EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
DENVER DISTRICT OFFICE
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Denver, CO 80203

CHANDLER GLOVER and DEAN ALBRECHT, *et al.*,	)
Complainants,	) EEOC CASE No. 320-A2-8011X) Agency Case No. CC-801-0015-99
v.	)
JOHN E. POTTER, Postmaster General, United States Postal Service,	) June 10, 2004
Agency.	)

ORDER APPROVING SETTLEMENT AGREEMENT

THIS MATTER is before me in connection with a Settlement Agreement entered into between class Complainants Glover/Albrecht *et al*. and the United States Postal Service (hereinafter, the Agency). Pursuant to 29 C.F.R. Section 1614.204(g)(4), I am charged with rendering a decision on the fairness, reasonableness and adequacy of the Settlement Agreement. On February 2, 2004, a Notice of Resolution was sent to all known potential class members. The Notice of Resolution (in conformance with EEOC's regulations) provided for 30 days from which potential class member could file their objections. Seventy-nine objections were received and accepted as timely. Class counsel and Agency counsel thereafter filed briefs in support of the Settlement Agreement. The parties also provided for the record sworn declarations from class counsel John Mosby and Brad Seligman, as well as a declaration from the mediator Linda R. Singer. This Order explains the findings along with the reasoning and rationale that support my conclusion that the Settlement Agreement is fair, adequate and reasonable.

I. *BACKGROUND OF THE CASE*

In 1992, Chandler Glover filed an individual complaint of discrimination. The individual complaint proceeded through discovery. During discovery Glover and his attorney became aware of the class implications of the individual complaint and on

February 29, 1999, filed a class complaint of discrimination against the Agency. In the complaint, Glover alleged that he and other employees, as a class, suffered employment discrimination. Specifically, Glover alleged that he and other permanent rehabilitation employees were denied promotional opportunities and opportunities to advance their careers with the Agency, on the basis of their alleged disabilities. On March 30, 2000, I certified the class action. On May 5, 2000, the Agency issued its Final Agency Decision rejecting my certification decision and the matter was appealed to EEOC's Office of Federal Operations (OFO). OFO reversed the Agency's decision and upheld the certification. *Glover v. USPS*, EEOC Appeal No. 01A04428 (April 23, 2001). The Agency thereafter filed a Request for Reconsideration with the full Commission challenging OFO's decision. The Commission denied the Agency's Request For Reconsideration and remanded the case to EEOC's Denver District Office for further processing on the merits. *Glover v. USPS*, EEOC Request No. 05A10711 (August 16, 2001).

Shortly after the Commission remanded the case, the Agency on September 24, 2001, filed a motion to dismiss arguing *inter alia* that:1) Glover failed to demonstrate the existence of a national policy that denied opportunities to disabled employees; 2) Glover failed to establish commonality; 3) Glover failed to demonstrate typicality; 4) Glover's claims for non-incidental damages predominate and could not be tried as a class action; 5) Certification would have a substantial impact on the policies, practices, operations of the Agency, maintenance of the class was uneconomical; 6)Disability determinations require burdensome highly individualized determinations and examination of the alleged policy would require burdensome individualized assessments.

Complainant on October 23, 2001, moved to hold the Agency's Motion to Dismiss in abeyance pending completion of discovery. Complainant's motion was granted and the processing of the case continued. While the *Glover* matter was underway, another class case was pending. This case was brought by Dean Albrecht. The *Albrecht* complaint was provisionally certified by Joseph Popiden, the Administrative Judge then assigned the case. Administrative Judge Popiden *sua sponte* transferred the case to Denver and the matter was assigned to me. On November 13, 2001, class counsel moved to consolidate the *Glover* and *Albrecht* class actions and to make Dean Albrecht a co-class agent. The Agency objected to the consolidation. On December 14, 2001, Dean Albrecht was made a co-class agent and the *Albrecht* class action was partially consolidated with the *Glover* class action. After the partial consolidation, the case was re-captioned as *Chandler Glover\Dean Albrecht v. John E. Potter, Postmaster General of the United*

States Postal Service. I, however, concurred with the Agency that other matters not related to promotional and\or advancement opportunities in *Albrecht* were not appropriate for consolidation. These other matters were severed from the consolidated matters and on their own certified. The Agency separately appealed the certification of these separate *Albrecht* issues and these unconsolidated parts of these *Albrecht* claims are presently on appeal and pending at OFO.

On December 12, 2001, I ordered the Agency to transmit the Class Notice to putative class members and to post the notice on all Agency bulletin boards. The notice was transmitted to over 22,000 putative class members. On or about October 4, 2002, the Agency provided verification of posting from Human Resource Managers of each postal district nationwide confirming the date of posting and the name of the local official responsible for such posting.

The Agency took the position that Glover and others like Glover who were allegedly placed in "productive work assignments" were not entitled to receive the Class Notice. On January 9, 2002, class counsel filed a "Motion for Order that the Agency Identify and Provide All Class Members with the Class Notice." On January 17, 2002, I ordered the Agency to identify and provide a copy of the Class Notice to Glover and others like Glover. On April 15, 2002, the Agency sent a second notice to Chandler Glover and approximately 1300 other individuals.

II. DISCOVERY

On October 29, 2001, I authorized discovery to commence and class counsel began to conduct extensive discovery of the claim. Class counsel through interrogatories requests for productions, requests for admissions, depositions, interviews of Agency officials, reviewed postal policies, the Agency's Transformation Plan, collective bargaining agreements and extensive electronic personnel data relating to the issues of the class complaint. In all, the Agency produced "26,349,251 data base records." (See Agency Brief at p. 5-6, and Declaration of Brad Seligman dated November 17, 2003).

III. MEDIATION

In February of 2002, after years of investigation, appeals and litigation, initial discussions began regarding settlement. As a condition to any settlement, class counsel requested that informal discovery proceed in order for class counsel to fully evaluate the case and prepare for hearing in the event the matter

did not settle. The parties agreed to formal mediation and established a process for such.

Class counsel contacted Attorney Brad Seligman, Executive Director of the Impact Fund, to act as lead counsel in the mediation and settlement negotiations. After 14 in person negotiation sessions conducted in Denver, Colorado, Berkeley, California, and Washington D.C., with the services of third party mediator, Linda R. Singer, the parties reached an agreement in principle subject to approval by Agency management officials. This agreement in principle was originally set forth in outline form. The parties did not discuss the amount of attorney's fees prior to reaching the agreement in principle.

On June 3, 2003, Agency officials granted full authorization to proceed with the settlement. Thereafter, the parties engaged in comprehensive negotiations to "hammer out" the terms of the settlement agreement. These discussions began in June 2003, and continued until a final agreement was signed by the parties on November 20, 2003. On December 3, 2003, I issued an order granting preliminary approval of the Settlement Agreement.

IV. *NOTICE GIVEN TO CLAIMANTS OF SETTLEMENT AGREEMENT*

Following preliminary approval of the Settlement Agreement and in accordance with Commission regulations, the Agency notified potential class members in writing of the terms of the settlement. Potential class members were specifically notified of the terms of the proposed Settlement Agreement and of the requirement to submit objections within 30 calendar days from the date of the Notice of Resolution.

Through a third party contract Claims Administrator, the Agency mailed the Notice of Resolution to over 26,000 potential class members. The Agency also posted the Notice of Resolution in over 30,000 Agency facilities, reported the existence of the Settlement Agreement and provided advice on obtaining more information in Agency publications. Class counsel issued a press release announcing the settlement, posted the Notice of Resolution on their website at *www.gloverclass.com*, and set up a toll free number for communication with class members.

V. DEFINITION OF THE CLASS

The *Glover/Albrecht* class is defined as follows:

> Those persons employed by the Agency through the United States between January 1, 1992, and the present while in permanent rehabilitation positions who were allegedly denied promotional and/or advancement opportunities allegedly due to discrimination on the basis of disability.

The phrase "advancement opportunities" was defined to mean vertical movement from a lower level grade and/or pay within the Postal Service system, to a position at a higher level grade and/or pay. The phrase "promotional opportunities" was defined to include training, assignments, details, and awards that would have enhanced a class member's qualifications for promotion to such position, whether the promotion would have been a career ladder promotion or a competitive promotion. The phrase "permanent rehabilitation employee" was defined to mean any current or former Postal Service employee injured in the performance of his/her duties, who as of January 1992, and forward: (1) had a claim accepted by the U.S. Department of Labor, Office of Worker Compensation Programs for wage loss and permanent partial disability; and (2) was provided with an indefinite modified job assignment or position, upon return to work.

VI. *THE TERMS OF THE PROPOSED SETTLEMENT*

The terms of the proposed settlement were succinctly described by the Agency in its brief as follows:

> Under the terms of the Settlement Agreement class members will be eligible for class-wide injunctive as well as individual relief through a claims process. In order to obtain any individual relief, an individual must first file a timely claim and participate in the claims process. No individual who files a claim form, not even the Co-Class Representatives Glover and Albrecht, is guaranteed any individual relief. Rather, each individual claim can be dismissed for failure to state a claim, settled, or arbitrated. An individual can only receive individual relief if the person’s claim is settled or the individual wins at arbitration.
>
> The claims process is divided into four distinct phases. In Phase One of the claims process, the class claims administrator will distribute claim forms to individuals who have been identified by the parties as

potential Class members. Claim forms will also be available on the internet. Individuals then will be required to submit timely claim forms. A third party arbitrator will resolve disputes over whether the claim is timely. The parties will review the claim forms. Claims submitted by individuals who are not Class members will be dismissed by agreement of the parties. The parties will also discuss settlement of groups of claims.

In Phase Two, the parties will exchange extensive discovery on the remaining individual claims. All remaining claimants will submit a second claim form that is more detailed than the initial claim form. The USPS will submit an answer to each remaining individual claim. The parties will also be permitted to serve additional discovery requests specifically tailored to each individual.

In Phase Three, individual claims will be mediated, either in-person or by telephone, if both sides agree to mediate the claim. All claims that are not settled or dismissed will proceed to binding arbitration in Phase Four. The burdens of proof at arbitration are a compromise between the burdens of proof set forth under 29 C.F.R. Section 1614.201(I)--where a finding of discrimination against a class has been made–and the burdens of proof in individual hearings.

For claimants successful at arbitration, the parties agreed to a compromise on the amount of individual relief. For promotional opportunities, defined as assignments, details, awards, and formal training that would enhance a Class member's qualifications for promotion, the parties agreed to a fixed amount of damages-$300 for denial of awards, $500.00 for denial of training, and $2,000 for denial of a detail/assignment.

For denial of an advancement opportunity, defined as vertical movement from a lower level grade and/or pay within the USPS system to a position at a higher level grade and/or pay, the parties agreed to a fixed amount for compensatory damages for all claimants (except Glover and Albrecht) ranging from $4,500 to $10,000, depending upon the year of the denial of opportunity. Claimants will also receive a fixed amount of back pay damages for the most common advancements in the craft ranging from $964 to $15,048,

> depending upon the year of the denial of the opportunity. For other positions, claimants will receive an amount of damages based on an actual back pay calculation. In addition, if an individual was denied advancement to an EAS position or letter carrier position, the individual may be awarded placement. The damages are capped at a combination of (a) denial of one promotion and one award, training or detail or (b)any two promotional opportunities. The parties have agreed to extensive class-wide injunctive relief. The USPS has agreed not to deny opportunities to permanent rehabilitation employees in violation of the Rehabilitation Act. The USPS has also agreed to review and revise several employment policies and to provide additional training on the Rehabilitation Act to a wide variety of employees. Furthermore, the USPS will set up a program whereby permanent rehabilitation employees may state comments and concerns about promotional and advancement opportunities outside the EEO process. Finally class counsel will monitor USPS compliance with the Rehabilitation Act and can file an enforcement action if they observe a systemic pattern of non-compliance as defined in the settlement agreement. (Agency Brief at p.7-9).

As will be discussed in greater detail below, the terms of the Settlement Agreement also provide for the payment of attorney's fees, costs and provide for legal representation without cost to claiming class members throughout the process.

VII. ***STANDARD OF REVIEW***

The fairness of settlements is generally analyzed in federal civil claims pursuant to FRCP 23(e). Although this rule does not technically apply to EEOC administrative proceedings, the Commission has held that the standards enunciated in FRCP 23(e) should be followed. *See Modlin v. Commissioner of SSA*, EEOC Appeal No. 01A24054 (February 20, 2003), *Branch v. Department of Veterans Affairs*, EEOC Appeal NO. 019022620 (November 7, 1990). Accordingly, courts and the EEOC evaluate settlements for their "fairness, adequacy and reasonableness." *See,* for example, *E.E.O.C. v. McDonnell 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,"[t]he agreement stands or falls in its entirety." *Binker v. Commonweaalth of Pennsylvania,* 977 F.2d 738,746 (3rd Cir. 1992).

Under Rule 23, 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.* The same standard applies equally to EEOC administrative proceedings.

The specific factors that must be considered in assessing whether a 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.*

As to the third factor, the "value of an immediate recovery" means "the monetary worth of the settlement." *Gottlieb v. Wiles,* 11 F.3d 1004, 1015 (10th Cir. 1993). "[T]hat value is to be weighed not against the net worth of the defendant, but against the possibility of some greater relief at a later time, taking into consideration the additional risks and costs that go hand in hand with protracted litigation." *Id.* "The financial condition of the defendant is irrelevant to a determination of the value of the settlement." *Id.* "[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. v. Mehta,* 723 F.Supp. 540, 546 (D.Colo.1989), *app. dismissed,* 936 F.2d 582 (10th Cir. 1991).

Further, I must determine whether the agreement is the product of fraud, overreaching or collusion. McDonnell Douglas, 894 F.Supp. at 1333; *see also In Re New Mexico Nat. Gas Antitrust Litig.*, 607 F.Supp. 1491, 1497 (D.Colo. 1984). Additional factors which may be relevant 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 possible settlement; and (4) the reaction of class members to the proposed settlement. *New Mexico Nat. Gas Antitrust Litig.*, 607 F.Supp. at 1504; *Hiram Walker,* 768 F.2d 884, 889 (7th Cir. 1985).

In evaluating the fairness of the settlement, it is not

appropriate to decide the merits of the case or resolve unsettled legal questions. *Carson v. American Brands,* Inc., 450 U.S. 79, 88 n. 14(1981); *New Mexico Natural Gas Antitrust Litig.,* 607 F.Supp. at 1497. This is because settlements involve compromise, and are generally favored. *See* EEOC MD-110 Chapter 12-I, wherein the Commission clearly stated, "public policy favors the amicable settlement of disputes." This public policy in favor of settlements "applies particularly to employment discrimination cases." *Id.* The Commission view in this regard is clear, "[c]onciliation and voluntary settlement are critical to efforts to eradicate employment discrimination, both in public and private sectors." *Id.*

VI. *APPLYING THE LEGAL STANDARDS TO THE SETTLEMENT AGREEMENT*

A. *Whether the Proposed Settlement Was Fairly and Honestly Negotiated*

First, it is important to note that no Objector to the Settlement Agreement has set forth any persuasive facts which when placed under proper scrutiny suggest that the Settlement Agreement entered into was the result of fraud, collusion or overreaching. While a few Objectors made broad claims of collusion and fraud, I find none of these unsubstantiated allegations of sufficient weight and/or substance to disturb my conclusion that the Settlement Agreement was the result of fair and honest arms length negotiations between the parties. *See, Flournoy et al. v. O'Keefe*, EEOC Appeal No. 01A24322 (December 18, 2002).

I have presided over this matter since its assignment to the EEOC Denver District Office and throughout the many years of litigation, I have personally observed both parties continuously, vigorously and relentlessly advocate their respective positions throughout the proceedings. In that regard, both parties devoted substantial resources to the prosecution and defense of the case. Class counsel expended substantial funds, attorney hours, and investigative and litigation support staff time in furtherance of the prosecution of the claim. Five separate law firms/entities were involved in the prosecution of this matter. This included as many as eight attorneys and various support staff members that were actively involved in the litigation. The Agency also staffed the case with considerable resources. In addition to its own local staff of attorneys, the Agency involved its Chief Class counsel as well as numerous Agency headquarters level attorneys and litigation support personnel.

The Parties filed a legion of motions, responses and

replies to assorted discovery and substantive issues. There were numerous telephonic conferences wherein the parties argued their respective positions in relation to various issues and/or motions.

The parties also engaged in voluminous discovery in connection with both the litigation and the mediation process. The litigation discovery consisted of millions of records which were produced and reviewed.

Linda R. Singer in her declaration, noted that the parties vigorously presented their respective positions throughout the comprehensive mediation process. I find that this mediation was agreed to in good faith and that there was, and is, no evidence of fraud or collusion involved in any stage of the process including the mediation process. The completeness and intensity of the mediation process, coupled with the quality and reputation of the Mediator, demonstrate a good faith commitment by the parties to seek informal resolution of the matters.

I conclude that class counsel and Agency counsel engaged in zealous advocacy in support of their respective positions. For the foregoing reasons, I find that each party vigorously represented the interests of its respective constituency throughout the process and that the Settlement Agreement was fairly and honestly negotiated.

B. *Whether Serious Questions of Law and Fact Exist That Place The Ultimate Outcome of The Litigation In Doubt*

Serious questions of law and fact exist in this case that place the ultimate outcome of the litigation in doubt. It simply is not certain that Complainants would have prevailed. Litigation is by its very nature uncertain and unpredictable. It is not appropriate at this stage of the proceeding to evaluate the merits of the litigation, since both parties have decided to "waive their right to litigate the issues involved in the case and thus save themselves the time, and the inevitable risk of litigation." *United States v. Armour & Co.*, 402 U.S. 673, 681 (1971). Nevertheless, had the parties litigated this case, there are many issues that place the final outcome of the litigation in question.

1. *Whether the Agency's Pending Motion To Dismiss Would Have Been Granted*

Central to the uncertainty of the litigation's outcome is the fact that, at the time of the Settlement Agreement, there was a pending Agency motion to dismiss which was stayed pending

completion of discovery. If this litigation were to proceed, Complainants would without doubt bear the open and present risk that the Agency's motion might be granted. If granted, the 26,000 potential claimants would have lost any chance of recovery whatsoever. This risk must, as the Agency asserts in its brief, be examined under the backdrop of EEOC's own statistics which show that "in the vast majority of federal sector employment discrimination cases, Complainants do not prevail." (Agency Brief at p.15). On the other hand, the Agency faced risks that its motion would not be granted and the matter would proceed to hearing.

2. *Whether There Existed a Nationwide Policy of Discrimination*

Another critical issue that could have affected the outcome of the litigation concerns whether or not any nationwide policy of discrimination existed. This factual issue was vigorously disputed by both the Agency and Complainants. The Agency in its brief asserts that "class members themselves have made statements in their petitions that support the Agency's contention that there is no nationwide policy of denying opportunities to rehabilitation employees." (Agency Brief at 16). This issue could have been resolved in favor of the Agency leaving Complainants without chance of recovery or against the Agency exposing the Agency to significant and substantial liability.

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

The existence or non-existence of sufficient statistical evidence to establish or not establish a violation of law was also vigorously disputed. The respective positions of Complainants and the Agency were at odds. "It is clear that a fact finder, when confronted with diverging opinions from experts could adopt the approaches used by one expert, or the other; could reject both; or could arrive at a middle ground between the two, accepting portions of the expert opinions but coming to an independent conclusion." *Wilkerson v. Martin Marietta*, 171 F.R.D. 273 (D.Colo. 1997). Clearly, the statistical evidence posed risks of litigation to both parties.

4. *The Effect of Intervening Supreme Court Precedent*

A similar risk that the parties faced involved the uncertainty of intervening Supreme Court precedent. The legal landscape of disability discrimination law is relatively new and

has been rapidly changing. These changes can easily be seen in some of the Supreme court's more recent disability discrimination decisions. *See, e.g. Sutton v. United Airlines*, 527 U.S. 471 (1999), wherein the Court specifically rejected the Commission's Interpretive Guidance on Mitigating Measures. These risks apply equally to the Agency and Complainants.

5. *Issues Pertaining to The "Regarded As" Question*

One of Complainant's theories of liability rested on the notion that the Agency "regarded" permanent rehabilitation employees as "disabled." The Agency vigorously disputed this claim and argued that, "it cannot be said nor established that the Agency perceives or regards its injured employees as being unable to perform the broad class or category of jobs required by current precedent." (Agency Brief at p.16). In view of the divergent positions, it is clear that had the matter proceeded to hearing the parties would bear the risk that this issue could have been resolved against them. For each party the risk of loss relative to this issue could have significantly and negatively impacted their litigation positions.

C. *Whether The Value of An Immediate Recovery Outweighs The Mere Possibility of Future Relief After Protracted and Expensive Litigation*

Class action employment discrimination lawsuits are known for their complexity. *Cotton v. Hinton,* 559 F.2d 1326, 1331 (5th Cir.1977). This case is no exception. Evidence of the complexity can be found in the volume of pleadings that have been filed and the number of significant issues of fact and law that exist. This controversy, including the initial investigation is approximately 12 years old. Absent settlement, this matter could conceivably drag on for many more years. The hearing process would likely take several months to complete, and would initially only address the question of liability. If the Agency prevailed and Complainants did not appeal, Complainants would recover nothing. If I concluded that Complainants established liability then complicated damage claim proceedings could take years to complete. If liability were established the Agency would probably appeal that decision. An appeal, in turn, could lead to a request for reconsideration, a possible remand, a new hearing and further appeals. In short, absent a case settlement, a final result could be ten or more years away. In *Officers for Justice v. Civil Service Commission,* 688 F.2d 615 (9th Cir.1982), *cert. denied,* 459 U.S. 1217(1983), the court stated:

> 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....

Id. at 629 (internal citation omitted).

Assuming Complainants prevailed in the liability phase, individual hearings would then be held to address the claim of each potentially aggrieved individual. In those hearings, the Agency would likely seek to introduce extensive, individualized rebuttal evidence as to each individual. These individual proceedings present a monumental task on behalf of both the EEOC and the Parties, since there are about 26,000 potentially aggrieved persons. Assuming, conservatively, that each Claimant's hearing required a half day of preparation time and a half day at the hearing, the proceedings would consume at least 26,000 days of attorney and hearing time.

It is obvious that the cost of protracted litigation would be immense and a tremendous burden for both Complainants and the Agency. 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). Many courts have recognized that failure to approve a settlement of this size and complexity essentially will mean "[d]uring 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.

Weighing all of these factors, I find that the probable value of immediate recovery through the Settlement Agreement claims process outweighs the mere possibility of future relief, following protracted and expensive litigation.

D. *The Judgment of The Parties and Their Counsel That The Settlement Is Fair and Reasonable*

It is undisputed that the attorneys representing both Complainants and the Agency support and recommend the approval of the settlement. Both filed briefs in support of such approval. Many courts have held that the recommendation of counsel is entitled to great weight. *See Luevano v. Campbell,* 93 F.R.D. 68, 88 (D.D.C. 1981). Indeed, "[c]ourts have consistently refused to substitute their business judgment for that of counsel and the parties." *Alvarado,* 723 F.Supp. at 548. I find that deference is particularly appropriate here given the high quality and extensive experience of both class and Agency counsel.

With respect to the Complainants' approval of the Settlement Agreement it is to be expected in a class this size that some persons would inevitably object. Nonetheless, only .3% of those who could have filed objections did so. A reasonable conclusion to be drawn from the small number of objections is that the vast majority of the potential class members consider the terms of the settlement agreement to be fair, reasonable and adequate. I therefore find no reason to substitute my judgment for that of the parties and/or their respective counsel.

E. *Consideration of Other Factors*

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

This factor, although an important consideration for the Commission, requires little discussion. The vigorousness of the advocacy, the broad-based impact of the non-monetary provisions along with readily apparent across-the-board eligibility of class members to recover monetary recompense all point to the fact that the Settlement Agreement was negotiated with an eye toward recovery as a whole for all class members. *See Alvarado,* 723 F.Supp. at 546. I find that class counsel adequately protected the rights of all Complainants, and that there is no evidence that certain Complainants' rights may not have been given adequate consideration during the settlement process.

2. *The Risk of Establishing Damages at Hearing*

As I have noted above in the discussion regarding the risks of litigation, there are significant risks of establishing damages at hearing assuming Complainants were to prevail during the liability phase. It is clear that the parties have balanced the risks of establishing damages in favor of defined monetary amounts as more fully set forth above in Section VI. I find that the certainty established by the Settlement Agreement regarding damages provides an equal basis from which the varying claims of different potential claimants can be globally and individually reviewed and assessed. The attempt to fairly address the damages issues is apparent on the face of the Settlement Agreement. For example, the Settlement Agreement provides for greater relief for persons who were denied promotional and/or advancement opportunities in the 1990's than for those that were allegedly denied such opportunities in the subsequent decade.

I find nothing in the balancing of these risks to suggest that the Settlement Agreement is anything but fair, adequate and/or reasonable. An objective analysis of this factor supports

my decision to approve the Settlement Agreement.

3. *The Extent of Discovery and The Current Posture of The Case*

As discussed above, this case has been in litigation for years. At the risk of being redundant, I would again emphasize that extensive discovery has been completed by the parties, including depositions; class counsel has reviewed literally millions of documents; the parties used expert witnesses to review and analyze statistical information, documents and testimony regarding the Agency's personnel practices and policies. Without doubt, the settlement was the result of an informed and carefully considered decision by the parties.

4. *The Range of Possible Settlement*

If approved, the proposed settlement will provide a process for the payment of monetary benefits to the aggrieved individuals. The extent of relief that could be recovered if the case were successfully litigated to a conclusion cannot be determined with any degree of certainty. What is certain is that continued protracted litigation would delay for many years relief for those persons who may receive immediate benefits under the terms and conditions of the Settlement Agreement. As discussed above, class counsel and those for whom relief is sought face obvious risks in litigating what undoubtedly would be a vigorously contested case with many uncertainties as to the ultimate outcome.

Given the risks inherent in proceeding with this litigation, I find that it is prudent to accept a settlement that provides eligible Complainants who establish their entitlement both a substantial monetary recovery and significant employment benefits now. *See Oppenlander v. Standard Oil Co.,* 64 F.R.D. 597, 624 (D.Colo.1974), where the court observed:

> [T]he 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").

IX. ***ANALYSIS OF THE OBJECTIONS IN THIS CASE***

A. *Insufficient Monetary Compensation*

The vast majority of objections to the Settlement Agreement concern the monetary amount of the settlement. Some Objectors claim that the settlement amount does not adequately compensate for their damages incurred as a result of the Agency's alleged wrongful conduct, including actual losses, emotional distress, and loss of retirement benefits. The Objectors generally characterize the amount of potential monetary benefits as a pittance and some even referred to the settlement as "insulting."

Despite the objections, the Settlement Agreement cannot be evaluated based on what each Complainant might recover if he or she prevailed on the full amount of each alleged claim. "Objections based purely upon individual claims of loss do not warrant disapproval of the proposed settlement." *McDonnell 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 (3rd Cir.1992). In analyzing the fairness issue, I must consider factors "beyond maximizing the potential benefit to an individual claimant." *Binker v. Com. Of PA.,* 977 F.2d 738 (3rd Cir. 1992). The criteria or methodology employed by the litigants is sufficient if **its terms, when applied to the entire group of individuals represented, appear reasonable** (emphasis added). McDonnell Douglas, 894 F.Supp. at 1335; *see also E.E.O.C. v. Hiram Walker & Sons, Inc.,* 768 F.2d 884, 889 (7th Cir.1985), *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"). Indeed, the Administrative Judge is not required to engage in a *de novo* determination of whether the settlement provides each individual claimant with a satisfactory recovery, and the mere possibility that greater relief could be obtained if the case went forward to hearing is not a valid reason to object to the settlement. *McDonnell Douglas,* 894 F.Supp. at 1335;

The Objectors, while looking only at the amount that they themselves might recover, fail to recognize that thousands of others also may be eligible to recover. For example, if many of the 26,291 persons were denied promotions in 1992, the recovery could theoretically involve payment by the Agency of hundreds of millions of dollars to potential class members. This amount is certainly not a "pittance."

The Objectors also fail to take into account the potential for a decision in favor of the Agency. The settlement

negotiated by the parties clearly must represent some compromise. The Agency vigorously disputed the claim and if Complainants did not prevail they would recover nothing. Even if the Complainants prevailed, Complainants would still face the risk that, in individual hearings, the Agency could substantially reduce their damages. Moreover, no Objector can persuasively argue that he/she would have without any doubt prevailed on his/her claim and achieved any better result than that negotiated under the terms of the Settlement Agreement. The reality is, had each person filed his or her own complaint, some would have prevailed and some lost, and many would have paid attorney's fees and costs.

Some Objectors complain that the Settlement Agreement provides no retirement enhancement. Contrary to the Objector's assertions, the Settlement Agreement may in fact enhance retirement pay for some employees. It is conceivable that the changes in Agency policy could make new opportunities available for many employees. Looking forward, this could positively impact employee retirement benefits. Similarly, some employees under the terms of the Settlement Agreement may be eligible for placement into new higher graded positions thus enhancing future retirement benefits.

The Settlement Agreement provides injunctive relief and nationwide changes to policies and procedures in addition to potential monetary payments. Monetary benefits are only a part of the Settlement Agreement. "A cash settlement amounts to only a fraction of the potential recovery will not per se render the settlement amount unreasonable." This is especially true when, as in this case, there is other relief in the settlement from which Complainants might benefit. *Officers for Justice,* 688 F.2d at 628; *see also United States v. Allegheny-Ludlum Industries, Inc.,* 517 F.2d 826, 864 (5th Cir.1975), *cert. denied,* 425 U.S. 944, 96 S.Ct. 1684, 48 L.Ed.2d 187 (1976) (settlement upheld; objectors did not make a "compelling showing" that average of $500 award was "nothing but a mere pittance"); *Hiram Walker,* 768 F.2d at 891 ("[t]here is no showing that the amounts received by the beneficiaries of the settlement were totally inadequate"). "It is the complete package taken as a whole, rather than the individual components, that must be examined for overall fairness." *Officers for Justice,* 688 F.2d at 628.

Finally, some Objectors assert that the settlement amount does not sufficiently penalize the Agency for violation of the Rehabilitation Act. These objections miss the point. The Commission has clearly stated,

> it has long been the practice in both the private

> sector and the federal sector for employers and Agencies to enter into settlements that contain cash payments where there has been neither a finding of discrimination, either judicially or administratively, nor an admission by the employer or Agency of any wrongdoing. *See* MD-110 12-IV.

Settlement involves compromise. Moudlin v. SSA, EEOC Appeal No. 01A24054 (February 20, 2003), Settlement "save(s) the [parties] the time, and the inevitable risk of litigation." *Armour,* 402 U.S. at 681.

Since the case has not gone to hearing and the evidence has not been presented, it is not appropriate to conclude, and there is no basis to determine, that the Agency violated the Rehabilitation Act. The Agency vigorously disputes that any discrimination occurred and, as discussed above, the ultimate outcome of the litigation is in doubt due to a number of serious disputed issues of fact and law. The only appropriate issue for the Administrative Judge's consideration is the fairness of the settlement.

My review of the overall fairness of the settlement leads me to conclude that the monetary portion of the settlement is fair and reasonable and the objections as to the amount are without merit. The reasonableness of the monetary settlement is supported by the additional non-monetary provisions of the settlement. Moreover, I specifically find that the monetary relief is not so "grossly inadequate" that it should be disapproved. *See Branch v. Department of Veterans Affairs*, EEOC Appeal No. 01902620 (November 7, 1990).

B. Other Claims, Issues and Time Frames

Some Objectors did not agree with the terms of the Settlement Agreement because it only addressed claims related to promotional and/or advancement opportunities. Objectors variously complained that overtime, demotions, removals, terminations, and denial of accommodations were not included and therefore they argued the Settlement Agreement was not fair.

Regarding the issue of overtime, Complainants contend that they did attempt to add the overtime issue to the complaint. On March 9, 2002, class counsel filed a motion requesting that Edmond Walker be added as a co-class agent. After I advised the Agency and Complainants regarding the complications and delay to the *Glover* matter that adding Walker could entail, class counsel withdrew the request and instead chose to file a separate class complaint. The question regarding whether or

not to certify the Edmond Walker complaint is presently pending before me.

Concerning the inclusion of other issues including demotion, removal, terminations, and denials of reasonable accommodations, none of these issues were part of any underlying complaint. Nor were these types of issues certified, part of the class definition, nor part of any of the underlying claims of the class agents.

The Objectors claim that the time frame of the defined class ought to have reached back to a time period before 1992. Clearly the time frame of the defined class is directly tied to the individual complaint of 1992. See 29.C.F.R. Section 1614.204(b).

In sum, I find no legally valid or supportable reason for including other issues that were not brought within the class definition or extending the matter to a time frame that was not part of the defined class. The Administrative Judge is simply not empowered to rewrite the agreement between the parties. The Administrative Judge's role at this juncture is limited to that of approving or disapproving the Settlement Agreement. *Evans v. Jeff D.*, 475 U.S. 717 (1986); *see also Manual for Complex Litigation Third*, Section 30.42. I therefore find that the objections on these grounds do not merit a conclusion that the settlement is unfair.

C. *Adequacy of Representation*

The third category of objections deals with the adequacy of representation in this case. I find these objections that Complainants were not adequately represented to be wholly without merit. As I previously found above, class counsel vigorously prosecuted and devoted substantial resources to this case. I specifically find that class counsel intensely, zealously and adequately represented their clients throughout the proceedings against a vigorous and persistent adversary. I further find that any allegations of inadequacy and/or improprieties attributed by Objectors to class counsel are not supported by any evidence of record whatsoever. *See Flournoy et al v. Okeefe*, EEOC Appeal No. 01A24322 (December 18, 2002).

D. Fairness of Distribution-Burdens of Proof, No Opt Out Provisions and the Fairness of Class Agent Awards

Some Objectors argued that they ought to be afforded the opportunity to "opt out" of the process and proceed with their own already pending administrative EEO complaints. Despite the

Objectors wishes, the Commission's regulations and EEOC Management Directive MD-110 Section 8(V)(D)8-7 do not allow for such opting out in the administrative process.

Another common theme of Objectors was that they ought to be afforded a guaranteed sum as part of the settlement instead of having to prove their claims under the terms of the Settlement Agreement. The parties have agreed to a specific framework for claims that are not settled and proceed to arbitration. (See Settlement Agreement Section VI.D(a-f). Under the terms of the Settlement Agreement the parties agreed to the following burdens of proof for claims involving the denial of promotion, detail or training:

> 1) the Arbitrator will presume that the Agency regarded the claimant as disabled unless the Agency proves by a preponderance of the evidence that it did not so regard the claimant; 2) claimants must prove by a preponderance of the evidence that they applied or were deterred from applying for a promotional or advancement opportunity because of disability that the person was qualified for and could perform the essential duties of with or without accommodation; and if claimant establishes these facts claimant will prevail unless the Agency proves by clear and convincing evidence that they would not have received the promotion, detail or training in the absence of their disability status. *Id*. Where the party asserts the existence of an actual disability the claimant must prove by a preponderance 1) that the claimant has an actual disability or record of disability 2) if disability status is established claimants must prove by a preponderance of the evidence that they applied or were deterred from applying for a promotional or advancement opportunity because of disability that the person was qualified for and could perform the essential duties of with or without accommodation; and 3)if claimant establishes these facts claimant will prevail unless the Agency proves by clear and convincing evidence that they would not have received the promotion in the absence of their disability status. *Id*.
>
> For claims that involve a denial of an award the claimant must show that they were more qualified to receive the award or at least as qualified as the person who received the award and were denied the award because of disability. *Id*.

In addressing this issue, I first must point out while the

Objectors focus on the arbitration phase of the Settlement Agreement process they ignore that many claims under the terms of the Settlement Agreement may be resolved by the parties through the settlement and mediation processes outlined in the agreement. While it is impossible to tell at this juncture how many such claims will be resolved it is safe to assume that some claimants will never be required to proceed through the formal proof processes about which Objectors complain. In fact, for many, the claims process and entitlement to receive compensation may involve merely filing the claim form.

Nevertheless, many claims will inevitably proceed through the arbitration process. A simple reading of the Settlement Agreement reveals terms of the Settlement Agreement relating to the burdens of proof that are clearly favorable to claimants. For example, claimants will have the benefit of the "regarded as" presumption and will also have the option of meeting their burden of having applied for a position by establishing only that they were "deterred from" applying for the position.

It is readily apparent from reviewing the terms of the Settlement Agreement that the parties attempted to strike a balance. The Agency was attempting to protect its interest in paying claims to only those that could establish that they were disabled and were denied promotional or advancement opportunities and/or awards. Class counsel on the other hand was attempting to negotiate the most favorable terms for the class members. The balance struck by the parties, as outlined above, represents the essence of compromise, an agreement that appears on its face to be fair, adequate and reasonable to the class as a whole.

Some mention should be made of the claims of the class representatives. Under the terms of the Settlement Agreement the co-class representatives are not guaranteed any relief. They stand in the very same shoes as any other claimant in this regard. The only distinction is that at arbitration they may argue for the payment of compensatory damages up to the statutory cap. Thus, the only difference is the enhanced **potential** of the class representatives to receive more compensatory damages. In *Moudlin v. SSA*, EEOC Appeal NO. 01A24054 (February 20, 2003), the Commission unequivocally approved a settlement with enhanced benefits to the class agents noting that "class agents were rewarded for their efforts to spearhead the claim." I find no unfairness to the class as a whole in similarly rewarding co-class agents with the mere "potential" to recover enhanced compensatory damages.

E. *Deceased Workers*

Some Objectors asserted that the Settlement Agreement should not be approved because it fails to provide for employees who could have been potential claimants but are deceased. These Objectors are mistaken in their understanding of the Settlement Agreement. The Settlement Agreement specifically provides for claims of deceased class members. (See Settlement Agreement Section VI.A.3. Moreover, as correctly noted by the Agency in its brief, "a federal sector EEO complaint survives the death of Complainant." (Agency Brief at p.29). *See Estate of Ginter v. USPS*, EEOC Appeal No. 01997239 (July 11, 2001).

In view of the fact that the Settlement Agreement makes special provisions for the claims of deceased individuals and the fact that the law is clear that such claims survive, there is nothing indicating that the Settlement Agreement as written is unfair to deceased individuals. On the contrary, I find that the parties have considered the question of deceased individuals and that such consideration is fair, adequate and reasonable.

F. *Alleged Continuing Discrimination by the Agency*

Some Objectors contend that the settlement should be rejected or should be reevaluated based on the fact that the Agency may be continuing to discriminate against persons on the basis of disability. I am not persuaded by these objections because upon final approval, the settlement agreement provides for injunctive relief, including the monitoring and cessation of policies and practices that might result in continuing discrimination. In view of these clear provisions contained within the Settlement Agreement, disapproval is not warranted.

G. *Attorney's Fees*

In considering fairness issues relating to settlement approval most courts have held that the issue of attorney's fees must be reviewed in order to determine the fairness of such regardless of whether or not any Objector raises the issue. *See e.g. In re General Motors Corp. Pick-up Truck Fuel Tank Litigation*, 55 F.3d 768, 819(3rd. Cir. 1985), wherein the court stated, "a through judicial review of fee applications is required in ***all*** class action settlements" (emphasis added).

The review in this case involves a two part analysis because the Settlement Agreement provides for fees for all work leading up to the Settlement Agreement and secondly fees for

work processing the claims of employees.

1. *Attorney's Fees Leading up to the Settlement Agreement*.

As to fees sought by counsel for the work in bringing the matter to Settlement, I have carefully reviewed the billing statements and the declarations provided by class counsel. I find that the fees sought by class counsel are adequately and appropriately documented. The payment generally reflects the total of hours expended multiplied by the reasonable hourly rates. This total is arrived at taking into account the full 12 years of litigation. This "lodestar" method of computing fees has long been recognized as appropriate by the courts and the Commission. *See Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983), *Blum v. Stetson*, 465 U.S. 886 (1984), *Engle v. Department of Defense*, EEOC Request No. 05931027 (June 23, 1994). I find, after reviewing the total hours expended by each attorney, and their hourly rates that they are reasonable under the circumstances. This is especially true given the magnitude and the complexity of the litigation. The total amount $1,025,000(plus "no more or less than $30,000 for fees expenses and costs incurred between the date on which counsel reached an agreement in principle and the date of Final Approval of the Settlement Agreement) in actuality represents a discount from the total lodestar for which class counsel could have sought recovery. The negotiation of fees in fact took place "only after an Agreement in Principle was reached" by the parties. (Agency Brief at p.12). I find that the amount of fees sought and the amount the Agency agreed to pay is reasonable under the circumstances presented.

I also find that the quality of representation supports approval of the fees. This case involved over 20,000 potential class members and complex legal theories with substantial risks. Class counsel over twelve years carried the case forth through the individual complaint process, the class complaint process two levels of appeals, the merits phase of litigation and settlement with all the appurtenant motion filing, brief writing, complex discovery, numerous mediation sessions and a multitude of teleconferences. I have personally observed, and specifically find, the quality of representation of class counsel to be of the highest order. Objectors cannot be reasonably heard to complain about the commitment of counsel nor the zealousness of the advocacy in this case as it has been of the highest caliber and exemplary.

2. *Post Agreement Attorney's Fees*

Under the terms of the Settlement Agreement, class counsel will be paid for processing claims filed by class members and for their representation of class members throughout the claims process. Depending on the number of claims filed class counsel is paid between $145-$1200 per claim. For each successful mediation class counsel is paid $1200; for each successful arbitration, class counsel is paid $4,000. (Complainants' Brief at p.36). These figures are based upon estimates of the amount of legal work that would be necessary. Counsel for Complainants assert that this arrangement,

> works for 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 of the Treasury*, EEOC Appeal No. 01890593 (April 13, 1989). (Complainants' Brief at p.36).

I concur with class counsel's conclusion. I further find that the benefit to the class of providing what amounts to free legal representation is substantial. Of equal importance to the analysis of fairness is the fact that payments for such representation is not subtracted from any class member awards. These factors weigh heavily in favor of approval. I therefore find that the attorneys fees provisions of the settlement agreement are fair, adequate and reasonable.

H. Public Policy Considerations

Finally, some mention ought be made of the public policy considerations of approving the Settlement Agreement in general. I find that the Settlement Agreement provides for the valuable conservation of both public and private resources (including scarce Commission resources) when compared to the costs that no doubt could have escalated further and further as the case continued on for an unknowable time frame into the future. These public policy considerations strongly favor approval of the Settlement Agreement.

X. *CONCLUSION*

After a detailed review and consideration of the terms of the Settlement Agreement, the briefs of the parties, the declarations provided, the objections filed thereto, and the factors to be considered in approving the fairness of such a

settlement, I conclude that the proposed Settlement Agreement is fair, reasonable and adequate. Accordingly, it is **ORDERED** that the Settlement Agreement is hereby **APPROVED AND SHALL PURSUANT TO 29 C.F.R. SECTION 1614.204(G)(4) BIND ALL MEMBERS OF THE CLASS.**

NOTICE TO BOTH 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. Section 1614.401(c), 402 (a) an appeal to the Commission may be made directly from this Order. 29 C.F. R. Section 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 Section 1614.204(g)(4).

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

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

Further Information regarding the right to appeal and a copy of EEOC Form 573 is hereby attached to this decision. 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

P.O. Box 19848

Washington, D.C. 20036

Fax No. (202)663-7022

Facsimile transmissions over 10 pages will not be accepted.

Dated: JUNE 10, 2004

Dickie Montemayor
Administrative Judge

CERTIFICATE OF MAILING

I hereby certify that a copy of the above referenced decision was placed in the U.S. mail to all counsel of record and all timely Objectors of record on June 10, 2004. Pursuant to Commission precedent it will be deemed received within five days of mailing.

_____

Dana McCann
EEOC