

UNITED STATES OF AMERICA
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
DENVER DISTRICT OFFICE

_____)	
CHANDLER GLOVER,)	
DEAN ALBRECHT, et. al.,)	EEOC Case No. 320-A2-8011X
)	
Complainants,)	
)	
v.)	
)	
JOHN E. POTTER,)	Agency Case No. CC-801-0015-99
Postmaster General,)	
United States Postal Service)	
)	
Agency)	
_____)	

**COMPLAINANTS' BRIEF IN SUPPORT OF REQUEST FOR FINAL
APPROVAL OF CLASS ACTION SETTLEMENT AGREEMENT**

COMES NOW the Complainants, by and through class counsel, and respectfully submit the following facts and legal authority in support of their request for the Commission to grant final approval to the Glover/Albrecht class action settlement agreement.

PREAMBLE

The Administrative Judge issued an Order April 26, 2004, approving seventy-nine (79) individuals as objectors to the settlement agreement.¹ This

¹ Order Approving Final List of Objectors to Class Action Settlement Agreement dated April 26, 2004.

number represents less than [.3] percent of the class members eligible to file objections. Stated otherwise, **99.7 percent** of the class **did not object** to the settlement agreement.

Most of the 79 individuals who objected to the Settlement Agreement, provide no factual or legal basis to support their objections. To the contrary, an inference that the Settlement Agreement is fair, reasonable and adequate and should be granted final approval may be drawn by the absence of objections by the vast majority of class members.

I. RELEVANT BACKGROUND²

This case alleges that the United States Postal Service (hereinafter “USPS” or the “Agency”) maintains a nationwide practice of denying promotional and/or advancement opportunities to individuals with disabilities in permanent rehabilitation duty positions in violation of the Rehabilitation Act of 1973, as Amended.

Chandler Glover, an employee of USPS, filed an informal individual complaint of discrimination in 1992 alleging, *inter alia*, disability discrimination because he was told that, based upon his status as a

² Declarations of Brad Seligman and John Mosby and Mosby’s Supplemental Declaration are attached hereto as Exhibits 1, 2 and 3.

rehabilitation employee, he could not be promoted.³

In October 1998, during discovery, Mr. Glover, and his attorney, John Mosby, became aware that his case had class implications.⁴ On February 29, 1999, Glover filed a formal class complaint alleging a practice of class-wide discrimination against rehabilitation employees.⁵ On August 18, 1999, the Agency forwarded the file to the Commission's Denver District Office for a decision on whether to certify Glover's class.⁶

On March 6, 2000, Administrative Judge Montemayor ordered the Agency to identify by March 27, 2000, the total number of employees that held "permanent rehabilitation duty" positions.⁷ The Agency did not respond. Judge Montemayor drew an adverse inference against USPS on the issue of numerosity. On March 30, 2000, Judge Montemayor certified the Glover case as a class action.⁸ Judge Montemayor defined the class and applicable timeframes as follows:

Those persons employed by the Agency throughout the United States between January 1, 1992, and the present while in permanent rehabilitation positions who were allegedly denied promotional and/or advancement

³ Mosby decl., ¶ 2.

⁴ Id. ¶ 3.

⁵ Id.

⁶ Id. ¶ 4.

⁷ Order certifying the class dated March 30, 2000.

⁸ Id.

opportunities allegedly due to discrimination on the basis of disability.⁹

On May 5, 2000, the Agency issued its Final Agency Decision rejecting the Administrative Judge's class certification decision.¹⁰ The Agency appealed the certification decision to EEOC's Office of Federal Operations. (OFO).¹¹ On April 23, 2001, OFO reversed the Agency's Final Agency Decision and upheld the Administrative Judge's certification of Glover's class action.¹² Thereafter, the Agency thereafter filed a Request for Reconsideration with the full Commission challenging OFO's decision, with the full Commission.¹³ On August 16, 2001, the Commission denied the Agency's Request for Reconsideration and remanded the Glover class action to the Administrative Judge for processing.¹⁴

In October 2001, class counsel, John Mosby, was retained by Dean Albrecht, a rehabilitation employee, who had filed a class complaint on behalf of rehabilitation employees in USPS's Sun Coast District located in the Tampa, Florida area.¹⁵ Albrecht's class action had been preliminarily

⁹ Id.

¹⁰ Mosby decl., ¶ 5.

¹¹ Id. ¶ 7.

¹² Id. ¶ 8.

¹³ Id.

¹⁴ Id.

¹⁵ Id ¶ 10.

certified.¹⁶ Some of the issues raised in Mr. Albrecht's class action overlapped with issues certified in the Glover class action. Upon Albrecht retaining class counsel, the Administrative Judge in the *Albrecht* case, on his own motion, transferred the *Albrecht* class action to the Denver District Office.¹⁷ The *Albrecht* class action was assigned to Administrative Judge Montemayor.

In November 2001, class counsel sought discovery directed to the class issues and size of the class.¹⁸ On November 13, 2001, over the Agency's objections, class counsel moved to consolidate the *Glover* and *Albrecht* class actions and to make Albrecht a co-class agent in the *Glover* class action.¹⁹ On December 14, 2001, Albrecht was made a co-class agent in the *Glover* class action and the *Albrecht* class action was consolidated with the *Glover* class action to the extent that the issues were the same or similar.²⁰

On December 12, 2001, the Administrative Judge ordered the Agency to transmit the class notice to putative class members and to post the notice

¹⁶ Id.

¹⁷ Id. ¶ 11.

¹⁸ Id. ¶ 20.

¹⁹ Id. ¶ 12.

²⁰ Id.

on all Agency bulletin boards.²¹ The notice of class action was transmitted to over 22,000 putative class members.²²

However, USPS alleged that Glover and individuals “like Glover” who “were placed into ‘productive work’ assignments without physical and/or mental restrictions” were not members of the class entitled to receive the Notice.²³ On January 9, 2002, class counsel filed a Motion for Order That the Agency Identify and Provide All Class Members with the Class Notice; specifically Mr. Glover and individuals similarly situated with Glover.²⁴ On January 17, 2002, the Administrative Judge ordered the Agency to identify and provide a copy of the class notice to Glover and individuals “similarly situated with Glover.” On April 15, 2002, the Agency sent a second class notice to Chandler Glover and approximately 1300 individuals who were “like Glover.”²⁵

In early February 2002, the Agency initiated settlement discussions with class counsel and requested a stay of all formal discovery in the case.²⁶

However, class counsel insisted that as a condition for settlement

²¹ Id. ¶ 14.

²² Id.

²³ Complainants’ Motion For An Order That The Agency Identify And Provide All Class Members With The Class Notice, Exhibit 2, dated January 9, 2002.

²⁴ Id.

²⁵ Mosby Supp. decl., ¶ 5.

²⁶ Mosby decl., ¶ 20.

negotiations, informal discovery would proceed in order for class counsel to fully evaluate the case and to prepare for hearing.²⁷ The Agency agreed. Thereafter, the Administrative Judge issued an order staying all formal discovery.

On February 27, 2002, the parties held their first formal meeting to discuss the method and process for proceeding with settlement negotiations.²⁸ The parties agreed to formal mediation and established a process for selecting a mediator.²⁹ The parties selected Linda Singer of ADR and Associates as their mediator.³⁰

After receiving discovery, performing analyses of thousands of documents and determining the size of the class and complexity of the issues involved, Class Counsel contacted Attorney Brad Seligman, a recognized expert in class action litigation.³¹ Mr. Seligman agreed to enter his appearance and to act as lead counsel in the mediation and settlement negotiations.³²

²⁷ Id.

²⁸ Mosby Supp. decl., ¶ 13.

²⁹ Id.

³⁰ Mosby decl., ¶¶ 20-21; Seligman decl., ¶ 7.

³¹ Mosby decl., ¶ 21.

³² Id.

On June 7, 2002, the first mediation session was held.³³ For the next nine months, the parties met and communicated intensively regarding the issues to be resolved.³⁴ In February 2003, the parties reached an Agreement in Principle. However, negotiations continued until November 2003, in order to refine and clarify the terms of the Settlement Agreement.³⁵ On November 20, 2003, the parties submitted the Settlement Agreement and exhibits thereto to Administrative Judge Montemayor for preliminary approval.³⁶

On December 3, 2003, Judge Montemayor issued his Preliminary Approval of the Settlement Agreement and Ordered the parties to transmit the Notice of Resolution of Class Action to class members.

On February 3, 2004, the Notice of Resolution of Class Action was mailed to 26,176 class members.³⁷ The Notice of Resolution was also posted on the Agency's bulletin boards at over 14,000 facilities.³⁸ The Settlement Agreement required that notice be posted on class counsel's

³³ Id. ¶ 22.

³⁴ Seligman decl., ¶ 11.

³⁵ Mosby Supp. decl., ¶ 15.

³⁶ Settlement Agreement § III.

³⁷ Mosby Supp. decl., ¶ 17.

³⁸ Settlement Agreement § IVA.2.a.

website.³⁹ The parties also agreed to a process to continue to identify additional class members and added individuals to the class list.⁴⁰

Pursuant to Commission regulation 29 C.F.R. 1614.204(g)(4), class members were given thirty (30) days to submit any objections to the terms of the proposed Settlement Agreement. At the end of the objection period, the Administrative Judge and parties approved seventy-nine (79) individuals as Objectors.⁴¹

On March 16, 2004, Administrative Judge Montemayor held a telephonic conference with the parties to discuss the issues to be briefed in written submissions to support requests for final approval of the settlement agreement. Judge Montemayor identified the following issues raised by objectors:

- **amount of monetary compensation, including the fairness of distribution formula;**
- **failure to include other claims, (i.e. overtime, removal, demotion and retirement);**
- **burdens of proof;**
- **standing of objectors;**
- **denial of liability by USPS;**
- **allegations of continuing discrimination by USPS;**
- **objection to timeframe of the settlement agreement;**
- **failure to provide for deceased workers;**
- **recovery of class agents;**
- **class counsel fees and adequacy of representation.**

³⁹ Settlement Agreement § IVA.4.b.

⁴⁰ Mosby Supp. decl., ¶ 18.

⁴¹ Order Approving Final List of Objectors to Class Action Settlement Agreement dated April 26, 2004.

II. SUMMARY OF TERMS OF SETTLEMENT

This case is the largest disability employment class action to date.⁴²

The Settlement Agreement in this case provides for both injunctive and monetary relief for the class members.⁴³ This agreement is the product of many months of discussion and compromise to arrive at a fair, adequate and reasonable settlement for all class members.⁴⁴

The settlement ensures that the discriminatory practice complained of will cease: policies will be revised, training given, a centralized complaint process is established, and class counsel will be provided reports and data from which it will be able to monitor compliance.⁴⁵

The EEOC class action regulations, 29 C.F.R. 1614.204(l), provide that if there is a finding of discrimination for the class after a hearing, each class member must file a claim with the agency. In this Settlement Agreement, the parties have negotiated a stream-lined claims process for all class members without the expense and lengthy litigation that would have been required for a case of this magnitude.⁴⁶ This Settlement Agreement bestows upon each class member the same rights, or more to which he/she

⁴² Seligman decl., ¶ 22.

⁴³ Settlement Agreement §§ V and VII.

⁴⁴ Seligman decl., ¶¶ 8-12.

⁴⁵ Settlement Agreement § V; Seligman decl., ¶ 20.

⁴⁶ Seligman decl., ¶ 14.

would have been entitled if this case had gone to hearing and there was a finding of discrimination.⁴⁷

This agreement provides for complete oversight and representation of all claiming class members throughout the claims process.⁴⁸ The claims process is divided into stages to allow counsel and the parties to fully evaluate each claim and recommend the appropriate action based on the facts available; either through mediation or, if needed, an arbitration.⁴⁹ Class members are given the same presumptions, or more, than they would have acquired had this case been litigated and the class prevailed.⁵⁰

The terms of the settlement agreement set up a monetary relief structure which ensures that all class members with meritorious claims will receive relief comparable to the loss suffered.⁵¹ All successful claimants will automatically receive compensatory damages based on the type of claim and year of promotion denial.⁵² The agreement sets up two methods for determining back pay. For claims of denial of seniority-based promotions, back pay matrices are provided from which losses can be determined based on the year and grade level held by the class member, without the necessity

⁴⁷ Seligman decl., ¶¶ 30-31.

⁴⁸ Settlement Agreement § VI.

⁴⁹ Seligman decl., ¶ 15 and Settlement Agreement § VI.

⁵⁰ Settlement Agreement § VI. D.10; Seligman decl., ¶¶ 30-31.

⁵¹ Settlement Agreement § VI.

⁵² Settlement Agreement § VII.B.1.

of any proof of damages.⁵³ Individuals who were denied an opportunity to advance to other positions will have their back pay individually determined based on agency policy.⁵⁴ Fixed compensatory damages amounts are allowed, without any requirement of damage proof, for claims of denial of training, assignments, details, or awards.⁵⁵

III. STANDARD FOR REVIEW OF CLASS SETTLEMENTS

Federal courts have held that approval of a class action settlement is committed to the sound discretion of the court. *Jones v. Nuclear Pharmacy, Inc.*, 741 F.2d 322, 324, (10th Cir. 1984). “In exercising its discretion, the trial court must approve the settlement if it is fair and reasonable.” *Id.* In making this assessment, it is “the settlement taken as a whole, rather than the individual component parts, that must be examined for overall fairness....” *Hanlon v. Chrysler Corp.*, 150 F. 3d 1011, 1026 (9th Cir. 1998). An Administrative Judge, when making a determination of whether a class action settlement is fair, adequate and reasonable to the class as a whole follows the standard enumerated by Federal Rules of Civil Procedure 23(e). *Modlin v. Barnhart*, EEOC Appeal No. 01A24054, February 20, 2003.

⁵³ Settlement Agreement § VII.B.1.d.

⁵⁴ *Id.*

⁵⁵ Settlement Agreement § VII.B.1.a.

"[T]he primary concern addressed by Rule 23 (e) is the protection of class members whose rights may not have been given adequate consideration during the settlement negotiations." *Alvarado Partners, L.P. Mehta*, 723 F. Supp. 540, 546 (D. Colo. 1989).

Factors that must be considered by the court in assessing whether the settlement is fair and reasonable under Rule 23 include the following:

- "(1) whether the proposed settlement was fairly and honestly negotiated;
- (2) whether serious questions of law and fact exist, placing the ultimate outcome of the litigation in doubt;
- (3) whether the value of an immediate recovery outweighs the mere possibility of future relief after protracted and expensive litigation; and
- (4) the judgment of the parties and their counsel that the settlement is fair and reasonable." *Id.*

The Commission has stated that the following factors should be considered in determining whether a settlement agreement is fair and reasonable: “ 1) whether the settlement was a product of fraud or collusion; 2) the complexity, expense, and likely duration of the litigation; 3) the stage of the proceedings and the amount of discovery completed; 4) the factual and legal obstacles to prevailing on the merits; 5) the possible range of recovery and the certainty of damages; and 6) the respective opinions of the participants, including class counsel, class representative, and the absent

class members.” *Branch et al., v. Derwinski, Secretary, Department of Veterans Affairs*, Appeal No. 01902620, (November 7, 1990). *New Mexico Nat. Gas Antitrust Litig.*, 607 F. Supp. At 1504.

The settlement should not be rejected “merely because individual class members complain that they would have received more had they prevailed at trial.” *Modlin v. Barnhart, Commissioner, Social Security Administration*, Appeal No. 01A24054, (February 20, 2003), quoting *Thomas v. Albright*, 139 F.3d 227, 231 (D.C. Cir. 1998). “Settlements inherently involve compromise from both parties; complainants should not expect the agency to provide the full relief to which they would be entitled if the claim was successful in trial. Further, the monetary relief provided, rather than promotions, is a reasonable compromise; it is not so ‘grossly inadequate’ that it should be disapproved.” Also see, *Branch v. Department of Veterans Affairs*, EEOC Appeal No. 01902620 (November 7, 1990).

Moreover, the relief offered must be tailored to cure the specific situation that gave rise to the alleged statutory violation. See, *Ducay v. U.S. Postal Service*, EEOC Request No. 05900470 (August 16, 1990), citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975). The Commission has noted with approval the fairness of a settlement agreement that provides class member “the same benefits ... as a finding of class-wide discrimination

and further required the agency to ‘establish an individual claim system whereby class members can seek individual relief in the same manner as provided in section 1614.204(1)(3) of EEOC’s regulations.’” *Mitchell, et al., v. Glickman, Secretary, Department of Agriculture, Agency*, Appeal No. 01960816, et al, (July 3, 1997).

When an Administrative Judge considers objections filed by class members, the judge must consider both “the number of those objecting to the settlement and the substance of their objections.” *Branch et al., v. Derwinski, Secretary, Department of Veterans, supra; Thomas v Albright*, 139 F. 3d 227 232, (D.C. Cir, 1998)(Court considered that 85% of class did not object) (Also, *Holden v. Burlington Northern Inc*, 665 F. Supp. 1398, 1421, (D. Minn. 1987).

“The plain language of Rule 23 (e) clearly contemplates allowing only class members to object to settlement proposals.” *Association For Disabled Americans, Inc. v. Amoco Oil Co.*, 211 F.R.D. 457, 473-74, (S.D. Fla., 2002)(Also, See, EEOC MD 110, Chapter 8, (V)(C), “All class members will have the opportunity to object to any proposed settlement”). Further, objections to a class action settlement agreement must be timely filed, otherwise they are waived and the Administrative Judge need not consider

untimely objections. *Campbell v. Barnhart, Commissioner, Social Security Administration*, Appeal No. 01A23974, February 20, 2003.

Finally, Courts must be ever mindful that settlement is “the offspring of compromise”. *Hanlon v. Chrysler Corp.* 150 F.3d 1011, 1027 (9th Cir. 1998). When evaluating the fairness and reasonableness of a proposed class action settlement, the Court is entitled to rely on the judgment of experienced counsel. *Reed v. General Motors Corp.* 703 F.2d 170, 175 (C.A. Tex 1983).

IV. NATURE OF OBJECTIONS

All the objections accepted in this case were filed *pro se*.⁵⁶ Accordingly, the parties agreed to give a liberal interpretation to “objections” regardless of the substance of said “objection”. Each correspondence was reviewed with the understanding that if an individual followed the procedures set out in the Notice of Resolution of Class Action for filing an objection, said objection would be reviewed in a light most favorable to the individual and construed as an objection where possible. Most of the objections were extremely general in nature, in many cases never addressing any particular provision of the settlement agreement.

⁵⁶ Final List of Objectors, attached to Order Approving Final List of Objectors To Class Action Settlement, dated April 26, 2004.

Class counsel categorized the objections based upon categories established by the Administrative Judge during the parties' telephonic conference on March 16, 2004. In categorizing the objections, class counsel acknowledges some difficulty because many individual objections address multiple issues. The objections are categorized based upon the central theme of the individual's objection. In addition, some objections were placed in more than one category.

The largest category of objections, thirty-five (35), mentioned or raised the issue that the settlement agreement provides insufficient monetary recovery to class members. (Objections 1, 4, 7, 13, 15, 16, 18, 21, 28, 31, 32, 33, 36, 38, 39, 41, 42, 44, 46, 50, 51, 52, 54, 57, 58, 60, 62, 65, 66, 68, 69, 70, 71, 77 and 78).

The second largest category, nineteen (19) objections raised concerns that certain issues were not addressed in the settlement agreement. (Denial of overtime, Objections 2, 23, 24, 28, 50, 53, 54 and 59); (Retirement benefits, Objections 5, 8, 13, 20, 55 and 67); (Agency refused to give individuals "rehabilitation status", Objection 6) ; (Agreement does not provide for survival benefits and sick leave usage, Objection 10); (Agreement does not include "limited duty individuals", Objection 27); (Case should be addressed in the Supreme Court, Objection 43); and

(Agreement did not address loss of seniority when crossing crafts, Objection 75).

The next largest category involved those class members who wanted to tell the Administrative Judge their individual situation: fifteen (15) objections. (Objections 26, 25, 34, 37, 40, 45, 47, 48, 56, 61, 63, 64, 72, 74 and 76). Many of the objectors in this category never use the word “object” and those that do, lodged no real objection. Two of these objectors, 48 and 56, objected because their individual cases have been litigated to conclusion and they argue they will not be able to recover under the settlement agreement. Significantly, none of the 15 objections in this category challenge the fairness, adequacy or the reasonableness of the settlement agreement to the class as a whole.

Seven individuals objected to the burdens of proof placed upon class members during the claims process. (Objections 12, 14, 30, 33, 44, 49 and 69). Six individuals raise the issue of not being able to opt out of the agreement. (Objections 7, 15, 22, 23, 36 and 69).

Three individuals objected because the time frame of the class action did not include acts occurring before 1992. (Objections 11, 61 and 73).

Two individuals objected because the USPS did not admit liability.

(Objections 9 and 29). One individual objects to the compensation to be received by class counsel. (Objection 69).

Finally, four individual objectors took a shotgun approach alleging a wide array including racketeering, collusion and conspiracy among all parties involved, including the Commission. None of these individuals discussed any specific sections of the settlement agreement. Moreover, none offered any factual support for their bare accusations. (Objections 3, 17, 35 and 79).

V. Legal Analysis

Under Commission precedent, the opinions of absent class members, those who did not object, must be considered and afforded weight. In this case, more than 99.7 percent of the class members chose not to object to the terms of the settlement agreement. The infinitesimal number of objections, when compared to the number of class members who chose not to object, must be considered by the Administrative Judge. See, *Thomas v. Albright, supra*, and *Holden v. Burlington Northern Inc, supra*. It is reasonable to conclude that the class, as a whole, considers the terms of the settlement agreement to be fair, reasonable and adequate. See, *Branch et al., v. Derwinski, Secretary, Department of Veterans Affairs, supra*.

The standing of some “objectors” must be resolved. With respect to standing, it should be noted that seven individuals, Objectors 14, 19, 25, 45, 63, 76 and 77 are not listed by the Agency as class members. None of these individuals, in their objections, identify themselves as permanent rehabilitation employees. Three of these individuals identify themselves as “limited duty employees”, 19, 63 and 76 and one individual, number 25, requested to be included in the class. If it is determined that these individuals are not members of this class, they have no standing to object. 29 C.F.R. § 1614.204(g)(4) and EEOC MD 110, Chapter 8, (V)(C). Also, see, *Association For Disabled Americans, Inc. v. Amoco Oil Co, supra*, (Non-class members have no standing to file objections).

An analysis of this agreement under the Commission’s standards for approval of class action settlement agreements, as set out in *Branch supra*, demonstrates that the agreement should be granted final approval:

1. Settlement Agreement Negotiations were Fair and Honest.

The entire mediation and settlement process was protracted, vigorous, and non-collusive.⁵⁷ There were no discussions of attorneys’ fees for class

⁵⁷ Seligman decl., ¶¶ 7-12.

counsel until there was an agreement in principle regarding all the major provisions of the settlement.⁵⁸

2. Complexity, Expense and Likely Duration of Litigation.

With respect to complexity, there has never been a class certified similar to this one. The class in this case, over 26, 000 individuals, is believed to be the largest disability employment case ever certified.⁵⁹ It is one of the few nation-wide classes ever certified or settled. The certification in this case occurred prior to any extensive discovery and could have been reconsidered at a later time.⁶⁰ While formal discovery was limited, class counsel still expended over \$70,000.00 in expenses.⁶¹ If the case had proceeded to trial, class counsel would have incurred additional discovery and trial preparation expenses including expert fees, deposition and travel costs.

The legal and factual issues in this case were complex, and largely unprecedented.⁶² Not only was the basic factual predicate for the case disputed (i.e. the existence of an unwritten practice of denying promotions to class members), but the increasingly complex disability definition's

⁵⁸ Id. ¶ 27.

⁵⁹ Id. ¶ 22.

⁶⁰ Id.

⁶¹ Seligman decl., ¶ 27.

⁶² Id.

applicability to this, or any class was hotly debated. The use of the “regarded as” prong of the disability status definition in the Rehabilitation Act for the class was also largely unprecedented.⁶³

This case is already approximately 12 years old. With the Postal Service planning to down-size, and its future shape and viability unknown, there was a risk that remedies and resources for future resolution of this case might not be available.⁶⁴

If the matter went to trial and the complainants were successful, the Agency would be required to establish a claim process. Due to the size of this class and likely appeals, the duration of this case would likely consume many more years to conclusion. Delay of several more years would likely result in the loss of class members through death or inability to locate them.⁶⁵

3. Stage of Proceedings and Discovery Completed.

The settlement was reached after the class certification motion, associated appeals and motions for reconsideration were resolved. The settlement adopts the litigated class definition. Thus, the dangers of abuse present when a pre-class certification settlement is reached, are absent here. See *Anchem v. Winsor*, 521 U.S. 591, 620 (1997). See also *Staton v. Boeing*

⁶³ Seligman decl., ¶¶ 22-24.

⁶⁴ Seligman decl., ¶¶ 22-26.

⁶⁵ Seligman decl., ¶ 26.

Company, 327 F. 3d 938, 952-953 (9th Cir. 2003) (Heightened scrutiny to settlements reached prior to class certification)

Prior to the start of mediation, class counsel engaged in discovery, which included obtaining computerized data, documents, class member address lists, EEO complaints, as well as depositions of supervisors and Human Resource witnesses. In addition, class counsel interviewed hundreds of class members, and received additional information from thousands of class member.⁶⁶ As noted above, as a prerequisite to mediation, class counsel insisted that additional discovery be provided.

During the mediation process, the Agency produced an electronic employee database to class counsel showing all job positions, pay rates, and promotional histories of all USPS employees, including employees in positions given a status number which indicated they were in rehabilitation positions.⁶⁷ USPS produced key witnesses who were informally examined by class counsel regarding equal employment and disability policies, the electronic databases, promotional procedures and the injury/compensation process. In addition, thousands of pages of documents on these subjects were produced.⁶⁸

⁶⁶ Mosby decl., ¶¶ 2, 17-19.

⁶⁷ Seligman decl., ¶ 8.

⁶⁸ Id.

Class counsel’s statistician, Dr. Richard Drogin, a highly experienced statistician, examined the electronic data. In order to best understand the data, Dr. Drogin, in the presence of counsel, was permitted to ask the expert for USPS questions in order to understand the data and how it was formatted.⁶⁹ Ultimately, Dr. Drogin was able to analyze and compare the relative promotion rates of permanent rehabilitation employees and similarly situated non-rehabilitation employees.⁷⁰

In addition, class counsel continued to interview class members. It provided to the Agency summaries of the claims made by over 400 of these class members.⁷¹

4. Factual and Legal Obstacles to Prevailing on the Merits.

The factual and legal basis for the case was hotly disputed by the Agency. The basic factual premise of the case—that the Agency had a practice or unwritten policy of denying advancement and promotion opportunities to the class—was not contained in any “smoking gun” memo or written document. In fact, the Agency offered a plausible explanation of the lower promotion rates of class members—the very impairments that

⁶⁹ Seligman decl., ¶ 9.

⁷⁰ Id.

⁷¹ Seligman decl., ¶ 10.

rendered them disabled limited their interest and ability to be promoted.⁷²

The law relating to disability discrimination remains unsettled, and the recent trend of Supreme Court cases has been disquieting for employees with disabilities. USPS argued strenuously that a) most class members likely did not have actual disabilities, b) that any class process to determine whether such disabilities existed would be unmanageable, c) would lead to a much reduced class. Class counsel's attempt to avoid this line of attack, i.e. the use of the "regarded as" prong of the disability definition, is largely untested in the law and depends on proof of the unwritten policy it asserts existed at the Agency.⁷³

Even if liability were established, it is an open question as to whether the class could seek and recover compensatory damages. The recovery of damages (as opposed to back pay) in class cases is very controversial, with different results in different jurisdictions.⁷⁴ Moreover, the Agency would argue that emotional distress damages are incompatible with class treatment because it requires individual testimony from each class member. In any event, a fully litigated process requiring individual proof of damages from

⁷² Seligman decl., ¶ 24.

⁷³ Id. ¶¶ 22-24.

⁷⁴ Id. ¶ 25.

each class member, would raise manageability issues, and delays.⁷⁵ If such damages were allowed, class members might be discouraged from seeking such damages by the requirements of proof and the risk of intrusive discovery by the Agency into their mental and emotional histories.

5. The Possible Range of Recovery and The Certainty of Damages.

As noted above, this case was fraught with uncertainties, both as to liability and extent of damages. The biggest uncertainty, however, is how many class members would assert claims. Because neither side could accurately estimate this, a global settlement with a single class fund was impossible to negotiate.⁷⁶ Instead, the settlement uses a claims process to allow class members to come forward. The settlement makes every attempt to maximize the filing of claims by, *inter alia*, providing broad notice, tracing and repeat mailings of claim forms, free counsel, and the use of a short and simple initial claim form.⁷⁷ After all claims are filed and evaluated, the parties will then explore the possibility of a global settlement.⁷⁸

The settlement provides for the same forms of relief normally available to the class member if there is a class finding of discrimination

⁷⁵ Id.

⁷⁶ Seligman decl., ¶ 10.

⁷⁷ Settlement Agreement § IV.B and Exhibit 4.

⁷⁸ Settlement Agreement § VI.A.3.

and he/she prevailed on their individual claim (back pay, compensatory damages) with a partial exception for instatement rights. For most positions, there is no instatement right because of the expected down-sizing of the USPS. Three exceptions to this are 1) promotions into letter carrier positions 2) promotions into EAS positions and 3) the Associate Supervisor Program (ASP).⁷⁹

The monetary relief provided to individual claimants sets up a fixed schedule of damages for lost promotion opportunities (denial of details, training and awards).⁸⁰ For denial of advancement, damages and back pay are available. Damages are based on the year of the advancement denial, with recoveries ranging from \$4550 to \$10,000.⁸¹ These figures were based on awards in promotion cases, the risks of the litigation, and the degree of harm likely from a denial of advancement.⁸²

For seniority-based bargaining unit positions, back pay awards will be based on agreed matrices that reflect estimates of promotional increases pursuant to USPS pay policies, with recoveries ranging from \$1,144 to \$15,048.⁸³

⁷⁹ Seligman decl., ¶ 17; Settlement Agreement § VII.C.3 and 6.

⁸⁰ Seligman decl., ¶16.

⁸¹ Id.

⁸² Id.

⁸³ Settlement Agreement, Exhibit 10.

Back pay will be evaluated on a case by case basis for 1) promotions from craft to “best qualified” craft positions; 2) promotions from any non-craft union position to another non-craft union position; and 3) promotion from craft to any non-craft non-union position. Back pay accrues through the end of 2003. There is no provision for front pay.⁸⁴

6. The Respective Opinions of The Participants, Including Class Counsel, Class Representatives and The Absent Class Members.

Under EEOC regulations, if the class prevailed at trial, general corrective action could be ordered. But, for individual relief, class members would be required to file detailed claim forms. At hearings they would be entitled to a presumption that they were subjected to discrimination which could be rebutted by clear and convincing evidence that the action would have been taken in the absence of discrimination.⁸⁵ As articulated by Attorney Seligman , “the class obtains many valuable benefits from settlement including A) a stream-lined claims process with cost-free (to class members) counsel, B) claims accepted for a 12 year period even if no timely EEO contact or complaint was made by the claimant, C) automatic emotional distress damages for prevailing claims, D) a favorable burden of proof for disability status and the shifting to [the Agency] of the highest

⁸⁴ Seligman decl., ¶ 16.

⁸⁵ Seligman decl., ¶ 30, citing EEOC Regulation 1614.204(k)(3).

burden of proof (clear and convincing evidence) to defeat relief, and E) injunctive relief that would end practices challenged in this case.” Seligman decl., ¶ 29. The overall package must be compared not only to the risk of defeat—in which case class members would get nothing, but also with what the class might obtain if they won at trial.⁸⁶

The regulations do not provide for free counsel or automatic emotional distress damages. Moreover, the regulations do not address how disability status of class members would be determined. Indeed, arguably even in a class context, the burden of establishing disability status (i.e. class membership) would be on the class member.⁸⁷

The proposed settlement gives class members the same, or even better, presumptions than they would have been entitled to had the class prevailed at the liability hearing. Moreover, it offers class members a free, stream-lined process for preparing and presenting their claims.⁸⁸

Under *Branch et al., v. Derwinski, supra*, the opinions of the class agents must be given weight. Neither class agent filed an objection. Both Glover and Albrecht, participated in the settlement negotiations.⁸⁹

⁸⁶ Seligman decl., ¶ 30.

⁸⁷ Id.

⁸⁸ Id. ¶ 31.

⁸⁹ Seligman decl., ¶ 7.

Under *Reed v. General Motors Corp. supra*, and *Association For Disabled Americans, Inc. v. Amoco Oil Co, supra*, p. 470, the Administrative Judge is entitled to rely upon the experience of class counsel. Overall, all class counsel collectively have many years of legal and litigation experience in the area of employment discrimination. The lead negotiator, Mr. Seligman, has litigated more than 40 class actions in federal administrative proceedings, State and Federal trial and appellate courts, the majority of which have been employment discrimination cases.⁹⁰ He concludes that the settlement is in the best interests of the class and is fair, reasonable and adequate.⁹¹

Clearly, under the Commission's standards as set forth in *Branch et al., v. Derwinski, Secretary, Department of Veterans Affairs, supra* and *Association For Disabled Americans, Inc. v. Amoco Oil Co, supra* at p. 466-470, this agreement satisfies all of the factors stated therein and final approval should be granted.

VI. THE SUBSTANCE OF THE OBJECTIONS.

Many "objections" are either not objections at all (i.e. class members telling their own stories), address issues outside the scope of this case, or

⁹⁰ Seligman decl., ¶ 3.

⁹¹ Id. ¶ 29.

otherwise do not address any specific provision of the settlement. Below we address the general categories of objections that are substantive.

1. Amount of Damages.

As explained above and in the Seligman decl., ¶16, the amount of back pay and damages for claims was based on an evaluation of actual losses of class members, awards in other cases, and the risks of this litigation.

Individual awards for denial of promotions (for union employees) could be more than \$25,000.⁹² With respect to those individuals who object generally because of insufficient monetary amounts, the Commission has held that this is an insufficient basis upon which to set aside a class action settlement.

See, *Modlin v. Barnhart, Commissioner, Social Security Administration, supra.*

The amount of recovery in any settlement must be evaluated in context with the risks of litigation, the likely recovery, the delay in recovery in the absence of litigation, and other factors. The amounts of recovery were the result of intense negotiation and were based on due consideration of appropriate factors.⁹³ In light of these factors, the monetary amounts to be awarded under the provisions of this settlement agreement are reasonable.

⁹² Settlement Agreement § VII.B. 1.b and Exhibit 10.

⁹³ Seligman decl., ¶¶ 12, 16, 22-26.

The Commission should be mindful that a settlement agreement is the “offspring of compromise.” *Hanlon v. Chrysler Corp. supra.*

2. Other Claims and Issues.

With respect to the overtime issue, class counsel did attempt to add this issue to the lawsuit because it was raised by numerous class members in correspondence to class counsel. On March 9, 2002, class counsel filed a motion requesting that the Commission add Edmond Walker as a co-class agent in this case.⁹⁴ Mr. Walker’s issues included restricting permanent rehabilitation employees’ work hours; including overtime. In considering this issue, the Administrative Judge noted to the parties that if Mr. Walker and his issues were added to the lawsuit the entire class would have to be re-noticed.⁹⁵

In light of the possible delay and the additional complexity of adding this issue, class counsel withdrew his request to add Mr. Walker as a co-class agent who raised the overtime issue. Class counsel did not abandon this issue. Instead, Mr. Walker filed a separate class complaint which includes the overtime issue. Mr. Walker’s request for class certification is presently pending a ruling by the Commission.⁹⁶

⁹⁴ Mosby Supp. decl., ¶ 6.

⁹⁵ Mosby Supp. decl., ¶ 8.

⁹⁶ Id. ¶ 9-12.

With respect to failure to include claims regarding demotions, removals, termination and denial of reasonable accommodation, these issues were not certified by the Administrative Judge in this case, nor were they part of the underlying charges of the class agents.

While the settlement does not expressly provide for adjustment to retirement credits, in most cases, particularly for class members denied step promotions, the impact is likely to be small. In any event, in assessing the overall reasonableness of the settlement, the failure to explicitly include retirement benefits must be weighed with the advantages of the settlement—automatic back pay damages without requiring proof, automatic compensatory damages, favorable burdens of proof etc. *Hanlon v. Chrysler*, supra at 150 F. 3d 1026 (assess overall fairness of settlement, not its individual component parts).

3. Time Frame.

The parameters of the class, including the applicable time frame, January 1, 1992 to the present, adopted the class definition utilized by Administrative Judge Montemayor in certifying the class.⁹⁷ The time frame in a class complaint is identical to that of an individual complaint. See, 29 C.F.R. 1614.204 (b). This time frame is based on the earliest complaint filed

⁹⁷ Seligman decl., ¶ 13.

by the class agent. The 11 year length of the class period is in fact one of the longest class periods class counsel is aware of in employment litigation.

4. Burdens of Proof.

The burdens of proof placed upon the class members are identical to or more favorable than those for any claimant had this matter gone to hearing and the class prevailed. See, EEOC Regulation 1614.204(k)(3) and *Mitchell, et al., v. Glickman, supra*. While the regulations provide for the same “*Teamsters*” presumption allowed under the settlement (shifting burden of proof to agency to prove by clear and convincing evidence in absence of discrimination, the same result would have occurred), the regulations do not address, or otherwise provide for, the extremely favorable presumption in the settlement that the agency “regarded” class members as disabled. Seligman decl., ¶ 15, (“Consistent with class counsel’s theory of the case, claimants will be presumed disabled under the ‘regarded as’ prong of the Rehabilitation Act (and ADA) definition of disability.”).⁹⁸

Under the Commission precedent set forth in *Mitchell, et al., v. Glickman, supra*, class members’ objections to the burdens of proof are both factually and legally insufficient to set aside the settlement agreement.

⁹⁸ Seligman decl., ¶¶ 30 & 31.

5. No Opt Out.

The Administrative Judge addressed this issue in his March 3, 2004 letter to Objector Jo Booker by stating, "...the Commission's regulations and Management Directive 110 do not allow class members to "opt out" of the defined class in class cases, See EEOC Management Directive MD-110 8 (V) (D) 8-7." The Commission's regulations are dispositive of this issue.

6. USPS's Refusal To Admit Liability.

A settlement agreement is a contract between the parties; the parties are free to negotiate the terms. *Mitchell, et al., v. Glickman, supra.* The Administrative Judge can take judicial notice that in settlement agreements, denial of liability is a standard provision which in no way implicates the substantive rights of class members. Thus, the fact that USPS has refused to admit any liability provides no basis for setting aside this settlement agreement.

7. Class Counsel Fees.

Class counsel fees for the case in chief were negotiated only after an Agreement in Principle was reached on all the class issues. The attorneys' fee amount is \$1,025,000.00, and represents a discount from class counsel's over-all lodestar. The attorneys' fees are fully documented.⁹⁹ This amount

⁹⁹ Seligman decl., ¶¶ 21, 27.

represents attorney's fees for work performed by class counsel over a 12 year period. This amount also represents the legal work of six attorneys. Class counsel's fees for the case in chief are reasonable.

Under the terms of this agreement, Class Counsel will also be paid for the processing of claims filed by class members and for the representation of class members throughout the claims process. Depending on the number of claims filed, class counsel is paid from \$145-\$1200 per claim. For each successful mediation, class counsel is paid \$1200; for each successful arbitration, class counsel is paid \$4,000.¹⁰⁰ These figures are reasonable, and are based on estimates of the amount of legal work that would be necessary.¹⁰¹ This arrangement works to the benefit of class members since it provides them with free legal representation and does not reduce their awards. Attorneys' fees for class counsel beyond the case in chief are provided to protect class members' rights throughout the process. The Commission has recognized the "built-in disadvantage" of pro se litigants against experienced government counsel. See, *Woolery et al., v. Brady, Secretary, Department of Treasury*, Appeal No. 01890593, (April 13, 1989).

The attorneys' fees paid to class counsel for claims processing are not deducted from class member awards, and thus does not prejudice class

¹⁰⁰ Settlement Agreement § XI.

¹⁰¹ Seligman decl., ¶ 19.

members. Moreover, the negotiated fee schedule is the product of arms length negotiations, and included counsel's best estimates of the amount of work necessary to prosecute class claims.

8. Adequacy of Representation.

As noted above, the litigation and mediation process has, at all times, been vigorous and the product of arms length negotiation. Class counsel is experienced and fully able to protect the rights of the class. Nevertheless, Objectors 3, 17 and 35, have made broad, unsubstantiated claims of collusion and fraud which should not be taken lightly. The Commission examines such claims with much scrutiny. See, *Flournoy et al., v. O'Keefe*, Appeal No. 01A24322, (December 18, 2002). Moreover, the parties raising allegations bear the burden of producing evidence in support of such charges. *Flournoy et al., v. O'Keefe, supra*.

The Declarations of Attorneys Mosby and Seligman establish the chronology of the parties' arms-length negotiations and the rationale and justification for the settlement provisions. Mr. Seligman's Declaration also presents evidence that the entire negotiation process and settlement agreement was non-collusive and done to protect the rights of all class

members.¹⁰² Absent some proof, objections alleging coercion, collusion or conspiracy must be rejected.

9. Continuing Discrimination.

Upon final approval, the settlement provides for injunctive relief and monitoring, and the cessation of policies and practices that might result in continuing discrimination.¹⁰³

10. Deceased workers.

Contrary to the objection, the settlement explicitly provides for claims for deceased class members.¹⁰⁴

11. Class Agent awards

Although Judge Montemayor listed it as an issue, in fact no objections directly challenge the class agent's "recovery". The settlement does not provide a given award for the class agents—they must file claims and are subject to the same procedures, burdens of proof and remedies as class members. The only exception is that they are allowed to attempt to prove emotional distress damages without regard to the automatic damages

¹⁰² Seligman decl., ¶¶ 7-12.

¹⁰³ Settlement Agreement § V.

¹⁰⁴ Settlement Agreement § VI.A.3 and Modification to Settlement Agreement dated January 7, 2004.

provided to class members.¹⁰⁵ Thus they shoulder a burden (proof of damages) and have the potential for higher compensatory damages than class members. This provision is justified by the efforts of the class agents, the risks they undertook, and the long delay to resolution of their personal claims while the class claims went forward.¹⁰⁶ Case law allows for a “bonus” for class representatives to account for similar factors. . .”. *Modlin v. Barnhart, Commissioner, Social Security Administration, supra* (Objection to settlement because only class agents received promotion, rejected, “[T]he class agents are [to be] rewarded for their efforts to spearhead the claim...”). See also, *In re Continental Illinois Sec. Litig.*, 962 F. 2d 566, 571 (7th Cir 1992); *In re Mego Fin. Corp. Sec. Litig.*, 213 F. 3d 454, 463 (9th Cir. 2000).

Here, no bonus is automatically conferred and the class agents may not be able to reap benefit— i.e. if they lose their claims, are unable to prove compensatory damages larger than those provided to the class, are unable to prove that they are entitled to a bonus. Under these circumstances, this settlement provision is reasonable and does not prejudice the class.

¹⁰⁵ Settlement Agreement § VII.

¹⁰⁶ Mosby decl., ¶ 23.

VII. CONCLUSION

This agreement is a paradigm for future disability class action settlements and satisfies the primary concerns addressed under Rule 23(e) and EEOC decisions: the protection of the rights of class members. More than ninety-nine (99.7%) percent of class members in this case chose not to object to the settlement agreement.

Finally, the Commission, in its consideration of this agreement, is entitled to rely upon the opinion and experience of class counsel. See, *Reed v. General Motors Corp, supra*. The lead negotiator, Mr. Seligman opined as follows:

“The proposed settlement thus gives class members the same, or even better, presumptions they would have been entitled to had the class prevailed at the liability hearing. Moreover, it offers class members a free, stream-lined process for preparing and presenting their claims.” Seligman’s Decl., ¶ 31.

“Given the risk of further litigation, and the clear benefits of the proposed settlement, class counsel believes the settlement should be approved.” Id. ¶ 32.

Wherefore, class counsel moves the Commission to grant Final Approval to the Glover/Albrecht class action settlement agreement.

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CERTIFICATE OF SERVICE

I certify that on this 4th day of May 2004, I served a copy by placing same postage prepaid in the U.S. mail addressed to:

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