1986 WL 11389
United States District Court, District of Columbia.

Christine A. HANSEN, Plaintiff,
v.
William H. WEBSTER, Director, Federal Bureau of Investigation, et al., Defendants.

Civ. A. No. 84–3026.
|
June 30, 1986.

Attorneys and Law Firms

Richard M. Sharp, John Townsend Rich, Elizabeth Runyan Geise, Shea & Gardner, Washington, D.C., for plaintiff.

Judith F. Ledbetter, Felix Baxter, Civil Division, Washington, D.C., for defendants.

MEMORANDUM OPINION AND ORDER

JOYCE HENS GREEN, District Judge.

***1** Before the Court are the parties' cross-motions for summary judgment. Plaintiff Christine A. Hansen challenges aspects of a ruling of the Equal Employment Opportunity Commission's Office of Review and Appeals (ORA) denying individual relief to herself and members of an administrative class that Ms. Hansen represented in a sex discrimination suit against the Federal Bureau of Investigation (FBI). Defendants William E. Webster, Edwin Meese III, and the United States of America contend that the ruling was proper in all respects and should be upheld. For the reasons set forth below, the plaintiff's cross-motion for summary judgment is granted and the defendants' cross-motion for summary judgment is denied.

I.

The procedural history of this case is both lengthy and complex. A proper understanding of the decision reached today requires that those proceedings be set forth in some detail.

A. *Initial Review*

Plaintiff Hansen began work as a special agent with the FBI on November 20, 1972. On September 19, 1977 Ms. Hansen filed an administrative class complaint with the Civil Service Commission Complaints Examiner alleging that the FBI had discriminated against women in hiring, training, and "in the field." The complaint, filed pursuant to 29 C.F.R. § 1613.602(a),[1] detailed extensive charges of discrimination on behalf of Ms. Hansen and a class of women defined by the plaintiff as:

> (a) All women who are presently Special Agents of the FBI;
>
> (b) All women who have been but are not now Special Agents of the FBI;
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> (c) All women who are rejected applicants for the position of Special Agent of the FBI, including those now or ever employed by the FBI in other capacities; and
>
> (d) All women forced to resign from Special Agent training school, including those now or ever employed by the FBI in other capacities.

Administrative Complaint at 1.

In the area of hiring, the plaintiff alleged that despite changes in procedure, the FBI'S hiring system for special agents discriminated against women. Prior to May 12, 1972, the Bureau officially barred all women from employment as Special Agents. Until 1975 the Bureau maintained a 5'7" height requirement for special agents, and until 1977 the FBI used a subjective interview process for selecting special agents. The plaintiff argued that these requirements discriminated on-the basis of sex by disproportionately screening out applicants for special

agent. In 1977 the FBI replaced its hiring procedures with the New Special Agent Selection System. To ease the transition from the old to new system, the FBI adopted a set of "transition policies." Plaintiff's Memorandum in Support of Motion for Summary Judgment at 6. The Hansen complaint argued that these transition policies discriminated against women "who were in the application pipeline when the new system was implemented [because they] us[ed] old system ratings to determine who would be reprocessed." *Id.*

Similarly, in .the area of training the plaintiff's administrative complaint charged that unvalidated physical and firearms training and testing screened out disproportionate numbers of female trainees. The testing requirements, the complaint contended, were not justified by business necessity.

***2** Finally, the administrative complaint alleged that the Bureau had engaged in discriminatory treatment of female special agents "in the field" through promotional policies, "in-service training," *id.* at 12, case and squad assignments, and field office assignments. Ms. Hansen alleged that these discriminatory "work situation" practices, as well as the discriminatory hiring and training practices, had been shielded from challenge in both administrative proceedings and the courts by a "grossly inadequate" FBI Equal Employment Opportunity (EEO) program. *Id.*

Upon initial review before the Civil Service Commission,[2] the Complaints Examiner recommended that the class complaint be limited to allegations concerning the treatment of current and former female special agents in the field:

> In summary, the Examiner recommends that the class be limited to current and former female special agents, and that Ms. Hansen be accepted as the agent for a class complaint regarding FBI practices in the assignment and usage of female agents. The Examiner recommends that [sic] rejection of all other allegations.

Plaintiff's Excerpts from Admin. Record, Tab 2 at 4. The Department of Justice (DOJ, the Department) rejected the Complaints Examiner's recommendation and accepted the plaintiff's complaint as alleged in full. The Department defined the class to include:

> (i) all female applicants for employment as FBI Special Agents, including those now or ever employed by the FBI in.other capacities; (2) all women forced to resign from Special Agent training school at the FBI Academy, including those now or ever employed by the FBI in other capacitier; (3) all current female FBI special Agents; and (4) all women who have been, but are not now FBI SPecial Agents.

Plaintiff's Excerpts from Admin. Record, Tab 3 at 4. The Department informed the plaintiff that she had been "accepted as agent for a class complaint regarding FBI policies and practices in the hiring, training, assignment, transfer, promotion and usage of female Special Agents." *Id.*

Notice of the class proceeding was sent to over 2,600 individuals between March and February, 1978. Each potential class member was given an opportunity to "opt out" of the class as required under 29 C.F.R. § 1613.605.[3] Following discovery, which lasted well into 1980, a second Complaints Examiner (this time from the Equal Employment Opportunity Commission (EEOC) conducted a five-day hearing.[4] The hearing concluded with the recommendation that findings of discrimination be made in the three areas challenged by the plaintiff.

On July 24, 1984, DOJ substantially accepted the recommended decision. In the area of hiring both the Complaints Examiner and the Department found that female applicants for special agent had been screened out in disproportionate numbers through the use of a height requirement, a subjective interview process, and the preclusion of all women from the special agent position prior to May, 1972. The Complaints Examiner and DOJ also found that the effect of the discriminatory policies in use before 1977 had carried over into the liability period.[5] Accordingly, individual relief was ordered for eligible class members in the form of reprocessing under the New Special Agent Selection System (NSASS). Those class

members who met the NSASS standards were to receive reinstatement and back pay.

***3** In one significant area related to hiring, however, the Department flatly rejected the Complaints Examiner's recommendation. The Examiner recommended a finding that preferences traditionally given to applicants from the FBI's clerical work force under the "modified hiring plan"[6] resulted directly in discrimination against women:

> Even assuming some of the male and/or female clerks qualified under programs different from the modified one, the number of male clerks hired is disproportionately high. Since the clerk applicants were almost an all male source of candidates, even though the majority of Agency clerical employees were female, the continued use of the clerks as a recruitment source when they were given credit for experience prior to the elimination of the no female and height requirements, perpetuated the exclusion of females as Special Agents.

Plaintiff's Excerpts from Admin. Record, Tab 6 at 22. The Department rejected these findings on the procedural ground that the issue fell outside the scope of the plaintiff's complaint:

> [T]he inclusion of the Modified Hiring Program contravenes the explicit language of the regulation [29 C.F.R. § 1613.603(b)] that issues must be specifically raised in the complaint. It was not specifically set forth in the complaint, and therefore, could not be considered unless the complaint is properly amended. It ... should not be presented as an evidentiary matter because it constitutes a distinct hiring practice—separate from the one ... alleged.

Plaintiff's Excerpts from Admin. Record, Tab 7 at 5.

In the area of training the Complaints Examiner and the Department found that both the physical training and firearms programs had a disproportionate, discriminatory impact on female trainees. Neither program, the Examiner and DOJ concluded, was justified by business necessity. On the Examiner's recommendation, the Department ordered general corrective steps designed "to improve and formalize the remedial training program and to ensure that trainees be aware in advance of the firearms require ments and the availability of remedial training." Plaintiff's Memorandum in Support of Motion for Summary Judgment at 9. The Department also ordered individual relief for female trainees who had been dismissed, or forced to resign, because of the training requirements. The Department's decision, however, granted relief only to those trainees who resigned or were dismissed after May 7, 1977. Those trainees who resigned or were dismissed prior to the onset of the liability period were denied relief.

In the third and final area—discrimination "in the field"—the Complaints Examiner recommended findings that the FBI had discriminated against women in case and squad assignments, maintained an ineffective and insensitive EEO program, and created a discriminatory work environment:

> The record is replete with evidence of a work environment which is discriminatory on the basis of sex and makes all working conditions more difficult for females. The Agency knew or should have known of these conditions. Examples range from serious verbal taunts and allbuse of female agents, to stricter requirements for female agents, to sexual mistreatment and destruction of property of a female agent, to failure until 1978 to provide bulletproof vests fitted for females, to expressed dislike by male superiors of female participation in certain work and training.
>
> ***4** One example of sex discrimination in the work environment cited by the Class Agent was the inadequacy of the Agency's equal employment opportunity program. The Class Agent has developed a great deal of evidence on this issue and it does indicate insenisitivity on the part of the Agency regarding the existence of sex discrimination and the necessity for females to have access to an effective EEO program.

Plaintiff's Excerpts from Admin. Record, Tab 6 at 41. DOJ accepted these findings and ordered remedial action. The Complaints Examiner also recommended a finding

that the FBI had failed to provide adequate specialized training to female special agents after graduation from the training course at Quantico. The Department, however, rejected this recommendation:

> [It is] alleged that the discrimination in the in-service training program affects women's opportunity for advancement and promotion.... [T]his allegation is not borne out by statistics presented by the FBI .... [T]he statistical data presented by the Agency reflects that among comparable groups of male and female special agents, males are advancing administratively at a rate somewhat slower then females.

Plaintiff's Excerpts from Admin. Record, Tab 7 at 16.

On one "work situation" issue of importance to the present litigation the Complaints Examiner did not recommend a finding of discrimination. The Examiner refused to find that the FBI had crafted and implemented a policy designed to disperse female special agents to various FBI offices with the purpose of isolating them and requiring them to perform physically burdensome and dangerous assignments. The Justice Department concurred in this finding.

B. *The ORA Ruling*

The plaintiff appealed the unfavorable rulings made by the Justice Department in all three areas (hiring, training, and "work situation") to the EEOC Office of Review and Appeals (ORA). On August 24, 1984, ORA issued a decision upholding most of the plaintiff's claims. In the area of hiring the ORA reversed the Department's ruling that the Examiner's findings on the issue of preferences for clerical workers fell outside the scope of the complaint: .

> In both the private sector and the federal sector, the purpose of a complaint is to initiate an investigation. Investigation may disclose illegal practices other than those listed in the charge. 'The charge is a starting point for a reasonable investigation by the Commission which may include in its deliberations all the facts developed.' *See EEOC v. General Electric Corp.,* 532 F.2d 359 at 364 (4th C r. 197) quoting *EEOC v. E.I. Dupont de Nemours and Co., etc.,* 373 [F.] Supp. 1321, 1335 (D. Del. 197 . Since the hearing occurs prior to the final agency decision it is a part of the investigative process. The Complaints Examiner is required to insure that the record is developed so that a proper decision may be recommended.
>
> In the instant case, the appellant's allegations regarding the hiring of female Special Agents generally described policies and practices. The hiring practices at the agency involved an outright ban on female Special Agents, height/weight requirements which significantly limited the number of eligible females, and certain preference which significantly favored males in the existing agency workplace. During the pendency of this complaint, the agency's policies and practices with respect to the hiring of Special Agents were fluid but; nevertheless, significantly adverse to females seeking employment as Special Agents. The agency erred in rejecting the findings on the discriminatory operation of clerk preferences in the Modified Hiring Plan.

***5** Plaintiff's Excerpts from Admin. Record, Tab 12 at 12. The ORA directed the agency to "implement the relief recommended by the Complaints Examiner on the issue of the clerk preference." *Id.*

In the area of training the ORA modified the Department's denial of individual relief to pre–1977 trainees by permitting any trainee who filed a discrimination claim prior to May 1, 1977 "[to] be processed pursuant to 29 C.F.R. § 1613.214."[7] Plaintiff's Excerpts from Admin. Record, Tab 12 at 7. The ORA decided not to grant "broader relief"[8] to all fifteen pre–1977 trainees because the plaintiff had "waived the right to appeal the issue." plaintiff's Cross-motion for Summary Judgment at 11. The Assistant Attorney Genera1, the ORA noted, ruled in 1978 at the time of class certification that time limits would not be extended beyond the 135–day period provided in 29 C.F.R. § 1613. Since plaintiff never appealed this 1973 decision to the ORA, the Appeals Board determined she was not entitled to seek an extension of the time limits governing individual relief through an appeal of the Department's July 24, 1981 ruling.

Third and finally, in the area of "work situation"

discrimination the ORA reversed the Department's finding that the Bureau's policy of assigning and reassigning female agents on the basis of sex was not discriminatory. The ORA concluded that, regardless whether the assignments had been made with "the effect of isolating ... and burdening [female agents] unfairly," Plaintiff's Cross-Motion for Summary Judgment at 13, "the agency's policy of using sex as a factor in determining where a female agent will be transferred violates Title VII ...." Plaintiff's Excerpts from Admin. Record, Tab 12 at 8. The ORA ruled, however, that plain tiff Hansen had "not demonstrated that she was either the victim of disparate treatment (with respect to the transfer policy) or that [her] transfer from Washington to Phoenix adversely affected her employment opportunities with the agency." *Id.* Accordingly, the ORA refused to grant the plaintiff individual relief for her transfer.

C. *Proceedings Before This Court*

In late 1984, the plaintiff filed this action in an effort to win reversal of certain unfavorable aspects of the ORA's rulings. The plaintiff also sought a court order compelling administrative enforcement of those parts of the ORA's ruling that mandated corrective action. Because the plaintiff challenged only the ORA's conclusions and did not dispute the Complaint Examiner's factual findings, the matter was properly submitted to the 'Court on cross motions for summary judgment. Summarized briefly, the plaintiff argued that (1) the ORA erred in ruling that only pre–1977 trainees who filed claims before May 7, 1977 were entitled to individual relief; (2) the agency had failed properly to implement the relief recommended by the Complaints Examiner and the ORA on the issue of the unlawful "clerk preference"; (3) the ORA erred in ruling that the plaintiff was not affected by the discriminatory transfer policy; and (4) even had the ORA not erred on certain contested issues, the agency was required to implement immediately the "limited" corrective action ordered by the ORA. The defendants rebutted each of these claims, and challenged the plaintiff's administrative class certification under tile Federal Rules of Civil Procedure.

***6** After the parties' cross-motions for summary judgment were filed with the Court, the EEOC belatedly ruled on the plaintiff's request for reconsideration of the ORA's decision.[9] In a short, written opinion the EEOC refused to reconsider the ORA's rulings on the clerk preference and transfer issues,[10] but reversed the ORA's decision not to grant individual relief to all pre–1977 trainees. The EEOC concluded that because the agency's class certification decision of January 26, 1978 failed to put the plaintiff on notice that a final, appealable decision on the availability of relief for all pre–1977 trainees had been made, the plaintiff's challenge to the July 24, 1981 decision (limiting relief to pre–1977 trainees who had filed a claim) was not time-barred. Accordingly, the Commission held that the plaintiff "timely appealed the issue of relief for those employees N,iho failed Special Agent Training prior to May 7, 1977" and that it "remain[ed] for the Commission to determine the propriety of that portion of the final agency decision rejecting relief for these individuals." *In the Matter of the Request to Reopen by Christine A. Hansen,* EEOC Request No. 05850006, slip. op. at 5 (Feb. 6, 1986). Ruling on the "propriety ... of the final agency decision," the Commission refused to accept the plaintiff's argument that factual circumstances and EEOC regulations required that the 135–day time limit of 29 C.F.R. § 1613.614(c) be equitably tolled with respect to all pre–1977 trainees. Instead, the Commission concurred with the plaintiff's "alternative" position that each of the individuals affected by agency actions prior to May 7, 1977 were "entitled to an opportunity to obtain equitable relief" by means of individualized hearings designed to determine whether the requirements for equi table tolling set forth in 19 C.F.R. § 1613.214(a)(4) had been met." The Commission directed the agency to "make such a determination [pursuant to] 29 C.F.R. § 1613.604(e) and § 1613.214(a)(4) ... and to set forth its reasons for not extending the time limits, where it determines that such an extension would not be appropriate." *Id.* at 6.

As a result of the EEOC's February 6, 1986 decision, the parties submitted supplemental memoranda on the status of the issues currently before the Court. The plaintiff argued that the "transfer" and "hiring" claims were still at issue, but that the EEOC decision removed the need for an order "directing relief for all individual class members who failed the requirements at Quantico prior to May 7, 1977." Plaintiff's Supplemental Memorandum on Status of Case at 1. Ms. Hansen requested, however, that the Court retain jurisdiction of this last issue—the training claim—on the theory that it would "avoid any possible loss of rights by potentially-affected class members who exhaust administrative remedies." *Id.* at 7. Similarly, the plaintiff acknowledged that while the EEOC decision had substantially mooted the request for immediate implementation of the ORA's August 1984 decision, that position was contingent on a stipulation by the defendants

that they were now "proceeding to implement the relief ordered in the ORA's August 1984 decision, as modified by the EEOC's February 1936 decision." *Id.* at 11. The defendants, on the other hand, argued that "the sole remaining issue on the merits [was] whether plaintiff, Christine Hansen, [was] entitled to any individual relief." Defendants' Supplemental Memorandum on Status of Case at 7. Predictably, the defendants agreed that the training claim waS "substantially moot," but differed over whether jurisdiction should be retained. The defendants insisted that the plaintiff was required to exhaust all administrative remedies before seeking relief from this Court, and that "[t]he Court [could] not assume that the agency [would] not comply with the EEOC's order. Likewise, the defendants argued that, notwithstanding the EEOC's decision, the clerk preference claim should be held "moot" because the plain tiff lacked standing to bring the claim on behalf of the class. Finally, although the defendants did not stipulate that the relief ordered in the ORA's August 1984 decision would be immediately implemented, the defendants contended that the February 6, 1986 EEOC decision "obviate[d] [the need for] judicial resolution of the plaintiff's request for implementation of the corrective action ordered in the ORA's August 24, 1984 decision." Defend ants' Supplemental Memorandum on Status of Case at 6 n.5. In the defendants' view, therefore, the only issue remaining on the merits before the Court was the individual "transfer" claim.[12]

***7** On May 23, 1986 the plaintiff filed a second supplemental memorandum stating that the Count II hiring claim and the request for implementation of the August 24, 1984 ORA decision were now moot. The plaintiff noted that counsel for both sides had agreed that any claimant with three years of work experience "substantially equivalent" to that of an FBI clerk would be deemed to have met the work experience requirement of the Modified Program, and that all claimants seeking individual relief under Count II would be processed by the FBI. The parties also agreed that any' further disputes involving the proper application of individual relief in the area of hiring would be submitted to an EEOC Complaints Examiner and the DOJ, and that the Bureau would proceed immediately to implement the relief ordered in the August 24, 1984 ORA decision, as modified by the February 6, 1986 EEOC decision. Neither party contended that the certification or standing issue had been rendered moot for the reason that resolution of the issue in favor of the plaintiff and against the defendants would jeopardize the plaintiff's ability to secure future enforcement action on the training issue, and require dismissal of the underlying complaint, thereby precluding a ruling on the transfer issue.

Only two issues now remain for decision by this Court: the transfer claim, and the certification and standing question. Both claims are still contested and go to the heart of the suit. Like the "hiring" issue and the request for "immediate implementation," the "training" claim need not be addressed. The February 6, 1986 decision in effect granted the plaintiff the "alternative" relief on the training issue that was sought at the time the case was filed. *See* Plaintiff's Memorandum in Support of Motion for Summary Judgment at 37 n. 22. Ms. Hansen has now indicated that she no longer seeks an order of this Court directing relief for all individual class members who failed the requirements at Quantico prior to May 7, 1977. *See* Plaintiff's Supplemental Memorandum on Status of Case at 1. To the extent that this issue is moot, continued jurisdiction is not justified. To retain jurisdiction on the training issue, as requested by the plaintiff, suggests that the agency will fail to act lawfully even before it has had an opportunity to act. Should the agency not swiftly implement the administrative procedures required by regulation and statute, the affected members would be free to either (1) seek individual relief, or (2) move to invoke the *equitable* powers of this Court to re-open the suit solely for th4e purpose of enforcing a judgment of this Court mandating just and speedy implementation of the EEOC decision of February 6, 1986. *See infra* part III. In short, failure to retain jurisdiction need not hamper or prejudice the effective enforcement of any rights to which the plaintiff is adjudged tobe entitled.

II.

A. *Certification and Standing*

The defendants contend that although the agency certified the plaintiff as class agent of an administrative class in 1978, *see* Plaintiff's Excerpts to Admin. Record, Tab 3 (Letter of January 26, 1978, Kevin D. Rooney to Christine A. Hansen), that certification does not authorize the plaintiff to file suit in federal court under 29 C.F.R. § 1613.641 without also satisfying the requisites of Federal Rule of Civil Procedure 23(a). In this instance, the defendants insist, the plaintiff cannot meet the requirements of the Federal Rules and thus the class

complaint must be dismissed.

***8** Title VII does not contain "special authorization for class suits maintained by private parties." *General Telephone Co. of Southwest v. Falcon,* 457 U.S. 147, 156 (1982). "An individual litigant seeking to maintain a class action under Title VII must meet 'the prerequisites of numerosity, commonality, typicality, and adequacy of representation specified in Rule 23(a)." *Id.* quoting *General Telephone Co. of Northwest v. EEOC,* 446 U.S. 318, 330 (1980). The Federal Rules, however, have little bearing on the certification procedure used in the processing of an administrative class complaint within the agency. Although the regulations include numerosity, commonality, and typicality requirements, see 29 C.F.R. § 1613.601(b), a class agent need not meet Rule 23(a) standards in order to satisfy the aqency prerequisites for certification. The critical question at issue here, there fore, is whether the filing of suit in this Court under 29 C.F.R. § 1613.641(a)(3)[13] should automatically trigger the requirements of Rule 23(a), regardless of the nature of the plaintiff's appeal from the agency proceedings.

In *Chandler v. Roudebush,* 425 U.S. 840 (1976), the Supreme Court ruled that in the wake of an adverse agency ruling a federal employee enjoyed the same right to a trial de novo under section 717(c) of The Civil Rights Act of 1964 (Title VII) as a private sector employee. The Court's decision did not, however, preclude a federal employee, or any employee for that matter, from deciding against a plenary judicial trial *de novo* in favor of a review of the administrative record. The plaintiff here has sought the latter. The plaintiff's complaint does not request a trial *de novo,* but rather merely seeks to "correct errors of law in the relief stage of the administrative proceedings after prevailing at the liability stage." Plaintiff's Reply Memorandum in Support of Cross-Motion for Summary Judgment at 2.

This distinction is important for three reasons. First, to the extent that that plaintiff does not seek to try the case again beginning at "square one," but merely seeks to correct certain specific alleged errors of law, it makes little sense to require the plaintiff to reaffirm its certification as a proper class agent. Neither party actually contests the validity of the certification process that the plaintiff went through in 1978. The scope of this proceeding is limited. At issue here are four specific legal questions concerning the nature of the remedial relief provided by the agency. As defined by the plaintiff, therefore, this proceeding serves the single purpose of evaluating whether those four questions were appropriately and correctly decided by the agency. Simply stated, the class issues raised by the defendants have no relevance to the type of review requested by the plaintiff.

Second, given the limited nature of the appeal sought by the plaintiff, the defendants' position raises both equitable and statutory problems. The agency itself accepted the plaintiff's proposed class for certification in 1978. Absent a challenge to the validity of the certification process by the plaintiff, as a matter of equity it is improper for the agency to now raise objections to the propriety of the class and the adequacy of the representation.[14] More important, were this Court actually to rule that Rule 23(a) standards were applicable and unsatisfied, the plaintiff would have no means of challenging the errors that the ORA and the Commission are alleged to have made. To permit such a result would totally frustrate the purposes of the EEOC's own regulatory scheme, *see e,g,* 29 C.F.R. § 1613.641, and ill-serve the agency appeal and review provisions of Title VII.

***9** Third and finally, the certification requirements of Rule 23(a) are part of a complex procedural device designed "to facilitate the adjudication of disputes involving common questions and multiple parties in a single action." Wright & Miller, Federal Practice and Procedure § 1751 at 504. The concern for judicial economy and efficiency that might otherwise make Rule 23(a) of great practical importance—if not a necessity—in a plenary judicial "*de novo"* proceeding, has little applicability in a narrowly focused judicial review of administrative proceedings. The latter proceeding requires the Court to decide a legal question "on paper," not preside over a complex trial, involving numerous parties and voluminous testimony. To the extent, there fore, that the plaintiff's complaint seeks review only of evidentiary proceedings that have now been completed, there is no practical rationale for requiring the plaintiff to undergo a second certification proceeding.

Even were the Court to conclude that this suit could not be maintained in federal court without also satisfying the prerequi sites of Rule 23(a), the plaintiff has met those requirements. Under Rule 23(a) a class action may not be brought unless the plaintiff establishes that "(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, land] (3) the claims or defenses of the representative parties will fairly and adequately protect the interests of the class." *McCarthy v. a Kleindienst,* 741 F.2d 1406, 1410 (D.C. Cir. 1984). The

Rule limits class claims to those "fairly encompassed by the named plaintiff's claims." *General Telephone Co. of Northwest,* 446 U.S. at 330. Although the Supreme Court has held that "one allegation of specific discriminatory treatment" by an aggrieved member of an "identifiable class of persons of the same race" is not sufficient to support an "across-the-board attack" on a common employer, *General Telephone Co. of Southwest,* 457 U.S. at 159 and n.15,[15] "(significant proof that an employer [has] operated under a general policy of discrimination conceivably could justify a class of both applicants and employees [an "across-the-board" action]." *Id.* at 159 n.15. The commonality and typicality requirements of Rule 23(a), therefore, are only "guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Id.* at 157 n.13.

Here the plaintiff alleged, and proved at the agency level, that the FBI operated under a "general policy of discrimination" based on sex. The Complaint Examiner's findings were not limited to a particular practice in one area of the defendants' activities. To the contrary, the findings covered practices in hiring, training, promotions, and "work situation." Unlike *General Telephone Co. of Southwest,* therefore, this is not a case where the class agent has asserted claims separate and distinct from those alleged by a subpart of the class. To the extent that Ms. Hansen has won administrative rulings that the FBI discriminated against each of the subclasses she seeks to represent, the commonality and typicality requirements of her "across-the-board" suit on behalf of the class have been met.

***10** The defendants challenge the *adequacy* of the plaintiff's representation by arguing that she lacks standing to sue on behalf of the class. "The sole personal grievance sought to be vindicated by the named plaintiff," the defendants argue, "pertains to an alleged discriminatory transfer." Defendants' Cross-Motion for Summary Judgment at 14 (emphasis added). The defendants contend that because the plaintiff does not allege "direct personal injury" from the discriminatory training and hiring practices, her "sole claim" of discriminatory transfer is not "common to the class as a whole." *Califano v. Yamasaki,* 442 U.S. 682, 700–01 (1979), *quoted in General Telephone Co. of Southwest,* 457 U.S. at 155. Indeed, the defendants argue, Ms. Hansen cannot satisfy the commonality requirement because she resigned voluntarily from the position of special agent and thus does not share the same injury as the class she purports to represent. A plaintiff alleging injury from a discriminatory transfer policy, it is argued, does not possess standing to represent a class alleging injury from training and hiring practices.

The defendants' argument misses the mark. In the context of a class action, the issue of standing necessarily merges with Rule 23(a) concerns of commonality and adequacy of representation. The plaintiff's complaint expressly alleged direct personal harm resulting from the isolation of incumbent female agents. Plaintiff's Administrative Complaint at 2. That harm arose from the general policies of discrimination engaged in by the defendants and alleged by the plaintiff on behalf of the class. The fact that the plaintiff was subjected to the same discriminatory training and hiring requirements as other members of her class and yet overcame them does not disqualify her from serving as a class agent provided there is "significant proof that an employer operated under a policy of discrimination." *General Telephone Co. of Southwest,* 457 U.S. at 159 n.15. The factual findings below provide precisely the degree of proof required. Under the circumstances the class claims are properly and "fairly encompassed by the named plaintiff's claims." *Id.* at 156, *quoting General Telephone Co. of Northwest,* 446 U.S. at 330. The plaintiff has met her burden of establishing that in this instance the "named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected."[16] *General Telephone Co. of Southwest,* 457 U.S. at 157 n.13.[17]

B. *The "Transfer" Claim*

In July, 1981 the Department found that the FBI's transfer policy was not discriminatory. The ORA reversed, but denied the plaintiff's request for individual relief for her own transfer from Washington, D.C. to Phoenix, Arizona. The ORA reasoned that while the FBI's "policy of using sex as a factor in determining where a female agent will be transferred" was discriminatory, the policy only affected "the locale to which a female Special Agent would be transferred, not whether she would be transferred." Plaintiff's Excerpts from Admin. Record, Tab 12 at 8. The ORA concluded, therefore, that the plaintiff "had not demonstrated that she was either the victim of disparate treatment or that the transfer from

Washington to Phoenix adversely affected her employment opportunities with the agency." *Id.* The plaintiff, according to the ORA, had simply not established that she was "reassigned more rapidly than males or that such reassignments adversely affected promotability." *Id.*

***11** The plaintiff contends that the ORA's decision to deny her individual relief is erroneous "because it rests on ... facts and assumptions that were never the subject of specific administrative findings." Plaintiff's Cross-Motion for Summary Judgment at 42. The plaintiff insists that neither the Complaints Examiner nor the Department found that the transfer would have occurred in the absence of a discriminatory transfer policy. In effect, the plaintiff concludes, the ORA found that the agency maintained a discriminatory transfer policy but improperly ruled "*de novo"* that the plaintiff was not affected by the illegal policy and thus not entitled to relief. In response the defendants argue that the plaintiff was afforded a full and fair opportunity to present evidence before the Complaints Examiner demonstrating that she would not have been transferred in the absence of the discriminatory policy. Any failure to make findings on this issue is attributable to the plaintiff's own inaction. The defendants further argue that the transfer costs charged to the plaintiff constitute a "contractual" debt arising out of the plaintiff's decision to resign following the transfer. Title VII, the defendants insist, cannot be used to "extinguish a debt owed by a person to the government." Defendants' Cross-Motion for Summary Judgment at 34.

29 C,F.R. § 1613.614(b) states that "when discrimination is found and a class member believes that but for that discrimination he/she would have received ... an employment benefit, the class member may file a written claim with the head of the agency ...." 29 C.F.R. § 1613.614(d) provides, in turn, that "[i]f the agency and the claimant do not agree that the claimant is a member of the class or [do not agree] upon the relief to which t the claimant is entitled, the agency shall refer the claim ... to the Complaint's Examiner." Subsections 1613.614(e) and (f) further state that the Complaints Examiner must hold a hearing and issue findings, if so requested by the claimant, to determine whether the claimant is affected by the discriminatory policy and a member of the class.

At no point in the proceedings below did either the Complaints Examiner or the Department make findings on the issue of whether or not *the plaintiff* was affected by the discriminatory transfer policy. Because the Complaints Examiner found that the transfer policy was not discriminatory, the Examiner never determined whether plaintiff Hansen would have been transferred in the absence of a discriminatory transfer policy.[18] Yet once the ORA ruled that the policy had indeed had a discriminatory effect, the plaintiff was entitled, under subsections 614.613(b)-(g), to submit evidence to the Complaints Examiner establishing her right to individual relief. The regulations do not authorize the ORA to undertake such a finding. The ORA, therefore, clearly erred in failing to remand the mAtter to the Complaints Examiner for additional findings under subsections 614.613(b)-(g) once it found the transfer policy discriminatory. By proceeding to rule on the plaintiff's request for individual relief the ORA ignored the mandate of the regulations and improperly issued a "*de novo"* ruling that plaintiff Hansen was not affected by the transfer policy. Accordingly, the plaintiff has not yet had a full opportunity to introduce evidence in an administrative "court of first instance" establishing her entitlement to individual relief.[19]

***12** The defendants' argument 'with respect to the appropriateness of the Title VII claim on this issue does not alter the conclusion reached above. The defendants are entirely correct in pointing out that the plaintiff only incurred moving expenses as a result of her failure to adhere to the contractual provisions of 5 U.S.C. § 5724(i).[20] That fact, however, is not relevant to the appropriateness of the Title VII claim that has been averred. if tile plaintiff establishes on remand before the Complaints Examiner that she was discriminatorily "affected" by the concededly illegal transfer policy, she will be entitled to relief under Title VII that will make her whole for the injury she has suffered. In this instance the injury suffered would be the illegal transfer. The plaintiff cannot be made whole unless she is relieved of paying for the moving expenses associated with the transfer.

III.

For the reasons set forth above the plaintiff's cross-motion for summary judgment is granted and the defendants' cross-motion for summary judgment is denied.

IT IS ORDERED that:

(1) the plaintiff is entitled to bring this action under 29 C.F.R. § 1613.641(a)(3) (1985),

(2) the plaintiff's request for relief for any class member who was dismissed or forced to resign from the FBI prior to May 7, 1977, because of the unlawful physical or firearms training requirements of the Bureau's Quantico training program is moot;

(3) the plaintiff's request for individual administrative reprocessing for any unsuccessful applicant class member who had had three years of clerical experience when she applied to the FBI (or by the time she would otherwise have been reprocessed under the New Special Agent Selection System) is moot;

(4) the plaintiff be permitted to file an individual claim demonstrating that she was "affected" by the agency's discriminatory transfer policy and is entitled to "make whole" relief;

(5) the defendants implement promptly, as agreed by the parties, the corrective action ordered in the August 24, 1984 decision of the ORA, as modified by applicable sections of the February 6, 1986 EEOC decision; and that

(6) the defendants begin negotiations with the plaintiff on the issue of attorneys' fees. The parties shall report to the Court on the status of their negotiations within 60 days from the date of this Memorandum Opinion and Order.

A separate judgment accompanies this Memorandum Opinion and Order.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp., 1986 WL 11389, 41 Fair Empl.Prac.Cas. (BNA) 214, 40 Empl. Prac. Dec. P 36,368

Footnotes

[1] 29 C.F.R. 5 1613.602(a) states that:

> "An employee or applicant who wishes to be an agent and who believes he/she has been discriminated against shall consult with an Equal Employment Opportunity Counselor within 90 calendar days of the matter giving rise to the allegation of individual discrimination or 90 calendar days of its effective date if a personnel action."

[2] At the time the administrative complaint in this case was filed the relevant regulatory provisions fell within the jurisdiction of the Civil Service Commission. *See* 5 C.F.R. pt. 713 *et seq.* Executive Order 12106 (Dec. 28, 1978), 3 C.F.R. § 263 (1978 Comp.), transferred jurisdiction to the Equal Employment Opportunity Commission. *See* 29 C.F.R. pt. 1613 *et seq.*

[3] That provision states that:

"(a) After acceptance of a class complaint, the agency, within 15 calendar days, shall use reasonable means, such as delivery, mailing, distribution or posting, to notify all class members of the existence of the class complaint.

"(b) A notice shall contain: (1) The name of the agency or organizational segment thereof, its location, and the date of acceptance of the complaint; (2) a description of the issues accepted as part of the class complaint; (3) an explanation that class members may remove themselves from the class by notifying the agency within 30 calendar days after issuance of the notice; and (4) an explanation of the binding nature of the final decision on or

resolution of the complaint."

[4] The hearing began on June 27, 1980.

[5] EEOC regulations state that in order to obtain relief a class member

"... may file a written claim ... within 30 calendar days of notification by the agency of the decision of the agency ....

"The claim must include a specific detailed showing that the claimant is a class member who was affected by a personnel action or matter resulting from the discriminatory policy or practice within not more than 135 calendar days preceding the filing of the class complaint." 29 C.F.R. § 1613.614(b),(c)."

The "liability period", therefore, is defined as the 135–day period preceding the filing of the class complaint. In this instance the administrative complaint was filed on September 19, 1977. Accordingly, the liability period extends from May 7, 1977 to September 19, 1977.

[6] Under the "old hiring system"—that is, from 1972 until 1977–individuals could become special agents through one of five different programs: "(1) prior support service; (2) attorneys; (3) accountants; (4) languages; and (5) ... [the] modified program." Plaintiff's Excerpts, from the Admin. Record, Tab 12 at 4. The modified program required a college degree and three years of professional or other "specialized experience." *Id.* Applicants who had served three years in a clerical position with the agency were deemed to have satisfied the "specialized experience" requirement, *id.,* while outside applicants were "scrutinized for the nature of their prior work that constituted their experience." Plaintiff's Excerpts from Admin. Record, Tab 6 at 20. Clerk applicants were also subjected to less stringent screening standards and a special interview process. *Id.* Indeed, from March 27, 1975 until April 15, 1977 the agency "directed that 50% of its new Special Agents would be hired from the clerical ranks." *Id.*

[7] 29 C.F.R. § 1613.214 provides in part that a complainant must bring "to the attention of the Equal Employment Opportunity Counselor the matter causing him to believe he had been discriminated against within 30 calendar days of the date of that matter, or, if a personnel action, within 30 calendar days of its effective date."

[8] The "broader relief" sought by the plaintiff is individual relief, "under the same procedures and terms as those trainees who failed the [training] requirements ... after 1977", for *all* fifteen pre–1977 Quantico trainees, not just those who filed a claim prior to 1977. Plaintiff's Cross-Motion for Summary Judgment at 37.

[9] At the time that the plaintiff filed her request for reconsideration with the EEOC the ORA had concluded that its decision was final. Included in the ORA decision of August 1984 was a "notice" informing Ms. Hansen that she had only 30 days in which to file a civil action challenging the ORA ruling. *See* 42 U.S.C. § 2000e–16(e). Concerned about a possible risk of the loss of her right to challenge the Agency decision, Ms. Hansen filed this suit without waiting for the outcome of her request for reconsideration.

[10] With respect to the clerk preference issue the plaintiff argued that the "relief recommended by the Complaints Examiner" and referred to by the ORA constituted nothing less. than "reprocessing" under the new special agent selection system or "other individual relief" for "any class member affected by the unlawful clerk preference policy." Plaintiff's Cross-Motion for Summary Judgment at B. The defendants took the position that the clerk preference was only relevant in determining whether discrimination existed, but did not automatically mean "that all individuals who appear to be affected by the acts used to demonstrate the discrimination are entitled to relief." *In the Matter of the Request to Reopen,* Request No. 05850006 at B. Accordingly, the defendants reasoned that the "relief recommended by the Complaints Examiner" did not necessarily include individual relief for class members affected by the discriminatory "clerk preference." The Commission agreed with the defendants, providing a brief analysis to support its conclusion:

"While the Commission finds merit to appellant's assertion that class members may be entitled to individual relief

for the discriminatory clerk preference, it finds that appellant has failed to demonstrate that the previous decision, in failing to explicitly provide for such relief, constituted an erroneous interpretation of law or regulation, or a misapplication of established policy, pursuant to 29 C.F.R. § 1613.235(a)(2). Regulation 29 C.F.R. § 1613.613 provides that an agency shall notify class members of a determination on discrimination, and, 'where appropriate, shall include information concerning the rights of class members to seek individual relief, and of the procedures to be followed.' Class members are then entitled to file a written claim for individual relief, pursuant to 29 C.F.R. § 1613.614(b). Because the Regulations mandate that the agency provide relief to affected class members, upon a finding of discrimination (as in the present case), the Commission finds that the failure of its previous decision to explicitly provide for such relief does not constitute an erroneous interpretation of law or regulation, or a misapplication of established policy. Accordingly, it is the decision of the Commission to deny appellant's request to reopen, with respect to this issue." *Id.* at 8–9.

The Commission's analysis of the transfer issue was equally cursory. The plaintiff argued before the Commission that the ORA's ruling on the transfer issue amounted to a finding that the plaintiff was not affected by the discriminatory transfer policy. This determination, the plaintiff argued, could only have been made by the Complaints Examiner. In a single paragraph of analysis the Commission concluded that the ORA's decision did not constitute an "erroneous interpretation of regulation" under 29 C.F.R. § 1613.235(a)(2) (the provision governing reconsideration):

> "However, the Commission finds that the issue of the reimbursement, as presented, was duly considered by the Commission's previous decision, and properly determines therein. Further, the determination was made at the specific request of appellant, as contained in her Brief on Appeal, and, having made such request, appellant will not now be heard to argue that the Commission was not empowered to act thereon. Accordingly, the Commission finds that appellant's request fails to meet the criteria of 29 C.F.R. § 1613.235(a), with respect to this issue."

11 29 C.F.R, § 1613.214(a)(4) states that:

> "The agency shall extend the time limits in this section: (i) when the complainant shows that he was not notified of the time limits and was not otherwise aware of them, or that he was prevented by circumstances beyond his control from submitting the matter within the time limits; or (ii) for other reasons considered sufficient by the agency."

12 Both sides concede that with the February 6, 1986 EEOC decision the parties have fully exhausted all administrative remedies on the issues now before the Court. That EEOC decision stated that "there is no further right of administrative appeal from a decision of the Commission on a request to reopen." Granting of Request to Reopen, Feb. 6, 1986 at 10. Accompanying the decision was a "Statement of Appellant's Rights" and "Notice of Possible Right to File a Civil Action." See Plaintiff's Supplemental Notice of Filing of Agency Decision at 2.

[13] 29 C.F.R. § 1613.641(a)(3) provides that:

> "An agent who has filed a complaint or a complainant who has filed a claim for relief based on race, color, religion, sex and/or national origin discrimination is authorized to file a civil action in an appropriate U.S. District Court: within 30 calendar days of his/her receipt of the decision of the Office of Review and Appeals on his/her appeal ...."

[14] The EEOC ORA concluded in August, 1984 that "pursuant to 29 C.F.R. § 1613.641(a)(3)" Ms. Hansen had "the right to file a civil action." Plaintiff's Excerpts from Admin. Record,Tab 12 at 12. It would appear, therefore, that not only did the defendants accept the proposed class and agent, but they also implicitly agreed with the plaintiff that a civil action, led by the present class representative, was proper.

[15] "The 'mere fact that a complaint alleges racial or ethnic discrimination does not in itself ensure that the party who has brought the lawsuit will be an adequate representative of those who may have been the real victims of that discrimination.' " *East Texas Motor Freight System, Inc. v. Rodriguez,* 431 U.S. 395, 405–06 (1977), *quoted in General Telephone Co. of Southwest,* 457 U.S. at 157. Similarly, the "mere fact that an aggrieved private plaintiff is a member of an identifiable class of persons of the same race or national origin is insufficient to establish his standing to litigate on their behalf all possible claims of discrimination against a common employer." *General Telephone Co. of Southwest,* 457 U.S. at 157 n.15.

[16] While the defendants do not challenge the plaintiff's ability to satisfy the numerosity requirement directly, reference is made to the "Plaintiff's own comment that the [plaintiff's] class numbers just fifteen individuals.' " Defendants' Memorandum in Support of Cross-motion for Summary Judgment at 17 n.13. still, the defendants themselves have refused to inform the plaintiff of the identity of seven members of the class. Under the circumstances it is impracticable to expect the class representative to arrange for the joinder of all class members. Procedurally, the "class action device" offers the most efficient and economical means of litigating the case. *See Califano,* 442 U.S. at 701; *American Pipe & Constr. Co. v. Utah,* 414 U.S. 538, 553 (1974). Here, the plaintiff has satisfied the numerosity requirement.

[17] Lhe defendants raise one final question that requires little discussion. The defendants note that the plaintiff asserts jurisdiction in this Court based on both section 10 of the Administrative Procedure Act and Title VII. The defendants argue that Title VII provides the exclusive remedy for claims of discrimination and thus "any claims alleged to arise under the Administrative Procedure Act should be dismissed ...." Defendants ' Cross-Motion for Summary Judgment at 38. The relief granted today by this Court, see infra parts II B, C, D, part III, is based squarely on claims arising under the provisions of Title VII, and not on APA considerations.

[18] Although the plaintiff did introduce some evidence concerning the transfer policy and her own circumstances, see Excerpts from Admin. Record, Tab 5 ¶¶ 228–32, the Complaints Examiner's decision was essentially concerned with other liability issues. Having ruled that the transfer policy was lawful, the Examiner was under no obligation to make—and the plaintiff had no incentive to provide—comprehensive findings on the policy's effect on the plaintiff.

[19] In addition to the violation of the regulatory scheme—and contrary to the defendants' assertions—the plaintiff was

not afforded a full and fair hearing on the transfer issue. Under the principles of *Day v. Mathews,* 530 F.2d at 10B5–86 and 29 C.F.R. § 1613.271(burden rests with the defendants to prove by "clear and convincing" evidence that the plaintiff would have been transferred even if there had been no discrimination. Given that the Complaints Examiner made no findings as to whether this burden had been met, or whether it had been met and successfully rebutted, it was particularly inappropriate for the ORA to have ruled on the issue. A proper decision on this claim requires the benefit of detailed findings from the administrative "tribunal of first instance."

[20] 5 U.S.C. § 5724(i) states that:

> "An agency may pay travel and transportation expenses (including storage of household goods and personal effects) and other relocation allowances under this section and sections 5724a and 5726(c) of this title when an employee is transferred within the continental United States only after the employee agrees in writing to remain in the Government service for 12 months after his transfer, unless separated for reasons beyond his control that are acceptable to the agency concerned. If the employee violates the agreement, the money spent by the United States for the expenses and allowances is recoverable from the employee as a debt due the United States."