U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Dallas District Office

207 S Houston St
3rd Floor
Dallas, TX 75202

In the Certification of:	) EEOC No. 310-2004-00322X
	) Agency No. 5-04-5026
David McCollum,	)
Class Agent,	)
	)
v.	)
	)
Norman Y. Mineta, Secretary,	)
U.S. Department of Transportation (FAA),	)
Agency.	)
	)
	) Date: February 22, 2006

DECISION ON CLASS CERTIFICATION REQUEST

Class Agent:

David McCollum
2327 Stableridge Drive
Conroe, Texas 77384

Class Counsel:

Jeffrey L. Atchley, Esq.
Norwood, Howard & Atchley
1407 Union Avenue, Suite 807
Memphis, Tenessee 38104

Agency Representative:

Julia A. Rhodes, Esq.
Personnel & Labor Law Staff
Office of the Chief Counsel AGC-30
Federal Aviation Administration
800 Independence Avenue SW
FOB-10B, 1st floor
Washington, DC 20591

Administrative Judge:

Veronica A. Cuadra

I. INTRODUCTION

Putative Class Agent ("PCA") David McCollum sought EEO counseling on October 31, 2003, complaining about the FAA's failure to hire him for vacancies filled at the Houston Air Traffic Control Center in September 2003. The PCA later raised classwide concerns with the Counselor. The Agency initially accepted his claim as only and individual claim. The PCA sought to correct and amend the accepted claim as follows:

> Whether the FAA discriminated against you and other similarly situated applicants (those applicants who are former FAA air traffic controllers fired as a result of the 1981 PATCO strike) on the basis of age (over 40) when you and similarly situated applicants were not selected for Air Traffic Control Specialist positions in, or after September, 2003. Specifically, you are claiming that you and other similarly situated applicants were subjected to disparate treatment and disparate impact discrimination on the basis of age.

II. PROCEDURAL BACKGROUND

All procedural prerequisites for making a determination as to whether the subject class complaint should be either accepted or dismissed have been satisfied. An Acknowledgment and Order for Class Certification Request was mailed to the parties. Both sides have submitted extensive briefing. Neither side requested discovery. The parties filed the following:

1. Memorandum of Facts of Law in Support of Request for Class Certification ("PCA's Memorandum in Support").

2. Agency's Motion in Opposition to Class Certification and Memorandum in Support Thereof (Agency's Motion in Opposition").

3. Complainant's Reply to the Agency's Motion in Opposition to Class Certification.

4. Complainant's Motion for a Hearing of the Issue of Class Certification.

5. Memorandum of Law on the Applicable Analysis of Disparate Impact Claims under Section 15 of the ADEA.

6. Supplemental Memorandum in Support of Class Certification. ("PCA's Supplemental Memorandum in Support").

7. Agency's Reply to Complainant's Supplemental Memorandum in Support of Class Certification.

8. Agency's Motion and Memorandum Responding to Memorandum of Applicability of Disparate Impact Claims.

9. Complainant's Response to the Agency's Motion and Memorandum Responding to the Proposed Class Agent's Memorandum of Law on the Application of Disparate Impact Claims under Section 15 of the ADEA.

III. FACTUAL BACKGROUND

The Federal Air Administration ("FAA" or Agency), through its Air Traffic Division, manages the Air Traffic Control (ATC) System, divided into nine regions covering the United States and Puerto Rico. The FAA utilizes the position air traffic controller specialist (ATCS) in two types of settings: Enroute or Terminal. Enroute traffic controllers work in one of the 21 radar only Air Route Traffic Control Centers (ARTCC's). Terminal air traffic controllers work in either the Airport Traffic Control Towers (ATCT's) or the Terminal Radar Approach Control (TRACON) Facilities. *See* PCA's Memorandum.

Brief Overview of PATCO Hiring Ban

In 1981, the PCA and other striking members of the Professional Air Traffic Controllers Organization ("PATCO") were terminated by President Ronald Reagan. That same year, President Reagan imposed "an indefinite bar against the strikers being rehired as air traffic controllers by the Federal Aviation Administration" *See* PCA's Memorandum in Support.

On August 12, 1993, President Bill Clinton lifted this ban. On the same date, the FAA issued various press releases. One of these press releases stated that the FAA would issue a recruitment notice that would "include application information about where and how the former controllers can apply for FAA controller jobs." Agency's Motion in Opposition, Exhibit 4.

Creation of PATCO Inventory

Subsequently, Recruitment Notice 93-01 opened and closed on September 1, 1993, and October 15, 1993, respectively. This notice provided information about applying for the position of Air Traffic Control Specialist, both Terminal and En Route. Agency's Motion in Opposition, Exhibit 6. It advised that the "FAA is establishing an inventory of applicants who have reinstatement and transfer eligibility and who qualify for GS-2152-9. Eligible candidates will be ranked as vacancies occur on the basis of job-related criteria." *Id.*

Responsive applications from former PATCO controllers were forwarded to the FAA's Aviation Careers Division/Office of Human Resource Management ("Aviation Careers Office") in Oklahoma City, Oklahoma, which in turn created a database consisting exclusively of these former PATCO controllers, known as the "PATCO Inventory" or the "PATCO list." According to the

Agency, it received 4,942 applications in response to Notice 93-01, 399 of which were deemed ineligible for employment. In 2005, the approximate number in the PATCO inventory was 3,652. Individuals who did not apply during 45-day announcement period were not allowed on the PATCO Inventory.

Other Hiring Sources

Other than the PATCO Inventory, the following were other sources of candidates for air controller specialist positions: Veterans Readjustment Act ("VRA") appointments of military controllers and former military controllers; college training initiative (CTI) program school graduates; Minneapolis Community & Technical College Air Traffic Control[1] (MCTC ATC) graduates; Department of Defense, preference eligible applicants as defined in 5 USC §2108; Reinstatement eligible applicants; OPM Register (based on Civil Service examination); air traffic control assistant convertees; employment of retired military air traffic controllers program (PC-20); Cooperative Education (Co-Op) program students, ATSAT, and Air Traffic Assistant Conversions. Agency's Motion in Opposition, Exhibit 7, pages 8-9.

The PCA contended that these other sources or pools were made up of applicants who were for the most part younger than the PATCO Inventory.[2] This seems a plausible contention as the regulations set thirty years as the maximum age for the appointment of new controllers, with a few exceptions.[3] These exceptions included the PC-20 program employing retired military air traffic controllers and reinstatements.

---

[1]Formerly, Mid American Aviation Resource Consortium (MARC).

[2]More specifically, the PCA argued that "during the entire relevant period (1993-present), virtually all other applicants selected have been substantially younger than the applicants in the PATCO Inventory, and invariably have been under the age of 40, with the vast majority of selectees being in the range of 23-35 years old. PCA's Memorandum In Support, page 14, footnote 14 (citing information gathered in connection with hires in Memphis).

[3]As authorized by statute, the Secretary of Transportation has set the maximum age that an individual may be appointed as an air traffic controller as 30 years. 5 USC §3307(b); Agency's Motion and Memorandum in Opposition to Class Certification, Exhibit 8. However, this age prerequisite does not apply if the following criteria are met:

i. Have received air traffic control specialist certification according to FAA standards;
ii. Have been qualified and certified on a minimum of two radar air traffic control positions at a FAA radar facility;
iii. Have engaged in the direct separation and control of air traffic at any air traffic control facility controlling traffic within the United States airspace, or in such facilities operated by the FAA or the Department of Defense (DOD) outside the United States within 1 year prior to the date of appointment.

Id.

As to how the sources or pools were administered, Agency briefing in another case stated that "the Agency did not compare candidates from one pool with the candidates from another pool when making hiring decisions. Rather, candidates from each pool were compared with candidates from the same hiring pool." PCA's Memorandum in Support, Exhibit 11.

The PCA objects to the PATCO Inventory and a number of policies/practices utilized in administering it because they allegedly resulted in the hiring of younger[4] – allegedly less qualified – applicants from *non*-PATCO Inventory sources.

Application Options for the Former PATCOs

The Agency objected to one of the PCA's primary premises that PATCO Controllers were injured because they were uniformly restricted to only applying through the PATCO Inventory.

Since December 1993, the Agency's rules have expressly recognized that former PATCO controllers were able to apply through channels other than the PATCO Inventory to the extent eligible. FAA's Order No. 3300.30 dated December 22, 1993, enacted that: "[e]ligible former controllers also may apply for consideration under regionally issued vacancy announcements that are open to transfer and reinstatement eligibles." *See* Agency's Motion and Memorandum in Opposition to Class Certification, Exhibit 9, page 2.[5]

In November 1996, headquarters' Jay Aul provided guidance to the regions about hiring PATCO controllers. PCA's Memorandum In Support, Exhibit 10. Among other things, he wrote that the former PATCO controllers should be allowed to apply under any methods for which they were eligible *Id.* To illustrate he said that "[v]irtually all the former PATCO controllers can apply under merit promotion announcements if the announcements are open to former Federal employees seeking to be rehired. Usually, the former PATCO controllers have the right to apply under these

---

[4]At this juncture, no determination is necessary as to the Complainant's apparent position that former PATCO Controllers would automatically be better qualified than those coming from the educational institution ranks.

[5]The recruitment, application, and referral process for eligible former controllers applying for ATCs positions in terminal and en route centers will be centrally administered by the Office of Aviation Careers (AMV), in Oklahoma City, Oklahoma. ***Eligible former controllers also may apply for consideration under regionally issued vacancy announcements that are open to transfer and reinstatement eligibles.*** If an eligible former controller is reemployed in a non-ATCS position and is interested in applying for an ATCS position, he or she must apply through normal merit promotion procedures . . . but [those] not eligible for transfer or reinstatement, may apply for employment in FAA through applicable civil service register appointments. This includes, for example, certain individuals who did not have a career status at the time of separation and who do not have a current basis for reinstatement or transfer.

other procedures. That means that we must accept their applications and process them the same as everyone else." *Id.* But, he added, that in order to treat all the former PATCO controllers the same, the preference would be to hire from the PATCO Inventory even if the selected controller had also applied through other sources. *Id.*

The FAA's website shows that at least in August 30, 2002, the Agency revised one of its Human Resources Policy Manual 1999 chapters to "clarify the recruitment sources under which to PATCO controllers can apply." The revised section advised that:

> Regional recruitment: Eligible former controllers may also apply for consideration for controller positions at en route and terminal facilities under applicable regionally issued vacancy announcements that are open to transfer, reinstatement and VRA eligibles. It is not required that their names be on the national "PATCO rehire" register for them to be considered and selected under this regional hiring source.

A former PATCO controller testified to being told that he could not apply for re-employment through channels other than the PATCO Inventory. He recounted that in April 2001, Joyce Brand at the Great Lakes Regional Office advised him that the applications from PATCO candidates were rejected because any hiring of PATCO applicants was done from the PATCO inventory in Oklahoma City. PCA's Memorandum, Exhibit 5, pages 2 and 3.

However, another witnesses, Herman Pettus, appended a February 5, 2003, letter received from Patricia Johnson, at the Oklahoma City AMV, where she noted that while he could no longer apply under Recruitment Notice 93-01, as that announcement had long expired, "[t]he FAA has many sources from which to select candidates for air traffic controller positions. You may log on to [the FAA's] website . . . to access vacancy announcements." PCA's Memorandum, Exhibit 3, attached letter. The foregoing shows that at a minimum, Ms. Brand of the Great Lakes regions may have given inaccurate information to former PATCO controllers contacting that region.

Hiring from PATCO Inventory vs. Other Sources

Selections for controllers were made by the different regions. PCA's Memorandum in Support, page 18. "In some regions all hiring decisions were made at the regional level, in others the decisions were made at the facility level and in others the decision were made cooperatively by the facility and the region."Agency's Motion in Opposition, Exhibit 17, page 2, paragraph 6.

However, the PCA contended that at some undetermined date the FAA began to impose annual "quotas" on hiring from the PATCO inventory and from other sources. PCA's Memorandum in Support, page 21.

Peter Kovalick, former Resource Management Office manager between 1999 through 2004, essentially confirmed this when he acknowledged that "the regions were encouraged by [his] office

to utilize, as necessary, the full panoply of hiring sources available to them. . . [a]t times, the guidance took the form of percentage goals or targets. . . [which] changed yearly" Agency's Motion in Opposition, Exhibit 17, pages 2-3.

In fiscal year 1999, Mr. Kovalick sent an e-mail explaining that due to lower than expected hiring but in efforts to still "meet the interests of all these groups. . . detailed regional hiring targets related to each pool" would be disseminated. He indicated that the plan was to hire "about 80 PATCO's. . . . We will reach that target by requiring each region to make a minimum 16% of all their hiring to be PATCO's." PCA's Memorandum In Support, Exhibit 21. At the same time, the regions were advised about the numerical hiring goals for other applicant pools and informed that hiring from a particular pool was of low priority until the requirements of the other pools were met. PCA's Memorandum in Support, Exhibit 21. There was some indication that these targets or quotas may have occurred in prior years.[6]

Annual hiring from the PATCO Inventory[7] is summarized as follows:

FY 1993 - PATCO controller ban lifted. Recruitment Notice 93-01 open from September 1, 1993, through October 15, 1993. No PATCO Inventory hires.

FY 1994 - No PATCO Inventory hires.

FY 1995 - Approximately 23.5 % of nationwide controller hires were from the PATCO Inventory.

FY 1996 - Approximately 73.5 % of nationwide controller hires were from the PATCO Inventory. Headquarter recommended that PATCO controllers applying through both the PATCO Inventory and other channels be selected from the PATCO Inventory.

FY 1997 - Approximately 44.70 % of nationwide controller hires were from the PATCO Inventory.

FY 1998 - Approximately 36.25 % of nationwide controller hires were from the PATCO Inventory.

FY 1999 - Approximately 20.82 % of nationwide controller hires were from the PATCO Inventory. Headquarters provided hiring targets from certain sources, including the PATCO Inventory. Regions did not always comply with targets.

---

[6]As support, the PCA pointed to the affidavit testimony of Darrell Dudley, a Facility Management Specialist in the FAA's Southern Region Air Traffic Division, Memphis ARTCC. Mr. Dudley asserted that in 1997 the Memphis ARTCC's thirty-three controller allotment was allocated by the "Southern Region" as follows: 5 regular reinstatements, 21 former PATCO reinstatements, and 5 MARC hires.

[7]The Agency noted that its coding system would not have tracked the numbers of former PATCO controllers who were hired through sources other than the PATCO Inventory.

FY 2000 - Approximately 10.93 % of nationwide controller hires were from the PATCO Inventory.

FY 2001 - Approximately 5.29 % of nationwide controller hires were from the PATCO Inventory.

FY 2002 - Approximately .69 % of nationwide controller hires were from the PATCO Inventory.

FY 2003 - Approximately 1.46 % of nationwide controller hires were from the PATCO Inventory.

FY 2004 - No PATCO Inventory hires.

See Supplemental Memorandum in Support of Class Certification, Declaration of Sandra S. Weaver.

The PCA's summary of the hiring numbers excluded reinstatements beginning with fiscal year 1999. See PCA's Supplemental Memorandum in Support. Such exclusion appears unfounded as the age of the reinstated controllers would be relevant to statistical analysis of disparity on the basis of age.

The PCA's Experience

The PCA applied for re-employment pursuant to Recruitment Notice 93-01 and, thus, became part of the PATCO Inventory. He sought employment as a controller in the Terminal setting in Texas, Louisiana, and Oklahoma, and it the Enroute setting at the Houston, Fort Worth, and Albuquerque ARTCCs. *See* PCA's Memorandum in Support.

Since October 2000, the PCA has served as an ATC Radar Instructor in the Houston ARTCC for the Washington Consulting Group, a government contractor. His duties have included providing ATC radar training to new controllers hired into the Houston ARTCC. The PCA testified that since October 2000, the FAA has hired approximately forty new controllers who have entered training at the Houston ARTCC. PCA's Memorandum in Support, Exhibit 1, page 3. He averred that none of these hires were from the PATCO Inventory and all were substantially younger than him and from three sources (College Training Initiative or CTI; Minnesota Aviation Resource Consortium or MARC, and VRA/DOD). PCA's Memorandum in Support, Exhibit 1, page 4.

The Houston ARTCC hired eighteen PATCO controllers in 1998, three in 1999, and three in 2000. Agency's Motion in Opposition, Exhibit 13. Most of these controllers were in their fifties at the time, with the exception of three who were age 46, 47, and 60. *Id.*

On September 21, 2003, seventeen controllers were hired at the Houston ARTCC (one of the PCA's preferred PATCO Inventory locations). The Oklahoma City Aviation Careers Office did not

refer the PCA for these particular vacancies (apparently, no PATCO Inventory referrals were made).[8] The PCA averred that thirteen of these new hires were under the age of forty and allegedly less qualified than him and fellow PATCO Inventory. PCA's Memorandum, Exhibit 1, page 4. The PCA did not apply for these openings other than through his ongoing request for employment by being part of the PATCO Inventory.

IV. ISSUES PRESENTED FOR CONSIDERATION

Whether the class requested by the PCA should be certified in view of the criteria set forth in 29 C.F.R. Sections 1614.204 and 1614.107. Based on the PCA's complaint, the Agency accepted the following issue:

> Whether the FAA discriminated against you, based on your age (over 40), when you were not selected for an Air Traffic Control Specialist in September 2003.

The PCA responded to the acceptance letter by requesting that the issue be modified as follows:

> Whether the FAA discriminated against you and other similarly situated applicants (those applicants who are former FAA air traffic controllers fired as a result of the 1981 PATCO strike) on the basis of age (over 40) when you and similarly situated applicants were not selected for Air Traffic Control Specialist positions in, or after September 2003. Specifically, you are claiming that you and other similarly situated applicants were subjected to disparate treatment and disparate impact discrimination on the basis of age.

In his memorandum supporting class certification, the PCA provided more information as what policies and practices he challenged:

> (i) The arbitrary creation of separate "applicant pools" – by which Complainant, and those similarly situated, have been segregated in an applicant pool consisting exclusively of applicants in the protected age group (e.g., the PATCO Inventory");
>
> (ii) The arbitrary exclusion from consideration of PATCO applicants who did not submit applications within a 45 day "window" of opportunity;
>
> (iii) The arbritary use of age-based quotas in making selections for Air Traffic

---

[8]By contrast, in filling Houston ARTCC openings in Fiscal Years 1998 through 2000, the Agency had referred as many as 86 PATCO Inventory members on January 15, 1998, to as few as seventy on October 1, 1999. *See* Motion in Opposition, Exhibit 16. These referrals included the PCA.

Control Specialist vacancies;

(iv) The refusal to consider the relative qualifications and experience of applicants in the selection process for air traffic controller vacancies; (this appears to be subsumed into the practice numbered one, above)

(v) The exclusion of applicants in the PATCO Inventory from consideration for hiring at certain ATC facilities;

(vi) The exclusion of applicants in the PATCO Inventory from consideration for selection through other application and selection procedures, and

(vii) Beginning in approximately 1999, the policy determination at the Agency level to not make any further selections from the PATCO Inventory, thereby precluding PCA and all similarly situated applicants in the protected age group from being hired.

V. ANALYSIS AND FINDINGS

The criteria for either accepting or dismissing a class complaint is set forth at 29 C.F.R. Section 1614.204. A class is defined in the regulations as: a "group of employees, former employees or applicants for employment who, it is alleged, have been or are being adversely affected by an agency personnel management policy or practice that discriminates against the group on the basis of their race, color, religion, sex, national origin, age or disability." 29 C.F.R. Section 1614.204(a)(1).

A class complaint is defined as:

[A] written complaint of discrimination filed on behalf of a class by the agent of the class alleging that:

(viii) The class is so numerous that a consolidated complaint of the members of the class is impractical;

(ix) There are questions of fact common to the class;

(x) The claims of the agent of the class are typical of the claims of the class; and

(xi) The agent of the class, or, if represented, the representative, will fairly and adequately protect the interest of the class.

29 C.F.R. Section 1614.204(a)(2).

The EEOC regulation found at 29 C.F.R. Section 1614.203(a)(2) is premised upon Fed. R. Civ. Proc. 23(a). Therefore, in order for a complaint to be certified as a class action, it must in fact, satisfy all of the criteria of Rule 23(a) of the Federal Rules of Civil Procedure. *East Texas Motor Freight Sys. v. Rodriguez,* 431 U.S. 345 (1977). The class agent bears the burden of proof as to certification.

The Administrative Judge may recommend that the Agency dismiss the class complaint, or any portion thereof, if it fails to satisfy the criteria set out in either 29 C.F.R. Section 1614.204(a)(2) or 29 C.F.R. Section 1614.107. The prerequisites for class certification and their application to the instant complaint are set forth below.

A. Commonality and Typicality

The class agent must establish that there are questions of fact common to the class. *General Telephone Co. of Southwest v. Falcon,* 457 U.S. 147, 157 (1982). Bare allegations in and of themselves, constitute an insufficient bases for showing commonality. Factors to be considered include the following: (1) nature of the employment practice challenged, whether it affects few employees or has a class-wide impact; (2) the uniformity or diversity of the relevant employment practices challenged; (3) the uniformity of the class; (4) the nature of the employer's management or agency action - to what degree is it centralized and uniform in its personnel policies, and (5) the length of time covered by the challenged practice. *Clifford Stokes v. Dept. of the Navy,* 1987 WL 775351 (EEOC Appeal, March 30, 1987). The merits of the case may not be examined in order to make a determination as to commonality. *Eisen v. Carlisle & Jacqueline,* 417 U.S. 156 (1974).

In *General Telephone Co. of Southwest v. Falcon,* 457 U.S. at 156, the Court emphasized that a class agent must be part of a class and possess the same interest and suffer the same harm as other class members. A class agent's grievances must be closely aligned with those of the class members. *Harris v. Pan American World Airways, Inc.,* 74 F.R.D. 24, 42 (N.D. Cal. 1977). In application, the commonality and typicality prerequisites tend to merge and are often indistinguishable. *Harris,* supra. For that reason, both elements are examined jointly in this section.

Review of Commission decisions regarding PATCO controller claims yielded *Torres v. Department of Transportation,* EEOC Appeal No. 01982649 (March 22, 2001). In that case the Commission certified a class of Air Traffic Assistants who claimed that the Agency's hiring policies and practices discriminated in favor ex-PATCO. That case provided limited guidance.

The PCA's individual claim arose from his non-selection for controller vacancies filled at the Houston ARTCC in September 2003. He averred that this non-selection was the result of disparate impact and disparate treatment discrimination. Specifically, the PCA claims that the following practices effected the Agency's failure to select him in September 2003, and affected the other former PATCO controllers in sufficiently similar ways to establish commonality and typicality.

The following analysis carefully tries to avoid addressing the merits of the claims, such as whether the alleged practices or policies actually existed.

1. **The arbitrary creation of separate "applicant pools" – by which PCA, and those similarly situated, have been segregated in an applicant pool consisting exclusively of applicants in the protected age group (e.g., the PATCO Inventory").**

Beginning at some unknown date or time, the Agency started to manage different sources of applicants as separate pools. While the PCA intimates that this practice began with the lifting of the 1981 hiring ban, contrary evidence shows that the Agency began tracking hiring from these hiring pools as early as fiscal year 1991. *See* Supplemental Memorandum in Support of Class Certification, Declaration of Sandra S. Weaver. Nevertheless, while this may be relevant to the merits (specifically, as to the "intent" element under the disparate treatment theory),[9] it does not defeat certification as the practice allegedly continues, and on its face affects all of the putative class members, it fulfills the commonality and typicality prongs. *See* Alleged Practice No. 4.

2. **The allegedly arbitrary exclusion from consideration of PATCO applicants who did not submit applications within a 45 day "window" of opportunity.**

As the PCA timely applied under Recruitment Notice 93-01, the complaint of those who did not, would not be closely aligned to with the PCA's interests.

3. **The arbitrary use of allegedly age-based quotas in making selections for Air Traffic Control Specialist vacancies.**

Preliminary evidence reflected that "from time to time" headquarters disseminated, to all regions, targets for hiring from the various hiring sources.[10] That type of centralized guidance sufficiently tied the PCA's individual disparate treatment claim to the class. However, post-certification, it will be the PCA's burden to demonstrate that this "practice" was still in use when the PCA was not selected in September 2003.[11] Consequently, certifying a class-wide attack on this practice prior to that date would be speculative.

---

[9] *Cf. Personnel Administrator v. Feeney,* 442 U.S. 256, footnote 25 (1979)(equal protection challenge to gender neutral hiring preference of veterans failed; foreseeability of consequence of hiring preference was not synonym for intent to discriminate against females).

[10] There was evidence specific evidence that as far back as February 12, 1999, and perhaps earlier, headquarters began imposing hiring targets or quotas that affected the PATCO Inventory. PCA's Memorandum in Support, Exhibit 21.

[11] *See* Section V(D).

4. **The alleged refusal to consider the relative qualifications and experience of applicants in the selection process for air traffic controller vacancies.**

This alleged practice is inextricably intertwined with Alleged Practice No. 1. As mentioned in the factual background section, there was evidence that the Agency did not compare candidates from one pool with the candidates from another pool; instead, applicants were compared against others in the same hiring pool.[12] As this was a nationwide approach to selecting from the various pools, the commonality and typicality elements are met.

5. **The exclusion of applicants in the PATCO Inventory from consideration for hiring at certain ATC facilities.**

There was no evidence that this was a practice sanctioned by headquarters. On its face, this allegation addressed practices at only "certain ATC facilities." History of the Houston ARTCC showed that it repeatedly had hired PATCO Inventory candidates. The thread tying the PCA's individual claim to the nationwide class in the case of the other accepted practices was indicia of influence by headquarter, that is absent here.

6. **The alleged exclusion of applicants in the PATCO Inventory from consideration for selection through other application and selection procedures.**

This allegation addressed headquarters' preference that PATCO Inventory candidates to be hired from that list versus other channels they may have used to apply, e.g., regional vacancy announcements. This practice did not harm the PCA because he did not apply through any avenue other than the PATCO Inventory. Thus, he would not adequately represent the interests of those other PATCO Inventory applicants who either did apply via other channels or attempted to do so, but were allegedly turned away or discouraged. The PCA did not testify that the Agency expressly or implicitly discouraged him from applying through other channels for which he would have been eligible. His submission of examples of others who were discouraged from doing so is insufficient to tie him to a nationwide class based on this alleged practice.

7. **Beginning in approximately 1999, the policy determination at the Agency level to not make any further selections from the PATCO Inventory, thereby precluding PCA and all similarly situated applicants in the protected group form being hired.**

The PCA may allege at this early processing stage that the precipitous drop in total PATCO Inventory hiring starting in FY 2000 – coupled with his observation,[13] at the Houston ARTCC –

---

[12]Exhibit 11 to PCA's Memorandum in Support.

[13]From October 2000, through May 13, 2004, the PCA observed that approximately forty new employees were hired at that Houston ARTCC. *See* PCA's Memorandum in Support, Exhibit 1. He

evidenced a nationwide practice or policy to stop hiring from that list. Moreover, the impact was allegedly similar across the class in that the other PATCO Inventory applicants would also have been excluded from consideration.[14]

Agency's Objections

In opposing a finding of commonality, the Agency argued *inter alia* that the PATCO Inventory is not uniform in that it is composed of "full performance level controllers as well as trainees, individuals certified on non-radar as well as those certified on radar facilities, individuals who worked at high level facilities . . . an those who worked at low level facilities." Agency's Motion in Opposition, page 21. Similarly, the Agency argued that varying regional implementation of headquarter's guidance and different selecting officials contribute to defeat commonality. But, while it might very well become crucial to control for these and other variances"[15] in devising a meaningful statistical analysis, such considerations are best addressed post-certification. As noted above these differences can be overcome for purposes of a commonality analysis by the evidence that headquarters had a hand in them.

Also, the Agency noted that exclusive focus on outside hiring provides an incomplete picture of how ATC vacancies have been filled in view of efforts in the last five years to hire internally. Beginning in February 2000, the Agency and Union agreed that in filling ATC vacancies, the Agency would "make every effort"to fill them with incumbent Certified Professional Controllers (CPCs) who met the qualifications and who wished to relocate to the areas where the vacancies existed. Agency's Motion and Memorandum in Opposition to Class Certification, Exhibit 11, page 3. The consideration of the ages of the CPCs transferees, as well as reinstated employees, would be important in order to develop a clearer picture, that would be something addressed by each side's statistical analysis/challenges after certification.

As mentioned above, the Agency contended that many of the alleged practices rest on the

---

asserted that none of these were from the PATCO Inventory and all were substantially younger than him. He further averred that the new hires were either from the CTI and MARC sources (with allegedly no actual work experience), or from the VRA and DOD sources (with allegedly some military experience).

[14]The PCA claimed that virtually all of the PATCO Inventory applicants were in the protected age category. PCA's Memorandum, page 10, footnote 10. In comparison, "virtually all other applicants selected have been substantially younger than the applicants in the PATCO Inventory, and invariably have been under the age of 40 with the vast majority of selectees being in the range of 23-35 years old." PCA's Memorandum, page 10, footnote 10.

[15]Additionally, beyond the various types of positions and certifications held by the PATCO Inventory controllers as of their 1981separations, whether they had garnered relevant experience during the 12-year ban would also be a relevant variable. Indeed, one of the regions ranked PATCO Inventory applicants with recent controller experience above others on the Inventory. PCA's Memorandum, Exhibit 18, pages 2-3.

inaccurate premise that the former PATCO controllers were restricted to applying for controller positions via the PATCO Inventory. However, this argument addresses the merits, and for that reason ruling on that challenge must wait.

B) Numerosity

"Although courts are reluctant to certify classes with 30 or fewer members, there are no specific numerical cut-off points. . . . 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." *Tschappat v. Department of Labor,* EEOC Appeal No. 07A40074 (May 5, 2005)(citations omitted).

In the administrative process, the exact number of class members need not be shown prior to certification because the "correct focus in determining whether a proposed class is sufficiently numerous for certification purposes is on the number of persons who *possibly* could have been affected by the agency's allegedly discriminatory practices and who, thus, may assert claims." *Id.* (emphasis added). An AJ retains discretion to redefine a class, subdivide a class, or even recommend dismissal of a class if it becomes apparent that there is no longer a basis to proceed with the class complaint as initially defined. This includes where later evidence demonstrates that the allegations about numerosity were inaccurate.

The PCA claims that there are at least 3,651 PATCO applicants who remained on the PATCO Inventory as to January13, 2004. PCA's Memorandum in Support, page 28. These putative class members would be dispersed throughout the country as it is a nationwide class. They should be easily identified by reference to the PATCO Inventory records. Additionally, the nature of the claim, with its focus on actions by headquarters lends itself to joint resolution.

However, as I have narrowed the class as explained in Section V(D), the numbers covered by this class may be greatly reduced. Nevertheless, even under one of the least favorable scenarios for the nationwide class, i.e., the limiting of the class to those applying to the Houston Region, the class would still meet numerosity in that the Agency had historically referred up to eighty-six and as many as 247 PATCO Inventory for vacancies in
ARTCC and "RADAR" facilities, respectively.

C) Adequacy of Representation

PCA assisted by his legal counsel are adequate representation. PCA's legal counsel practices exclusively in the area of plaintiffs' employment litigation. He is part of a form which has represented plaintiffs in several collective actions under the Fair Labor Standard Act. The class complaint is financially supported by PATCO Local 6881, a non-profit organization.

D) Limitations Period for Class Members

Those PATCO Inventory applicants who were not selected for vacancies at their preferred locations during the forty-five days preceding the PCA's EEO Counselor contact and thereafter should be the ones benefitting from that timely contact.

This is appropriate because the PCA's timely action should not serve to revive time-barred claims about "discrete" non-selections. *See National R.R. Passenger Corp. v. Morgan,* 536 U.S. 101 (2002)). Nevertheless, this class complaint would permit redress for allegedly systematic and ongoing practices and policies that began years before the PCA's EEO Counselor contact as long as they persisted into this limitation period. *Cf. Inglis v. Buena Vista Univ.,* 235 F.Supp. 2nd 1009 (N.D. Iowa 2002)(discriminatory pay structure challenge untimely due to its discontinuation at time of complained about action).

This approach balances the goal of eradicating discrimination versus the timely filing requirement regularly imposed on individuals.

E) Failure to State a Claim

In order for a class complaint to fall within the scope of 29 C.F.R. Section 1614, it must be one which alleges that a class of former or present employees of an agency, or applicants for positions with the agency, were, or are now, being adversely affected by an agency policy or practice which the agency has the authority to rescind or modify, and that discriminates against those employees on the basis of their common race, color, religion, sex, national origin, age, or disability. 29 C.F.R. Section 1614.103; Section 1614.107(a)(1).

The redefined class complaint states a claim under the ADEA.

F) Identical Prior Class Allegations

The Commission's regulations do not permit the acceptance of a class discrimination complaint that states the same claim that is pending before or has been decided by the agency, or which is the basis of a pending or decided U.S. District Court civil action. 29 C.F.R. Section 1614.107. The record in this case does not contain any information that would indicate that other class complaints containing an allegation similar to the instant case have either been previously filed with the Agency or are pending or have been previously decided by a U.S. District Court. Accordingly, the PCA's complaint is not barred by 29 C.F.R. Sections 1614.107(a)(1) and 1614.107(a)(3).

G) Timely Consultation with an EEO Counselor

A class agent must consult with an EEO counselor "within 45 days of the date of the matter alleged to be discriminatory." 29 C.F.R. Section 1614.105(a)(1)[16]. The Commission has adopted a "reasonable suspicion" standard in determining the timeliness of contact with an EEO Counselor. The 45-day time clock begins when an individual reasonably suspects discrimination, but before all the facts have become apparent. *Casey v. Department of Transportation,* EEOC No. 01A33700 (September 16, 2003).

The PCA timely contacted an EEO Counselor on October 31, with respect to the September 21, 2003 non-selection. PCA's Memorandum in Support, Exhibit 1, page 4. Therefore, the PCA's individual claim based on that event is neither time-barred nor subject to laches. However, as addressed above, the challenged practices should also be shown to have been in effect at the time of this non-selection. For purposes of this certification analysis, there is sufficient evidence that the accepted practices met that threshold.

H) Timeliness of Filing

The applicable regulation states that "the complaint must be filed with the agency that allegedly discriminated not later than 15 days after the agent's receipt of the notice of right to file a class complaint." 29 C.F.R. § 1614.204(a)(2). There is no indication that the PCA's complaint as to the September 2003 non-selection and ongoing was untimely in this respect so as to be barred by 29 C.F.R. Section 1614.107(a)(2).

I) MSPB - Pending Civil Action

There is no evidence that the matter has been raised in an appeal to the Merit Systems Protection Board (the "MSPB") or in a civil action pending in or previously decided by a United States District Court in which the Class Agent was a party. Therefore, 29 C.F.R. § 1614.107(a)(3) and (4) do not prevent acceptance of this class complaint.

J) Mootness

The complaint alleges discrimination in ongoing personnel policies and practices, and is not moot, nor does it allege that a *proposed* personnel action was discriminatory. Therefore, 29 C.F.R. § 1614.107(a)(5) does not prevent acceptance of this class complaint.

K) Failure to Prosecute

There is no evidence that the provisions of 29 C.F.R. § 1614.107(a)(6) and (7) apply to this

---

[16]This general rule is subject to waiver, estoppel and equitable tolling. 29 C.F.R. Section 1614.604(c).

complaint.

L) Spin-off Complaint

There are no allegations of dissatisfaction with the processing of a previously filed complaint evident in this matter. Therefore, 29 CFR § 1614.107(a)(8) does not prevent acceptance of this class complaint.

M) Abuse of the EEO Process

There are no allegations that this complaint is part of a clear pattern of misuse of the EEO process for a purpose other than the prevention and elimination of employment discrimination and there appears nothing in the record to support any such concern. Therefore, 29 CFR 1614 § 107(a)(9) does not prevent acceptance of this class complaint.

VI. VIABILITY OF DISPARATE IMPACT THEORY

The Agency argued that the disparate impact theory under the ADEA is inapplicable her. The argument is one based on statutory interpretation (e.g., different statutory language of the private sector vs. federal sector laws) and an absence of specific waiver sovereign immunity. *See* Agency's Motion and Memorandum Responding to Memorandum of Applicability of Disparate Impact Claims. In addition to the Agency's arguments, one commentator extensively addressed the legislative history behind section 633a of the ADEA finding that it militated against applying the disparate impact theory to the federal sector in the age discrimination context.[17]

While there is no specific regulation addressing this issue, the Commission's long-standing position has been to permit utilization of this theory in the federal sector. Additionally, the plain language of Section 633a is identical to its Title VII counterpart in the federal sector and the language in both is sufficiently broad to encompass the disparate impact theory as well as the disparate treatment theory. *See Lagerstrom v. Mineta,* No. CIV.A. 04-2517, 2006 WL 91539 (D. Kan. Jan. 13, 2006). In that case, the court noted that the concept of discrimination "is generally susceptible to multiple interpretations" and the disparate impact theory addresses the same ultimate issue of discrimination as disparate treatment does, just through a different evidentiary method." *Id.*

In conclusion, the disparate impact theory may be applied in the prosecution of this case. What remains unsettled is whether Title VII's business necessity defense or the ADEA's reasonable factors other than age defense will apply in the absence of explicit statutory guidance for federal

[17]He concluded that such statute "by its terms requires discriminatory intent for liability and thus is incompatible with disparate impact. This language is supported by its legislative history, which is concerned solely with intentional discrimination, and with the enforcement practices of anti-discrimination law in the federal sector, which are in tension with disparate impact liability."

sector age claims. This question, however, does not need to be decided at the certification stage.

VII. DECISION

The redefined claim met the elements required for class certification. Pursuant to EEO Management Directive-110 (MD-110), page 8-5, the following class complaint is certified:

> Whether the FAA discriminated against PATCO Inventory applicants on the basis of age when they were not selected for Air Traffic Control Specialist vacancies on September 16, 2003, and thereafter. This class complaint encompasses the following allegedly discriminatory practices and/or policies for the hiring of Air Traffic Control Specialists:
>
> (A) The maintenance of separate "applicant pools."
>
> (B) The use of quotas in making selections.
>
> (C) Not comparing candidates from one pool with those in other applicant pool.
>
> (D) Beginning in approximately 1999, not making any further selections from the PATCO Inventory.
>
> Class membership is reserved to:
>
> Those PATCO Inventory applicants who were not selected for Terminal and Enroute Air Traffic Control Specialist vacancies (at their preferred locations) beginning on September 16, 2003,[18] and thereafter. Preferred locations refers to the locations identified by the PATCO Inventory applicant as ones for which they would like to be considered for ATCS employment.

VIII. NOTICE TO CLASS MEMBERS

Within ninety (90) days of receiving this decision, the Agency shall use reasonable means, such as delivery, mailing to last known address or distribution, to notify all class members of the acceptance of the class complaint in compliance with 29 C.F.R. § 1614.204(e). The Administrative Judge may consider a petition to stay this notice order where it appears likely that either party may

[18] 45-days before the PCA's timely EEO Contact.

appeal this decision.[19]

IX. AGENCY'S FINAL DECISION

Attached is a report of findings and recommendations issued pursuant to 29 C.F.R. § 1614.204(i). Within sixty (60) days of receiving this report of findings and recommendations, the agency shall issue a final decision, in writing, notifying the class agent, *via* certified mail, whether or not the agency will accept, reject, or modify the findings and recommendations, those findings and recommendations shall become the final decision, and the agency shall transmit the final decision to the class agent within five (5) days of the expiration of the sixty (60) day period. If the Agency's final decision does not implement the decision of the Administrative Judge, it shall simultaneously appeal it in accordance with 29 C.F.R. § 1614.403 and append a copy of the appeal to the final order. The final decision shall inform the class agent of the right to appeal or to file a civil action in accordance with 29 C.F.R. § 1614 Subpart D and of the applicable time limits. 29 C.F.R. § 1614.204(j).

FOR THE COMMISSION:

Veronica A. Cuadra

Veronica A. Cuadra
Administrative Judge
U.S. Equal Employment
Opportunity Commission
207 S. Houston St., 3rd Floor
Dallas, Texas 75202
Tel: (214) 253-2733
FAX: (214) 253-2739

[19] *See* Handbook for Administrative Judges.