

**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Denver Field Office**

303 E. 17th Ave., Suite 410
Denver, CO 80203
PH: (303) 866-1300 / 1301
TDD: (303) 866-1950
FAX: (303) 866-
1197

December 22, 2010

**NEEOISO - FAD
U.S. Postal Service
P.O. Box 21979
Tampa, FL 33633-1979**

**RE: EEO Complaint of John Cyncar, Class Agent v. Patrick R. Donahoe,
Postmaster General, United States Postal Service
EEOC File No. 320-A1-8380X
Agency Nos. CC-809-0001-10 (4E-800-0033-00)**

To Whom It May Concern:

On December 22, 2010, I signed the Order Granting Final Approval of the Parties Global Settlement in the above referenced cases. Therefore, I am closing this class case as an active case in this office.

I wish to thank the parties for their efforts and hard work in settling this matter.

Very truly yours,


Ronald W. Taoka

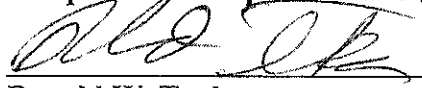
Administrative Judge

cc:

**John Cyncar – Class Agent
Todd J. McNamara, Esq. – Attorney for the Class
Elwyn F. Schaefer, Esq. – Attorney for the Class
David B. Ellis, Esq. – Agency Representative
Tiffany L. Cummings, Esq. – Agency Representative
M. Terry Clark, Esq. – Agency Representative
Reginald Haywood – Sole Objector**

Certificate of Mailing

For timeliness purposes, the EEOC will presume that this document was received within five (5) calendar days of mailing. I certify that on December 22, 2010, I mailed a copy of the foregoing Closure, postpaid to Complainant, Complainant's Representative (if applicable), and the Agency.



Ronald W. Taoka
Administrative Judge

**UNITED STATES OF AMERICA
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Denver Field Office
Denver, Colorado**

JOHN CYNCAR,)
)
Class Agent,) EEOC File No. 320-A1-8380X
)
v.)
) Agency File No. CC-809-0001-10
PATRICK R. DONAHOE, POSTMASTER) (4E-800-0333-00)
GENERAL, U.S. POSTAL SERVICE,)
)
Agency.)
)

**ORDER GRANTING FINAL APPROVAL OF
THE PARTIES' GLOBAL SETTLEMENT AGREEMENT**

THIS MATTER comes before the Equal Employment Opportunity Commission (“Commission” or “EEOC”) upon consideration of the Parties’ Joint Motion for Final Approval of Global Settlement Agreement entered into between the Class Agent, John Cyncar, and the United States Postal Service (USPS). Having considered the Joint Motion, the record and the pertinent legal authority, and for the reasons set forth herein, the Commission finds that the Parties’ Joint Motion for Final Approval of Global Settlement Agreement (Joint Motion) should be GRANTED.

I. BACKGROUND

COMPLAINT

On April 30, 2001, John Cyncar filed a formal complaint of discrimination with the USPS (Complaint) alleging class discrimination. On April 1, 2003, EEOC Administrative Judge Kelly Humphrey certified this matter as a class action. On May 13,

2003, the USPS appealed Judge Humphrey's certification decision to the EEOC's Office of Federal Operations (OFO). The OFO upheld the class certification on February 1, 2007 (EEOC Appeal No. 0720030111). Thereafter, the USPS filed a request for reconsideration, which was denied on May 1, 2007.

The *Cyncar* class is defined to include those persons who:

(1) Were an employee of the USPS and were working at a USPS facility in the USPS Western Area between January 1, 1998 and December 31, 2002;

(2) Were disabled within the meaning of the Rehabilitation Act; and

(3) Were allegedly discriminated against under the Rehabilitation Act when they were denied a reasonable accommodation during the aforementioned period:

(A) After they applied for but were denied Family and Medical Leave Act (FMLA) leave during the aforementioned period;

(B) Were subjected to disciplinary actions for leave violations after their FMLA status was denied; or

(C) Were unreasonably required to recertify their medical condition.

On August 1, 2007, the USPS mailed class certification notices (Class Certification Notice) for this case to over 49,000 putative class members (the "Class").

DISCOVERY

On November 6, 2007, I authorized discovery to commence and Class Counsel and the USPS began to conduct extensive discovery of the Class claims. Discovery was ultimately stayed as a result of the John Cyncar and the USPS's (Parties') agreement to mediate this case and participate in informal discovery necessary to determine the potential scope of the eligible class in this case.

MEDIATION AND SETTLEMENT

Initial settlement discussions began between the Parties in 2008 and continued into 2009. Because the actual scope of the class was uncertain, the Parties agreed to conduct informal discovery in order to more fully evaluate the case and proceed with a meaningful mediation. Towards that end, the Parties jointly distributed and reviewed 10,000 multi-page questionnaires. The selection of potential class members to whom the questionnaires were directed was made on a random basis, but in accord with the geographical distribution of the putative class throughout the Western Area of the USPS.

Following several months of negotiation, the Parties established a formal process for the mediation and selected former United States Magistrate Judge Richard Borchers as their mediator. The mediation was conducted in Denver, Colorado, over the course of four days: March 29-30, 2010, and April 14-15, 2010. The Parties reached an agreement in principle to globally resolve all issues in this case on April 15, 2010.

Throughout the mediation and negotiations process, the Class was represented by Class Counsel, Class Agent Cyncar and a Class Settlement Committee of eight present and former USPS employees. The Class Settlement Committee was geographically, ethnically and gender diverse, and the members represented a variety of interests of the Class, with a wide range of strengths and weaknesses with regard to both liability and damages.

The Parties finalized the Global Settlement Agreement (Global Settlement Agreement) in July 2010 and submitted it to me for preliminary approval on July 30, 2010. I granted preliminary approval of the Global Settlement Agreement on August 6, 2010 (Preliminary Approval).

NOTICE TO CLAIMANTS OF THE GLOBAL SETTLEMENT AGREEMENT

After I granted Preliminary Approval, the Parties, through an independent third party Class Administrator, notified the Class in writing of the terms of the Global Settlement Agreement. In addition,, the Class Administrator set up a comprehensive website, www.cyncarsettlement.com, which provides key materials to the Class, including the Global Settlement Agreement, an explanation of the terms and conditions of the settlement, the Distribution Plan/Settlement Formula and other relevant documents. The Global Settlement Agreement further provides that potentially eligible class members can request hard copies of any documents posted on the settlement website.

The Class Administrator mailed the Settlement Notice of Resolution to over 49,000 potential class members. Additionally, as noted above, the terms of the Global Settlement Agreement and other material documents were posted on the settlement website. The Class Administrator set up a toll-free number for communication with class members. Additionally, since the Notice was distributed, Class Counsel has been in contact with numerous potential Class Members, via letter, email and phone.

TERMS OF THE GLOBAL SETTLEMENT AGREEMENT

The Global Settlement Agreement includes the following material terms:

1. A total payment by the USPS of \$3,850,000.00 to resolve all claims of the Class, allocated as follows: \$2,700,000.00 to eligible Class Members (Class Fund); \$200,000.00 to create a Reserve Fund (Reserve) with regard to the administration of the settlement by the Class Administrator; and \$950,000.00 to Class Counsel for attorneys' fees and costs.

2. From the Class Fund of \$2,700,000.00, the following amounts are allocated as follows:
 - a) \$20,000.00 to Class Agent Cyncar for his efforts throughout the course of the litigation;
 - b) \$3,500.00 per person for each of the eight members of the *Cyncar* Settlement Committee; and
 - c) The payment of \$9,783.54 as reimbursement for costs contributed by Class members.
3. The creation of a detailed claims process through which Class Counsel and the Class Administrator would determine both the eligibility of potential class members and their settlement proceeds, if any.
4. A Distribution Plan/Settlement Formula which, based on a variety of material factors, would allocate the settlement proceeds to individual class members.
5. An allocation of the settlement proceeds for eligible class members between wage and non-wage loss.
6. A provision that unclaimed funds would be divided equally between the USPS and the Wounded Warriors Fund.
7. All amounts remaining in the Reserve after payment of all Administrative Costs would be divided among eligible class members on a *pro rata* basis.

II. STANDARD OF REVIEW

Pursuant to 29 C.F.R. §1614.204(g)(4), the Administrative Judge assigned to the case shall “review the Notice of Resolution and consider any petitions to vacate filed.” If the settlement is fair, then the judge may approve it. The fairness of class settlements in federal claims is reviewed in accordance with Fed.R.Civ.P. 23(e). Although this rule does not technically apply to EEOC administrative proceedings, the Commission has held that

the standards enunciated in Fed.R.Civ.P. 23(e) are applicable. *See Modlin v. Comm'r of SSA*, EEOC Appeal No. 01-A24054 (Feb. 20, 2003); *Branch v. Dep't of Veteran Affairs*, EEOC Appeal No. 019022620 (Nov. 7, 1990).

The approval of a class action settlement is committed to the sound discretion of the Commission. *In re Integra Realty Res., Inc.*, 354 F.3d 1246, 1266 (10th Cir. 2004). Settlements are reviewed to ensure “fairness, adequacy and reasonableness.” *See, e.g., EEOC v. McDonald Douglas Corp.*, 894 F.Supp. 1329, 1333 (E.D. Mo. 1995). The pertinent inquiry in evaluating a settlement entered into by the Parties is the “overall fairness” of the settlement. In considering the fairness of the settlement, “the agreement stands or falls in its entirety.” *Binker v. Commonwealth of Pennsylvania*, 977 F.2d 738, 746 (3d Cir. 1992).

Additionally, the Commission is charged with considering factors which are “beyond maximizing the potential benefit to an individual claimant.” *Id.* Thus, the Commission’s role is not to assess whether the terms and conditions of the Global Settlement Agreement provide each individual with a satisfactory recovery. Rather, the criteria or methodology employed by the litigants is sufficient if its terms, when applied to the entire group of individuals represented, appear reasonable. *Thacker v. Chesapeake Appalachia, L.L.C.*, 695 F.Supp. 2d 521 (E.D. Ky. 2010) quoting *McDonald Douglas* 894 F.Supp at 1335; *see also EEOC v. Hiram Walker and Sons, Inc.*, 768 F.2d 884, 889 (7th Cir. 1985), *petition for cert. denied*, 478 U.S. 1004, 106 S.Ct. 3293, 92, L.Ed.2d 709 (1986) (“The parties to a settlement will not be heard to complain that the relief is substantially less than what they would have received from a successful resolution after trial”).

“The 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.” *Ashley v. Reg’l Transp. Dist.*, 2008 WL 384579 at *5 (D. Colo. Feb. 11, 2008). The specific factors that must be considered 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;¹ and
- (4) The judgment of the parties and their counsel that the settlement is fair and reasonable.

Jones v. Nuclear Pharmacy, Inc., 741 F.2d 322, 324 (10th Cir. 1984). Additionally, the Commission must also determine whether the agreement was the product of fraud, overreaching or collusion. *McDonald Douglas*, 894 F.Supp at 1333; *see also In Re: New Mexico Nat. Gas Anti-Trust Litig.* 607 F.Supp. 1491, 1497 (D. Colo. 1984).²

In evaluating the fairness of the settlement, the Commission does not decide the merits of the case or resolve unsettled legal questions. *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981); *In re Global Crossing, Ltd. Sec. Litig.*, 471 F.Supp.2d 338, 345-46 (S.D.N.Y. 2006). All settlements involve compromise, and “public policy favors the

¹ The “value of an immediate recovery” means the “monetary worth of the settlement.” *In re Sprint Corp. ERISA Litig.*, 443 F.Supp.2d 1249, 1261 (D. Kan. 2006) quoting *Gottlieb v. Wiles*, 11 F.3d 1004, 1015 (10th Cir. 1993). “That value must be weighed against the possibility of some greater relief at a future time, taking into consideration the additional risks and costs that go hand-in-hand with protracted litigation.” *Id.*

² Additional factors which also may be relevant to the Commission’s inquiry include: (1) the risk of establishing damages at trial; (2) the extent of discovery and the current posture of the case; (3) the range of

amicable settlement of disputes.” See *EEOC MD-110*, Ch. 12-1. This public policy in favor of settlements “applies particularly to employment discrimination cases.” *Id.*

III. LEGAL ANALYSIS

A. THE GLOBAL SETTLEMENT AGREEMENT

To analyze the fairness of the Global Settlement Agreement between the Parties, the Commission will consider in turn each of the four factors enumerated in *Jones*. 741 F.2d at 324.

1. Whether the Global Settlement Agreement Was Fairly and Honestly Negotiated

Upon consideration of the first *Jones* factor, whether the settlement was fairly and honestly negotiated, I find that the first factor weighs strongly in favor of finding that the Global Settlement Agreement is fair and reasonable for a variety of reasons. First, of the 49,000 putative class members who received notice of the Global Settlement Agreement, only one individual filed an objection. See *Lachance v. Harrington*, 965 F.Supp. 630, 645 (E.D. Pa. 1997) (“Generally, if the class members do not oppose the class settlement, then the court is justified in concluding that they consider it fair.”); *Cohen v. Chilcott*, 522 F.Supp. 2d 105, 118-19 (D.D.C. 2007). As discussed *infra*, not only does that objection lack merit, but also neither the sole Objector nor anyone else has alleged that the Global Settlement Agreement entered into was a result of fraud, collusion or overreaching.

Second, prior to the mediation, Class Counsel and Class Agent Cyncar carefully reviewed the potential eligibility of a number of putative class members and selected an eight-person Settlement Committee to participate in the settlement mediation, in addition

possible settlement; and (4) the reaction of class members to the proposed settlement. *Wilkerson v. Martin*

to Class Agent Cyncar and Class Counsel. The eight-person Class Settlement Committee was both gender and ethnically diverse; contained both present and former USPS employees; and was geographically diverse in that they represented many of the districts within the Western Area of the USPS. Additionally, the members of the Settlement Committee with varying damages and liability strengths and weaknesses represented a variety of the class members' interests in the litigation. The entire Settlement Committee participated for the length of the settlement mediation.

Third, the Declarations of Class Counsel, the Class Settlement Committee and the Class Agent, as well as the statement provided to me by Judge Borchers, clearly support the finding that the Class was ably and professionally represented by Class Counsel, Class Agent Cyncar and the Settlement Committee. Judge Borchers specifically noted that the Parties engaged in contentious, but ultimately successful discussions. Simply put, there is not the slightest reason to believe that the mediation was anything but an arms-length and hard-bargained process.

Considering that there was only one objector to the Global Settlement Agreement and based on the evidence presented, including the Declarations of Class Counsel, Class Agent Cyncar, the Settlement Committee and the statement of Judge Borchers, I find that Global Settlement Agreement was agreed to in good faith by all Parties. Additionally, there is no evidence of fraud or collusion involved in any stage of the mediation and settlement processes. Therefore, I find that the Global Settlement Agreement was fairly and honestly negotiated.

2. Whether Serious Questions of Law and Fact Exist that Place the Ultimate Outcome of the Litigation in Doubt.

Marietta Corp., 171 F.R.D. 273, 284 (D.Colo. 1997).

Considering next the second *Jones* factor, I find that there were serious questions of law and fact that placed the ultimate outcome of the litigation in doubt; there is no certainty that the Class Agent or the Class would have prevailed in this case. By reaching the Global Settlement Agreement, the Parties have decided to “waive their right to litigate the issues involved in the case and thus save themselves the time, and the inevitable risks of litigation.” *United States v. Armour and Co.*, 42 U.S. 673, 681 (1971), While I will not evaluate the merits of the litigation at this stage of the proceedings, I will address a number of the issues that would have placed the final outcome of the litigation in question.

a. **Whether the U.S.P.S Would Have Been Successful in Decertifying the Class, in Whole or in Part.**

While the Class was initially certified and had withstood an appeal to the OFO, the USPS could have filed a Motion to Decertify the Class in its entirety or to decertify a portion of the class. According to the Parties’ Joint Motion for Final Approval of the Global Settlement Agreement, the greatest evidence of discrimination existed in Colorado and Wyoming. A number of other geographic entities within the Western Area had minimal representation within the scope of the class. Thus, the Class faced a genuine risk of decertification by moving forward. Conversely, the USPS faced the risk of substantially greater exposure if its motion to decertify was denied, and the matter proceeded to a Phase I liability hearing.

b. **Whether There Existed Sufficient Statistical Evidence to Establish a Pattern of Discrimination.**

The existence or non-existence of sufficient statistical evidence to prove or disprove a violation of law was in dispute. Substantial further discovery would need to

have occurred on this issue, with great expense to each party. Moreover, the Class and the USPS likely would have offered dramatically differing statistical arguments at the case hearing. The uncertainty of the outcome of this dispute would have posed great risks of litigation to all Parties involved.

c. The Effect of Intervening Supreme Court Precedent.

A Phase I liability hearing in this matter was not likely to have occurred for several additional years. Thus, the Parties faced the potential risk of favorable or unfavorable Supreme Court or Circuit Court intervening decisions. While the ADA has recently been amended to broaden the scope of disabilities, this matter would have proceeded under the more restrictive version of the Rehabilitation Act then in effect during the time period framed by the certified class. Further Circuit Court or Supreme Court decisions could have resulted in favorable or unfavorable decisions to either the Class or the USPS

d. Issues Pertaining To Whether Class Claimants Were Disabled

In addition to claiming that employees were denied FMLA leave, the class also alleged that, as result of each class member's disability, he or she was treated less favorably than non-disabled employees. Thus, the Class would have had to establish in a Phase I hearing that there was a class-wide pattern and practice within the Western Area of the USPS of targeting disabled individuals for less favorable treatment under the FMLA, in violation of the Rehabilitation Act. Then, in a Phase II hearing, each class member would have to establish that he or she was, in fact, disabled and had suffered damages attributable to disability discrimination.

The Parties contested, both in the original certification pleadings and in the subsequent appeal to the OFO, whether class members could meet such an individualized determination of whether they were, in fact, disabled within the meaning of the Rehabilitation Act. The USPS faced the risk that, at a Phase I hearing, a judgment of liability could have been entered against it on a class-wide basis for disability discrimination. Similarly, the Class faced the risk that many putative class members, even assuming a favorable Phase I finding, would not be able to demonstrate their individual disability, precluding any entitlement to damages.

e. Issues Pertaining to Class Members' Damages

Moreover, there was also disagreement as to what damages, if any, class members might have suffered. Monetary losses, except for those class members who could have established that they were suspended or terminated as a result of their disability and during the relevant time period, would have been marginal. Based upon discovery to date, it appeared that fewer than 10% of potential eligible class members have either "termination" or "suspension" claims. Because FMLA leave is unpaid, damages for many other eligible class members, even assuming that claimants prevailed at both the Phase I and Phase II proceedings, might not have exceeded several hundred dollars for out-of-pocket medical expenses incurred by repeated discriminatory requests for recertification of their disabled conditions.

In light of the outstanding issues to be litigated in this case, I agree that settlement of this matter removes the inherent uncertainty with regard to: (1) decertification in whole or in part; (2) the establishment of Phase I liability; and (3) the establishment of Phase II liability and damages. Additionally, the Global Settlement Agreement removes

the specter of what impact, if any, the USPS's present economic situation would have had on the future collectability of any amounts secured at trial, if any. Therefore, the risk of further litigation in this case weighs in favor of reaching a settlement between the Parties.

3. Whether the Value of an Immediate Recovery Outweighs the Mere Possibility of Future Relief after Protracted and Expensive Litigation.

Even assuming that this case reached Phase I and Phase II hearings, years of appeals and requests for consideration would likely have followed. As noted by the 9th Circuit in *Officers for Justice v. Civil Service Comm'n*, “the track record for large class action employment discrimination cases demonstrates that many years may be consumed by trial(s) and appeal(s) before the dust finally settles” 688 F.2d 615, 629 (9th Cir. 1982), *petition for cert. denied*, 459 U.S. 1217 (1983). Considering the size of the class involved in this case, protracted litigation would be expensive and a substantial burden for both the Class and the USPS. The Parties would likely need to conduct numerous depositions, additional paper discovery and statistical analyses. The Supreme Court has noted, “the interest in avoiding the additional expenditures associated with continuing the litigation may . . . justify accepting an otherwise doubtful settlement.” *Evans v. Jeff D.*, 475 U.S. 717, 743 n. 36 (1986). Here, I find no reason to believe that this is a “doubtful settlement.”

This case had been pending for more than eight years. Based on the Parties' projections and assuming that the class would not be decertified, the Phase I hearing would likely not have occurred until 2012. Additionally, a Phase II hearing could have lasted longer than one year. Further, the appellate processes could have taken until 2016 or beyond to reach a resolution in this case. During those intervening years, given that the relevant class period in this case is from 1998-2002, memories of the pertinent events

would only further fade and diminish, with potential negative ramifications to both the Class and its individual members.

Finally, it is well settled that failure to approve a settlement of this size and complexity essentially will mean “during the remainder of the litigation, and probably an appeal, many of the immediate and tangible benefits accruing from the settlement would be lost.” *Officers for Justice*, 688 F.2d at 629. Having weighed all of the foregoing factors, I find that the probable value of immediate recovery through the Global Settlement Agreement claims process clearly outweighs the mere possibility of future relief, following extensive, protracted and expensive litigation.

4. The Judgment of the Parties and Their Counsel That the Settlement is Fair and Reasonable.

Based on the Joint Motion for Final Approval and the Joint Brief filed in support by the Parties, it is clear that counsel for both the Class and the USPS support and recommend my final approval of the Global Settlement Agreement. It is beyond cavil that the recommendation of counsel is entitled to great weight. *See Luevano v. Campbell*, 93 F.R.D. 68, 88 (D.D.C. 1981). “Courts have consistently refused to substitute their business judgment for that of counsel and the Parties.” *Alvarado*, 723 F.Supp at 548. I find that such deference, while not without limits, is clearly appropriate in this case.

Counsel for the Parties in this case have substantial experience litigating employment class actions. Their expertise and professionalism has been evident throughout the course of this litigation. Moreover, upon review of the declarations submitted by both Class Agent Cyncar and all eight Settlement Committee members and of the statement submitted by the mediator, Judge Borchers, it is clear that counsels’

professionalism and diligent representation continued throughout the course of the mediation and the settlement of this case.

Furthermore, the declarations submitted by Cyncar and Settlement Committee reflect their unanimous approval of this Global Settlement Agreement. Given that these individuals were intimately involved in the mediation process and represented a wide range of both geographic, damage and liability interests within the class, it is appropriate to give their recommendations substantial weight.

Additionally, a material factor to be considered is that, although notice of the terms of the settlement were mailed to approximately 49,000 putative class members and over 955 individuals have already filed claims, only *one* objection was received. This extraordinarily minimal fraction of those eligible to file objections is telling. With only one objection being filed, I can conclude with near certainty that the vast majority of the potential class members considered the terms of the Global Settlement Agreement to be fair, reasonable and adequate. *In re Cendant Corp. Litig.*, 264 F.3d 201, 235 (3d Cir. 2001) (“The vast disparity between the number of potential class members who received notice of the settlement and the number of objectors creates a strong presumption that [the reaction of the class] weighs in favor of settlement.”). This is particularly true where the Class Notice, which was individually mailed to approximately 49,000 putative class members, directed each such potential class member to an extensive website which clearly detailed the terms and conditions of the settlement. It is undisputed that the Parties and their respective counsel find the Global Settlement Agreement is fair and reasonable.

5. Consideration of Other Factors.

a. **The Protection of Class Members Whose Rights May Not Have Been Given Adequate Consideration During the Settlement Negotiations.**

The quality of the advocacy in this case, the amount recovered by the class, the well-crafted Distribution Plan/Settlement Formula set forth in the Global Settlement Agreement, and most importantly, the fact that the Settlement Committee was comprised of a broad spectrum of potential class members all suggest that no particular portion of the class was given any undue or improper preference. The Global Settlement Agreement was negotiated with an eye toward recovery as a whole for all class members. *See Alvarado Partners, L.P. v. Mehia*, 723 F.Supp 540, 546 (D.Colo. 1989). Therefore, I find that Class Counsel, together with Class Agent Cyncar and the Class Committee fully and adequately protected the rights of all potential class members, and there is no evidence that any class member's rights may not have been given adequate consideration throughout the course of the settlement process.

b. **The Range of Possible Settlement.**

In assessing the fairness of a settlement agreement, the Commission may consider the litigation risks versus what is being achieved in a settlement. For instance, in *Oppenlander v. Standard Oil Co.*, 64 FRD 597, 624 (D. Colo. 1974), the Court observed:

The court should consider the vagaries of litigation and compare the significance of immediate recovery by way of compromise to the mere possibility of relief in the future, after protracted and expensive litigation. In this respect, it has been held proper to take the bird in hand instead of a prospective flock in the bush.

Id. at 624 (quotation omitted); *see also Officers for Justice*, 688 F.2d at 629 (Failure by the court to accept the settlement could mean that “many of the immediate and tangible benefits accruing from the settlement would be lost.”).

The Global Settlement Agreement provides a process for the payment of monetary benefits to eligible class claimants, in accord with a detailed Distribution Plan/Settlement Formula. While it would be impossible to ascertain what each particular individual might recover, assuming a success in both Phase I and Phase II trials of this matter, it is certain that the Global Settlement Agreement will provide recovery to eligible class members, while protracted litigation would delay any such *possible* relief for five years or longer. In fact, there is no assurance that *any* eligible class member, as defined under the terms of the Global Settlement Agreement, would receive *any* recovery if this matter proceeded to Phase I and Phase II hearings. As noted previously, the substantial specter of decertification, in whole or in part, of the class loomed. If either a portion or the entirety of the class were decertified, a large number of Class Members, or conceivably the entire Class, would have recovered nothing.

On the other hand, the USPS faced the risk of both a Phase I and Phase II loss, years of protracted litigation, additional discovery expense and sizeable potential liability. Furthermore, the Postal Service is presently facing an approximate \$9 billion deficit. Under these circumstances, the Parties faced many uncertainties as to the ultimate outcome and made a reasoned and informed decision to resolve the claims for a specified and guaranteed amount. Thus, it was both rational and prudent for the Parties to resolve this case and accept a settlement that provides that eligible class members will receive what may be a substantial monetary recovery.

B. THE SOLE OBJECTION

As noted, there was only one objection to the Global Settlement Agreement, which was raised by Reginald Haywood. Mr. Haywood's objection was based upon the

premise that, although the relevant temporal scope of the class period in this case was from January 1, 1998 to December 31, 2002, that he should be permitted to recover damages arising from his purported discriminatory termination in 2004. Upon review of Mr. Haywood's objection, I find that the objection should be overruled.

It is well settled that the Global Settlement Agreement cannot be evaluated on what each complainant might recover if he or she had prevailed on the full amount of the claim. "Objections based purely upon individual claims of loss do not warrant disapproval of the proposed settlement." *McDonald Douglas*, 894 F.Supp. at 1335; *EEOC v. Com. of Pa.*, 772 F.Supp. 217, 220 (M.D. Pa. 1991), *aff'd*, 977 F.2d 738 (3d Cir. 1992). Since Mr. Haywood's claim, whether viable or not, arises outside the scope of the clearly defined class, there is no merit to his objection with respect to my Final Approval of Global Settlement Agreement.

C. PAYMENTS TO THE CLASS AGENT AND THE SETTLEMENT COMMITTEE

The Settlement Agreement provides for payments of \$20,000 to Class representative Cyncar and \$3,500 to each individual Settlement Committee member. Having reviewed the Declarations of Class counsel, Class Agent Cyncar, the Settlement Committee members and the statement of Judge Borchers, it is clear that both Mr. Cyncar and the Settlement committee members took an active role in the litigation and mediation process. Thus, I find that the payments to both Class Agent Cyncar and the Settlement Committee members to be fair and reasonable to the Class.

D. ATTORNEYS' FEES

The Global Settlement Agreement provides for a payment to Class Counsel of \$950,000.00 in attorneys' fees and costs incurred in this case.³ In considering the fairness of a settlement agreement, the Commission must assess the fairness of a payment of attorneys' fees and costs under the agreement, even though no one has raised any objection to the fees and costs award in this case. *See, e.g., In re: General Motors Corp. Pick-up Truck Fuel Tank Litig.*, 55 F.3d 768, 819 (3d Cir. 1985) ("A thorough judicial review of fee applications is required in all class action settlements"). Nonetheless, the lack of objections to the award of attorneys' fees and costs strongly implies the proposed award is reasonable. *In re Marsh & McLennan Cos., Inc. Sec. Litig.*, 2009 WL 5178546 at *22-23 (S.D.N.Y. Dec. 23, 2009) (single objection to fee award in class action is "powerful evidence that the requested fee is fair and reasonable").

Having reviewed the Declarations and the billing statements provided by Class Counsel, I find that the fees sought by Class Counsel are adequately and appropriately documented. The payment generally reflects the total number of hours expended multiplied by Class Counsels' reasonable hourly rates. This total is arrived at taking into account the full eight years of litigation. This "lodestar" method of computing fees has long been recognized as appropriate by the courts and the Commission. *See Hensley v. Echohart*, 461 U.S. 424, 433 (1983); *Blum v. Stetson*, 465 U.S. 886 (1984); and *Engle v. Dep't of Defense*, EEOC Request No. 05931027 (June 23, 1994).

Furthermore, after reviewing the total hours expended by each attorney, and support staff, as well as their hourly rates, I find that the billable hours accumulated are

³ Class Counsel, in accord with the Global Settlement Agreement, are also entitled to recover all costs incurred since the Preliminary Approval of the Global Settlement Agreement on August 5, 2010. These costs will be paid directly from the Reserve and will not diminish the Class recovery.

reasonable under the circumstances. This is particularly true given the magnitude and complexity of the litigation. I also note that the total amount sought approximates the “lodestar” at the time of the fee application.⁴

Additionally, Class Counsel continues to have obligations throughout 2011 to assist the Class Administrator with regard to the claims process, answer class member inquiries and further participating in the settlement process. Because the award of attorneys’ fees and costs is fixed under the Global Settlement Agreement, Class Counsel will not receive additional compensation for the additional time expended throughout the completion of the claims process.

Moreover, I note that, under the alternate “common fund” theory of attorneys’ fees recovery, courts typically approve settlement fee awards that are between 25 – 33% of the common fund. *See 4 Newberg on Class Actions, §14.6 (4th Ed.)*. Here, the attorneys fees (and costs) sought by class counsel amount to approximately 25% of the recovery, which is discounted from the 37.5% contingent fee agreement which was negotiated with Class Agent Cyncar. Thus, even under a common fund recovery, I find the amounts sought by Class Counsel are fair and reasonable.

⁴ Additionally, a fee multiplier may be applied in a “lodestar” case. *See e.g. Barnes v. City of Cincinnati*, 401 F.3d 729 (upholding district court award of 1.75 multiplier); *Lonardo v. Travelers Indem. Co.*, 706 F.Supp.2d 766 (N.D. Ohio 2010)(1.3 multiplier); *Lucas v. Kmart Corp.*, 2006 WL 2729260 (D. Colo. Jul. 27, 2006)(1.87 multiplier); *McMahon v. Olivier Ching Catering & Events, LLC*, 2010 WL 2399328 (S.D.N.Y. Mar. 3, 2010) (awarding 1.4 multiplier and citing other cases upholding larger amounts). There was no fee multiplier, however, sought in this case.

IV. CONCLUSION

Having reviewed the Global Settlement Agreement in detail; the Declarations of the Class Agent, the Class Settlement Committee Members and Class Counsel; the statement of Judge Borchers; the Parties' Joint Motion and Brief; the single objection filed hereto and all of the relevant factors to be considered in approving the fairness of such a settlement, I conclude that the proposed Global Settlement Agreement is fair, reasonable and adequate to the Class as a whole. Accordingly,

IT IS HEREBY ORDERED that the Parties' Joint Motion for Final Approval of the Global Settlement Agreement is GRANTED. The Global Settlement Agreement is hereby APPROVED and, pursuant to 29 C.F.R. §1614.204(g)(b), shall bind all members of the Class.

NOTICE TO PARTIES

THIS IS AN ORDER by an Equal Employment Opportunity Commission Administrative Judge issued pursuant to 29 C.F.R. §1614.204(g)(4). Pursuant to 29 C.F.R. §1614.401(c), 402(a) an appeal to the Commission may be made directly from this Order. 29 C.F.R. §1614.401(c) provides, in part:

A class member, a class agent or an agency may appeal a final decision on a petition pursuant to §1614.204(g)(4).

29 C.F.R. §1614.402(a) provides, in part:

Appeals described in §1614.401(a)(c) must be filed within 30 days of the dismissal, final action or decision.

In accord with the Global Settlement Agreement, and more precisely, Exhibits 4 and 5 of Global Settlement Agreement, I direct that, upon the USPS's execution of the Notice of Final Action (Exhibit 4), that the Class Administrator shall mail such Notice to potential class members, together with the Notice of Final Approval of Global Settlement Agreement (Exhibit 5). I further direct that a copy of my complete Decision and Order shall be posted by the Class Administrator on www.cyncarsettlement.com.

In the event an appeal is filed, a copy of the Administrative Judge's decision should be attached to the appeal. A copy of any appeal shall be furnished to the Agency and Class Counsel at the same time it is filed with the Commission, and should certify to the Commission the date and method by which such service was made on the Agency and Class Counsel.


All appeals to the Commission must be filed by mail, personal delivery or
facsimile to the following address:

Director, Office of Federal Operations
Equal Employment Opportunity Commission
PO Box 19848
Washington, DC 20036
Fax No. 202.663.7022

Facsimile transmissions over ten pages will not be accepted.

DATED this ~~22~~ day of December 2010.

BY THE COMMISSION:



Ronald Taoka, Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that on December 22, 2010, a copy of the forgoing **ADMINISTRATIVE JUDGE'S DECISION AND ORDER GRANTING MOTION FOR FINAL APPROVAL OF SETTLEMENT AGREEMENT** was placed in the U.S. Mail, postage prepaid,



David B. Ellis, Esq.
Chief Counsel, NELU
United States Postal Service
475 L'Enfant Plaza SW #6436
Washington, DC 20260-1149

Mr. John Cyncar
Class Agent
PO Box 15192
Colorado Springs, CO 80935

Tiffany L. Cummins, Esq.
Employment & Labor Law
United States Postal Service
475 L'Enfant Plaza SW #6344
Washington, DC 20260-1149

Todd J. McNamara, Esq.
McNamara, Roseman, Martinez
& Kazmierski LLP
1640 East 18th Avenue
Denver, CO 80218

M. Terry Clark, Esq.
Senior Litigation Counsel
Denver Program Office
United States Postal Service
600 17th St, Dominion Towers South
Suite 2705
Denver, CO 80202-5402

Elwyn F. Schaefer, Esq.
Elwyn F. Schaefer, P.C.
1801 Broadway, Suite 550
Denver, CO 80218

Mr. Reginald Haywood
4917 E. Thomas Road
Unit # 135
Phoenix, AZ 85018
(Sole Objector)