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IN THE REQUEST FOR CLASS CERTIFICATION OF ROBERTA M. GABALDON AND COURTNEY SCHILLING COMPLAINANTS/CLASS AGENTS vs. ALEJANDRO MAYORKAS SECRETARY, U. S. DEPARTMENT OF HOMELAND SECURITY, (U.S. CUSTOMS AND BORDER PROTECTION), AGENCY.	EEOC NO. 450-2017-00086X AGENCY NO. HS-CBP-00258-2017 *CLASS COMPLAINT DATE: APRIL 21, 2023

DECISION ON THE CLASS AGENTS' MOTION FOR CLASS CERTIFICATION

1. Introduction

This proposed class case is before the United States Equal Employment Opportunity Commission for certification on the following issue:

> Whether the United States Department of Homeland Security, U.S. Customs and Border Protection (Agency), discriminated against employees on the basis of their sex (female/pregnancy) in violation of the Pregnancy Discrimination Act (PDA) of 1978, which amended Section 701 of Title VII of the Civil Rights Act of 1964, when they were removed from their work assignments and reassigned into other work assignments pursuant to the Agency's policies and/or practices because they were pregnant, without assessing whether they could continue to perform the essential functions of their positions of record with or without an accommodation and without according them the process and protections afforded to employees with comparable short-term disabilities.[1]

The Class Agents present the following class for certification:

> All women who were employed as U.S. Customs and Border Protection ("CBP") Officers and Agriculture Specialists and were placed on temporary light duty pursuant to CBP's Temporary Light Duty Policy due to their pregnancy, at any time after July 18, 2016.[2]

[1] Amended Order on Complainants/Class Agents' Motion to Amend of September 30, 2022.
[2] Notice of Correction to Memorandum and Reply in Support of Class Certification of January 6, 2023.

2. Background

On September 30, 2022, the Class Agents filed their Motion for Class Certification (Motion for Class Certification). On October 7, 2022, the Class Agents filed their Notice of Additional Declarations in Support of Motion for Class Certification. On November 9, 2022, the Agency filed its Agency's Opposition to Complainant's Motion for Class Certification (Opposition). On December 16, 2022, the Class Agents filed their Reply in Support of Motion for Class Certification (Reply).

The Class Agents contend that the Agency's temporary light duty (TLD) policy violates the PDA because it treats pregnant CBP Officers and Agricultural Specialists (pregnant employees) differently than employees with a non-work-related injury or illness who are eligible for TLD. The Class Agents assert that the Agency's supervisors will place pregnant employees on TLD involuntarily because they are pregnant without inquiring whether the pregnant employees can perform the essential duties of their position of record. The Class Agents contend that class members consist of 515 pregnant employees who were placed on TLD after July 2016.

According to the Class Agents, supervisors across the Agency's field offices have a pattern or practice of involuntarily placing pregnant employees on TLD as soon as the pregnant employee discloses her pregnancy because of the Agency's TLD policy. The Class Agents note that in contrast to pregnant employees, supervisors will only place injured or ill employees on TLD if the injured or ill employee requests TLD. In addition, per the TLD policy, the supervisor will offer that injured or ill TLD employee additional workplace accommodations not offered pregnant employees.

The Class Agents assert that supervisors involuntarily reassign the pregnant employees from their positions of record into TLD positions with substantially fewer job duties and responsibilities, which impact the pregnant employees' ability to earn overtime or other types of differential-pay. In addition, the Class Agents contend that the TLD policy as applied to pregnant employees impairs their chances of promotion, renders them ineligible for various training opportunities, and affects their chances of obtaining preferred schedules. Finally, the Class Agents observe any employee, pregnant or not, who is placed into a TLD position--voluntarily or involuntarily--loses their right to carry a firearm, and it may require that employee to requalify for the firearm.

The Agency concedes that if a supervisor involuntarily placed a pregnant employee into a TLD position because of her pregnancy it would presumably violate the PDA. However, the Agency argues that the putative class lacks commonality because the Agency policy only allows supervisors to place employees--whether injured, ill, or pregnant--into a TLD position with the employee's express written consent. According to the Agency, if a supervisor placed a pregnant employee into a TLD position without that employee's written consent, it was contrary to the Agency's express policies, directives, and guidance. Thus, there is no evidence of an overriding Agency policy or practice of discrimination necessary to establish commonality.

Similarly, the Agency asserts that the Class Agents lack typicality because without an Agency policy common to the class, the claims of the Class Agents and the claims of the other impacted pregnant employees involuntarily placed into a TLD position are different. The Agency also argues that the putative Class Agents lack numerosity because they only produced sworn testimony from 23 proposed class members who were purportedly involuntarily placed into TLD positions because of their pregnancy.

The Agency argues that because the putative Class Agents conducted extensive discovery during the pre-certification phase, that included approval to contact all members of the putative class, they cannot now claim that there are other potentially pregnant employees who were involuntarily placed into TLD positions.

3. Statement of Facts

A. The Agency's Mission and Organization

The Agency is divided into three major components, one of which is the Office of Federal Operations (OFO). The OFO is primarily composed of uniformed law enforcement officers, namely CPB Officers and CBP Agriculture Specialists. The primary mission of the OFO is to facilitate legitimate travel and trade at the ports of entry to the United States; to prevent, detect, and interdict terrorism and the introduction of illegal drugs and other contraband into the country; and to prevent the entry of persons through ports of entry who do not have a legal basis to be in the United States. To that end, the OFO operates many ports of entry across the borders and interiors of the United States at seaports, airports, and land crossings. (Opposition, Exhibit 6, p. 8).

In addition to its headquarters elements, the OFO operates 21 Field Offices that among them contain over 300 ports of entry. (Opposition, Exhibit 6, p. 9). Every Field Office is overseen by a Director of Field Operations. (Opposition, Exhibit 6, pp. 9-10).

A Port Director manages operations for each port of entry. (Opposition, Exhibit 6, p. 11). CBP Officers conduct most of the actual inspection of persons and cargo that seek entry into the United States. (Opposition, Exhibit 6, pp. 12-14). The CBP Officers and CBP Agricultural specialists are supervised by the following uniformed positions in ascending order: Supervisory CBP Officers; Chief CBP Officers; Watch Commanders; Assistant Port Directors; and Port Directors. (Opposition, Exhibit 6, p. 12).

CBP Officers are law enforcement officers and the primary enforcers of customs, immigration, and various criminal statutes at United States ports of entry. (Opposition, Exhibit 9, p. 3). CBP Officers, as law enforcement officers, carry firearms and other less lethal devices on duty and must be able to deploy various levels of force in response to threats encountered in the performance of their duties, ranging from physical restraint to lethal force with firearms. As such, CBP Officers are required to maintain physical standards sufficient to engage in these use-of-force and other law enforcement duties and are expected to be able to perform strenuous physical activities during the workday. (Opposition, Exhibit 9, p. 9).

CBP Agriculture Specialists are intended to function as specialists in inspection, intelligence, analysis, examination, and other activities concerning the importation or exportation of plants, plant products and miscellaneous articles of restricted or prohibited agricultural commodities at United States ports of entry. (Opposition, Exhibit 10, p. 3). While not a law enforcement position and not subject to specific physical standards, CBP Agriculture Specialists must still be able to meet physical demands in the course of their duties. (Opposition, Exhibit 10, p. 9).

B. The Agency's TLD Policy and History

In 2011, the Agency and the union entered into a collective bargaining agreement which provided for TLD. The TLD policy covered most employees within OFO, excluding non-bargaining unit employees. The 2011 CBA provisions that related to light duty and pregnant employees were Article 33 ("Health and Safety"), Section 11.A, and Article 43 ("Use of Force and Firearms"), Section 26.

Article 33 ("Safety and Health"), Section 11.A. provided the following in relevant part:

> "A pregnant employee or an employee returning to work after an injury, illness or pregnancy with a medical certificate indicating that the employee should work restrictively and that full recovery is expected, will be considered for light duty by her supervisor on a case-by-case basis. An assignment to light duty appropriate to the specific medical condition will normally be granted for a temporary period, if such work is available and the assignment will not unduly disrupt work operations." (Exhibit 1, p. 11, attached to the Agency's Opposition)."

Article 43 ("Use of Force and Firearms"), Section 26 provided the following:

> "A. If a pregnant employee authorized to carry firearms in the course of her duties wishes to perform the full range of duties envisioned in the position to which she is assigned, the Employer may request a medical certificate stating that the employee is physically capable of performing the full range of duties.
>
> B. Employees who elect to perform the full range of duties must qualify in accordance with appropriate firearms policy.
>
> C. Light duty for a temporary period will be considered for a pregnant officer or for an officer returning to work after an injury, pregnancy, or illness, provided that such work is available and the assignment will not unduly disrupt the work unit's operation.
>
> In such cases, the officer must provide a medical certificate indicating that the officer should work restrictively and that full recovery is expected." (Opposition, Exhibit 1, p. 19).

In January 2013, the Agency issued the TLD policy as an Agency Directive. (Opposition, Exhibit 3, p. 1). This Agency Directive governed the administration of TLD for:

". . . any employee of CBP who is suffering from a medical illness or injury, is pregnant, or requires treatment of a licensed physician or practitioner, and who, because of injury or illness sustained off duty, or pregnancy, is temporarily unable to perform essential duties of his or her position but is capable of performing alternative assignments." (Opposition, Exhibit 3, p. 1).

The Directive also provided that in situations in which there were insufficient TLD positions, then employees that suffered on-the-job injuries and were approved for benefits under the Federal Employee Compensation Act (FECA) would receive priority for a TLD-position over employees approved for such assignments under the TLD Agency Directive. (Opposition, Exhibit 3, p. 4).

In 2017, the Agency and union amended the CBA to remove the reference to pregnancy in Article 33, but otherwise left the provision intact.[3] (Opposition, Exhibit 2, p. 11). The 2017 CBA left the language of Section 26 of Article 43 from the 2013 CBA intact, but the provision was moved to a different section. (Opposition, Exhibit 2, p. 19).

In 2018, the Agency amended the TLD Agency Directive to remove the provision that employees injured on-the-job who are receiving FECA benefits would have priority for TLD positions over employees approved for such assignments under the TLD Agency Directive.[4] Otherwise, the Agency's 2018 TLD Directive remained unchanged from its 2017 TLD Directive. (Opposition, Exhibit 4).

The Agency's 2013 TLD Directive and its 2018 TLD Directive were applicable to all Agency employees. (Motion for Certification, p. 5). The Agency did not conduct any training on the TLD Directive for mangers, supervisors, or employees. (Motion for Certification, p. 13).

4. Applicable Law

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

[3] Article 33, Section 11a of the 2017 CBA is as follows:

> An employee who returns to work after an off duty medical condition who has a medical certificate indicating the employee should work restrictively and that full recovery is expected, will be considered for light duty on a case-by-case basis. If management determines it is available, employees who return to work after an on duty or off duty injury, illness, or medical condition (see Section 10A and 11A) will be assigned light duty assignments on the shifts they occupied immediately prior to assuming light duty. An assignment to light duty appropriate to the specific medical condition will normally be granted for a temporary period, if such work is available and the assignment will not unduly disrupt work operations.

[4] The Agency's reason for the change to the Agency's TLD Directive was to align it with the EEOC's updated guidance on pregnancy discrimination following *Young v. UPS*, 575 U.S. 206 (2015), which prohibited treating employees with on-the-job injuries more favorably than those with other medical conditions, including pregnant women. (Exhibit 5, pp. 10-12, attached to the Agency's Opposition).

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 Class Agents, as the parties seeking certification of the class, carries the burden of proof, and it is their obligation to submit sufficient probative evidence to demonstrate satisfaction of the four regulatory criteria. *Stan G., v. Social Security Administration,* EEOC Appeal No. 2020004534*,* (May 19, 2021) citing to *Anderson, et al. v. Dep't of Def*., EEOC Appeal No. 01A41492 (Oct. 18, 2005); *Mastren, et al. v. U.S. Postal Serv*., EEOC Request No. 05930253 (Oct. 27, 1993).

Commonality requires that there be questions of fact common to the class. The Class Agent therefore must establish some evidentiary basis from which one could reasonably infer the operation of an overriding policy or practice of discrimination. This can be accomplished 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 against members of the class. *Hopkins v. U.S. Postal Serv.*, EEOC Appeal No. 01A02840; *Mastren v. U.S. Postal Serv.,* EEOC Request No. 05930253 (Oct. 27, 1993). Mere conclusory allegations, standing alone, do not show commonality. *Id.*

Typicality requires that the claims of the class agent be typical of the claims of the class. 29 C.F.R.§ 1614.204(a)(2)(iii). The overriding typicality principle is that the interests of the class members must be fairly encompassed within the class agent's claim. *Falcon*, 457 U.S. at 160. *See also Hopkins*, EEOC Appeal No. 01A02840. The Commission found a lack of typicality because the purported class based on race, sex, disability and reprisal consisted of members who were of various races and both sexes, while only two had disabilities and one engaged in prior EEO activity. *Thaddeus N. v. U.S. Postal Serv.*, EEOC Appeal No. 0120142701 (Feb. 6, 2019).

EEOC Regulation 29 C.F.R. § 1614.204(a)(2)(i) requires that a class be so numerous that a consolidated complaint of the members of the class is impractical. This regulation is patterned on Rule 23(a)(1) of the Federal Rules of Civil Procedure. The Supreme Court has indicated that the numerosity requirement of 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). Thus, although courts are reluctant to certify classes with 30 or fewer members, there are no specific numerical cut-off points. *See Harris v. Pan American World Airways,* 74 F.R.D. 24, 23 F.R. Serv. 2d 1335, 1349 (N.D. Cal. 1977). In addition to number, 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 plaintiff'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).

The final requirement for class certification requires a showing by the Class Agents that as the Agents of the class, or, if represented, the representatives, will fairly and adequately protect the interests of the class. 29 C.F.R. § 1614.204(a)(2)(iv). The Class Agents should have no conflicts with the class and should either have sufficient legal training and experience to pursue the claim or designate an attorney with the requisite skills and experience. *Kennedy v. National Aeronautics & Space Admin.*, EEOC Appeal No. 01993626 (Apr. 26, 2001).

5. Analysis and Findings

A. Commonality and Typicality

i) Arguments on Commonality on Typicality

The Class Agents argue that the Agency's TLD Directive distinguishes pregnancy from all other short-term impairments and that the TLD Directive permits the Agency to place employees into TLD positions without regard to whether they can perform the essential duties of their position of record. (Motion for Certification, p. 23). The Class Agents contend that the TLD Directive distinguishes between pregnant employees and employees with short-term impairments because the Directive permits pregnant employees "to be placed on light duty because of their pregnancy without regard to whether they can continue to perform the essential functions of their positions of record." (Motion for Certification, p. 23).

The Class Agents contend that the following six factors are sufficient probative evidence to support the commonality requirement for class certification:

> "The text of the TLD policy which distinguishes pregnancy from all other short-term impairments and an admission that the policy does not preclude managers from placing pregnant employees on TLD involuntarily.
>
> The Agency could not provide a legitimate, non-discriminatory reason for singling out pregnancy in the TLD policy. *See supra* 6-7 (citing representative testimony from the Agency's chief labor negotiator at the time the TLD policy was developed that he could not explain why the policy differentiated pregnancy from all other short-term impairments).[5]
>
> Unlike the Accommodation Policy, the Temporary Light Duty policy fails to require an individual assessment of an employee's ability to continue performing the essential duties of the position of record or provide accommodations that could permit them to remain in their positions of record. *See supra* II.D.2.
>
> The TLD policy consistently applies throughout all field offices. *See supra* II.B.1.
>
> CBP failed to provide field office supervisors the necessary guidance or training about how to implement the TLD policy in a lawful manner. *See supra* 5.

[5] The "supra" text in the quoted section refers to a page number or section in the Motion for Certification.

> Employees in the 11 of the 20 field offices, from which nearly 80% of all temporary light duty placements for pregnant workers originate, provided sworn accounts that they and others were involuntarily placed on temporary light duty after disclosing their pregnancy, without regard to whether they could continue to perform the essential duties of their positions of record. *See supra* II.D.1." (Motion for Certification, p. 25).[6]

The Agency argues that there are no "questions of fact common to the class, that is the same action or policy affected all members of the class" because the Agency's TLD Directive "plain black-and-white language" is that a supervisor may only place a pregnant employee, or any employee, on light duty at the "explicit request in writing from the employee." (Opposition, pp. 26-27, citing to *Footland v. Dept. of Commerce*, EEOC Appeal No. 0120071973 (May 15, 2012); request for reconsideration denied EEOC Request No. 0520120179 (May 15, 2012).

The Agency asserts that "[the Class Agents'] overall theory of the case necessarily fails because they cannot point to any Agency policy or practice which undergirded or led to the allegations of the 23 putative class members." (Opposition, p. 27).

The Agency argues there are several pieces of evidence that support its argument against commonality. First, it notes the Agency officials deposed during discovery testified that managers do not have the authority to order someone on TLD without a request from the employee to go on TLD. (Opposition, p. 7). Second, it argues the Agency's TLD Directive is clear that the only way an "Approving Official" may approve or disapprove a TLD request is after the employee submits a written request for TLD.[7] (Opposition, p. 11, fact 16 and Exhibit 3, p. 2, attached to Opposition). Third, the Agency notes that its 2016 Supervisor's Desk Reference Guide states that it is the employee's responsibility to request TLD. (Opposition, pp. 11-12, fact 19 and Exhibit 15, p. 7, attached to Opposition).[8] Fourth, it argues that because the Class Agents provided sworn testimony from relatively few pregnant employees who contend they were involuntarily placed into TLD positions when compared to the number of pregnant employees who were placed into TLD positions, presumably at the pregnant employee's request, demonstrates that the practice of involuntarily placing a pregnant employee on TLD is so rare and unusual that it cannot be the result of an Agency-wide policy. (Opposition, pp. 27-28). Fifth, it asserts that the putative class members are concentrated in a limited number of Field Offices along the southwest border of the United States, which suggests that any misunderstanding of the TLD Directive is limited to a handful of offices and not because of an Agency-wide policy. (Opposition, pp. 32-33).

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[6] The Class Agents' provided sworn testimony from a combination of sworn declarations from pregnant employees provided to the Class Agents and from various Reports of Investigation after pregnant employees filed individual formal complaints of discrimination. (Motion for Certification Exhibits 11a-11p, Exhibits 12, 14, 17, 18, 19, and 20).

[7] The Directive defines "Approving Official" as a management official authorized to approve or disapprove requests for TLD; the Agency asserts they are typically GS-14 or higher officials. (Opposition, p. 11, fact 16 and Exhibit 3, p. 2).

[8] The Agency also attached as an Exhibit to its Opposition, the 2020 Supervisor's Desk Reference Guide. In their Reply, the Class Agents' moved to strike the 2020 Supervisor's Desk Reference Guide from consideration because it was not produced in discovery. (Reply, p. 6, fn. 3). After a review, I find the relevant section in the 2020 Desk Reference Guide regarding the TLD Directive is not materially or meaningfully different than the relevant section regarding the TLD Directive in the 2015 Desk Reference Guide. I decline to strike the 2020 Supervisor's Desk Reference Guide because the immaterial change makes the objection moot.

The Agency acknowledges the TLD Directive references pregnancy by name but argues that "the most reasonable reading is that the Agency meant to make it clear simply that pregnancy is in fact a condition that permits light duty." (Opposition, p. 29). The Agency notes that its interpretation of the TLD is the most "common-sensical" because "pregnancy has occupied an ambiguous position in employment discrimination and disability law" and that it included pregnancy in the TLD Directive "to ensure that pregnant employees would be able to avail themselves of this benefit offered by the Agency." (Opposition, p. 30).

The Agency disputes Complaints' contention that the TLD Directive does not require any individual assessment for employees on TLD. (Opposition, p. 31). The Agency notes that its TLD Directive requires that a TLD position must fall within an employee's medical restrictions. (Opposition, p. 31 and Exhibits 3 and 4, paragraph 8.2.1).

The Agency contends that the Class Agents' argument that the Agency has failed to provide sufficient guidance to supervisors regarding its TLD Directive is specious because the TLD Directive's language is unambiguously clear that pregnancy is treated the same as other short-term impairments, and it requires the employee to initiate the request for TLD. The Agency also asserts that the Supervisor's Desk Reference Guide provides further clarity that TLD is a voluntary option for all employees. (Opposition, p. 32).

The Agency argues that because there is no overriding policy or practice, a certification of the class is inappropriate because it would require a review of each class members' "distinct, individualized incidents" and that is not "efficient adjudication" for a class action hearing. (Opposition, p. 34).

Regarding typicality, the Class Agents argue that the putative Class Agents are each challenging the application of the TLD Directive or policy to them when they were placed on TLD because of their pregnancy, and thus their claims are sufficiently typical to encompass the general claims of the class members.

The Agency argues that the typicality requirement is not satisfied because there is no overriding Agency policy or practice satisfying the commonality requirement. Thus, each of the putative co-class members claim is unique, and lacks typicality.

ii) Analysis of Commonality and Typicality

The Class Agents have submitted sufficient probative evidence that the Agency subjected pregnant employees to a policy that distinguished pregnancy from other short-term impairments and involuntarily placed them on TLD because they were pregnant without regard to whether they can continue to perform the essential duties of their positions of record.

The Class Agents provided sworn testimony from 24 pregnant employees from 11 of the 20 field offices, including offices in New York, Detroit, Baltimore, Miami-Tampa, San Francisco-Portland, Seattle, El Paso, Laredo, Houston, San Diego, and Los Angeles, that they were placed on TLD involuntarily after they disclosed their pregnancy. (Reply, pp. 7-8). The 11 field offices represented are from the eight largest field offices and from which approximately 80 percent of all TLD placements from pregnant employees occurred. (Reply, pp. 7-8).

The pregnant employees sworn testimony describes their placement into the TLD positions without any individual assessment as to whether they can continue to perform the duties of their positions of record. I note that the pregnant employees' sworn testimony asserts that the placement into the TLD positions was involuntary, and the TLD positions were less desirable than their positions of record, and resulted in loss of opportunities for overtime pay, additional training, and the use of a firearm. The Agency concedes that if such a policy exists, it would "presumably" violate the PDA. (Opposition, p. 22).

In addition, the dispute between the parties over the interpretation of the TLD Directive and whether the Agency's lack of training on the TLD Directive is evidence of an unlawful discriminatory policy present questions common to the class supporting certification. (Reply, p. 7).

I conclude that the pregnant employees sworn testimony that provides specific incidents of discrimination in the same manner with the same set of adverse actions taken is sufficient probative evidence to satisfy the commonality requirement for class certification.

Regarding typicality, the Agency's argues that because the class lacks commonality it lacks typicality. I have concluded the Agency's TLD policy is a discrete Agency employment action satisfying the commonality requirement. I also find that the Class Agents are challenging the Agency's TLD policy and their placement onto TLD because of their pregnancy. I conclude that the Class Agents' claims are sufficiently typical to encompass the general claims of the class members.

B. Numerosity

i. Arguments on Numerosity

The Class Agents argue that the putative class is composed of 515 pregnant employees who were placed on TLD or went on leave pursuant to the Agency's TLD Directive or policy during the relevant time. The Class Agents assert that 515 class members easily satisfies the numerosity requirement.

The Agency argues that the class fails to satisfy the numerosity requirements because the Class Agents only submitted evidence that 23 class members were involuntarily placed into TLD positions.[9] (Opposition, pp. 18-19). The Agency asserts that the class cannot be made up of all the 515 pregnant employees who were placed into TLD or took leave because there is no evidence

[9] The Agency challenged the inclusion in the class of four pregnant employees for whom the Class Agents provided sworn testimony. (Opposition, pp. 19-21). The Agency argued that the sworn testimony of the four pregnant employees established they were not part of the class because the pregnant employees either requested TLD and were complaining about the terms and conditions of its implementation of their TLD position or in one case the event occurred before 2016, which is the start of the class period. (Opposition, pp. 19-21). I find one of the employees excluded-Tara Gray—did allege that she was subjected to an involuntary TLD after she announced her pregnancy in 2019. (Reply, p. 17, fn. 10). Even assuming that three of the four pregnant employees did not suffer a harm as a result of the Agency's TLD policy, there are 24 pregnant employees who claim they were involuntarily placed on TLD because of the Agency's discriminatory TLD policy.

that they all suffered any harm or loss. The Agency asserts that at best the class can only be comprised of those pregnant employees that supervisors involuntarily placed on TLD because of their pregnancy. (Opposition, pp. 21-24). The Agency argues that the Class Agents cannot contend that there are additional putative class members who have not been identified because the Agency provided the Class Agents in discovery a list of nearly all pregnant employees since 2013 who were placed onto TLD, and the Class Agents could only find a little over 20 pregnant employees who were improperly placed on TLD because of their pregnancy. (Opposition, pp. 25-26).

In their Reply, the Class Agents argue that the Agency's has misconstrued the numerosity criterion to require the Class Agents to produce sworn testimony from every class member harmed, or by producing evidence that each putative class member suffered the same harm. (Reply, pp. 8-12). The Class Agents argue that to satisfy the numerosity requirement they only need to show that sufficiently numerous employees were subjected to the same unlawful employment practice. (Reply, pp. 8-12). The Class Agents contend that the production of the sworn testimony was not submitted to establish numerosity but to establish commonality because it shows in a "majority of field offices a pattern or practice of the TLD policy has been administered to place on temporary light duty pregnant employees solely because of their pregnancy." (Reply, p. 10). The Class Agents note that whether a pregnant employee subjected to the TLD policy suffered harm "implicates the remedies, if any, to which each class member is entitled." [10] (Reply, p. 12).

ii. Analysis of Numerosity

The Class Agents have submitted sufficient probative evidence to satisfy the numerosity requirement. At the certification stage, the Class Agents are not required to submit sworn testimony from a significant number of putative class members to establish numerosity. (Opposition, pp. 22-23; citing to *Valentin P. v. Dep't of Army*, EEOC Appeal No. 0120113722 (December 16, 2016) (Class Agent was able to satisfy the numerosity requirement although identifying only 20 putative class members because the Class Agent was able to show the putative class consisted of over 800 employees subject to the policy); *see also* Reply, pp. 1-2 and pp. 8-12 and *Tessa L. v. Dep't of Agriculture*, EEOC Appeal No. 0720170021 (November 3, 2017) (the Commission found that the Class Agent was not required to prove that each potential class member had a viable claim, and also that the Class Agent showed that there were 40 hearing-impaired employees who were possibly affected by the Agency decision to decentralize interpreting services.) Here, the sworn testimony from 24 pregnant employees who were involuntarily placed into TLD positions provides the sufficient probative evidence that the Agency's TLD policy was applied to 515 pregnant employees in manner that may have violated the PDA.

I also find that the sworn testimony demonstrates that the putative class members are sufficiently dispersed geographically to render joinder impracticable. I find that the class members can be easily identified because the parties know the names of the approximately 515 pregnant employees placed on TLD from 2016 onward. I find that the size of each members claims could

[10] *See Velva B. v. U.S Postal Service*, EEOC No 0220160006 and 0720160007 (September 25, 2017); request reconsideration denied EEOC Request Nos. 0520180094 and 0520180095 (March 8, 2018) (class members need only establish that they suffered compensable harm once the case has reached the remedies stage of the proceeding).

be individually minimal or nominal because TLD assignments for pregnant employees are presumably for a duration no longer than the pregnancy. A class case is the most efficient and equitable method of adjudicating claims of this size. I conclude that because joinder is impracticable, the putative class members easily identifiable, and the size of the claims relatively small, the Class Agents' have satisfied the numerosity requirement.

At the class certification stage, I need not determine if every pregnant employee subjected to the TLD Directive was harmed because she may have voluntarily requested TLD. As the Class Agents note, at the liability stage, the Class Agents would produce evidence that "pregnancy was plainly treated differently than other short term impairments, sworn accounts of how the policy has been administered throughout the Agency field offices and evidence of the failure of the Agency to forbid supervisors from placing pregnant employees on temporary light duty solely because of their pregnancy." (Reply, p. 21, citing to *United States v. International Brotherhood of Teamsters,* 431 U.S. 324 (1977). At the liability stage, the Class Agents are not required to "offer evidence that each person for whom it will ultimately seek relief was a victim of the employer's discriminatory policy." *Teamsters*, 431 U.S. at 360. If liability is established, then the burden is on the Agency at the remedial stage to prove that the pregnant employee subjected to the unlawful employment policy was placed on TLD for lawful reasons. *Teamsters*, 431 U.S. at 361.

C. Adequacy of Representation

I find the Class Agents have submitted sufficient probative evidence that they have no conflicts with class and that their representatives will fairly and adequately represent the interests of the class. Both law firms representing the Class Agents have significant combined experience representing plaintiffs in employment discrimination class cases and with the EEOC administrative proceedings. (Motion for Certification, pp. 27-28). I note that the Agency does not contest the adequacy of the representation.

6. Conclusion

Therefore, based on a review of the record, the Class Agents' Motions for Class Certification is approved. The certified class is as follows:

> All women who were employed as U.S. Customs and Border Protection ("CBP") Officers and Agriculture Specialists and were placed on temporary light duty pursuant to CBP's Temporary Light Duty Policy due to their pregnancy, at any time after July 18, 2016.

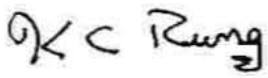
Within thirty (30) days of the date of this Decision, the Agency shall use reasonable means, such as hand delivery, mailing to the last known address, or distribution (such as through inter-office mail or email) to notify all class members of the certification of the class complaint. An Agency may file a motion with the Administrative Judge seeking a stay in the distribution of the notice for the purpose of determining whether it will fully implement or appeal the Administrative Judge's decision. *See 29 C.F.R. § 1614.204(e)* and *Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614* (EEO MD-110), at Chap. 8 § V. A (Aug. 5, 2015).

The "reasonable means" used by agencies for notification should be those most likely to provide an opportunity for class members to know about the complaint. Conspicuous posting on bulletin boards to which all potential class members have easy access may constitute adequate notice in some situations.

The notice must contain:

1. the name of the agency or organizational segment, its location, and the date of acceptance of the complaint;
2. the definition of the class and a description of the issues accepted;
3. an explanation of the binding nature of the decision or resolution of the complaint on class members;
4. the name, address, and telephone number of the class representative; and
5. a copy of the Administrative Judge's decision certifying the class. *See EEO MD-110* at Chap. 8 § V.B (Aug. 5, 2015).

It is so ORDERED.



For the Commission

_____
Administrative Judge
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