



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

**Doering Meyer et. al.**  
**Class Agent,**

v.

**John Kerry,**  
**Secretary,**  
**Department of State,**  
**Agency.**

**Request No. 0520140506**  
**Appeal No. 0720110007**  
**Hearing No. 570-2008-00018X**  
**Agency No. DOSF03407**

**DENIAL**

The Agency timely requested reconsideration of the decision in Doering Meyer v. Department of State, EEOC Appeal No. 0720110007 (June 6, 2014). EEOC Regulations provide that the Commission may, in its discretion, grant a request to reconsider any previous Commission decision where the requesting party demonstrates 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. See 29 C.F.R. § 1614.405(c). For the following reasons, the Agency's request for reconsideration is DENIED.

**BACKGROUND**

As noted in the appellate decision, Complainant, the Class Agent, applied for a position with the Foreign Service.<sup>1</sup> She passed the written and oral exams and was granted a conditional offer of appointment which was contingent on her satisfactory completion of the medical, security, and suitability clearance processes. Complainant's medical documentation revealed that she had a diagnosis of Multiple Sclerosis. After submission of additional medical documentation and a neurological exam it was determined that she was not Worldwide Available. Instead of getting a Class 1 certification which would have allowed her to travel anywhere, she was given a classification of Class 5, which indicated that she was not cleared for Medical Assignment Abroad. Complainant was advised of her right to request a waiver of the worldwide availability requirement which would only be granted if it was in the best

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<sup>1</sup> In this decision, the terms "Complainant" and "Class Agent" are used interchangeably.

interest of the Service. Complainant applied for the waiver, and it was granted and she was selected for a position.

Notwithstanding, Complainant filed a formal complaint alleging that she had been discriminated against on the basis of disability with regard to the Worldwide Availability policy. During discovery, however, she filed a Motion for Class Certification. She alleged that the State Department's Worldwide Availability policy, as administered, disparately treats and disparately impacts qualified individuals with disabilities. Complainant further maintained that the policy denied the class the individualized assessment required for a direct threat determination, which resulted in the Agency basing hiring decisions on stereotypical notions regarding medical conditions. She asserted that the worldwide availability requirement required every candidate to be able to work wherever the Foreign Service had a post, without the possibility of reasonable accommodation. The Class Agent also claimed that the policy disparately impacted those over the age of 40.

An EEOC Administrative Judge (AJ) found that the State Department's policy requiring worldwide availability affected all members of the purported class because individuals who cannot work in all locations were denied positions without any reasonable accommodation considered or individualized assessment conducted. The AJ found the centralized policy involved common questions of fact in that all applicants received conditional offers, but were denied a position because of their actual, perceived or record of disability. Following an analysis of the requirements for a class action, the AJ certified the class action on behalf of "all applicants for career Foreign Service employment with a disability who have been or will be denied employment from October 7, 2006 until the present because the State Department's Office of Medical Services denied them 'Class 1 - Unlimited Clearance for Worldwide Assignment' type clearance." The Agency issued a final order rejecting the AJ's finding that the class should be certified. The Agency then filed an appeal to the Commission from the AJ's decision.

In EEOC Appeal No. 0720110007, the Commission held that the Class Agent demonstrated that she was a qualified individual with a disability. With regard to the Agency's assertion that the Class Agent was not a member of the class because she was not "denied employment," and at most her claim should have been limited to a "delay in hiring," the Commission found that the class definition should be clarified to include: All qualified applicants to the Foreign Service who were denied employment, or whose employment was delayed pending application for and receipt of a waiver, because the State Department deemed them not "world-wide available" due to their disability. Further, the Commission found that questions related to whether other Foreign Service agencies should be joined in the complaint should be raised before an AJ. The Commission found that the Class Agent had met the requirements of numerosity, commonality, typicality, and adequacy of representation. Finally, the Commission determined that the denial of certification of the class based on age was correct, as the Class Agent failed to establish through anecdotal or statistical evidence that the policy discriminated against applicants because of their age.

### REQUEST FOR RECONSIDERATION CONTENTIONS

The Agency argues that the Commission's legal finding of commonality and typicality is erroneous because it is based on an incorrect understanding of its medical clearance process. Further, the Agency maintains that its medical clearance process provides the individualized assessment required by the ADA; therefore, in light of the individualized assessment provided by the waiver possibility the commonality and typicality requirements are not met. The Agency also argues that the Commission improperly ruled on the merits of the underlying case. Specifically, the Agency asserts that the Commission went too far in changing the class definition to include the word, "qualified," apparently concluding that all individuals who were denied a Class 1 medical clearance were "qualified individuals" with a disability. Finally, the Agency argues that the Commission improperly expanded the class to include applicants for non-career positions. The Agency asserts that by removing the word "career" from the original class definition, the Commission has potentially expanded the class to include all applicants to the Foreign Service, both for career and non-career employment.

The Agency maintains that the Commission should uphold the Agency's Final Order and find that Complainant has failed to meet the requirements for class certification. At a minimum, the Commission should find that Complainant is not a proper class agent because she received a reasonable accommodation and any delay in her hiring was due solely to the Agency's engagement in the interactive process required by the ADA. To the extent the Commission does not overturn the class certification determination, the Agency requests that the class definition be modified as follows: "All applicants for career Foreign Service employment who were denied employment from October 7, 2006, until the present because the State Department deemed them not 'worldwide available' due to their disability."

In response, Complainant asserts, among other things, that the Agency is largely rehashing the same arguments regarding commonality and typicality that were previously raised on appeal and asserts that a request for reconsideration is not a second appeal to the Commission. Further, Complainant contends that the Agency's new arguments regarding the class definition, as modified slightly by the Commission, should likewise fail. The class definition including the term "qualified applicants" is not a merits determination but a reference to the fact that, in order to proceed to any medical clearance process, an individual has already been deemed qualified for the Foreign Service and given a tentative employment offer. Complainant maintains that the Agency's argument regarding applicants for non-career positions mischaracterizes the Administrative Judge's decision - which explicitly stated that the AJ would revisit the issue of inclusion of term appointment candidates if OFO redefined the class in a manner that might include such individuals. Because the Agency's contentions have already been addressed, in large part, and the Agency has not shown any error in the previous decision, Complainant maintains that the Agency's request for reconsideration should be denied.

### ANALYSIS AND FINDINGS

At the outset, we remind the Agency that a "request for reconsideration is not a second appeal to the Commission." Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110) (rev. Nov. 9, 1999), at 9-17. A reconsideration request is an opportunity to demonstrate that the previous decision involved a clearly erroneous interpretation of material fact or law; or will have a substantial impact on the policies, practices, or operations of the Agency. After reviewing the previous decision and the entire record, the Commission finds that the Agency's request fails to meet the criteria of 29 C.F.R. § 1614.405(c), and it is the decision of the Commission to deny the request.

We find that the Agency has simply reiterated the arguments previously made in the appellate decision. While the Agency clearly disagrees with the appellate decision, we find that it has not presented persuasive evidence which supports its contention that the decision *clearly* erred. Moreover, we note that because the appellate decision directed the Agency to continue processing the complaint, it may continue raising appropriate arguments and concerns to the Administrative Judge assigned to this matter. Accordingly, the decision in EEOC Appeal No. 0720110007 remains the Commission's decision. There is no further right of administrative appeal on the decision of the Commission on this request. The Agency shall comply with the previous decision's Order as set forth below.

### ORDER

It is the decision of the Commission to certify the class comprised of "all qualified applicants to the Foreign Service beginning on October 7, 2006, who were denied employment, or whose employment was delayed pending application for and receipt of a waiver, because the State Department deemed them not "world-wide available" due to their disability."

The AJ shall address the Class Representative's request to add a new Class Agent if properly raised before the AJ.

To the extent that the Agency has not already done so:

The Agency is ORDERED to process the remanded class complaint in accordance with 29 C.F.R. §1614.204(e) et seq. Within 15 calendar days of the date this decision becomes final, the Agency shall notify all class members of the acceptance of the class complaint in accordance with § 1614.204(e). Within 30 calendar days of the date this decision becomes final, the Agency shall provide the appropriate EEOC District Office with a copy of the notice sent to the class members, and shall request the appointment of an AJ, who shall undertake the continued processing of the complaint pursuant to § 1614.204(f) et seq. The Agency shall provide a copy of the notice of certification and request for appointment of an EEOC Administrative Judge to the Compliance Officer, as referenced herein.

### IMPLEMENTATION OF THE COMMISSION'S DECISION (K0610)

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 77960, Washington, DC 20013. 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.

### COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)

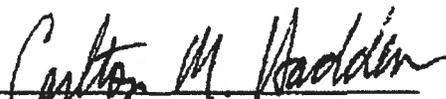
This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court within ninety (90) calendar days from the date that you receive this 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 (Z0610)

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, Director  
Office of Federal Operations

FEB 19 2015

Date