of specific alleged nationwide employment practices that, while facially neutral, purportedly negatively affected the success of minority brokers. Merrill Lynch gave significant discretion to brokers to form their own teams. Joining teams could lead to the greater success of brokers due to sharing of accounts and the availability of complementary skills. Greater success was important since when a broker left Merrill Lynch, that broker's accounts were competed for within an office and assigned based on the degree of success of each broker. The teaming and assignment policies were centralized corporate policies. Since brokers could choose their own teams, they might act like little fraternities and admit members based on how similar they were to each other, thus, leaving minorities "out in the cold." 672 F.3d at 488-90. In McReynolds, brokers and managers were afforded considerable discretion, but it was the two nationwide policies of teaming and competition for the accounts of former brokers which bound the class together.

In Ellis v. Costco Wholesale Corp., 285 F.R.D. 492 (N.D. Cal. 2012), the District Court certified a class of female candidates for the high-level positions of General Manager (GM) and Assistant General Manager (AGM) at its warehouses. Although Regional Managers and General Managers ostensibly made these selection decisions, the evidence was clear that top corporate executives personally and substantially contributed to the decision-making. Potential promotion candidates for GM and AGM positions were "frequently discussed among top-level managers, both at weekly meetings and the monthly meetings at Costco headquarters." Costco's most senior management, including its Chief Executive Officer (CEO) and Senior Vice Presidents, maintained a constant ongoing dialogue with warehouse-level management about candidates for promotion, with them personally reviewing lists of promotion candidates. Corporate headquarters even maintained a "Green Room" where the photographs of potential promotees were displayed. Moreover, at this level, vacancies were not posted and no applications or open competition for positions were allowed. 285 F.R.D. at 497, 501, 511-12. Clearly, the decision-

makers in Ellis exercised unfettered discretion, but the major difference from Dukes was that that discretion was exercised by a small group of very high-level managers exercising an extraordinary degree of control. Thus, there was evidence of a "common mode of exercising discretion that pervade[d] the entire company." 285 F.R.D. at 518.

In Moore v. Napalitano, 926 F. Supp.2d 8 (D.D.C. 2013), the District Court certified a promotion class of African American Special Agents of the Secret Service considered for promotion where the selecting officials exercised extensive discretion in promotion. Unlike Dukes, all promotions at the GS-14 and GS-15 levels went through a centralized review process. All GS-14 candidates were rated by a first Peer Review Panel consisting of agents at the GS-14 level or above. Panel members received oral instructions and no notes were taken during the panel's evaluation. Then, there was a Second Level Panel which evaluated GS-14 and GS-15 candidates by rating them against six competencies. The Second Level Panel consisted of representatives from each of the seven Assistant Director offices. That panel was also instructed not to take note during deliberations and they were allowed to rate candidates at their discretion. This process produced a Merit Promotion Program (MPP) score. Candidates were ranked on Best Qualified Lists according to their MPP score, but the agent with the highest score was not guaranteed an award of a vacant position. Instead, a recommendation was made to the Director by an Advisory Board consisting of the seven Assistant Directors, the Deputy Director and the Chief Counsel. Moreover, the entire class consisted of only between 120 and 27 members. 926 F.Supp.2d at 12-13, 28-31. Thus, a small centralized control group exercised unfettered discretion within a highly structured promotion selection process. Consequently, Moore was very different from Dukes.

In contrast, the Seventh Circuit, in Bolden v. Walsh Group, 688 F.3d 893 (7th Cir. 2012), reversed a certification finding where construction job site superintendents were delegated extensive local discretion. There were two purported classes, an overtime class and a racial harassment and working conditions class. Discretion was delegated to superintendents at more than 212 job sites. Superintendents further delegated local discretion to their foremen. Crews and foremen changed and involved a different mix at each site. Policies which superintendents and foremen adopted and followed were different at each site. Each superintendent and foreman had local discretion regarding work hours, overtime, promotion, and investigation and discipline regarding claims of racial discrimination. 688 F.3d at 895-96, 898-99. In Bolden, there were thousands of employment decisions by numerous decision makers all involving local discretion by different superintendents and foremen using different policies and practices at each job construction site. There was no central policy or centralized control which could hold a class together. Thus, this case was more like Dukes and the lower court's certification decision was reversed.

The delegation of unfettered discretion in the instant case is more like that in Bolden and Dukes than in McReynolds, Ellis and Moore. In terms of providing commonality, the Class Agents argue that the class is held together by the use of the review and rating procedures to place applicants on Best Qualified Lists (BQL). Targeted Disabled Employees (TDE) who applied and were placed on BQL's were presumptively qualified for the positions for which they

applied. The Class Agents argue that those facts and the delegation of unfettered discretion are enough to bind the class together. Opposition, p. 14. However, this only provides a framework for the delegation of locally exercised discretion where more than a thousand managers selected applicants for tens of thousands of vacancies. This BQL framework does not give any hint of bias or skewing the results against class members. Thus, any discrimination these selecting officials practiced, without more, is practiced locally without guidance or intervention from an overriding policy binding the entire class together. Thus, without more, this case is more like Bolden and Dukes, i.e., thousands of managers making tens of thousands of selection decisions each for their own reasons. Accordingly, the delegation of unfettered discretion in the instant case is not enough; Class Agents must offer more to provide the glue of commonality to bind the class together. Class Agents must provide some Agency-wide policy holding the class together in addition to unfettered discretion exercised locally.

Fortunately for the class, a review of the more than 100 class member affidavits and deposition extracts show clear patterns of Agency-wide policies which could hold the class together. The most obvious of these is the denials of reasonable accommodation which thereby hamper TDE performance, prevent them from equally participating or benefitting from training and prevent them from being more qualified for promotion. The affidavits provide extensive evidence of the denial of reasonable accommodation and its effects. This includes instances where the need to accommodate a disability or the perceived need to accommodate a disability was the reason for the failure to be promoted. It also includes instances where it is difficult for TDEs to obtain the reasonable accommodations necessary to perform their jobs. Carson Appendix, Opposition Ex. 9, pp. 4-12, 48-54 and affidavits cited therein. According to the affidavits, this problem is widespread. It also may well constitute an overarching Agency-wide policy to deny reasonable accommodation. This may be the case since reasonable accommodation decisions are usually made through the collaboration of human resources personnel and medical directors. Thus, the decision to grant or deny a reasonable accommodation may be centralized and controlled by a relatively small group implementing Agency-wide policies. It also may be the case that it is very difficult to obtain a reasonable accommodation from this Agency. See, e.g., Underwood v. SSA, EEOC Appeal No. 0720120001 (January 18, 2013) (upheld finding of violation for denial of reasonable accommodation where the agency denied complainant the accommodation of limited unscheduled leave without having to provide medical documentation to help complainant cope with her depression); and the numerous affidavits cited in the Carson Appendix, supra, p. 4.

At this point, it is not known if this or other policies would bind the class together to achieve the commonality required by Commission regulations, Fed. R. Civ. P. 23(a) and Dukes. The reason it is unknown is that, unlike in district court, precertification and decertification discovery has been limited to that necessary to conduct statistical analyses. Now, with denial of the motion to decertify, the Class Agents will have the opportunity to inquire about whether there are Agency-wide policies such as the pervasive denial of reasonable accommodation, which could bind the class together. Further, if there are other complementing policies, such as requiring that the cost of reasonable accommodation be paid out of the budget where the class member works, that would be an Agency-wide policy which further discourages the granting of

reasonable accommodation.

Another pattern perceived through review of the affidavits is the refusal to consider applicants from outside the commuting area. The decision to not authorize moving expenses does not mean that applicants cannot apply and be selected, provided they understand that they cannot receive moving expenses. See affidavits of class members Matthew Palmer and Alvin Stewart and supervisors Rossana D'Alessio and Velma Blaine (no authorization of moving expenses led to not considering these two class members for the vacancies at issue). Whether this or other policies are Agency-wide and have an adverse effect on TDEs remains to be seen. However, it is imperative that the Class Agents find such overarching policies because what they have done so far is not enough.

Although not enough to carry the day without additional Agency-wide policies, there are several differences between this case and Dukes which makes this case salvageable. The class consists of only 571 members, not the millions as in Dukes. The Dukes class included women whether or not they applied or were qualified for promotion vacancies. Here, the class is limited to those who applied and can prove they are presumptively qualified for each vacancy because they made it onto BQLs. Also, in Dukes, a very small percentage of the class provided anecdotal evidence over limited geographical areas (one anecdotal affidavit for every 12,500 class members). Dukes, 131 S.Ct. at 2256. However, in this case, more than 100 class members have provided testimony through affidavits or depositions to provide anecdotal evidence of discrimination (more than one in six). These affidavits cover all geographical regions and constitute a higher percentage of the class than in Teamsters v. United States, 431 U.S. 324, 338 (1977) (one anecdotal affidavit in eight). Opposition, pp. 11, 15.

Accordingly, due to the limited discovery so far and the factors contained in the previous paragraphs, the Agency's Motion is denied and the class should be given the further chance to prove commonality by finding a Agency-wide policy binding the class, i.e., one in addition to unfettered discretion.

Other arguments in support of decertification are rejected at this time. The Agency offered the expert report of Michael P. Ward, Ph.D., Reply, Ex. A. Ward presented evidence that Dr. Drogan's statistical analysis is entirely driven by outliers, those who applied for positions more than 23 times and that when such outliers are eliminated from the analysis, statistical significance disappears for the remaining class. Some of these alleged outliers filed hundreds of applications over the nine years of the data but they constituted only 6.3 percent of the total TDEs making up the class. Ward Report, Reply Ex. A, pp. 11-12, 14, 15 and Tables 5 and 7. Ward claims that the outliers are the "tail wagging the dog." Id. at 14.

However, upon review of the report of the Class Agents' statistical expert, Richard Drogan, Ph.D., and the two Drogan Rebuttal Affidavits, the undersigned finds that it is not appropriate to eliminate these so-called outliers from the analysis at this time. See Drogan Report, Opposition Ex.; Drogan Supplement, Sur-Reply, Ex. 1; January 21, 2014 Second Supplemental Drogan Declaration. First, it is questionable whether these individuals are even

outliers. The undersigned does not find it unusual for employees to file as many as ten applications for vacancies per year. That number of applications is what is usually necessary to conduct a serious job search, whether that search is within or outside the Agency. Ten applications a year would accumulate to eighty applications over the course of the eight years of the statistical data. Further, the undersigned agrees with the Class Agents that it is unfair to eliminate individuals applying for more than 23 vacancies over eight years since those individuals might have been discriminated against also. The Agency is seeking to introduce a possibly tainted variable. Drogan Supplement, Sur-Reply, Ex. 1, p. 2. As Dr. Drogan stated:

> Dr. Ward argues that if an employee had many applications they must be less qualified, and therefore they should not be compared with someone who had fewer applications. However, the same adverse statistical pattern could also result if TDEs were equally qualified, but were less likely to be accepted because of bias, and Dr. Ward ignores this possible bias. Of course, in this case, the Class certified by the EEOC is already defined to include only those applicants who made it onto the Best Qualified List for each promotional opportunity. This fact undermines Dr. Ward's approach, and Dr. Ward fails to address it in his Declaration.

January 21, 2014 Second Supplemental Drogan Declaration, pp. 2-3.[1]

Moreover, there is evidence that this group is fully qualified for these positions and should not be eliminated from the analysis. When those selected for promotion from the so-called outlier group are included in the analysis, the number of standard deviations from the norm increases markedly. Id. at p. 4, Table 1.

Further, since it is possible that an Agency-wide policy may be found to hold the entire class together, it is not necessary to add Class Agents to represent geographical areas or create sub-classes at this time.

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1 Dr. Ward's analysis shows that those TDEs who only filed between one and five applications were actually favored in selections. Ward Report, p. 15 and Table 7. This is a problem which the Class Agents need to explain. Dr. Drogan did not explain or adequately respond to it in his January 21, 2014 Second Supplemental Declaration even after the undersigned asked the Class Agents that he do so. Nonetheless, this failure does not justify decertification at this time because the so-called outliers constitute 6.3 percent of a class of 571 members. That amounts to 36 "outliers." The undersigned reminds the Agency that 36 members may provide sufficient numerosity to support a class even if everyone else were eliminated from the analysis. See, e.g., Moore, 926 F. Supp.2d at 28 (court indicated that 27 members would still provide sufficient numerosity to support a class provided the class was geographically dispersed). Since the 36 "outliers" are geographically dispersed in this case, that number alone could supply sufficient numerosity to support a class.

For the foregoing reasons, the Drogan analysis and reports are not rejected and, in fact, continue to support class certification.

The other Agency arguments are also rejected. There is no basis to decertify the class on grounds of dissimilarity between GS-5 TDEs who were never promoted during their tenure at the Agency and GS-14 TDEs who received several promotions during their careers. Reply, pp. 36-37. The main point of commonality is that they were selected for promotion at a statistically significant lower rate than non-TDE applicants. When this statistical information is coupled with a possible Agency-wide failure to reasonably accommodate their disabilities, there is commonality.

Lastly, the Agency argues in its Reply and reinforced through its many rebuttal affidavits, that the class should be decertified because large numbers of selecting officials never even knew the TDE applicants had disabilities. Reply, pp. 28-29, n. 13. The Agency tries to buttress this argument with testimony that many selecting officials never conducted interviews before making their selections. Reply, pp. 26-27, n. 11, and cited affidavits. Frankly, this argument is premature at this stage of the proceedings and is patently unfair. It is both premature and unfair because Class Agents have not had the opportunity to conduct discovery to rebut it. As noted in the Sur-Reply, many hiring decisions were based primarily on the recommendations of supervisors, who clearly did know the TDEs and probably were aware of their disabilities. Sur-Reply, p. 9, n. 25. Thus, there is a substantial catspaw argument to be made to establish management's liability because the supervisory recommendations may have tainted the selection process to the same extent as if the selecting officials knew of the Class Members disabilities. These same supervisors may have been involved in decisions to deny or limit reasonable accommodation requests which would have made TDE candidates more competitive. Moreover, this is the kind of factual argument is commonly made in EEO cases and, as noted by Class Agents, is best reserved for the remedial phase of the proceedings should we get there. Id., p. 9.

For the foregoing reasons, the Motion is hereby DENIED.

It is so Ordered.

FOR THE COMMISSION:

David Norken
Administrative Judge

CERTIFICATE OF SERVICE

For timeliness purposes, it shall be presumed that the parties received the foregoing ***MEMORANDUM AND ORDER RULING ON AGENCY'S MOTION FOR CLASS DECERTIFICATION*** within five (5) calendar days after the date it was sent *via* first class mail. I certify that on March 10, 2014 the foregoing ***ORDER*** was sent *via* first class mail to the following:

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