UNITED STATES OF AMERICA
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
BALTIMORE FIELD OFFICE

Ben Robbins, II, and, Alfred Fordan, Class Agents, v. Nat'l Aeronautics & Space Admin., Agency.	EEOC Hearing No. 531-2014-00109X Agency Case Nos. NCN-13-GSFC-00028 NCN-13-GSFC-00038 Supervisory AJ Stephanie Herrera[1] Date: September 30, 2022

DECISION ACCEPTING CERTIFICATION ON PROPOSED CLASSES

I. INTRODUCTION

Two proposed class cases are before the U.S. Equal Employment Opportunity Commission (EEOC or Commission) pursuant to § 717 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-16. The parties filed a multitude of motions and supplemental briefings before and after limited pre-certification discovery. The list of filings will not be recapped here, other than to note that I have reviewed all filings uploaded to the Public Portal and that were forwarded to me by email, as well as documentation mailed or hand-delivered to the Baltimore Field Office. I find the record sufficient to make a decision on the certification of the proposed classes.

The Class Agents argue that flaws in the Employee Performance Communication System (EPCS) have a disparate impact on African American and Asian American employees at grades 13-15, and that a statistical analysis conducted demonstrates significant differences in ratings when compared to Caucasian employees at NASA overall and at its various Centers. These disparities, according to Class Agents, are a consequence of their supervisors' unfettered creation of appraisals that introduce bias and reduce accuracy when rating minority subordinates. Class Agents also contend that the Agency's own policies/guidance demonstrate its intent to make this a nationwide system. Moreover, according to Class Agents the failure to require a second review and approval of all ratings, the encouragement to use preprinted standards, along with the training provided, and the manner in which summary ratings are calculated are further deficiencies in the system affecting minority employees more than Caucasian employees.

[1] The Baltimore Field Office reassigned this matter from Administrative Judge Laurence Gallagher to the undersigned in late 2018. Thereafter, due to a government shutdown, departure of several administrative judges resulting in significant changes in workloads, the pandemic, and my new role as a supervisor, this matter was delayed more than it should have been despite the parties' efforts to work expeditiously on the various briefings. The parties were allowed limited discovery and provided supplemental briefings, including identifying relevant authority for the undersigned to consider.

Before addressing the substance of the determination to certify the proposed classes, two preliminary matters must be dispensed with first. Class Agents seek to substitute Alfred Fordan for James La after La withdrew from serving as class agent on behalf of Asian American employees on November 30, 2015. Class Agents filed their motion on October 5, 2018, and the Agency objected on October 22, 2018. In conjunction with its objection, the Agency moved to dismiss the proposed class of Asian American employees. The Agency has not presented any persuasive authority barring the substitution of the proposed class agent, Fordan. While I find Class Agents waited far too long to address the matter of replacing La once he notified the Commission of his withdrawal, the Agency has not suffered any prejudice from this delay nor has it been impacted in its ability to defend its case. Therefore, Class Agents' Motion to Substitute Alfred Fordan for James La as Agent for the Proposed Class of Asian American Employees is GRANTED. For the reasons discussed in more detail below, the Agency's various Motions are Dismiss is DENIED. Finally, as explained this decision, the Class Agents' Motions for Certification are GRANTED.

For the foregoing reasons, the two proposed classes represented by Class Agents Robbins and Fordan will be framed as follows:[2]

> All African American employees in grades 13-15 who received less than a "Distinguished" rating on their annual performance since 2008 under the Agency-wide performance appraisal system.
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> All Asian American employees in grades 13-15 who received less than a "Distinguished" rating on their annual performance review since 2008 under the Agency-wide performance appraisal system.

II. RELEVANT FACTS

1. The Agency is divided into ten centers located across the United States that employ GS-13s through GS-15s throughout the relevant time frame. The centers are:
   (1) the Ames Research Center of Mountain View, California (ARC),
   (2) the Armstrong Flight Research Center formerly the Dryden Flight Research Center of Edwards AFB, California (AFRC or DFRC),
   (3) the Glenn Research Center of Cleveland, Ohio (GRC),
   (4) the Goddard Space Flight Center of Greenbelt, Maryland (GSFC),
   (5) NASA Headquarters, Washington, DC (HQ),
   (6) the Johnson Space Center of Houston, Texas (JSC),
   (7) the Kennedy Space Center of Cape Canaveral, Florida (KSC),
   (8) the Langley Research Center of Hampton, Virginia (LaRC),
   (9) the Marshall Space Flight Center of Huntsville, Alabama (MSFC),
   (10) the NASA Shared Service Center, Mississippi (NSSC) and
   (11) the Stennis Space Center of Stennis Space Center, Mississippi (SSC).

[2] This group does not include minority employees in the Agency's Office of Inspector General.

2. Eight of the centers (ARC, GRC, GSFC, HQ, JSC, KSC, LaRC, and MSFC) employ bargaining unit members. (Administrative File at 76.)

3. On or about May 1, 2007, the Agency instituted an agency-wide performance appraisal system called Employee Performance Communications System (EPCS). (Administrative File at 93.)

4. Class Agent Robbins (African American) is a Lead Aerospace Engineer, GS-0861-14, in the Goddard Space Flight Center, Safety Office, located at the Wallops Flight Facility in Wallops Island, Virginia. At the time of his formal complaint, he had held that position for seven years.

5. Class Agent Fordan (Asian American) is a Project Manager with Launch and Flight Operations, GS-0801-13, in the Goddard Space Flight Center, Safety Office, located at the Wallops Flight Facility in Wallops Island, Virginia. In 2018, when Class Agents filed the Motion to Substitute, Fordan had been employed with the Agency for five years.

6. In June 2010, Class Agent Robbins filed a unit-wide grievance on alleging that the EPCS had a discriminatory impact on African-Americas at the Wallops Flight Facility. (Opposition to Class Certification & Motion to Dismiss (Agency 1st Opp.) at 8.)

7. Class Agent Robbins later filed three separate unit-wide grievances challenging the equity and validity of EPCS and the validity of its approval by OPM. (*Id*.) Following the Step 3 Denial of the Grievances through the negotiated grievance process, Class Agent Robbins withdrew the grievances he had filed. (*Id*.)

8. Between 2012 and 2014, the Agency adopted an online evaluation program referred to as SPACE, Standard Performance Appraisal Communication Environment. Class Agents claim that SPACE may have exacerbated the problems inherent in EPCS.

9. In April 2012, the Agency entered into an agreement with its bargaining units in which it agreed to modify the EPCS process by eliminating elements, providing self-assessment opportunities, requiring second-level reviews that analyze ratings systemically, requiring Performance Standards only at Level 3, and providing objective Level 5 indicators for each element of the employee's performance plan. Agency Opposition to Motion to Substitute Alfred Fordan for James La for Proposed Class of Asian-American Employees and Agency's Motion to Dismiss Asian American Employees Class Complaint (Agency 2nd Opp.), Ex. 4 Att. A at 83.

10. On October 2, 2012, Class Agent received reports derived from NASA-generated data that (1) summarized the performance ratings issued to all NASA civil service employees under the EPCS from May 2011-April 2012; and, (2) summarized EPCS ratings to civil servants dating back to 2008. (Administrative File at 14.) These reports

showed lower performance ratings for African American employees from 2008 onward and for the period of May 2011-April 2012. (Administrative File at 14.) Similar information was obtained for Asian American employees.

11. These reports were presented to the Agency by its unions in or around October 2012. (Administrative File at 70.)

12. On February 19, 2013, Class Agent filed a formal class complaint alleging that the Agency's EPCS constituted race and age discrimination based on the Agency performance data.

13. In April 2013, the Agency entered into a Memorandum of Agreement with AFGE Local 1923 regarding the performance ratings used.

III. APPLICABLE LAW

Pursuant to 29 C.F.R. § 1614.204(a)(2), "[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 of the class are typical of the claims of the class;
>
> (iv) The agent of the class, or, if represented, the representative, will fairly and adequately protect the interests of the class."

A class complaint may be dismissed if it does not meet the prerequisites of a class complaint under 29 C.F.R. §§ 1614.204(a)(2) or 1614.107. These prerequisites closely follow Rule 23(a) of the Federal Rules of Civil Procedure. Notwithstanding the above, the putative class agents in a federal sector proceeding are not held to the same standard of proof to which a Rule 23 plaintiff in U.S. District Court is held. *See Hines, Jr., et al. v. Dep't of the Air Force*, EEOC App. No. 01931776 (July 7, 1994), *aff'd*, EEOC Req. No. 05940917 (Jan. 29, 1996), wherein the Commission stated:

> [T]he Commission is mindful that our decisions in class certification cases must take into consideration the fact that a class agent does not get access to precertification discovery in the same manner and extent that a Rule 23 plaintiff does.

The EEOC regulations provide for a development of the evidence by the parties at a greater extent once a class complaint has been certified. The Administrative Judge may issue orders for the investigation of a class complaint, and then may take appropriate action if the evidence reveals that the class should be redefined, subdivided, or dismissed. 29 C.F.R. § 1614.204.

IV. ANALYSIS AND FINDINGS

A. Commonality and Typicality

While courts have not required class agents to prove the merits of their claims at the class certification stage, class agents have been required to provide more than bare allegations that they satisfy the requirements of Fed. R. Civ. P. 23. Class agents must show some nexus with the alleged class. Specifically, the class agents must establish some evidentiary basis from which one could reasonably infer the operation of an overriding policy or practice of discrimination. This can be done through allegations of specific incidents of discrimination, supporting affidavits containing anecdotal testimony from other employees against whom an employer allegedly discriminated in the same manner as the class agents, and evidence of specific adverse actions taken. However, mere conclusory allegations, standing alone, do not show commonality. "Across the board" actions which involve allegations of discrimination in different practices such as hiring, promotion, termination, training and awards, will not be certified merely because the class members share the same race, national origin, or sex. *Hopkins v. U.S. Postal Serv.*, EEOC App. No. 01A02840 (July 22, 2002); *Mastren v. U.S. Postal Serv.*, EEOC Req. No. 05930253 (Oct. 27, 1993); *Gen. Tel. Co. of the Sw. v. Falcon,* 457 U.S. 147, 150-52 n.4, 158-59 n.15, 160 (1982).

Factors the Commission considers in determining whether commonality is present include whether the practices at issue affect the whole class or only a few employees, the degree of local autonomy or centralized administration involved, and the uniformity of the membership of the class, in terms of the likelihood that the members' treatment will involve common questions of fact. *Hopkins*, EEOC App. No. 01A02840; *Sedillo v. Dep't of Agric.*, EEOC App. No. 07A20071 (Aug. 7, 2002); *Mastren*, EEOC Req. No. 05930253. For example, commonality and typicality requirements might be satisfied if there was a showing of "significant proof that an employer operated under a general policy of discrimination" and "the discrimination manifested itself in hiring and promotion in the same general fashion, such as through entirely subjective decisionmaking processes." *Falcon,* 457 U.S. at 159 n.15; *Sedillo*, EEOC App. No. 07A20071.

Wal-Mart Stores, Inc. v. Dukes, wherein plaintiffs alleged "that the discretion exercised by their local supervisors over pay and promotion matters violates Title VII by discriminating against women," 546 U.S at 342, is illustrative here because in this case, like *Wal-Mart*, "[t]he crux of the case is commonality" and how to prove it exists in discretionary decision-making. *Id.* at 349. Acknowledging that "'in appropriate cases,' giving discretion to lower-level supervisors can be the basis of Title VII liability under a disparate-impact theory," the Court emphasized that this act alone "does not lead to the conclusion that every employee in a company using a system of discretion has such a claim in common." *Id.* at 355. It went on to explain that, when the Court addressed this type of disparate impact claim in *Watson v. Fort Worth Bank and Trust,* 487 U.S. 977, 994 (1988), "the plurality opinion *conditioned* that holding on the corollary that merely proving that the discretionary system had produced a racial or sexual disparity *is not enough.*" *Id.* at 357 (emphasis in original). The *Wal-Mart* Court, pointing to its earlier decision in *Falcon,* further explained how plaintiffs could make this showing of commonality by either demonstrating that "the employer 'used a biased testing procedure'" or setting forth "[s]ignificant proof that an

employer operated under a general policy of discrimination." *Id.* at 353 (quoting *Falcon,* 457 U.S. at 159 n.15). As to the second factor, whereas in *Wal-Mart*, plaintiffs allege that their employer "engages in a *pattern or practice* of discrimination"

> [and plaintiffs] wish to sue about literally millions of employment decisions at once. Without some glue holding the alleged *reasons* for all those decisions together, it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question *why was I disfavored.*

Id. at 352. Thus, the very nature of a disparate impact claim results in an assessment of not only the "proof of commonality," but the overlapping merits of plaintiffs' theory of "the reason for a particular employment decision." *Wal-Mart,* 546 U.S. at 352 (quoting *Cooper v. Fed. Reserve Bank of Richmond,* 467 U.S. 867, 876 (1984)). In other words, the plaintiffs must "identify[] the specific employment practice that is challenged" that ties all putative members of the class together. *Id.* at 357 (internal citations omitted).

To determine whether the plaintiffs had established commonality, the Court considered plaintiffs' statistical evidence that analyzed regional and national data "comparing the number of women promoted into management positions with the percentage of women in the available pool of hourly workers" and finding "statistically significant disparities between men and women at Wal-Mart." *Id.* at 356. Plaintiffs also proffered a comparison of work-force data that demonstrated that Wal-Mart "promotes a lower percentage of women than its competitors." *Id.* The Court also considered anecdotal evidence in the form of 120 affidavits "reporting experiences of discrimination" that amounted to "1 [affidavit] for every 12,500 class members" for only 235 of Wal-Mart's 3,400 stores. *Id.* at 358. The Court found that "[m]ore than half of these reports [we]re concentrated in only six States;" "half of all states have only one or two anecdotes; and 14 states have no anecdotes about Wal-Mart's operations at all." *Id.* Regarding the "statistical proof" showing disparities in the percentage of women promoted and the overall low promotion rate in comparison to its competitors, the Court determined it "insufficient to establish . . . [proof] on a classwide basis" because the evidence does not show disparities at the individual store level (and, therefore, evidence of disparities at the regional and national level cannot be imputed on an individual store) nor does evidence of disparities amount to an "inference that a company-wide policy of discrimination is implemented by discretionary decisions at the store and district level." *Id.* at 356-57. The Court stressed that the statistical proof failed in a "more fundamental" way in that, "[e]ven if it established (as it [did] not) a pay or promotion pattern that differs from the nationwide figures or the regional figures in *all* of Wal-Mart's 3,400 stores," the plaintiffs still had not identified a specific employment practice. *Id.* at 357. "[T]he bare existence of delegated discretion" that results in "an overall sex-based disparity" without having identified a specific employment practice "that ties all their 1.5 million claims together" is not enough.[3] *Id.*

[3] *See Wal-Mart Stores, Inc. v. Dukes,* 564 U.S. 338, 356 (2011) ("[R]ecognition that this type of Title VII claim 'can' exist does not lead to the conclusion that every employee in a company using a system of discretion has such a claim in common.").

Here, the Class Agents have offered much more than "bare bones" allegations satisfying the commonality and typicality requirements of class certification. Class Agents have provided some evidentiary basis to support an inference that there exists an overriding policy or practice of discrimination. Each member of the proposed classes is evaluated in accordance with the EPCS process annually so typicality has been established. The Agency's own reports demonstrate that, across geographically distributed locations, "white employees receive more above-average summary ratings and fewer below-average summary ratings than the members of each proposed class." Class Agents' Briefing at 9, 22. This results in fewer monetary awards and promotions for proposed class members. *Id.* Class Agents' offer what they allege to be statistically significant evidence to support an inference that every year between 2008 and 2018, white employees received more above-average ratings than members of the proposed classes. *Id.* at 4-9. The consistency and degree of disparity over time and across locations demonstrate an overriding discriminatory policy or practice.[4] *Id.* at 8. Class Agents have also offered data to support an inference that lower performance ratings for putative class members resulted in fewer monetary awards and promotions. *Id.* at 12-13. As explained in more detail below, the Class Agents here have offered evidence that the Agency uses a "biased" evaluation procedure.

First, I do not find that *Wal-Mart* applies to an EEOC class certification case, particularly where the parties have not yet engaged in full discovery and were only allowed limited discovery that I requested.[5] Even if *Wal-Mart* and its progeny are adopted by the Commission, Class Agents have met their initial burden to establish commonality. That the Agency's ECPS and the training provided to managers as to this system sufficiently provide the "glue" that binds all of the putative class members together. While I do not fully agree with Class Agents that the many flaws necessarily resulted in a disparate impact, Class Agents have provided sufficient evidence to demonstrate at this early stage of the proceedings that the two classes should be certified. It is not for me to decide at this juncture whether the Class Agents' arguments have merit without the benefit of having a fully developed record and especially because Class Agents have not yet been allowed full discovery. *Stan G. v. Soc. Sec. Admin.,* EEOC App. No. 2020004534 (May 19, 2021), *req. for recons. den.,* EEOC Req. No. 2021003771 (Apr. 21, 2022) (emphasizing on reconsideration "that it is improper to consider the merits of a complaint prior to certification" and that the agency's arguments were more appropriate for a "future stage, and not at the certification stage"); Sept. 2018 Class Suppl. at 13 n.5, 14-15.

The Agency argues that *Stan G*. is of limited use because its underlying facts differ significant from this case because the class that was certified was located at a single geographic location (the Social Security Administration's Baltimore headquarters), and concerned the application of a single awards review process that was administered by a centralized panel in the Office of Personnel. *See Stan G. v. Saul*, Appeal No. 2020004534, 2021 WL 2366281 (May 19, 2021) at *5. Agency's response to Complainant's Notice of Supplemental Authority, dated November 2, 2021,

[4] While there may be a dispute as to whether there are other explanations for the disparities, this goes to the merits of case, which are not presently before me or properly considered at this time.

[5] In this regard, I adopt by reference and incorporate herein the Class Agents' Supplemental Memorandum Identifying Relevant Class Certification Decisions Issued Since Briefing of Class Certification Motion, at 6-7 (Sept. 27, 2018) (hereinafter Sept. 2018 Class Suppl.). Page numbers refer to the "PDF" page numbers of a document.

p. 1. The Agency also argues that the Administrative Judge in *Stan G*. determined that the class agents had presented evidence of "a specific policy which tied all of the allegations together," and that the policy was developed and implemented by a centralized office. *See id.* at *5. Furthermore, the Agency states that Class Agents have not identified a specific policy that would warrant treating this case as a class action, let alone one where the putative class would span 11 geographically diverse NASA Centers (including additional facilities and installations connected to those Centers), involving hundreds (if not thousands) of individual decision-makers, all applying locally developed processes and receiving local guidance on the application of the performance review process. I disagree.

To be clear, it is enough for Class Agents to proffer that EPCS has been instituted widely throughout the various centers and at the direction of NASA headquarters. Class Agents have set forth sufficient evidence at this juncture to establish commonality, for example, by showing "'that all managers would exercise their discretion in a common way'" because of the training and guidance provided or that there is "some thread that tied the many discretionary decisions together." *Id.* at 198-99 (quoting *Wal-Mart*). Class Agents have presented evidence of "'common contention' that 'is central to the validity of each one of the [class members'] claims' and that 'is capable of classwide resolution[.]'" *Id.* at 200 (quoting *Wal-Mart*).

Second, as the Class Agents have pointed out, this case is very much like one recently affirmed by the Commission and for which a request for reconsideration was denied. Specifically, in *Stan G. v. Social Security Administration,* EEOC App. No. 2020004534 (May 19, 2021), *request for reconsideration denied,* EEOC Req. No. 2021003771 (Apr. 21, 2022), Administrative Judge (AJ) Julie Schmid certified a class of African American males in grades 14 and below who worked at the Social Security Administration's (SSA) headquarters in Baltimore, MD. In that case, class agents contended that the class had over 2,000 members and that these individuals had been subjected to a discriminatory policy governing the grant of performance awards and quality step increases resulting in a disparate impact. SSA argued that class agents had not adequately identified the policy they were challenging, but the Commission demurred. It was sufficient that "the record contains copies of the Agency's policy manuals on performance awards" and "that the [a]gency asserted that its industrial psychologist validated the [a]gency's use of its [Performance Appraisal and Communication System (PACS)] and its awards procedures," the two policies that the AJ identified as giving rise to the claims. The Commission did not require the class members in *Stan G.* to identify what elements in the SSA's "centralized awards system" were flawed and resulted in the observed disparities. The Commission reiterated that all that is required is "some evidentiary basis from which one could reasonably infer the operation of an overriding policy or practice of discrimination". *Stan G.*, EEOC App. No. 2020004534 (internal citation omitted).

Class Agents Robbins and Fordan have done far more that the Commission required in *Stan G*. Class Agents state that NASA provides guidance and training to the managers assessing class members' performance, though the guidance is flawed in various ways. *See, e.g.,* Cl. Agt. Open. Br. at 21- 22 ("Instructions, requirements, and guidelines are contained on NASA Forms 1763 (for nonsupervisory employees) and 1762 (for supervisory employees). The forms were essentially unchanged from March 2007 until May 2012, when several revisions were made….") (citations

omitted); Cl. Agt. Supp. Br. at 10 ("From the inception of EPCS in 2007, NASA set up agencywide training 'for all EPCS users' to ensure all supervisors and employees could use the new system.).

Moreover, any argument that the decision-making at issue was too subjective and diffuse to support a finding of a common discriminatory practice is unsupported by the record. EPCS is described by the Agency as "a systematic process for planning monitoring, developing, assessing, and rewarding employee performance…applicable to NASA HQ, Centers, and the Shared Services Center." NASA also specifies that the EPCS "establishes an Agency-wide performance management system that ensures alignment with the Agency's goals." Finally, "Standard Agency-wide performance plan and appraisal forms for supervisory and non-supervisory employees must be used by all Centers." As such, the Agency's guidance on the implementation of the EPCS undermines its argument that rating decisions related to performance and awards were subjective and diffuse.

Similarly, as affirmed in *Stan G.* by the Commission, Class Agents Robbins and Fordan have extensive statistical evidence, based on the data accessible to them, to support commonality for certification, which is further detailed below. The Supreme Court has held that statistics "showing racial or ethnic imbalance are probative . . . because such imbalance is often a telltale sign of purposeful discrimination; absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired." See *Int'l Bd. of Teamsters v. United States*, 431 U.S. 324, 339 n.20 (1977). The Commission has likewise affirmed that a class can be certified based on a showing that "statistically significant imbalances" exist. *Dunbar, et al. v. Soc. Sec. Admin.*, EEOC App. Nos. 0120081816, 0120081817, 0120081818 (Apr. 28, 2011)

Moreover, the Agency's contention that the EPCS is similar in decentralization to *Walmart* is also undercut by its changes to the policy in 2012, where such alterations were made to all units throughout the Agency. As demonstrated in the Class Agents' expert report, the Martell Report, "additional evidence of the uniform and Agency-wide nature of NASA's performance management system is evident in the manner in which the changes made by NASA in May 2012, changes that involved alterations in the performance appraisal system, were rolled out in 2013 to all the Units throughout the Agency. This wide-scale distribution could only occur if all NASA Units rely on the same performance appraisal system." Dr. Richard F. Martell Report at 20.

When looking at the Class Agents' compiled data there is need for context. It must be noted that the Martell Report worked with summary data (from years 2008-11) while the Lundquist Report worked with individualized data (from years 2012-18) after receiving discovery responses from the Agency in this case. In both reports, the data calculations are statistically significant to support a finding that the disparities between White employees' ratings and minority (African American and Asian American) employees' ratings could not have happened as a result of chance. Additionally, as a result of having individualized data, the Lundquist Report controlled for type of occupation, supervisor status, and grade levels (controlling for GS was important because White employees made up most of GS15). Overall, as seen in the Martell Report, the Lundquist

Report shows adverse results at each center every year for African American and Asian employees.

The Martell Report also points out that the Agency's EPCS is highly susceptible to racial bias within its framework for the reasons detailed below, which support the finding of a common discriminatory practice in this case. "Based on my review of completed NASA performance review documents used to evaluate employees, I have concluded that frequently the goals used for assessment (a) are ill-defined and not specific, (b) lack unambiguous performance measurement metrics and (c) do not include specific goal completion dates. In other words, they lack the key elements of SMART goals that serve to reduce ambiguity and subjectivity in the performance evaluation process and, in turn, provide safeguards against race bias in the assessments of minority employees." Martell Report at 12.

As explained by the Class Agents' expert, in the Lundquist Report, every variable reasonably available to her was used in her regression analyses, including centers, occupational groups, grades, and supervisory status. Cl. Agt. Supp. Br. at 8-9. Even taking the Agency's concern over educational disparities among the groups into account, such concerns are insufficient to deny certification of the two classes. As the Lundquist Report points out, controlling for such factors would exacerbate the already-existing gap in ratings among these employees. Given the fact that Class Agents have not had an opportunity to conduct depositions or to obtain and analyze a scientifically selected sample of performance appraisal forms while controlling for all the relevant variables, the analysis presented is far more substantive than expected. The work behind the Lundquist Report was far more comprehensive than the statistical work done in *Stan G*.

It is my ruling that Class Agents have presented sufficient evidence that the Agency's EPCS program, and any of its subsequent revisions and iterations (like the SPACE online appraisal process), was an Agency-wide initiative that effected a significant number of class members from 2008-2018. I find Class Agents have provided sufficient preliminary evidence of an extensive statistical representation that demonstrates the disparities among minority employees and White employees could not have happened as a result of chance but by some other factor. **The disparities between minority employees as compared to White employees exceed 3 standard deviations across the Martell and Lundquist Reports respectively.** This statistically significant result (across two expert reports) supports commonality of class certification. Any remaining concerns or deficiencies identified by the Agency contentions would go to the merits of the case (not whether the two classes should be certified).

When considering typicality, the overriding principle is that the interest of the class members must be fairly encompassed within the class agents' claims. Typicality exists where the class agents demonstrate some "nexus" with the claims of the class, such as the similarity in the conditions of employment and similarity in the alleged discrimination affecting the agent and the class. *Thompson v. U.S. Postal Serv.*, EEOC App. No. 01A03195 (Mar. 22, 2001). The Commission has found typicality where a complainant alleges class-wide discrimination due to excessive subjectivity in the promotion process. *Taylor v. Soc. Sec. Admin.*, EEOC App. No. 07A50060 (May 5, 2006); *Davis v. Labor, Employment & Training Admin.*, EEOC App. No. 01930457 (Sept. 10, 1993); and, *Conanan v. Fed. Deposit Ins. Corp.*, EEOC App. No. 01952486 (Jan. 13, 1998). The

claims need not be identical, only 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 agents' claims. *Cosentine, et al. v. Dep't of Homeland Sec.*, EEOC App. No. 01A23856 (Mar. 24, 2004).

The Agency's EPCS affected African American and Asian American employees ranging from GS levels 13-15 and various positions over the course of 2008-2018. The Class Agents and the members of the purported class have all been subjected to EPCS, including the SPACE online appraisal process. They have worked in a center in which minority employees regularly receive lower ratings than White employees. They are in grades 13-15 and received lower summary ratings. Robbins has never received a "Distinguished" rating, and Fordan has only once. As such, the EPCS creates the nexus between the Class Agents' claims and those of the purported class members to support a finding of typicality for certification in this case.

It should be noted that the Agency argues that Class Agent Robbins's claims are atypical of others in the class because Robbins purportedly did not timely initiate EEO contact. According to the Agency, of relevance:

- "[b]etween June 2009 and September 2010, Class Agent Robbins repeatedly used the FOIA process to obtain demographic and other statistical information related to the EPCS ratings for Wallops and/or GSFC employees[;]"
- "Robbins filed four **unit-wide** Step 2 grievances regarding the application of the EPCS to Wallops BUE's[,]" including a June 11, 2010 grievance alleging "that the [EPCS] 'as implemented at Wallops during the 2008/2009 appraisal period discriminates on the basis of race. . . . result[ing] in a disproportionate number of less-than Fully Successful (Level 3) ratings given to African Americans[;]'"
- "in 2010, [] Robbins and AFGE also sought intervention from Congress, claiming that the demographic data obtained via the FOIA process revealed that the EPCS, as implemented in Wallops, resulted in a disproportionate number of less-than-fully successful ratings being given to African American employees[.]"

I disagree. Under a continuing violation theory, employees may "proceed with complaints alleging a series of interrelated discriminatory acts, provided that at least one of the claims occurs within the forty-five day time limit." *Crazythunder, et al. v. Dep't of Health & Human Servs.,* EEOC App. Nos. 01986510, 01994921, 01995607 (Dec. 19, 2000) (citing *Reid v. Dep't of Commerce*, EEOC Req. No. 05970705 (Apr. 22, 1999)). In addition, "when the claims involve a discriminatory system, policy, or practice maintained beyond the forty-five day time period, complainant's failure to contact a counselor within forty-five days of a specific incident does not defeat her claim." *Crazythunder*, EEOC App. Nos. 01986510, 01994921, 01995607 (citing *Redmon v. Office of Personnel Mgmt.*, EEOC Req. No. 05991100 (Aug. 25, 2000)). "In cases where a system or policy of discrimination is sufficiently alleged, it is the ongoing program of discrimination, rather than any of its particular manifestations, that is the subject of attack." *Redmon,* EEOC Req. No. 05991100 (internal citations omitted).

I agree with the Class Agents' reasoning at 44-45 of its Consolidated Memorandum in Support of Class Certification and find that under *Tarrats v. Fed. Deposit Insurance Corp.*, EEOC App. No. 01A41422 (Nov. 15, 2004), a claim can reach back before the filing period if it was part of a

pattern-or-practice claim. I further find that the continuing violation doctrine applies to disparate impact claims, which the EEOC's Compliance Manual makes very clear.[6]

I also disagree with the Agency's assertion that the Commission should impute the knowledge of a Union Representative to the detriment of the Class. I find that public policy does not support prejudicing the Class on the basis that class members were covered by a collective bargaining agreement.

Furthermore, as stated in *Stan G.,"*AJ2 noted that the Commission found typicality in classes with employees of different GS levels and/or positions where the specific discriminatory policy created the nexus between the class agent's claim and those of the purported class, and where the differences in GS levels and positions had no impact on the harm each class member allegedly suffered. AJ2 also noted that the Agency did not contest the adequacy of representation, and that Class Agents submitted sufficient information to support adequacy of the representation requirements." *Stan G.,* at *5.

Here, the Agency's EPCS affected minority employees ranging from GS levels 13-15 and various positions over the course of 2008-2018. The Class Agents have also been subject to EPCS, including the SPACE online appraisal process. They have worked in a center in which minority employees regularly receive lower ratings than white employees. They are in grades 13-15 and received summary ratings of "Fully Satisfactory," (below average) as well as "Accomplished" (average) ratings. Mr. Robbins has never received a "Distinguished" rating, and Mr. Fordan has only once. As such, the EPCS creates the nexus between the CA's claim and those of the purported class to support a finding of typicality for certification in this case. *See* Class Agent Supplemental Memo (8-5) at 24.

Here, Class Agents' allegations concern an ongoing denial of higher level performance ratings on the basis of race before and after contacting his EEO counselor involving the Agency's performance appraisal system. This is sufficient to state a claim under the continuing violation theory of timeliness. The Class Agents allege that the performance appraisal system and process result in an "ongoing program of discrimination." *Redmon,* EEOC Req. No. 05991100. Therefore, the class allegations are timely. *See Crazythunder, et al.,* EEOC App. Nos. 01986510, 01994921, 01995607 (The Commission found timely "a pattern of non-selection and non-promotion occurring before and after counselor contact" raised in other forums regarding "the agency's failure to promote or select Native American women.").

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[6] *See* EEOC Compliance Manual, Sec. 2, *available at* http://www.eeoc.gov/policy/docs/threshold.html#N_195_:

> Example – In March 2003, CP files a charge alleging that Respondent discriminates against African-American applicants to its apprenticeship program. … The investigation reveals that African-American applicants for the apprenticeship program have been selected at a much lower rate than similarly qualified white applicants. Because Respondent's systematic discrimination against African-American applicants to the apprenticeship program constitutes a pattern or practice of discrimination, all discriminatory selection decisions under the program are timely.

B. NUMEROSITY

The criterion of numerosity requires that the class be sufficiently numerous that a consolidated complaint by its members is impractical. 29 C.F.R. §1614.204(a)(2)(i). This regulation is patterned on Rule 23(a)(1) of the Federal Rules of Civil Procedure. Rule 23 imposes no absolute limit for the size of a class complaint, but rather, requires an examination of the facts of each case. *General Telephone Co. v. EEOC*, 446 U.S. 318, 330 (1980). Other factors such as the geographical dispersion of the class, the ease with which class members may be identified, the nature of the action, and the size of each member's claim, are relevant to the determination of whether the numerosity prerequisite of Rule 23 has been met. *Zeidman v. J. Ray McDermott & Co., Inc.,* 651 F.2d 1030, 1038 (5th Cir. 1981).

Following Commission precedent, the numerosity requirement can be satisfied based on an agency's records. Based on their review of Agency records, Class Agents believe over 1,000 African American and over 1,000 Asian American employees in grades 13-15 have received systematically lower ratings than White employees across the Agency's 11 centers. There is no clear, persuasive evidence in the record disputing the accuracy of the number of members of these two proposed classes. Regardless, the estimated size of both classes need not be determined at this stage of the proceedings.

C. ADEQUACY OF REPRESENTATION

Adequacy of representation "is perhaps the most crucial requirement because the judgment will determine the rights of absent class members." *Bailey v. Dep't of Veterans Affairs*, EEOC Req. No. 05930156 (July 30, 1993) (citing to *Hansberry v. Lee,* 311 U.S. 32, 41 (1940)). Adequacy requires that "[t]he agent of the class, or, if represented, the representative, will fairly and adequately protect the interests of the class." 29 C.F.R. § 1614.204(a)(2)(iv). "The class representative should have no conflicts with the class" and any attorney representing the class agent and class must have the "requisite skills and experience." *Sedillo*, EEOC App. No. 07A2007. "The Commission has previously held on numerous occasions that a lack of experience in class action litigation can be fatal to meeting the adequacy of representation requirement for class certification." *Id.*

Class Agents' counsel have provided sufficient information confirming their experience in class action litigation. Cyrus Mehri, Michael Lieder, and Ezra Bronstein with Mehri & Skalet, PLLC, have previously served as counsel in class action litigation, in addition to numerous years of experience in employment discrimination claims involving federal employees. The law firm of Brown, Goldstein, and Levy, LLP, has also served as counsel in class action litigation and has more than sufficient experience. It is not disputed that Class Agents have fully demonstrated that counsel possesses the skills and experience to litigate class actions.

I also find Class Agent Robbins and Class Agent Fordan to be adequate representatives. I do not find the Agency's arguments as to an actual or possible conflict of interest persuasive.

VI. CONCLUSION

Therefore, based on a careful review of the record, the Class Agents' Motions for Class Certification are GRANTED. The two classes are accepted and defined as follows:

> All African American employees in grades 13-15 who received less than a "Distinguished" rating on their annual performance since 2008 under the Agency-wide performance appraisal system.
>
> All Asian American employees in grades 13-15 who received less than a "Distinguished" rating on their annual performance review since 2008 under the Agency-wide performance appraisal system.

The Agency is further ORDERED to identify employees as delineated in the description of the two classes and provide the name, address, email address, and telephone number to the Class Agents. Within thirty (30) days of the date of this Decision, the Agency shall notify all class members of the acceptance of the class complaint by email and regular mail to the last known address. Such notice shall contain: (i) The name of the Agency and organizational segment, its location, and the date of acceptance of the complaint; (ii) A description of the issues accepted as part of the class complaint; (iii) An explanation of the binding nature of the final decision or resolution of the complaint on class members; and, (iv) The name, address, email address and telephone number of the Class Agents and their counsel.

It is so ORDERED.

For the Commission: /s/ Stephanie Herrera
Stephanie M. Herrera
Supervisory Administrative Judge

NOTICE TO THE PARTIES

The Administrative Judge's decision to accept or dismiss the class complaint is subject to final agency action. The agency has forty (40) days from receipt of the Administrative Judge's decision to take final action by issuing a final order informing class agents as to whether the agency will fully implement the decision. If the agency informs class agent that it does not intend to fully implement the decision, the agency must simultaneously file an appeal with the Commission and append a copy of the appeal to the final order served on class agent. The agency may use the form, Appendix O, to file its appeal with the Commission. Class agents will have thirty (30) days from receipt of the final order to file an appeal and the agency shall provide complainant with a copy of EEOC Form 573, Notice of Appeal/Petition (Appendix P). *See* EEO Management Directive for 29 C.F.R. § 1614 (MD-110) (Aug. 2015).

HOW TO FILE AN APPEAL

RECOMMENDED METHOD – The EEOC highly recommends that you file your appeal online using the EEOC Public Portal at https://publicportal.eeoc.gov/, and clicking on the "Filing with the EEOC" link. If you have not already registered in the Public Portal, you will be asked to register by entering your contact information and confirming your email address. Once you are registered you can request an appeal, upload relevant documents (e.g., a statement or brief in support of your appeal), and manage your personal and representative information. During the adjudication of your appeal, you can also use the Public Portal to view and download the appellate record. **If you use the Public Portal to file your appeal, you do not have to send a copy to the agency.** A complainant with an account with the EEOC's Public Portal may waive receipt of the appellate decision via U.S. mail and receive the decision via the EEOC Public Portal. Federal agencies will receive the appellate decision via the FedSEP digital platform.

BY MAIL – You may mail your written appeal to:

Director, Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 77960
Washington, D.C. 20013-8960

BY HAND DELIVERY OR COURIER – You can also hand-deliver or send your appeal by courier service to:

Director, Office of Federal Operations
Equal Employment Opportunity Commission
131 M St., NE
Washington, D.C. 20507

BY FAX – Finally, you may send it by facsimile to (202) 663-7022.

If you elect to mail, deliver, or fax your appeal you should use EEOC Form 573, Notice of Appeal/Petition, and should indicate what you are appealing. Additionally, you must serve the agency with a copy of your appeal, and include a statement certifying the date and method by which service to the agency was made.

Facsimile transmissions over 10 pages will not be accepted.

CERTIFICATE OF SERVICE

I certify that on September 30, 2022, the foregoing Order was served by electronic issuance to the following:

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/s/ Stephanie Herrera
Supervisory Administrative Judge