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**IN THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
BALTIMORE DISTRICT OFFICE**

RONALD JANTZ, individually and on behalf
of all others similarly situated,

Complainant,

v.

MICHAEL D. ASTRUE,
Commissioner,
Social Security Administration,

Agency.

EEOC Case No.: 531-2006-00276X

Agency No: HQ-O6-2518-SSA

MOTION FOR CLASS CERTIFICATION

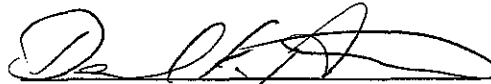
Complainant Ronald Jantz, individually and on behalf of all others similarly situated, through his undersigned counsel, hereby moves the Commission to enter an Order granting this Motion for Class Certification. Complainant respectfully requests that the Commission grant this Motion for the reasons set forth in Complainant's Memorandum of Law, and accompanying appendices and exhibits. A proposed form of Order is attached.

Dated: June 27, 2008

Respectfully submitted,

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Judge: David Norken

**MEMORANDUM IN SUPPORT OF
COMPLAINANT'S MOTION FOR
CLASS CERTIFICATION**

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I. INTRODUCTION

Congress has directed the federal government to be a “model employer” of individuals with disabilities. “Inherent in this duty is an obligation to break down artificial barriers which preclude individuals with disabilities from participating in an equal footing in the work force -- from having an ‘equal employment opportunity.’” *Rowlette v. Soc. Sec. Admin.*, EEOC Appeal No. 01A10816 (August 1, 2003). The mandate to be a model employer not only requires non-discrimination, but also imposes a legal duty to take affirmative efforts to promote the disabled. *Prewitt v. United States Postal Serv.*, 662 F.2d 292, 306 (5th Cir. 1981) (observing that “section 501 [of the Rehabilitation Act] requires affirmative action on the part of federal agencies”). The Social Security Administration (“SSA” or the “Agency”), has violated the law both by failing to take adequate affirmative action efforts to ensure equal opportunity, and by systematically discriminating against its employees with targeted disabilities (referred to hereafter as “TDEs”).¹

Pattern-or-practice discrimination claims such as this one present a means by which a plaintiff may challenge systemic discrimination in the workplace. *See Wright v. Stern*, 450 F. Supp.2d 335, 363 (S.D.N.Y. 2006). Here, TDEs at SSA have been and continue to be denied equal employment opportunity in promotions as a result of systemic barriers stemming from SSA’s uniform promotion system.² This motion and the accompanying declarations and exhibits

¹ The EEOC defines the following as targeted disabilities: deafness, blindness, missing extremities, partial paralysis, complete paralysis, convulsive disorders, mental retardation, mental illness, and genetic and physical conditions affecting limbs and/or spine. *See Equal Employment Opportunity Management Directive 715 (“EEOC MD-715”),* Appendix A, October 1, 2003, available at <http://www.eeoc.gov/federal/eeomd715.html>, a copy of which is attached as Exhibit A to the Declaration of Daniel Goldstein, Esq. (“Goldstein Decl.”). *See also Improving the Participation Rate of People with Targeted Disabilities in the Federal Work Force*, United States Equal Opportunity Employment Commission, January 2008, available at <http://www.eeoc.gov/federal/report/pwtd.html>, a copy of which is attached as Exhibit B to Goldstein Decl.

² Complainant’s counsel has determined that any alleged hiring claims on behalf of TDEs seeking jobs at SSA are sufficiently distinct to warrant special treatment. The first mention of hiring claims in this case appears in Complainant Ronald Jantz’s Motion for Provisional Class Certification that was never ruled upon. Mr. Jantz’s EEO complaint focused on denial of promotion. Subsequent discovery seems to have presumed that hiring claims were encompassed in the class claim, but that issue has never been squarely

demonstrate that SSA has been aware of the systemic barriers facing its TDEs since at least 1991, but has failed to implement effective remedial efforts to address these obstacles. TDEs continue to face substantial disparities in promotion rates as demonstrated by Complainant's expert reports, SSA's expert testimony, SSA's MD-715 Reports, and anecdotal testimony from class members. To remedy this discrimination Complainant seeks certification of claims for one of two class definitions. The first of these is a broader class consisting of:

All current and former employees with targeted disabilities at the Social Security Administration at General Schedule Grade five and above who, on or after August 22, 2003, have been denied equal promotional opportunities.

The evidence submitted in support of this motion amply supports certification of this proposed class consisting of *all* TDEs denied equal promotional opportunities during the relevant time period, including those who were deterred from applying for promotion or applied but did not make a Best Qualified List ("BQL") for promotion. One advantage of the broader class definition is that it does not presume the validity of the BQL process. As explained in the Declaration of Lance Seberhagen, one of the reasons for the overall adverse impact in selection rates for TDEs may be associated with problems with the procedures used to develop BQLs.³ Dr. Seberhagen's analysis of the broader class claims adopts the analytical approach used by the EEOC itself in monitoring equal opportunity among various groups employed in the federal agency workforce.⁴

However, should the Commission find a narrower class definition more appropriate, Complainant would seek certification of discrimination claims on behalf of the following class:

addressed. There has been limited discovery on the hiring claim and SSA has produced no data on which a statistical study can be based. The discovery that has been conducted on the issue indicates that there are a number of individuals who present hiring claims. In light of these facts, counsel request that the Commission schedule a status conference to address this issue.

³ See Declaration of Lance Seberhagen ("Seberhagen Decl") at ¶¶5-16, attached as Exhibit C to Goldstein Decl.

⁴ 29 C.F.R. §1607.16B; 29 C.F.R. 1607D; *Impact of Employee Selection Procedures on Employees with Targeted Disabilities at the Social Security Administration* ("Seberhagen Report"), at 2-3, attached as Exhibit D to Goldstein Decl.; Seberhagen Decl. at ¶¶5-6.

All current and former employees with targeted disabilities at the Social Security Administration who, on or after August 22, 2003, have applied for and made a Best Qualified List for promotion, but have been denied equal promotional opportunities.

This narrower class definition encompasses only those TDEs who SSA has determined are qualified to perform the essential functions of the positions sought with or without reasonable accommodation. In addition, the Agency has acknowledged through its counsel that “[t]he cost of accommodation has no bearing on the decision to select or not to select an individual.”⁵ Thus, the statistical comparison of relative promotion rates from the BQLs between TDE and non-TDE applicants is as valid and reliable as in a race or gender discrimination case. The extreme discrepancy between actual promotion rates of TDEs and non-TDEs on the BQL dramatically demonstrates systemic discrimination. The uniform nature of the Agency’s promotion procedure, the unfettered discretion exercised by selecting officials, the Agency’s own admissions that TDEs are significantly underrepresented in higher level positions and that anti-disability bias is a continuing problem in the agency’s overall culture, are further clear evidence that certification of either class is warranted.

Under either formulation of the class definition, this case presents a prototypical class action:

- the proposed class is numerous;
- SSA’s policies and practices at issue are common to all class members, including a single uniform promotion system that applies throughout SSA and is excessively subjective, allowing unfettered discretion at critical junctures;

⁵ See Declaration of Shanon Carson (“Carson Decl”) at ¶¶36-38.

- SSA's policies and practices are disseminated by the Center for Human Resources and apply throughout the Agency;⁶
- the claims of the Complainant are typical of the claims of the class; and
- the Complainant and proposed class counsel are adequate representatives.

Complainant challenges the common features of SSA's system that permit ongoing discrimination against the class.

The evidence shows that SSA's policies allow decision-makers to exercise unchecked subjective discretion in selecting individuals for promotions. The statistics establish that this wide discretion results in highly statistically significant disparities in promotions for TDEs employed by SSA. For example, analysis of the promotion rates of TDEs and non-TDEs who apply for promotions and make the BQL, a necessary step for obtaining any competitive promotion, shows that TDEs are promoted at a selection rate of 7.7%, while non-TDEs are promoted at a selection rate of 11.1%.⁷ The likelihood of these results occurring absent disability discrimination is less than *1 in 10 trillion*.⁸ Furthermore, the number of TDEs working at SSA has declined steadily since 2000, and currently over half of the TDEs are employed at the lower grade levels, GS-8 and below.⁹

Social scientific findings confirm that this highly significant disparity in promotions between TDEs and other SSA employees is a result of significant attitudinal, environmental and structural barriers to promotion of TDEs at SSA. SSA's policies allow stereotypes and

⁶ Deposition of Ronald Jantz ("Jantz Dep.") at 95-96, attached as Exhibit E to Goldstein Decl.; First Report of Investigation, filed on 4/25/06 (ROI #1) Ex. 10, at 13, attached as Exhibit F to Goldstein Decl.

⁷ Declaration of Richard Drogin, Ph.D. ("Drogin Decl.") at ¶4, attached as Exhibit G to Goldstein Decl.; See also Rebuttal Declaration of Richard Drogin, attached as Exhibit H to Goldstein Decl.

⁸ Drogin Decl. at ¶8.

⁹ See Agency Response to Complainants First Discovery Request, Request for Admission #3; *SSA MD-715 Report FY 2004* at 5; *SSA MD-715 Report FY 2005* at 5; *SSA MD-715 Report FY 2006* at 5; *SSA MD-715 Report FY 2007*, at 17, at Table B4-1 "Participation Rates for General Schedule (GS) Grades by Disability;" attached respectively as Exhibits I, J, K, L, M to Goldstein Decl.; see also Deposition of Mark Anderson [3/14/07] (Anderson Dep. [3/14/07]) 76:10-15, attached as Exhibit N to Goldstein Decl.

prejudices to enter into promotional decisions and, as a result, TDEs as a class are significantly under-promoted at SSA. Such uncontrolled and unmonitored discretionary decision making coupled with the prevalence of discriminatory attitudes in the workplace raises common questions of fact and is a well-recognized basis for class certification both in Federal Court and before the Equal Employment Opportunity Commission (“EEOC”). *See, e.g., Dukes v. Wal-Mart, Inc.*, 509 F.3d 1168, 1183 (9th Cir. 2007); *Lewis v. Dep’t of Transportation*, EEOC Appeal No. 01A40442 (September 28, 2005); *Conanan v. FDIC*, EEOC Appeal No. 01952486 (January 13, 1998); *Davis v. Dep’t of Labor, Employment and Training Administration*, EEOC Appeal No. 01930457 (September 10, 1993).

The EEOC routinely grants class certification in cases where far less evidence is presented at the class certification stage. In the EEOC’s administrative process, complainants are not held to the same standard of proof as a Rule 23 plaintiff due to the limited availability of discovery prior to certification of the complaint as a class complaint. *See Hines v. Dep’t of the Air Force*, EEOC Appeal No. 01931776 (July 7, 1994), *aff’d*, *Hines v. Dep’t of the Air Force*, EEOC Request No. 05940917 (Jan. 29, 1996) (“[T]he Commission is mindful that our decisions in class certification cases must take into consideration the fact that a class agent does not get access to precertification discovery in the same manner and extent that a Rule 23 plaintiff does.”). EEOC regulations provide for development of the evidence by the parties once a class complaint has been accepted. As a case progresses, the Administrative Judge may take appropriate action if the evidence reveals that the class should be redefined, subdivided or dismissed. *See* 29 C.F.R. § 1614.204.¹⁰

¹⁰ In light of this standard, the Commission ordered a 90 day-period for class discovery on October 23, 2006 in its Acknowledgement and Order Regarding Discovery and Briefing for Class Certification. Carson Decl. at ¶5. The period for discovery related to class certification issues was extended three times. The first time was due to the Agency’s refusal to fully respond to Complainant’s discovery. *Id.* at ¶¶8-12. The second time was to allow the Agency to depose putative class members, during which time Complainant also deposed former Associate Commissioner for the Office of Civil Rights and Equal

Here, Complainant relies upon:

- Complainant's Class Action Complaint ("Compl.");
- the deposition testimony of Complainant;
- the affidavits, declarations and deposition testimony of over 40 class members, describing the denial of equal promotional opportunities;¹¹
- SSA's internal analyses of the promotion rates of TDEs, as set forth both in its MD-715 reports and the deposition of its own statistical expert, which find systemic evidence of adverse impact against TDEs which has worsened in recent years, and which SSA has failed to sufficiently address;
- the expert reports of Lance Seberhagen, Ph.D.,¹² Richard Drogin, Ph.D.¹³ and Peter Blanck, Ph.D., J.D.,¹⁴ submitted by Complainant in support of class certification;

Opportunity Mark Anderson. *Id.* at ¶¶22-24. The final extension was at stipulation of the parties to allow for expert discovery. *Id.* at ¶35. In spite of this length of time, the Agency has refused to provide full responses, has admitted to destroying relevant evidence, has provided conflicting information as to what data is available, and has refused to produce relevant data for expert analysis. *Id.* at ¶¶16-17, 18-21, 25-50. Nonetheless, Complainant has more than met his burden in showing that class treatment is appropriate in this case, even with the limited discovery made available.

If a class is certified, Complainant will be seeking further merits discovery, especially in light of the Agency's refusal to produce documents and data that were made available to its experts, such as the Human Resource Management Information System database ("HRMIS"). Carson Decl. at ¶¶51-58.

¹¹ See Appendix Of Prospective Class Members' Experiences, attached herewith.

¹² Dr. Seberhagen has been an industrial and organizational psychologist for over thirty (30) years, and supplied the expert report on which the EEOC relied on certifying the class in *Taylor v. Soc. Sec. Admin.* His statistical analyses of SSA's MD-715 reports are consistent with the existence of discriminatory practices against TDEs in promotion.

¹³ Dr. Drogin is an Emeritus Professor in the Department of Statistics of the California State University, Hayward. His statistical analyses of the Best Qualified Lists produced by SSA are consistent with the existence of discriminatory practices against TDEs in promotion.

¹⁴ Dr. Blanck holds the rank of University Professor at Syracuse University, received a Ph.D. in psychology from Harvard University and has published more than 150 articles and books on the Americans with Disabilities Act, the Rehabilitation Act, and disability laws and policies. Based on his analysis of evidence in this case, he concludes that,

SSA has a common organizational culture affecting the career training and advancement opportunities available to, and promotion of, employees with Targeted Disabilities. In

- SSA's internal class-wide study finding that disabled employees at the Agency have historically been the subject of the most extreme systemic discrimination faced by any group of employees;
- A recent study by the EEOC finding that federal agency employers overall, including SSA, continue to subject disabled employees as a group to discrimination as the result of ongoing bias; and
- the sworn deposition testimony of SSA's witnesses and experts.

addition, there are uniform features of SSA's organizational culture that create attitudinal, environmental, and structural barriers to the career advancement of employees with Targeted Disabilities. Finally, SSA's policies and practices are not effective in the areas of identifying and eliminating potential barriers facing employees with Targeted Disabilities.

Expert Declaration and Report of Peter Blanck, Ph.D., J.D., ("Blanck Decl."), at 8; *see also* Supplemental Expert Declaration and Report, attached as Exhibits P & Q to the Goldstein Decl.

II. STATEMENT OF FACTS

SSA is a federal agency responsible for administering income support programs for the elderly, the disabled, and their dependents.¹⁵ As of FY 2007, SSA had 61,540 employees, of whom 1,284 (2.09%) had targeted disabilities.¹⁶

A. SSA Has a Long History of Systemic Barriers to Upward Mobility for Its Disabled Employees.

1. **The 1991 Study – TDEs Were the Most Under-Represented Group In SSA’s Workforce.**

A 1991 study conducted by the SSA Work Group on Employees with Disabilities revealed that TDEs were the most under-represented group in SSA’s workforce (1.58% at SSA versus 5.95% in the civilian workforce).¹⁷ This trend increased with grade level and remained relatively consistent from 1986 to 1989, when the study was conducted.¹⁸ The study further reported that TDEs received fewer promotions, fewer awards and less training than their non-disabled colleagues, and were subject to significantly more disciplinary actions.¹⁹ Although the Work Group’s report included various recommendations intended to address these disparities, the efforts SSA has taken to date have not effectively rectified these barriers. SSA may claim that it is a “model employer” but the claim rings hollow given the stark realities of the statistical disparities and testimony from class members describing the struggles they have faced while seeking promotions.

¹⁵ SSA Strategic Plan FY 2006-FY 2011, available at <http://www.retirement.gov/strategicplan2006.pdf>, at 2, attached as Exhibit R to Goldstein Decl.

¹⁶ *SSA MD-715 Report FY 2007* at 17.

¹⁷ *Report of the Work Group on Employees with Disabilities: Department of Health and Human Services, Social Security Administration*, 1991, at 10, attached as Exhibit S to Goldstein Decl. This report can also be found at Exhibit 10D to ROI #1.

¹⁸ *Id.* at 9 (data from FY 89 demographics of SSA workforce), 10-12 (grade distribution).

¹⁹ *Id.* at 2, 16.

2. SSA's Most Recent Report to the EEOC Confirms That TDEs are Still Under-Represented at SSA.

For nearly 30 years, the EEOC has regarded employees with targeted disabilities as a class of employees deserving of special attention. The term "targeted disabilities" was first officially recognized by the EEOC in MD-703.²⁰ Carlton Hadden, who directs the EEOC's Office of Federal Operations, indicates that the EEOC closely monitors the progress of TDEs in the federal workforce:

Since 1979, the EEOC has paid particular attention to the progress of individuals with targeted disabilities because these individuals tend to have more severe disabilities that are immediately apparent to potential employers and which the employers are likely to believe will require accommodation. Accordingly, individuals with targeted disabilities serve as the harbingers for success or failure of the Federal Government's efforts with respect to all individuals with disabilities. Maintaining a 'bottom line' focus on the employment of individuals with targeted disabilities enables the EEOC to best serve the goal of ensuring that improved representation rates are the first and most fundamental criterion for judging the success of federal agencies.²¹

To this end, EEOC Management Directive 715 ("MD-715") requires federal agencies to report annually on their employment of individuals with disabilities and individuals with targeted disabilities, including data on each group's participation in different occupational categories, in the agency's major occupations, in career development programs, and in recognition and awards programs.²² Agencies must also report on each group's grade levels, as well as the number of new hires and promotion rates for each group.²³

²⁰ *Improving the Participation Rates of People with Targeted Disabilities in the Federal Workforce.*

²¹ Statement of Carlton M. Hadden, Director of EEOC's Office of Federal Operation, available at <http://www.eeoc.gov/abouteeoc/meetings/6-28-06/hadden.html>, attached as Exhibit T to the Goldstein Decl.

²² *EEOC MD-715*, Part B (III).

²³ *Id.*

SSA's recent MD-715 reports paint a dismal picture for TDEs whose actual numbers have dropped each year since 2000²⁴ and more than half of whom are currently employed at the lower grade levels.²⁵ Not a single TDE can be found at the upper management levels, GS-15 or Senior Employment Service ("SES").²⁶ SSA's recent MD-715 reports have also consistently indicated that TDEs have disproportionately low rates of promotion at multiple grade levels, beginning at grade 5 and going up through various levels to grade 15.²⁷ These overall discrepancies have continued year after year.²⁸ These reports further identify numerous job categories in which TDEs are under-represented.²⁹

B. The Statistical Evidence Shows That TDEs at SSA Have Suffered Discrimination in the Promotions Process Throughout the Class Period.

Analysis of SSA's promotion rates from FY 2004 to FY 2007 establishes that SSA continues to discriminate against TDEs at alarming rates. There are currently 1,284 TDEs employed by the Social Security Administration, 2.08% of the total number of SSA employees.³⁰ Of these, approximately 57% are employed at or below Grade Level 8.³¹ Starting at Grade Level 9, the numbers of TDEs represented in the SSA workforce begin to decrease dramatically.³² Even SSA noticed the pattern and has begun to review 3 years of data to determine if a trend exists for individuals with targeted disabilities in the area of "major occupation by grade level,

²⁴ See Agency Response to Complainant's First Discovery Request, Request for Admission #3; *SSA MD-715 Report FY 2004* at 5; *SSA MD-715 Report FY 2005* at 5; *SSA MD-715 Report FY 2006* at 5, *SSA MD-715 Report FY 2007* at 17.

²⁵ See *SSA MD-715 Report FY 2007*, at Table B4-1; Anderson Dep. [3/14/07] 76:10-15.

²⁶ See *MD-715 Report FY-2007*, at 18.

²⁷ See *MD-715 Reports for FY 2004-2007*. The problem with regard to promotion can also be seen in the number of EEOC complaints filed against SSA by TDEs between 2000 and March 2007. During this time period, at least 42 TDEs filed EEOC complaints against SSA alleging non-promotion due to disability. See EEO Complaints Filed by Employees with Targeted Disabilities in Which At Least One Basis is Disability and In Which At Least One Issue is Nonpromotion 2000-present, and Supplemental Chart, attached as Exhibit U to the Goldstein Decl.

²⁸ *Id.*

²⁹ *Id.*; see also Deposition of Mark Anderson [8/8/07] ("Anderson Dep. [8/8/08]"), at 40-41, attached as Exhibit O to Goldstein Decl.

³⁰ *SSA MD-715 Report FY 2007*, at 17, at Tables B4-1P, B4-1T.

³¹ Anderson Dep. [3/14/07], at 76; *SSA MD-715 Report FY 2006*, Table B-4-1.

disciplinary actions, and promotions.”³³ The total numbers and percentages of TDEs employed at SSA have steadily decreased each year since 2000.³⁴

1. The Statistical Evidence Reveals that TDEs Win Competitive Promotions at a Rate Significantly Lower Than Their Non-TDE Counterparts.

Complainant retained Dr. Lance Seberhagen, an industrial and organizational psychologist, to analyze the MD-715 data SSA reports to the EEOC. Dr. Seberhagen, confirms that disparities in promotion rates for each year are statistically significant and “indicate a consistent pattern of adverse impact.”³⁵ The likelihood that the disparities over the three-year period initially analyzed by Dr. Seberhagen (FY 2004, 2005, and 2006) occurred absent discrimination on the basis of disability is less than one tenth of one percent (0.1%).³⁶

Dr. Seberhagen was unable to analyze the relative promotion rates of TDEs versus others at individual grade levels below GS-13 for the period FY 2003-FY 2007 because that data was not reported or produced by SSA.³⁷ Dr. Seberhagen was able to analyze and found statistically significant disparities for promotion to Grade 13 in FY 2004 and FY 2006.³⁸ Moreover, Dr Seberhagen was able to analyze the relative promotion rates at lower grade levels by using the total number of employees at the lower grade (or grades) from which selections were normally made as a reasonable proxy for applicant data.³⁹ He then calculated selection rates as a percentage of the pool of eligible employees to determine if there was adverse impact.⁴⁰ Dr. Seberhagen concluded that there “appeared to be a pattern of adverse impact against employees

³² *SSA MD-715 Report FY 2007*, at 17, at Tables B4-1P, B4-1T.

³³ *Id.* at 17-18.

³⁴ See Agency Response to Complainant’s First Discovery Request, Request for Admission #3; *SSA MD-715 Report FY 2004* at 5; *SSA MD-715 Report FY 2005* at 5; *SSA MD-715 Report FY 2006* at 5, *SSA MD-715 Report FY 2007* at 17.

³⁵ Seberhagen Report, “Findings” at 4.

³⁶ Seberhagen Report, Tables 4-6, at 8. See also Seberhagen Declaration, Table 2, at 10.

³⁷ Seberhagen Declaration ¶8; Seberhagen Dep. 80:21-81:12.

³⁸ Seberhagen Report, Tables 7-9.

³⁹ Seberhagen Report, at 4.

⁴⁰ *Id.*

with targeted disabilities in the SSA's noncompetitive and competitive promotion selection procedures" for promotions to "Grades 7-13."⁴¹ Though Dr. Seberhagen did not find statistically significant disparities in the promotion rates of TDEs to Grades 14, 15 and SES, because the sample size was "quite small," it is nevertheless notable that not a single TDE was selected for promotion at Grade 15 or the SES level for FY 2004-FY 2007.⁴² *Victory v. Hewlett-Packard Co.*, 34 F.Supp. 2d 809, 823 (E.D.N.Y. 1999) (noting "evidence of the absence of a single minority employee being hired, labeled the 'inexorable zero,' would in and of itself support an inference of discrimination") (citations omitted).

Throughout the class period, TDEs won competitive promotions at a statistically significantly lower rate than that of their non-TDE counterparts. In FY 2004, the selection rate of TDEs for competitive promotions was 64% that of non-TDEs.⁴³ In FY 2005 the promotion rate dropped to approximately 52% that of non-TDEs.⁴⁴ At the end of FY 2006, the selection rate for competitive promotions for TDEs was approximately 54% that of non-TDEs.⁴⁵ As of the end of FY 2007, the selection rate for competitive promotions for TDEs had dropped to that of non-TDEs had dropped to approximately 42% that of non-disabled employees.⁴⁶ Under the EEOC Uniform Guidelines on Employee Selection Procedures, where, as there is here, there is a selection rate for a member of a protected class that is less than four-fifths or 80% of the rate of a group with a higher rate, there is evidence of adverse impact (the "80% Rule"). See 29 CFR 1607.4D.

SSA's designated statistical expert, Dr. Lisa Harpe, who was retained to test the statistical analyses of Dr. Seberhagen and Dr. Drogin (discussed below), revealed at deposition that *in her*

⁴¹ Seberhagen Report, at 6.

⁴² Seberhagen Decl. Tables 5-6; Seberhagen Report, Tables 13-18.

⁴³ Seberhagen Report, Table 4.

⁴⁴ Seberhagen Report, Table 5.

⁴⁵ Seberhagen Report, Table 6.

⁴⁶ Seberhagen Decl. Tables 2, 11.

own analysis of the promotion rates of TDEs, she found that there was “a statistically significant disparity in competitive promotions between people with targeted disabilities and those without.”⁴⁷ Dr. Harpe omitted this finding, which confirms the propriety of certification, from her expert report. Dr. Harpe, in fulfillment of her perceived role to provide “statistical support to SSA’s defenses in this litigation,”⁴⁸ chose not to include this analysis after consultation with SSA’s counsel, who at deposition sought to prevent this information from being revealed. The analysis of SSA’s expert, based on significantly more data than that produced to Complainant, confirms the existence of serious disparities indicative of discrimination.⁴⁹

SSA’s own MD-715 Reports also acknowledged that TDE employees have received promotions at disproportionately low rates at multiple grade levels. “The analysis shows that when promotions to the GS-9 and above are compared to the grade level that would be the applicant pool, employees with targeted disabilities received promotions...not proportionate to their representation in the applicant pool at the GS-5, GS-7, GS-9 [through] GS-12 and GS-15 grade levels.”⁵⁰

2. TDEs in Grades 5-12 are Rarely Selected for Employee Career Development Programs.

Dr. Seberhagen’s analysis also reveals a statistically significant disparity in the number of TDEs selected for Employee Career Development Programs as compared to non-disabled employees. For example, in FY 2006, no TDEs were selected for Employee Career Development Programs. The likelihood of these results occurring if disability did not influence

⁴⁷ Deposition of Lisa Harpe, Ph.D., (“Harpe Dep.”), 70:3-71:12, attached as Exhibit V to Goldstein Decl.

⁴⁸ Harpe Dep. 25:10-17.

⁴⁹ Harpe Dep. 70:13-24, 114:2-11, 261: 8-15; *see also* Carson Decl. ¶¶44-50.

⁵⁰ SSA MD-715 Report FY 2006 at 18.

the selection process is extremely small, a chance of only twenty-two one thousandths of one percent (0.022%).⁵¹

3. TDEs Who Make the BQL are Rarely Selected for Promotion.

Applicants for promotions are ranked using a number scoring system, and the highest ranked applicants who receive at least 50% of the total maximum score possible are included on the BQL.⁵² Inclusion on the BQL is generally a condition precedent to consideration for a competitive promotion.⁵³

The disparity between the promotion rates of TDEs and non-TDEs who made the BQL is striking. Complainant retained Dr. Drogin, a statistician, to analyze data containing the BQLs for certain vacancy announcements and final selections for promotions between August 1, 2003 and January 4, 2008. He concluded that there was “a consistent pattern of statistically significant shortfalls in selection of applicants with TDEs over the time period covered.”⁵⁴ During this time period, only 195 TDEs who made the BQL were selected for the promotion, an overall selection rate of 7.7%.⁵⁵ This compares to the 4,810 non-TDEs selected for promotions, an overall selection rate of 11.1%.⁵⁶ The likelihood of these results occurring if disability did not influence the selection process is less than 1 in 10 trillion.⁵⁷

⁵¹ Complainant is not seeking certification of a distinct career advancement claim, rather, this evidence is submitted to support Complainant’s promotion claim.

⁵² 2005 CBA, §10 (H); 2000 CBA, §10 (D) (5); 1999 MOPP Art. 13.1.1.1; 2006 MOPP, Art. 16.1.2; attached as Exhibits W, X, Y, Z, respectively, to Goldstein Decl.; *see also* Declaration of Darrell Miles, (“Miles Decl.”) ¶¶15-16, attached as Exhibit GGG to Goldstein Decl. The actual number of candidates to be included on the BQL depends on the number of available vacancies. 2005 CBA, §10(H); 1999 MOPP, Art. 13.1.1.2; 2006 MOPP, Art. 16.1.4. The 2000 CBA did not provide for a predetermined number of candidates per vacancy. 2000 CBA, §10(D) (6).

⁵³ *See id.*

⁵⁴ Drogin Decl., ¶¶8, 9.

⁵⁵ *Id.* at ¶4.

⁵⁶ *Id.*

⁵⁷ *Id.* at ¶8.

The statistical evidence overwhelmingly demonstrates that employees with targeted disabilities (particularly those who made the BQLs) suffer discrimination in promotions throughout SSA.

C. SSA's Human Resources Policies and Procedures are Standardized, Uniform and Centrally Promulgated by Headquarters.

The promotion process for SSA's employees is standardized and uniform. Agency-wide guidelines are established and disseminated by SSA's Center for Human Resources, located at the Agency's Office of Central Operations in Maryland.⁵⁸ The guidelines are set forth in two documents, designed to ensure a uniform approach to promotion throughout the Agency for all employees whether unionized or not.

1. SSA's Promotions Policies are Uniform Regardless of Whether Employees are Part of a Bargaining Unit.

Promotions of bargaining unit employees are governed by the Agency's collective bargaining agreement ("CBA") with the American Federation of Government Employees ("AFGE"),⁵⁹ while promotions of non-bargaining unit employees are governed by the Management Officials Promotion Plan ("MOPP").⁶⁰ All of the CBAs negotiated since 1990 reflect an agreement by union and management regarding the need for uniform national procedures for promotion.⁶¹

a. *The Provisions of the CBA and the MOPP Governing Competitive Promotions are, In All Essential Respects, the Same.*

The CBA and the MOPP include very similar provisions regarding competitive promotions.⁶² Both policies provide that vacancy announcements for competitive promotions

⁵⁸ *SSA Organizational Manual*, Chapter S2: Office of the Deputy Commissioner, Operations, at 26; available at <http://www.ssa.gov/org/orgdco.htm>, attached as Exhibit AA to Goldstein Decl.

⁵⁹ 2005 CBA, Art. 26; 2000 CBA, Art. 26.

⁶⁰ 1999 MOPP, S335-2; 2006 MOPP, S335-2.

⁶¹ Declaration of Witold Skwiercznski, ("Witold Dec."), ¶9, attached as Exhibit WW.

⁶² See Anderson Dep. [8/8/07], at 25:

must be widely posted in the recruitment area.⁶³ Such announcements must include a summary of required qualifications.⁶⁴ Prospective applicants can obtain more detailed information regarding job requirements from the appropriate personnel office.⁶⁵

(1) Both the CBA and the MOPP Require a Preliminary Screening of Job Applicants for Minimum Qualifications.

Once the application period closes, a preliminary screening is conducted to ensure that the applicants have the minimum qualifications for the position.⁶⁶ This determination is made from information submitted by the applicants and data from SSA's automated personnel information system.⁶⁷

(2) Both the CBA and the MOPP Require That Job Applicants' Knowledge, Skills and Abilities Be Evaluated on a Point System.

Applications are then evaluated based on a point system that rates applicable knowledge, skills and other abilities (K/S/A).⁶⁸ Once again, information from SSA's automated personnel

Q. It's your understanding that the MOPP is written to essentially mirror the bargaining unit collective bargaining agreement; is that correct?

A. Again, that's not my area, so I don't know exactly –

Q. I'm asking for your general understanding.

A. – but in the general sense, yes.

⁶³ 2005 CBA, Art. 26, §7(A) (specifying that actions requiring the use of competitive procedures must be announced on SSA Intranet); 2000 CBA, Art. 26, §7(A) (specifying that actions requiring the use of competitive procedures must be announced and posted on official bulletin boards and/or distributed through electronic mail throughout the area of consideration); 1999 MOPP, Art. 3.1.3 (specifying that vacancies for competitive procedures will normally be posted under MOPP procedures); 2006 MOPP, Art. 3.1.3 (specifying that areas of consideration must be sufficiently broad to ensure the availability of high quality candidates). SSA employees outside the recruitment area can apply for posted vacancies by submitting a completed SSA Form 4100, Availability for Assignment, indicating that they are available for assignment to positions in other regions. 2005 CBA, Art. 26, §7(B); 2000 CBA, Art. 26, §7(D); 1999 MOPP, Art. 8.1.2; 2006 MOPP, Art. 9.1.2.

⁶⁴ 2005 CBA, Art. 26, §7(C); 2000 CBA, Art. 26 §7(E); 1999 MOPP, Art. 9.1.1; 2006 MOPP, Art. 10.1.1.

⁶⁵ *SSA Personnel Policy Manual*, ¶9.4.3, attached as Exhibit BB to the Goldstein Decl.; 1999 MOPP Art. 7.3.3; 2006 MOPP, Art. 8.3.3.

⁶⁶ 2005 CBA, §10(A); 1999 MOPP Art. 11.1.2; 2006 MOPP Art. 12.1.2.; Witold Decl. ¶11.

⁶⁷ *SSA Personnel Policy Manual*, ¶13.1.2.; 1999 MOPP Art. 11.1.2; 2006 MOPP Art. 12.1.2.

⁶⁸ 2000 CBA, §10(D) (4); 2005 CBA, §10(B); 1999 MOPP ¶12.1.1; 2006 MOPP, ¶13.1.1; Witold Decl. ¶12.

system is used to supplement the information provided by the applicants.⁶⁹ Applicants receive credit for relevant experience, outside activities, training/education, and awards.⁷⁰ Under both the CBA and the MOPP, the highest-ranked applicants who receive at least 50% of the total maximum score possible are included on the BQL.⁷¹

D. SSA's Selection Process is Rife with Opportunities for Biased Decision Making Because Both the CBA and the MOPP Give the Selecting Official Complete Discretion to Choose Among the Applicants on the BQL.

The ultimate decision about which applicant to promote is left entirely to the subjective discretion of the selecting official.⁷² AFGE Council 2000 President Witold Skwiercznski confirmed:

*In all my dealings with the agency regarding promotions (including individual grievances as well as contract negotiations), management has always insisted that the selecting official have **total discretion** to select whomever he or she wants from the Best Qualified List. Management consistently insists that **the selecting official is not required to articulate why he or she deems the person selected to be better qualified for the position than the other candidates.***⁷³

⁶⁹ SSA Personnel Policy Manual, ¶14.2.2; 1999 MOPP Art. 12.2.2; 2006 MOPP Art. 13.2.2.

⁷⁰ SSA Personnel Policy Manual, ¶14.2.3; 1999 MOPP Arts. 12.2.6, 20.1.2.4; 2006 MOPP, Arts. 13.2.6, 23.1.2.4. See also GAO, *Equal Employment Opportunity: SSA Region X's Changes to Its EEO Process Illustrate Need for Agencywide Procedures*, July 2003, at 46 ("Experience, training, and awards are among the elements considered under SSA's merit promotion process"), attached as Exhibit CC to Goldstein Decl.; Witold Decl. ¶12.

⁷¹ 2005 CBA, §10(H); 2000 CBA, §10(D) (5); 1999 MOPP Art. 13.1.1.1; 2006 MOPP, Art. 16.1.2; see also Miles Decl., ¶¶15-16. The actual number of candidates to be included on the BQL depends on the number of available vacancies. 2005 CBA, §10(H); 1999 MOPP, Art. 13.1.1.2; 2006 MOPP, Art. 16.1.4. The 2000 CBA did not provide for a predetermined number of candidates per vacancy. 2000 CBA, §10(D) (6).

⁷² 2005 CBA, §11; 2000 CBA, §11; 1999 MOPP, Art. 15.1.1; 2006 MOPP, Art. 17.1.1. See also "Miles Decl. at ¶17 ("Managers could choose anyone off the BQL for a promotion and managers have always had a lot of discretion over who off the BQL was selected for a vacancy."); Anderson Dep. [8/8/07], at 26 ("The supervisor has some latitude in selecting whoever's on the Best Qualified List.")

⁷³ Witold Decl., ¶¶13, 14 (emphasis added).

This practice allows for favoritism and bias to enter into the selection process.⁷⁴ The 2005 CBA provides that the decision of the selecting official may be based on “all available information,” including personal interviews with one or more of the applicants.⁷⁵ Similarly, under the MOPP, “[s]election decisions [are] based on the selecting official’s personal judgment as to which of the candidates has the greatest potential for successful performance of the duties and responsibilities of the position being filled.”⁷⁶ Under either, the selecting official has complete discretion to choose from any candidate on the BQL. Furthermore, a selecting official can opt not to select any of the candidates identified either competitively or non-competitively through CBA or MOPP procedures.⁷⁷

E. SSA’s Organizational Culture Creates Barriers to the Career Advancement of Employees With Targeted Disabilities.

Complainant’s expert Dr. Peter Blanck assessed SSA’s organizational culture. Such social scientific analyses are regularly relied upon to show commonality in class certification proceedings. *See e.g., Dukes*, 509 F.3d at 1178-81 (9th Cir. 2007). After an exhaustive review

⁷⁴ See Deposition of Charlene Stewart-Walker (“Stewart-Walker Dep.”) at 129-130 (testifying that promotions were given out on a “who you know” basis); Deposition of Sherri Hall (“Hall Dep.”) at 132-134 (testifying that she was told by a human resources representative in Atlanta with whom she interviewed that recommendations from management determine who gets promoted more than qualifications); Deposition of George Hoge (“Hoge Dep.”) at 106-111 (testifying that the promotion of a disabled employee depends on how individual supervisors “feel” about the employee); Deposition of Darlene Wicker (“Wicker Dep.”) at 93-94 (testifying that she was told by a supervisor that he had tailored the requirements for a promotion with a certain non-disabled employee in mind); Deposition of Steven Lance (“Lance Dep.”) at 69-70, 81-82 (testifying that awards seem to be given out only to management’s favorites and that the process for selecting who gets awards is very secretive); attached as Exhibits DD, EE, FF, GG, HH, respectively, to Goldstein Decl.

⁷⁵ 2005 CBA §11(A), (B); *see also SSA Personnel Policy Manual*, ¶18.1.2. By contrast, the 2000 CBA provided that a selecting official could not interview one candidate without the others. 2000 CBA, §11(A).

⁷⁶ 1999 MOPP, Art. 15.1.1; 2006 MOPP, Art. 17.1.1.

⁷⁷ *SSA Personnel Policy Manual*, ¶18.1.3; 1999 MOPP, Art. 15.1.3; 2006 MOPP, Art. 17.1.3.; *See also* Lance Dep. at 58-59, 90 (testifying that, although he had received one of the highest rankings on the BQL for a technical expert position, the selecting official circumvented the BQL process completely); Deposition of Laurie Taylor (“Taylor Dep.”) at 63-64 (supervisor sent back BQL for position; after deponent inquired she was told that “[manager] had the right not to pick anybody”), attached as Exhibit II to Goldstein Decl.

of the evidence and relevant social scientific research on organizational culture, attitudes, and the employment of people with disabilities, Dr. Blanck concluded that:

... SSA has a common organizational culture affecting the career training and advancement opportunities available to, and promotion of, employees with Targeted Disabilities. In addition, there are features of SSA's organizational culture that create attitudinal, environmental, and structural barriers to the career advancement of employees with Targeted Disabilities. Finally, SSA's policies and practices are not effective in the areas of identifying and eliminating potential barriers facing employees with Targeted Disabilities.⁷⁸

In his Declaration and Report, Dr. Blanck explained that promotion decisions based on excessively subjective and discretionary criteria – such as those applicable at SSA – are susceptible to stereotyping and bias against people with disabilities.⁷⁹ He found the selecting official's broad discretion to choose applicants off the BQL particularly problematic with respect to the low promotion rates of TDEs.⁸⁰ According to Dr. Blanck, “[t]his step is a critical flaw that allows for in-group bias and prejudices/stereotypes to influence actual promotion rates of employees with Targeted Disabilities.”⁸¹

Dr. Blanck also found that supervisor and co-worker attitudes toward people with disabilities are affected by negative stereotypes,⁸² discomfort from being around people with disabilities,⁸³ exclusion caused by communication barriers (such as speech and hearing

⁷⁸ Blanck Decl., at 6-8.

⁷⁹ *Id.* at 9.

⁸⁰ *Id.* at 13. *See also* Deposition of Peter Blanck, Ph.D., J.D. (“Blanck Dep.”) at 191 (in which SSA’s state, “*I am conceding, I will stipulate that the selecting official has wide discretion. That is in the MOPP. That is not in contention.*”) (emphasis added), attached as Exhibit JJ to Goldstein Decl.

⁸¹ *Id.*

⁸² *Id.* at 15. For example, Christopher Casey, a blind SSA attorney, states: “... I think they've stereotyped me. I think I've shown my ability to handle the most difficult and time consuming case that we have. And I think on the other hand they stereotype me as somebody who can't produce the high numbers that they want to see. So that works against me both ways.” Deposition of Christopher Casey (“Casey Dep.”) at 55-56, attached as Exhibit KK to Goldstein Decl. *See also* Deposition of Linda Bieri (“Bieri Dep.”) at 16, 58- 59; attached as Exhibit LL to Goldstein Decl.; Lance Dep. at 47-50, 62-63.

⁸³ Blanck Decl., at 15-16 (citing Stewart-Walker Dep. at 14-15, 105, 111, 144).

impairments),⁸⁴ and lack of prior and meaningful contact with people with disabilities, which may exacerbate the effects of negative stereotypes, discomfort, marginalization, and dislike.⁸⁵

Blanck's review of the evidence in this case revealed numerous instances where TDEs were prevented from seeking and attaining promotions on an equal basis with non-disabled employees.⁸⁶ Some examples included:

- TDEs who are not assigned work that leads to promotions;⁸⁷
- TDEs who are denied training and special or temporary assignments;⁸⁸
- TDEs who are denied access to leadership development programs;⁸⁹
- TDEs who receive fewer awards than their non-disabled peers;⁹⁰
- TDEs who are denied promotions even when placed on the BQLs;⁹¹
- TDEs who are denied promotions because of their disabilities;⁹²
- TDEs who are denied interviews for promotions;⁹³
- Deficiencies in SSA's posting process;⁹⁴

⁸⁴ Blanck Decl., at 16. For example, Ms. Geraldine Murray, a deaf employee who has worked at SSA for 32 years, comments that during her first 15 or so years at SSA there was no true communication and she stayed in the same position, felt isolated and received no training. Murray Dep. at 68, 76-77 (testifying that without communication accommodations, she felt "rejected" and "excluded"), attached as Exhibit MM to Goldstein Decl.

⁸⁵ Blanck Decl., at 16-17. For example, Mr. Dennis Bozzell, who is paraplegic and has been denied four or five competitive promotions (including two for which he made the BQL) over his 28 years at SSA explains: "My experience has been that for the most part attitudes of management and other employees towards people with disabilities are negative or condescending." Declaration of Dennis Bozzell ("Bozzell Decl.") at ¶10, attached as Exhibit FFF to Goldstein Decl. He further states, "I am conscientious, I do what I am asked to do, and I get along with most of the other employees. But I am in a wheelchair and the other employees are not. It is hard not to take this treatment from management and others employees that I have talked about as personal." Bozzell Decl. ¶15.

⁸⁶ Blanck Decl., at 19, 23.

⁸⁷ *Id.*

⁸⁸ *Id.* at 20.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 21.

⁹² *Id.*

⁹³ *Id.* at 22.

⁹⁴ *Id.*

- Failure of SSA to properly train its management to ensure that TDEs are promoted at the same rate as their non-disabled peers;⁹⁵ and
- Failure of SSA to have [an] adequate monitoring system to ensure that TDEs are promoted at the same rate as their non-disabled peers.⁹⁶

Dr. Blanck, using a social science model that looks at the role of in-group vs. out-group bias and relying on multiple modes of evidence, found that there is strong evidence of a common discriminatory culture within SSA that works to the disadvantage of equal promotional opportunities for TDEs.⁹⁷

1. Dr. Blanck’s Findings are Corroborated by SSA’s Proffered Social Science Expert, Dr. Marjorie Baldwin.

SSA retained Dr. Baldwin, a labor economist, to opine whether the methods and evidence used by Dr. Blanck would be used by a social science researcher.⁹⁸ However, Dr. Baldwin is totally unfamiliar with the social framework analysis used by Dr. Blanck.⁹⁹ In fact, Dr. Baldwin has never studied a subjective decision-making process in connection with promotional opportunities, and she could not define or elaborate upon the concepts of “corporate culture” and “in-group vs. out-group bias,” even though they are central components of Dr. Blanck’s research and support his specific findings in this case.¹⁰⁰ Dr. Baldwin claimed to comment on the evidence Dr. Blanck reviewed, yet she herself did not review the deposition testimony *of a single class member*, had no idea what an MD-715 report was, and had never heard of a barrier analysis.¹⁰¹

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* at 9-10, 33-34.

⁹⁸ Deposition of Marjorie Baldwin (“Baldwin Dep.”) at 14:16-21, attached as Exhibit NN.

⁹⁹ *Id.* at 17:4-18:8; 52:10-12.

¹⁰⁰ *Id.* at 51:17-24; 49:5-18; 52:10-12.

¹⁰¹ *Id.* at 94:7-16.

Nonetheless, within her discipline of labor economics, Dr. Baldwin's own research supports Complainant's argument that TDEs should be evaluated *as a group* to determine if they are experiencing discrimination. Dr. Baldwin herself has studied similar groupings of individuals with severe disabilities because those types of groupings identify and isolate for study the types of disabilities that are most subject to prejudicial attitudes, according to scientifically valid "social distance" and "prejudicial ranking" studies.¹⁰² Dr. Baldwin agrees that it "would make sense to evaluate whether persons with targeted disabilities are experiencing employment discrimination as a group," at SSA and she believes that there could be discrimination at SSA against persons with targeted disabilities."¹⁰³ She agrees it is a question worthy further study.¹⁰⁴

The statistical analyses finding adverse promotion rates at SSA, the anecdotal evidence of over 40 class members who submitted testimony about their own experiences of discrimination within SSA, and the testimony of one of SSA's own supervisors indicate that bias within the organizational culture at SSA remains pervasive. According to Dr. Blanck:

These negative attitudes and biases, in turn, affect performance expectations and opportunities, performance evaluations, the desire to work with an individual with a disability, policies and procedures for managers to accommodate employees with disabilities (with the resultant barriers from lack of accommodation, in turn, affecting career aspirations and advancement), and promotion [of] employees with disabilities.¹⁰⁵

As a result, employees with disabilities are relegated to lower paying jobs that do not offer much opportunity for career enhancement.¹⁰⁶

¹⁰² *Id.* at 35:7-37:12; 41:7-23.

¹⁰³ *Id.* at 42:6-12; 95:1-9.

¹⁰⁴ *Id.* at 95: 7-9.

¹⁰⁵ Blanck Decl., at 17-18.

¹⁰⁶ *Id.* at 18.

2. Dr. Blanck's Findings are Corroborated by and Explain the Statistical Evidence.

Dr. Blanck's findings regarding the attitudinal and systemic barriers to promotion facing TDEs as a group at SSA are corroborated by: 1) the expert report of Dr. Seberhagen, who found a pattern of statistically significant promotional and career advancement disparities facing TDEs at SSA at multiple grades from FY 2004 to FY 2007;¹⁰⁷ 2) the expert report of Dr. Richard Drogin, who found a statistically significant shortfall in the selection of TDEs for promotion for each year from 2004 to 2007;¹⁰⁸ and 3) a 2008 EEOC report that found that the number and rate of promotion for TDEs in the federal workforce decreased by 25.19% from FY 2002 to FY 2006 (compared to 3.99% for individuals without disabilities and 4.36% for the total federal workforce).¹⁰⁹ Dr. Blanck noted that these adverse trends indicate that efforts to overcome ongoing "negative attitudes or discrimination" against employees with disabilities within federal agencies overall and within SSA specifically have clearly been ineffective.¹¹⁰ Thus, he concluded that "SSA's organizational culture leaves employees with Targeted Disabilities particularly vulnerable to bias and discrimination in career advancement and promotion opportunities."¹¹¹

3. One of SSA's Own Supervisors Confirms That the Unfettered Discretion Given to Selecting Officials at SSA Leads to Discrimination Against TDEs.

Barbara Penny, a former Unit Supervisor in Auburn, Washington, who participated on several occasions in selection processes, confirmed that the substantial discretion accorded to selecting officials had a negative impact on TDEs seeking promotion:

... We had total discretion to choose who we wanted from the BQL list. For at least one of these positions, we were sent an EEOC list that contained specific

¹⁰⁷ *Id.* at 24-25; Seberhagen at 6.

¹⁰⁸ Blanck Decl. at 25-26; Drogin Dec. at ¶¶4,7-8.

¹⁰⁹ Blanck Decl. at 26-28 (citing *Improving the Participation Rate of People with Targeted Disabilities in the Federal Work Force*, at 20).

¹¹⁰ Blanck Decl. at 32.

¹¹¹ *Id.* at 33.

information about the applicants' race, gender and disabilities, which was shredded after we made our decision. There is no doubt in my mind that disability was a factor in decision making, because it was more convenient for SSA not to pick the disabled person who needed an expensive accommodation.

In my managerial experience, SSA tries to avoid paying for "expensive" accommodations like a reader for a blind employee, or an interpreter for a deaf employee. Since all employees on the BQL are theoretically "equal," it is simply easier for SSA to pick the non-disabled employee over the disabled one.¹¹²

Ms. Penny further explained that "employees with disabilities did not typically receive the same level of training and special recognition as non-disabled employees."¹¹³ Because most candidates on the BQL had similar educational credentials and work experience, such professional development opportunities were often the only way for candidates to distinguish themselves.¹¹⁴ Thus, TDEs' lack of access to these opportunities had a negative impact on their chances for promotion.¹¹⁵

F. SSA Has Failed to Take Legally Required Remedial Action to Address the Disparate Promotion Rates of TDEs.

The Rehabilitation Act requires federal agencies to submit "an affirmative action program plan for the hiring, placement, and advancement of individuals with disabilities" to the EEOC for review and approval.¹¹⁶ The EEOC can approve these plans only after it "determines ... that such plan[s] provide[s] sufficient assurances, procedures and commitments to provide adequate hiring, placement, and advancement opportunities for individuals with disabilities."¹¹⁷ Despite this requirement, SSA has admitted that it has no meaningful affirmative action or

¹¹² Declaration of Barbara Penny ("Penny Decl."), ¶¶ 12-13, attached as Exhibit OO.

¹¹³ Penny Decl., ¶14.

¹¹⁴ Penny Decl., ¶15.

¹¹⁵ Penny Decl., ¶¶14-16.

¹¹⁶ 29 U.S.C. § 791(b), *et seq.*

¹¹⁷ *Id.*

EEOC plans relating to TDEs.¹¹⁸ Testimony from class members confirms that SSA's efforts to ensure the promotion of TDEs have been woefully inadequate.¹¹⁹

EEOC Management Directive 715 also requires federal agencies to identify and eliminate barriers to equal opportunity in the workplace and to implement special program plans for the recruitment, hiring and advancement of TDEs.¹²⁰ SSA's MD-715 report for the period covering October 1, 2005 through September 30, 2006 states:

SSA has begun conducting a barrier analysis for individuals with targeted disabilities. The barrier analysis will focus on individuals with targeted disabilities in the area of major occupation by grade level, disciplinary actions, and promotions. SSA has observed, by reviewing the FY 2006 MD-715 tables, triggers in these areas and has begun a review of 3 years worth of data to determine if a trend exists for individuals with targeted disabilities in the aforementioned areas. SSA will also investigate the factors that have resulted in a decrease of representation for individuals with targeted disabilities.¹²¹

The report also sets forth a timetable for planned activities. Specifically, the timetable provides that by March 30, 2007, the Agency would review data by grade and job series; by September 30, 2007, it would review data by personnel transactions including promotion and disciplinary actions; by December 31, 2007, it would determine which area needs further investigation and analyses; and by March 30, 2008, if barriers are determined to exist, it would develop a strategy to eliminate the barriers.¹²² At his deposition, SSA Associate Commissioner Anderson

¹¹⁸ Letter from Marlene Heiser to Shanon Carson, March 28, 2008, attached as Ex. 8 to Carson Decl. Although SSA's MD-715 reports include "Goals for Targeted Disabilities" regarding "Career Development" and "Advancement," the stated goals are exceedingly vague. *See also SSA MD-715 Report FY 2006*, Section 01, Part J. In fact, the same vague goals are repeated in these reports year after year, with no indication that they are anything more than window dressing.

¹¹⁹ *See* Deposition of James Hulbert ("Hulbert Dep.") at 95-101, attached as Exhibit PP to Goldstein Dep. (testifying that he knows other blind employees at SSA who have not been promoted and that he believes SSA fails to follow its own affirmative action policies); Lance Dep. at 73-74 (testifying that the Agency hires disabled people because they have to under the ADA, but then fails to follow its affirmative action plan); Deposition of Allan Morato ("Morato Dep.") at 39 (stating that there are no affirmative action plans in place to help disabled employees get promoted), attached as Exhibit QQ.

¹²⁰ *EEOC MD-715*, Part B (VI).

¹²¹ *SSA MD-715 Report FY 2006*, at 17.

¹²² *Id.*

confirmed that the Agency had initiated a barrier analysis for TDEs in 2005, but indicated that the project would not be completed until the end of FY 2009.¹²³

Based on these assertions, Complainant's counsel requested, in a letter dated December 10, 2007, that SSA "produce all 'barrier analyses' conducted or being conducted by SSA concerning TDEs, and all documents and raw data underlying such analyses."¹²⁴ During a phone conversation, SSA's counsel responded that the Agency did not possess any such documents.¹²⁵ In a subsequent letter, SSA's counsel contradicted herself by asserting that SSA's barrier analysis was indeed underway but that the timetable had shifted.¹²⁶ She promised that the new timetable would be provided in SSA's MD-715 report for FY 2007.¹²⁷

Whatever the current status of SSA's barrier analysis, SSA Associate Commissioner Anderson testified on August 2007 that SSA had not yet identified any barriers to the hiring or promotion of TDEs.¹²⁸ In fact, the prevalence of discrimination against TDEs at SSA is well-established. As noted above, a 1991 study conducted by the SSA Work Group on Employees with Disabilities revealed that TDEs were the most under-represented group in SSA's workforce (1.58% at SSA versus 5.95% in the civilian workforce).¹²⁹ This trend increased with grade level and remained relatively consistent from 1986 to 1989, when the study was conducted.¹³⁰ The study revealed further that TDEs received fewer promotions, fewer awards, and less training than

¹²³ Anderson Dep. [3/14/07] at 31-32, 35, 37.

¹²⁴ See Letter from Shanon Carson to Marlene Heiser, December 10, 2007, attached as Exhibit 10 to Carson Decl.

¹²⁵ See e-mail from Shanon Carson to Marlene Heiser, March 20, 2008; see also Letter from Shanon Carson to Marlene Heiser, December 21, 2007 (memorializing Ms. Heiser's statement "that SSA has not conducted any 'barrier analyses' concerning TDEs"), attached as Exhibit 7 to Carson Decl.

¹²⁶ Letter from Marlene Heiser to Shanon Carson, March 28, 2008, attached as Exhibit 8 to Carson Decl.

¹²⁷ *Id.*

¹²⁸ Anderson Dep. [8/8/07], at 8.

¹²⁹ *Report of the Work Group on Employees with Disabilities*: Department of Health and Human Services, Social Security Administration, 1991, at 10; see also "SSA treats disabled workers poorly," Ken Hughes, *Federal Times*, November 18, 1991 (reporting work group findings), attached as Exhibit RR to Goldstein Decl.

¹³⁰ *Report of the Work Group on Employees with Disabilities*, at 10 (data from FY 89 demographics of SSA workforce), 11-13 (grade distribution).

their non-disabled colleagues, but were subject to significantly more disciplinary actions.¹³¹

Although the Work Group's report included various recommendations intended to address these disparities, whatever efforts were made to implement these recommendations have been ineffective. Moreover, it is not at all clear that senior management even knows about those recommendations. Associate Commissioner Anderson testified that he had first learned of the 1991 Work Group Report while responding to discovery in this case.¹³²

G. The Statistical Findings are Borne Out By the Anecdotal Evidence.

While a Complainant's *prima facie* burden in a pattern and practice discrimination case can be met through statistics alone, individual testimony is often useful to "bring the cold numbers convincingly to life." *Teamsters v. U.S.*, 431 U.S. 324, 338-40 (1977).

1. The Experiences of Class Agent Ronald Jantz Illustrate The Effect of SSA's Discriminatory Policies.

Complainant Ronald Jantz, who is completely deaf,¹³³ was hired by SSA in 1988 as a Fiscal Management Analyst (GS-12) in the Administrative Payment Section, Office of Financial Policy and Operations.¹³⁴ Despite repeated efforts to seek promotion, Mr. Jantz has remained at the same grade level after almost twenty years at SSA.¹³⁵

Mr. Jantz estimates that, over the course of his employment with SSA, he has applied and made the BQL for at least thirty vacant GS-13 positions.¹³⁶ He has not been selected for any of

¹³¹ *Id.* at 2, 16.

¹³² Anderson Dep. [3/14/07], at 92-94.

¹³³ Jantz Dep. at 17; Ex. 10 to ROI #1, at 5. When Mr. Jantz was first hired, he was totally deaf in his left ear and wore a hearing aid in his right ear. Jantz Dep. at 18. Five years later, he lost his hearing completely. Jantz Dep. at 18. He was totally deaf by the time of the personnel actions discussed herein. Ex. 10 to ROI #1, at 6.

¹³⁴ Jantz Dep. at 13, 15.

¹³⁵ Jantz Dep. at 22-23.

¹³⁶ Jantz Dep. at 26.

these promotions, and has been passed over in favor of non-disabled employees who were less qualified.¹³⁷

2. The Experiences of Other Class Members and Prospective Class Agents are In Accord.

Over 40 members of the proposed class have already come forward and presented testimony in the form of affidavits, declarations and/or depositions. Each of these witnesses is a TDE and has presented testimony recounting instances in which he or she was denied equal promotional opportunities.¹³⁸ This extensive anecdotal evidence “breathes life” into the statistical evidence and other system-wide reports documenting the discriminatory practices at issue.

Counsel believe that Mr. Jantz is an adequate agent to represent the class on his own. However, to ensure adequate representation, Counsel have also identified four additional individuals - Ellen Altemose (multiple sclerosis), Karl Baldwin (mental disability), T. Jameel Muhammad (wheelchair user), and Donna Kay Ring (blind employee) - within the class who are willing to serve as additional class agents. Each of these four individuals has a targeted disability, has applied for promotions at SSA, and has made the BQL, but has been repeatedly passed over for promotions due to disability discrimination on the part of management.¹³⁹

III. ARGUMENT

Congress passed the Rehabilitation Act of 1973 for the express purpose of “promot(ing) and expand(ing) employment opportunities in the public and private sectors for handicapped individuals.” *Prewitt*, 662 F.2d at 301 (quoting 29 U.S.C § 710(8)). The Act requires that federal agency employers develop an “affirmative action program plan for the hiring, placement

¹³⁷ Jantz, Dep. at 23-24. A complete history of Mr. Jantz’s attempts to secure promotion at SSA can be found at Exhibits F & SS to Goldstein Decl.

¹³⁸ See Appendix Of Prospective Class Members’ Experiences.

¹³⁹ See Affidavits and Declarations and Supplemental Declarations of Ellen Altemose, Karl Baldwin, T. Jameel Muhammad, and Donna Kay Ring, attached as Exhibits YY through EEE to Goldstein Decl.

and advancement of handicapped individuals.” § 501, 29 U.S.C. 794(a). In 1978, Congress amended the Rehabilitation Act to explicitly provide a private right of action under § 501 that allows federal employees to pursue claims of discrimination. *See Prewitt*, 662 F.2d at 302; *Shirley v. Devine*, 670 F.2d 1188, 1194-96 (D.C. Cir. 1982); § 505, 29 U.S.C. 794(a).

In its first case addressing the Rehabilitation Act, the Supreme Court recognized that the affirmative action obligation imposes additional duties beyond non-discrimination. *Southeastern Community College v. Davis*, 442 U.S. 397, 410 (1979) (“The language and structure of the Rehabilitation Act of 1973 reflect a recognition by Congress of the distinction between the evenhanded treatment of qualified handicapped persons and affirmative efforts to overcome disabilities caused by handicaps.”). That affirmative obligation extends to claims made by federal employees regarding the denial of promotion. *Prewitt*, 662 F.2d at 306 (§501 “impose(s) a duty upon federal agencies to structure their procedures and programs so as to ensure that handicapped individuals are afforded equal opportunity in both job assignment and promotion.”); *Ignacio v. United States Postal Serv.*, EEOC Appeal No. 03840005 (September 4, 1984) (“The legislative history of the Rehabilitation Act shows that Congress expected and fully intended that the [f]ederal government was to be a model employer of the handicapped, taking affirmative action to hire and promote the disabled.”) The EEOC’s regulations and legislative history of § 501, 29 U.S.C., 791 *et. seq.* further demonstrate that Congress intended that the federal government be a model employer of the handicapped. 29 C.F.R. § 1614.203(b); *see Prewitt*, 662 F.2d at 301-306 and *Shirley*, 670 F.2d. at 1193-97 (discussing legislative history).¹⁴⁰

A. Claims Under § 501 of the Rehabilitation Act Are Suitable for Class Treatment.

¹⁴⁰ Congress’s incorporation of ADA standards for the purposes of determining whether §501 has been violated in a complaint alleging nonaffirmative action employment discrimination, does not diminish the agency’s affirmative obligations. 29 C.F.R. 1630.1 (“Except as otherwise provided in this part, this part does not apply a lesser standard than the standards applied under Title V of the Rehabilitation Act of 1973.”).

The Commission has certified numerous cases on behalf of federal agency employees with disabilities who allege their rights have been violated under § 501 of the Rehabilitation Act. *See McConnell, et. al. v. United States Postal Serv.*, EEOC Hearing No. 520-2008-00053X, (May 30, 2008) (noting that the EEOC “has found in certain cases, a large number of disabled persons can be an appropriate group for class certification” and certifying class of “[a]ll permanent rehabilitation employees and limited duty employees who have been subjected to NRP [national reassessment process]”); *Walker v. United States Postal Serv.*, EEOC Appeal No. 0720060005 (March 18, 2008) (certifying class comprised of individuals with disabilities in permanent rehabilitation positions who had their duty hours restricted); *Cyncar v. United States Postal Serv.*, Appeal No. 0720030111 (February 1, 2007) (certifying class of individuals with disabilities in the agency’s Western Region who were subject to discrimination under the Rehabilitation Act when they were denied reasonable accommodation through: (1) denial of their applications for leave; (2) disciplinary actions for leave violations following denial of their FMLA status; and (3) unreasonable requirements to re-certify their medical conditions); *Glover v. United States Postal Serv.*, EEOC Appeal No. 01A04428 (April 23, 2001) (certifying class where Complainant alleged that the agency maintained a nationwide policy of denying promotional opportunities to individuals with disabilities in permanent rehabilitation duty positions); *see also Travis v. United States Postal Serv.*, EEOC Appeal 01992222 (October 10, 2002) (rejecting argument that actions brought under the Rehabilitation Act are “ill-suited” for class treatment).

For example, in *Glover, supra*, the complainant alleged that the agency maintained a nationwide policy of denying promotional opportunities to individuals with disabilities in permanent rehabilitation duty positions, in violation of § 501 of the Rehabilitation Act. The Commission affirmed certification of the class and rejected the agency’s argument that the

putative class lacked commonality and typicality. The Commission specifically addressed and rejected the agency argument that commonality and typicality could not be met in a case involving people with disabilities because “each individual class member would require separate evaluation from the standpoint of whether, despite compensable injury, s/he was a qualified individual with a disability who could perform the essential functions of the sought-after position and who had the qualifications to be selected.” *Id.* (discussing *Moten v. Federal Energy Regulatory Commission*, EEOC Request No. 05960233 (April 8, 1997) (certifying class “notwithstanding argument” that “selection criteria is not uniform and the positions involve varying skills and abilities.”)).

B. Complainant Has Satisfied His Threshold Burden to Represent the Class Claims.

The Commission has explained that “[i]n order to bring a class complaint of disability discrimination, Complainant must demonstrate at a minimum, that he has a disability within the meaning of the Rehabilitation Act.” *Cyncar*, EEOC Appeal No. 0720030111 (February 1, 2007). Disability means, with respect to an individual, a physical or mental impairment that substantially limits one or more major life activity. 29 C.F.R. § 1630.2(g) (1). An individual is substantially limited in a major life activity if he is “significantly restricted as to the condition, manner or duration under which [he] can perform a particular major life activity as compared...to the average person in the general population.” 29 C.F.R. § 1630.2(j) (ii). Complainant must also show that he is a “qualified individual with a disability” under 29 C.F.R. 1630.2(m).

Mr. Jantz easily satisfies these threshold requirements. Mr. Jantz is “100% deaf” with “bilateral deficit in both ears.”¹⁴¹ Mr. Jantz is thus substantially limited in the major life activity

¹⁴¹ Jantz Dep. 17:16-20.

of “hearing.” 29 C.F.R. 1614.203(a) (1).¹⁴² Mr. Jantz is also clearly regarded by SSA as disabled, based on his designation as an employee with a targeted disability. Mr. Jantz has demonstrated that he is a qualified individual with a disability for the position he applied for by virtue of making the BQL through SSA’s competitive process. 29 C.F.R. § 1614.203(a) (6).¹⁴³ Mr. Jantz has also sufficiently demonstrated he is “qualified” for the positions for which he applied based on his credentials. 29 C.F.R. § 1614.203(a) (6).¹⁴⁴

C. Complainant Has Satisfied All EEO Procedural Requirements.

Mr. Jantz’s first individual claim of discrimination was based on his non-selection for the following positions: (1) promotion to the position of Management Analyst, GS-343-13, which was posted under vacancy announcement number (VAN) B-3115 (Mr. Jantz was denied promotion on July 21, 2005); (2) GS-343-13 Lead Management Analyst position advertised under VAN J-438-USAS (Mr. Jantz was denied promotion on August 3, 2005); (3) GS-343-13 Management/Program Analyst position posted under VAN U-491 (Mr. Jantz was denied promotion on August 22, 2005).¹⁴⁵

Mr. Jantz initiated timely contact with a Counselor on August 22, 2005 to address all three promotion claims. 29 C.F.R. § 1614.05(a) (1) (providing for 45 day period from the date of discrimination or adverse personnel matter to initiate counseling).¹⁴⁶ Mr. Jantz’s discussions with the EEO counselor did not resolve Mr. Jantz’s complaint. On November 2, 2005, the agency provided Mr. Jantz with notice informing him of his right to file a complaint.¹⁴⁷ Mr. Jantz filed a timely complaint on November 16, 2005. 29 C.F.R. § 1614.106(b).¹⁴⁸

¹⁴² ROI #1 (Exhibits 9-10, 12-20, 22-24).

¹⁴³ Jantz Dep. 52:14-51:12; ROI #1 (Exhibits 9-10, 21, 25).

¹⁴⁴ Jantz Dep. 28:14-29-14; 33:12-34:3; 41:1-16.

¹⁴⁵ ROI #1, p.4.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

Mr. Jantz's case was assigned to an investigator on March 15, 2006.¹⁴⁹ An investigation was conducted March 17-April 25, 2006 and revisited on June 20, 2006 and July 5, 2006.¹⁵⁰ On or about June 21, 2006, Mr. Jantz notified the investigator that he was interested in pursuing the case as a class action and was therefore changing his "individual" complaint to a class complaint. 29 C.F.R. § 1614.204(3)(b) ("A complainant may move for class certification at any reasonable point in the process when it becomes apparent that there are class implications to the claim raised in an individual complaint").¹⁵¹ On September 25, 2006, the Commission issued its Acknowledgment and Order for Class Certification. Thereafter, Mr. Jantz filed a timely "Motion for Provisional Class Certification, Discovery and Briefing Schedule on Class Certification Issue" on October 23, 2006. On December 13, 2006, the Commission issued an Acknowledgment and Order Regarding Discovery and Briefing Schedule setting the parameters for discovery on the class claims.¹⁵²

Mr. Jantz has since filed an additional complaint alleging denial of promotion for two vacancy announcements (1) L-3004-Staff Assistant, GS-301-13 (Mr. Jantz was denied promotion on August 11, 2006); and (2) W-1256-Building Manager, GS-1176-13 (Mr. Jantz was denied promotion on January 23, 2007).¹⁵³ Mr. Jantz's complaint alleges discrimination based on his physical disability (bi-lateral deafness) and reprisal for prior EEO activity.¹⁵⁴ Mr. Jantz initiated timely counseling with a counselor on September 20, 2006, within 45 days of the first adverse personnel matter. 29 C.F.R. § 1614.05(a) (1). Those discussions did not resolve his complaint. Mr. Jantz filed a timely complaint on January 12, 2007, the same day he was notified of his right to file. 29 C.F.R. § 1614.106(b).¹⁵⁵ An investigation was conducted April 16-June 5, 2007.¹⁵⁶

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at p.19.

¹⁵² See Carson Decl. ¶¶4-50 (describing subsequent procedural history).

¹⁵³ Jantz Revised Report of Investigation ("ROI#2"), at 1-3.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

Mr. Jantz's later filed claims regarding denial of promotion are subsumed by the class allegations he raises in this motion.¹⁵⁷

Complainant is not aware of any other complaints pending before the agency that assert the claims pled on behalf of the class in this motion. Based on the history recited above Complainant Jantz has met all regulatory deadlines and fulfilled all administrative requirements to permit this case to proceed as a class action.

IV. COMPLAINANT HAS SATISFIED ALL OF THE COMMISSION'S CLASS CERTIFICATION REQUIREMENTS

"A *class* is a group of employees, former employees or applicants for employment who, it is alleged, have been or are being adversely affected by an agency personnel management policy or practice that discriminates against the group on the basis of the race, color, religion, sex, national origin, age or handicap." 29 C.F.R. § 1614.204(a) (1). The purpose of class action complaints is to economically address claims "common to [a] class as a whole... turn[ing] on questions of law applicable in the same manner to each member of the class." *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 155 (1982).

To sustain a class action before the Commission, complainants must satisfy four prerequisites: "(1) the class is so numerous that a consolidated complaint of the members of the class is impractical, (2) there are questions of fact common to the class, (3) the claims of the agent of the class are typical of the claims of the class, and (4) the agent of the class, or, if represented, the representative, will fairly and adequately protect the interests of the class." 29 CFR § 1614.204(a) (2). The EEOC has explained that when addressing a class complaint, it is important to resolve the requirements of commonality and typicality prior to addressing numerosity in order to "determine the appropriate parameters and the size of the membership of the resulting class." *Moten*, EEOC Request No. 05960233 (April 8, 1997) (citing *Harris v. Pan*

¹⁵⁷ See U.S. Equal Employment Opportunity Commission Handbook for Administrative Judges, Chapter 10, <http://eoc.gov/federal/ajhandbook.html#class>.

American World Airways, 74 F.R.D. 25, 45 (N.D. Cal. 1977)). As a practical matter, “commonality and typicality tend to merge.” *Hudson v. Dep’t of Veterans Affairs*, EEOC Appeal No. 01A12170 (March 27, 2003). Class Complainants are not required to prove the merits of their claims at the class certification stage, but they must provide more than bare allegations that they satisfy the class complaint requirements. *Mastren v. United States Postal Serv.*, EEOC Request No. 05930253 (October 27, 1993). Here, Complainant clearly meets the Commission’s prerequisites for class certification.

A. Commonality

To demonstrate commonality, Complainant must demonstrate that there is a question of fact common to the class. 29 CFR § 1614.204(a) (ii). In other words, Complainant must establish an evidentiary basis from which one could reasonably infer the operation of an overriding policy or practice of discrimination. *See Mastren*, EEOC Request No. 05930253 (October 27, 1993); *Garcia v. Dept. of the Interior*, EEOC Appeal No. 07A10107 (May 8, 2003). “Evidence used by courts to determine whether individual and class claims meet commonality include statistical evidence, anecdotal testimony by other employees showing that there is a class of persons who were discriminated against in the same manner as the individuals and evidence of specific adverse actions alleged.” *Hines*, EEOC Request No 05940917 (January 29, 1996); *see also Belser v. Dep’t of the Army*, EEOC Appeal No. 01A05565 (Dec. 6, 2001) (*citing Mastren*, EEOC Request No. 05930253).

“Factors to consider in determining commonality include whether the practice at issue affects the whole class or only a few employees, the degree of centralized administration involved, and the uniformity of the membership of the class, in terms of the likelihood that the members’ treatment will involve common questions of fact.” *Garcia*, EEOC Appeal No. 07A10107 (*citing Mastren*, EEOC Request No. 05930253). *Cf. Turner v. Dep’t of Justice (Fed.*

Bureau of Prisons), EEOC Appeal No. 0720060041 (July 19, 2007) (“To the extent that the agency argues that the mere fact that individuals work in different positions in different locations automatically defeats a claim for class certification, we disagree. If there is sufficient evidence of a common policy or practice, the commonality test can be met, even if the employees hold different positions and work in different facilities.”). Courts construe the commonality requirement “permissively.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998).

1. SSA’s Statistical Workforce Disparities Create a Common Issue of Fact.

In class cases, statistical evidence is frequently used to raise an inference of a common pattern and practice of discrimination. *Hines*, EEOC Appeal No. 01931776 (July 7, 1994); *Dukes v. Wal-Mart*, 509 F.3d 1168, 1180 (9th Cir. 2007) (“It is well-established that commonality may be established by raising an inference of class-wide discrimination through the use of statistical analysis.”). Significant statistical disparities are relevant to determining whether the challenged employment practice has a class-wide impact. *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 292-93 (2d Cir. 1999) (citing *Barefield v. Chevron U.S.A. Inc.*, 1987 WL 65054, *3 (N.D. Cal. 1987)); *Stastny v. S. Bell Tel. & Tel. Co.*, 628 F.2d 267, 278 (4th Cir. 1980) (recognizing that statistical data showing comparable disparities experienced by protected employees may raise an inference of a policy or practice of discrimination). The burden on the party submitting statistics in support of certification has been described as “less than a prima facie showing of liability.” *Wagner v. Taylor*, 836 F.2d 578, 587 n.60 (D.C. Cir. 1987) [citations omitted].

Complainant’s submission of statistical evidence presents a common issue to be decided in this proceeding, *i.e.*, whether SSA’s policies and practices are resulting in systemic denial of equal promotional opportunities for TDEs. *Teamsters*, 431 U.S. 324, 340, n.20 (“Statistics showing...imbalance are probative...because such imbalance is often a telltale sign of

purposeful discrimination”). Here, Complainant Jantz has submitted probative and compelling statistical evidence demonstrating that employees with targeted disabilities at SSA share common claims regarding their lack of promotion.

a. Dr. Seberhagen

Using the EEOC’s 80% Rule and the Fisher’s Exact Test,¹⁵⁸ Dr. Seberhagen found statistically significant disparities in the relative promotion rates between employees with targeted disabilities and those without targeted disabilities in SSA’s overall promotional selection procedures in FY 2004, FY 2005, and FY 2006 for total non-competitive promotions and total competitive promotions.¹⁵⁹ After production of SSA’s MD-715 report for FY 2007, Dr. Seberhagen conducted the same analysis and found that the trend of statistically significant disparities continues.

b. Dr. Drogin

Dr. Drogin’s statistical analysis focuses on the relative promotion rates for TDEs as compared to other candidates selected from the BQL. Dr. Drogin determined the statistical significance of the disparities and the chance that such disparities would occur through random fluctuation. Dr. Drogin found that the chance of the existing disparity at SSA between TDEs and others being attributable to random fluctuation was less than 1 in 10 trillion.

The Agency’s expert, Dr. Lisa Harpe, reached a similar conclusion, finding the relative rates of promotion between TDEs and non-TDEs statistically significant – greater than 2 or 3 standard deviations.¹⁶⁰ Under both social science and judicial standards, roughly two or more

¹⁵⁸ Fisher’s exact test is a calculation used by statisticians to determine the statistical significance of an observed value as compared to the prediction of a pre-established hypothesis. See David H. Kaye & David A. Freedman, *Reference Guide on Statistics*, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 83, 164, 172-73 (Federal Judicial Center 2000); Deposition of Lance Seberhagen 34:4-38:14, attached as Exhibit TT to Goldstein Decl. (describing Fisher’s exact test and application to this case).

¹⁵⁹ Seberhagen Report at 6.

¹⁶⁰ Harpe Dep. at 71:6-15; 256:16-257:1.

standard deviations is widely considered statistically and legally significant. *See Hazelwood School Dist. v. United States*, 433 U.S. 299, 309-312 & n.14, 17 (1977).¹⁶¹

By any statistical measure, the expert opinions of Drs. Seberhagen and Drogin, as well as the analysis conducted by SSA's own expert, Dr. Harpe, establish a strong inference of discrimination against employees with targeted disabilities at SSA that warrants class treatment.

2. SSA's Subjective Decision Making Creates a Common Issue of Fact.

Subjective decision making is defined as those employment decisions "based on the exercise of personal judgment or the application of inherently subjective criteria." *Watson v. Forth Worth Bank and Trust*, 487 U.S. 977, 988 (1998). Where decisions regarding the promotion of particular candidates involve objective and subjective elements, courts consider the overall system subjective. *Id.* at 989-991 ("However one might distinguish 'subjective' from 'objective' criteria, it is apparent that selection systems that combine both types would generally have to be considered subjective in nature."); *McReynolds v. Sodexo Marriott Services, Inc.*, 208 F.R.D.428, 442 (D.D.C. 2002); *Sengupta v. Morrison-Knudsen Co.*, 804 F.2d 1072, 1075 (9th Cir. 1986) ("It is well-established that subjective decision-making is a "ready mechanism for discrimination" and the courts should scrutinize it carefully.).

Courts throughout the country have long recognized that allegations regarding the prevalence of subjective decision making in the workplace raises a common issue suitable for class treatment. *Caridad*, 191 F.3d at 286 ("delegation to supervisors, pursuant to company-wide policies, of discretionary authority without sufficient oversight...gives rise to common questions of fact warranting certification of the proposed class."); *Staton v. Boeing Co.*, 327 F.3d 938, 955 (9th Cir. 2003) (rejecting argument that "decisionmaking at Boeing is too decentralized

¹⁶¹ Dr. Harpe's reported analysis asserts that there is no disparate promotion rates for individual impairments based on a comparison of candidates with particular types of disabilities within the TDE category. This analysis is a disaggregation analysis which is fundamentally flawed and ignores the

to permit a class that combines plaintiffs from disparate locales”); *Shipes v. Trinity Indus.*, 987 F.2d 311, 316 (5th Cir. 1993) (upholding commonality finding where all of company’s plants “utilized the same subjective criteria in making personnel decisions”); *Cox v. Am. Cast Iron Pipe Co.*, 784 F.2d 1546, 1557 (11th Cir.1986) (holding that “[a]llegations of similar discriminatory employment practices, such as ... [the] use of entirely subjective personnel processes that operated to discriminate, would satisfy the commonality and typicality requirement of Rule 23(a)”[quotations omitted]); *Segar v. Smith*, 738 F.2d 1249, 1276 (D.C.Cir. 1984) (explaining that “subjective criteria may well serve as a veil of seeming legitimacy behind which illegal discrimination is operating.”).

The Commission has similarly determined that challenges to subjective decision making and the use of subjective criteria by management officials create common issues. *Lewis*, EEOC Appeal No. 01A40442 (September 28, 2005) (certifying class of African-American Federal Aviation Administration employees at Mike Monroney Aeronautical Center who were denied competitive and/or noncompetitive promotion to a GS-5 or higher position who alleged agency’s promotion policies allowed so much “flexibility” that they were completely subjective and without any meaningful standards.); *Howard v. Dep’t of Commerce*, EEOC Appeal No. 01956455 (June 4, 1997) (“Typically, cases in which courts have certified ‘across-the-board’ class actions involve allegations that all of the challenged decisions (only some of which affected the named plaintiff(s) are made through a subjective process, in which a group of supervisors exercise total or near total discretion in a discriminatory fashion”) (citing *Richardson v. Byrd*, 709 F.2d 1016, 1020 (5th Cir.), *cert. denied*, 464 U.S. 1009 (1983); *Davis*, EEOC Appeal No. 01930457 (September 10, 1993) (certifying class where Complainants alleged that subjective decisions of the agency’s predominantly white supervisory workforce, who acted in an

approach followed by the EEOC for nearly 30 years as discussed in the supplemental reports of Drs. Drogin, Seberhagen and Blanck.

unchecked and unfettered manner without regard for the regulations, had affected all Black professional employees at ETA in the use of promotion criteria, in the procedures used to rehire or repromote persons, and in the selection of award recipients.); *see also Taylor v. Soc. Sec. Admin.*, EEOC Appeal No. 07A50060 (May 5, 2006) (discussed in detail below).

When common promotional policies and practices of an agency engender harm, like “denial of promotion,” to a protected class, the Commission has certified the case for class treatment. *Basu v. Dep’t of Agriculture*, EEOC Appeal No. 01A10660, (June 27, 2001) (certifying class of “all Asian employees of the agency who were eligible for but have not received promotions and all Asian persons who have applied for positions within the agency but have not been selected,” determining that the “‘common facts’ involve policies and practices of the agency which Complainant claims caused the same harm to all Asian employees: denial of promotion.”); *Madrid v. Dep’t of Army*, EEOC Appeal No. 01981636 (July 17, 2001)(certifying class where the “common facts” involve policies and practices of the agency which Complainant claims caused the same harm to all Hispanic employees: denial of promotion); *Moten*, EEOC Request No. 05960233 (April 8, 1997) (noting that where common facts exist, such as centralized promotion policy and practices, a class agent may represent people from more than one job group; finding evidence that evidence of a centralized promotion policy, enacted separately by each facility office was sufficient to find adequate commonality and typicality between a class of non-supervisory Black employees in different grades at different facilities).

Here, the Class Agent has submitted extensive evidence regarding the uniform use of excessive subjectivity in the promotion process, thereby establishing the commonality of that class claim. As discussed above, SSA has standardized nationwide policies and procedures for determining who is selected for promotion. Those promotional policies are outlined in identical terms, in SSA’s Merit Promotion Plan and the Management Officials Promotion Plan, which are

applicable to both bargaining unit and non-bargaining unit employees. Job vacancy and applicant information are contained in a centrally administered database maintained by SSA, the HRMIS.

Selecting officials maintain unfettered discretion when choosing candidates for promotion from the BQL, even though SSA's agency-wide culture is marked by bias and stereotypes concerning employees with targeted disabilities, and even though SSA has failed to engage in sufficient affirmative efforts to combat this latent prejudice. It is not surprising, therefore, that the total discretion afforded to selecting officials in choosing candidates from the BQLs has resulted in systemic discrimination against employees with targeted disabilities. As discussed, the statistics demonstrating the systemic discrimination at SSA are reinforced by anecdotal testimony of class members.¹⁶²

Additional factual questions for class-wide adjudication include whether SSA's policies and practices are effective in identifying and eliminating barriers facing employees with targeted disabilities and whether SSA has failed to engage in adequate affirmative efforts to ensure equal promotional opportunities for such employees. Thus, there are many common questions concerning SSA's promotion policies and practices which affect all TDEs.

¹⁶² See Appendix Of Prospective Class Members' Experiences. See, e.g., Casey Dep., at 55-56; Deposition of Sharre Jones 69-70 ("I feel I am or have been held back from career advancement opportunities at SSA. How this occurs is having an emotional disability has a stigma attached to it. When my applications are processed I am passed over because the people who have authority over hiring see the nature of my disability in my file"), attached as Exhibit UU to Goldstein Decl.; Bieri Dep., at 16, 58- 59 "... [T]he last time that I had applied for a promotion, which was a year ago, and I actually had -- my manager at that point told me that he did not recommend me for that position because he did not think that I was mentally and emotionally stable enough to handle a promotion"); Murray Dep. at 76-77 (testifying that without communication accommodations, she felt "rejected" and "excluded"). Deposition of Tanya Crumble ("Crumble Dep."), at 12-13, 20-21 ("Q. Have any of your coworkers ever expressed a feeling of, I'll say, frustration to you about the fact that when they communicate with you they need to take the time to write? A. Coworkers sometimes don't feel like writing when I'm working and I can't hear, and they get an attitude and they decide to take the paper and pen and kind of scribble something down. Some coworkers have no patience with deaf people and in communicating with me."), attached as Exhibit VV to Goldstein Decl.; Bozzell Dec. at 4 (stating "two other coworkers threatened me by saying 'even though you are in a wheelchair doesn't mean you can't get f---ing ass-whipped,' 'Good thing you are in a wheelchair, ...'"); Lance Dep. at 47-50, 62-63; Stewart-Walker Dep. at 14-15, 111, 105, 144.

Similarly, there are many common legal questions which have an impact on the class as a whole. These include:

- Whether the statistical disparities in the relative promotion rates of employees with targeted disabilities establishes discrimination;
- Whether SSA is violating its obligation to be a “model employer” under Section 501 of the Rehabilitation Act;
- Whether SSA has failed to meet its affirmative action obligations under the Rehabilitation Act;
- Whether SSA is using qualification standards or other selection criteria that screen out, or tend to screen out, TDEs in violation of the Rehabilitation Act;
- Whether SSA is using standards, criteria, or methods of administration that have the effect of discrimination against TDEs in violation of the Rehabilitation Act;
- Whether SSA is limiting, segregating, or classifying TDEs in a way that adversely affects their opportunities in violation of the Rehabilitation Act;
- Whether SSA is excluding or otherwise denying equal jobs or benefits to TDEs because of their disabilities in violation of the Rehabilitation Act; and
- Whether SSA can demonstrate that its selection procedures are consistent with business necessity in conformance with the Rehabilitation Act.

For the foregoing reasons, commonality is satisfied here.

B. Typicality

Under 29 CFR § 1614.204(a) (iii), Complainant must also demonstrate that his claims are typical of the claims of the class. The overriding typicality principle is that the interest of the class members must be fairly encompassed within the class agent’s claims. Typicality exists where the class agent demonstrates some “nexus” with the claims of the class, such as the similarity in the conditions of employment and similarity in the alleged discrimination affecting the agent and the class. *Thompson v. United States Postal Serv.*, EEOC Appeal No. 01A03195 (March 22, 2001).

The Commission frequently finds typicality where a Complainant alleges class wide

discrimination in the promotion process. *Madrid*, EEOC Appeal No. 01981636 (July 17, 2001)(discrimination against Hispanics); *Basu*, EEOC Appeal No. 01A10660 (discrimination against Asians) (June 27, 2001); *Mastren*, EEOC Request No. 05960233 (April 9, 1997) (discrimination against Blacks); *Dunbar v. Soc. Sec. Admin.*, EEOC Appeal No. 01975435 (July 8, 1998) (discrimination against Black males at SSA). This includes finding typicality where Complainants challenge the excessive subjectivity in a promotion process. *Taylor v. Soc. Sec. Admin.*, EEOC Appeal No. 07A50060 (May 5, 2006); *Davis*, EEOC Appeal No. 01930457 (September 10, 1993); *Conanan*, EEOC Appeal No. 01952486 (January 13, 1998).

The claims of Complainant Ronald Jantz are typical of the class. The gravamen of Mr. Jantz's complaint is that he is unable to obtain a promotion at SSA due to his status as a TDE. In his 20 years of employment at SSA, Mr. Jantz has not once received a promotion.¹⁶³ He has made the BQL approximately 30-40 times for a variety of positions, but has never been selected.¹⁶⁴ Mr. Jantz contends, as do other class members in this case, that he has not been selected for promotion because he is a person with a targeted disability.¹⁶⁵ His claim is thus typical of others in the broader proposed class – all TDEs denied equal promotional opportunities; and in the narrower alternative proposed class – all TDEs denied equal promotional opportunities despite making a BQL. Like others in the proposed class, Mr. Jantz's claim is premised on allegations that (1) SSA is discriminating against members of the proposed class in violation of the Rehabilitation Act; and (2) SSA is failing to fulfill its affirmative action obligations with respect to its employees with targeted disabilities.¹⁶⁶ Like others in the proposed class, Mr. Jantz' claim will be based on the same type of evidence – statistical analyses of relative promotion rates, reports and studies (by experts and the agency) of SSA-wide policies

¹⁶³ Jantz Dep. 22:9-12; ROI #1, at 4; 3/21/06 Affidavit of Ronald Jantz ("Jantz Affidavit 3/06"), at 4, attached as Exhibit XX to Goldstein Decl.

¹⁶⁴ Jantz Dep. 26:17-19; Jantz Affidavit 3/06, at 14; Exhibits 22-25 to Jantz ROI #1.

¹⁶⁵ Jantz Dep. 22:9-12; 23:2-3; Jantz Affidavit 3/06, at 13-14.

and practices, and testimony of SSA's senior managers as well as various representative class members.

Mr. Jantz's status as a GS-12 employee does not make his claims atypical. The typicality of his claim is that he and other class members have been denied promotional opportunities due to a lack of affirmative efforts by SSA to support and encourage promotion of TDEs as well as the excessive subjectivity in SSA's promotion process that allows for in-group bias to be expressed. *See Basu*, EEOC Appeal No. 01A10660 (June 27, 2001) (finding that Complainant's high grade as a GS-15 did not make his claim atypical of the class he represented: all Asian employees at the agency; concluding that Complainant raised typical claims by providing evidence that "the harm was not confined to a single position, grade level, or subagency."); *Wagner v. Taylor*, 836 F.2d at 581, 591 (finding typicality where SES attorney sought to represent "black professional, administrative, and technical employees [of defendant agency] graded GS-9 and above;" rejecting proposition that high position alone renders claims against the agency atypical of those of the class; and concluding that key inquiry is whether the Complainant suffered injury from a specific discriminatory promotional practice of the employer in the same manner as the proposed class did.); *Paxton v. Union Nat'l Bank*, 688 F.2d 552, 562 (8th Cir.1982) (holding that "[t]ypicality is not defeated because of the various promotional opportunities at issue, or the different qualifications of plaintiffs and class members"); *Hartman v. Duffey*, 19 F.3d 1459, 1471 (D.C.Cir. 1994) ("recognizing that an employee can challenge discrimination where the primary practices used to discriminate in the different categories are themselves similar," finding division into subclasses unnecessary); *Ellis v. Costco*, 240 F.R.D. 627, 641 (9th Cir. 2007) (finding typicality where "class representatives have demonstrated they will present the same type of legal and remedial theory as unnamed class members, namely that

¹⁶⁶ Jantz Dep. 43:20-45:14; 49:6-50:4; Jantz Affidavit 3/06 at 14-15.

the subjective processes for promotion to AGM and GM positions discriminate against female employees.”).

Moreover, as previously discussed, Complainant has identified four additional individuals to represent the class of employees with targeted disabilities at SSA: Donna Kay Ring, Jameel Muhammed, Ellen Altemose and Karl Baldwin. These individuals raise the same promotional claims as Mr. Jantz yet span a number of different disabilities within the TDE category and a number of different GS grade levels. Adding these additional representatives is not essential but would reinforce the typicality of the named agents’ claims.

1. The Commission Has Already Certified a Class of SSA Employees Challenging SSA’s Subjective Decision Making

Administrative Judge Enechi A. Modu and the EEOC's Office of Federal Operations have already determined that the identical employment practice challenged here, unfettered discretion and excessive subjectivity in the promotion and selection process at SSA, warrants class treatment. *Taylor v. Soc. Sec. Admin.*, EEOC Appeal No. 07A50060, (May 5, 2006) (certifying class of African-American women at Agency Headquarters in grades GS-7 through GS-13 who have not been promoted who alleged the agency’s promotion process is discriminatory because it allows a high level of subjectivity in selection decisions).

In *Taylor*, Paulette Taylor and Debra Harley, two African American female employees of SSA, allege that SSA engages in a pattern or practice of discrimination against African-American women because “(1) the SSA personnel system allows a high level of subjectivity in decisions; (2) information on opportunities and the kinds of training and experience necessary for advancement is disseminated by word-of-mouth, and African-Americans are excluded from much of the word of mouth communications from supervisors.”

In *Taylor*, class agents submitted statistical and anecdotal evidence to support their claim. Dr. Seberhagen’s first report concluded that SSA’s promotional system adversely impacted

promotion rates of African-American women to grades GS-11 through GS-14 for the period 2001-2003. Dr. Seberhagen's second report concluded that the "Social Security Administration's promotion rates had an adverse impact against black women for [promotion to] Grade 9" over the same time period. Utilizing the same approaches followed here - EEOC's 80% rule and the Fisher's Exact Test - Dr. Seberhagen concluded that for the period 2001-2003 there was an adverse impact against black women for promotion to grades 11, 12, 13 and 14." For anecdotal evidence, the class agents submitted affidavits from eleven African-American females who stated they had been employed by the Agency for several years without promotion.

On that evidence, Administrative Judge Modu concluded that "Complainants presented enough...to raise an across-the-board claim of class-wide discrimination in the agency's promotion practices," and certified the class.¹⁶⁷

Taylor v. Soc. Sec. Admin., supra. Upon consideration of the Agency's appeal, the EEOC's Office of Federal Operations concluded that the Class Agents had met their burden to satisfy the requirements of commonality, typicality, numerosity and adequacy, affirming the Judge Modu's certification order. *Id.*

Here, Complainant has submitted evidence that far exceeds the submission in *Taylor*. As in *Taylor*, Complainant Jantz has submitted reports from Dr. Seberhagen that find a consistent pattern of adverse impact against TDEs for non-competitive and competitive promotions for specified grade levels. Dr. Seberhagen looked at SSA's overall promotion system nationwide, and at all grade levels for the class period, which includes FY 2004, FY 2005, FY 2006 and FY 2007. As discussed above, Dr. Seberhagen found significant disparities in the relative promotion rates between TDEs and non-TDEs in each year and for multiple grade levels. Complainant has also submitted testimony from over 40 class members describing the discriminatory attitudinal

¹⁶⁷ AJ Modu denied certification of the awards and training claims, but explained that "Class Agents may use disparities in awards and training to support their class-wide discrimination in promotions for African-American females." Complainant here does not seek certification of distinct training, awards or

barriers that have impeded their career advancement and promotion. Based on existing Commission precedent, Complainant's submission of evidence should be more than sufficient to certify the class.

In addition, Complainant has submitted extensive additional evidence to demonstrate that this case is appropriate for class treatment, including:

- (1) a declaration and report from Dr. Drogin analyzing relative promotion rates for employees with targeted disabilities who made the BQL and others who made the BQL, finding enormous statistically significant disparities;
- (2) a declaration and report from Dr. Blanck, a nationally renowned expert in the field of disability discrimination and the effect of biases and stereotyping of employees with disabilities in the workplace. Dr. Blanck concludes that "there are uniform features of SSA's organizational culture that create attitudinal, environmental, and structural barriers to the career advancement of employees with Targeted Disabilities;"
- (3) evidence of EEOC policies and initiatives which detail the appropriateness of considering the career advancement opportunities of employees with targeted disabilities as a group;
- (4) evidence of reports by the SSA and EEOC documenting the continued existence of bias and stereotypes impacting employees with targeted disabilities, and that SSA itself concludes there needs to be a barriers analysis for this group; and
- (5) unlike race and gender cases, SSA has an obligation to engage in affirmative action for employees with targeted disabilities as a group, an obligation that calls for class-wide treatment of the discrimination claims at issue.

C. Numerosity

career advancement claims. Complainant instead seeks to use that evidence to bolster the central class claim: denial of promotion.

29 CFR § 1614.204(a)(2)(i) requires that complainant establish that “the class is so numerous that a consolidated complaint of the members of the class is impractical.” No set number is required, and each case is evaluated on its own circumstances. *See General Telephone Company v. EEOC*, 446 U.S. 318, 330 (1980). When determining whether numerosity exists, relevant factors to consider, in addition to the number of class members, include geographic dispersion, ease with which the class may be identified, the nature of the action, and the size of each claim alleged. *Wood v. Dep’t. of Energy*, EEOC Request No. 05950985 (October 5, 1998). The exact number of class members need not be shown prior to certification, but some showing must be made of the number of individuals affected by the allegedly discriminatory practices who therefore may assert a claim. *See Moten*, EEOC Request No. 05960233 (April 8, 1997).

Here, the broader class proposed by complainant consists of well over 1,300 TDEs, including former and current employees, in Grade 5 or above who allege they were denied equal promotional opportunities. Because the EEOC’s MD-715 requires SSA to report each year on the number of employees with targeted disabilities, the number of TDEs employed by SSA is readily ascertainable. For example, SSA reported the following numbers of TDEs in its MD-715 reports: FY 2004 (between 1469 and 1422); FY 2005 (between 1422 and 1370); FY 2006 (between 1370 and 1311); FY 2007 (between 1311 and 1284). Thus, Complainant’s proposed class for the broader class definition easily satisfies the numerosity requirement.

Complainant also satisfies the numerosity requirement for the proposed narrower class of TDEs who made the BQL but were not selected for promotion. Complainant has submitted deposition testimony and supplemental declarations that establish that at least 34 TDEs have applied for competitive promotions, made the BQL, but have not been selected for promotion.¹⁶⁸ More importantly, in discovery, SSA produced data files to Complainant in order to allow an

¹⁶⁸ *See* Appendix Of Prospective Class Members’ Experiences.

analysis of the relative promotion rates of TDEs who made the BQL as compared to others. The data filed contained:

“the Best Qualified List of applicants for certain vacancy announcements and who was selected...[t]his data gives the best available record of ‘information regarding the identities of individuals whose names appeared on the BQL’s for any vacancy announcement under merit promotion procedures in any SSA component on or after August 22, 2003. The file also identified the applicants who were TDEs and the applicants who were selected, for each vacancy announcement.’”¹⁶⁹

The data file reflected vacancy announcements between August 1, 2003 and January 4, 2008.¹⁷⁰ For the purpose of analyzing numerosity, the data file indicated that there were “2,545 TDE applicants” who made the BQL for “1,915 vacancy announcements” during the proposed class period.¹⁷¹ Even after taking the possibility of multiple applications by TDEs for a variety of vacancies into account, the proposed class for the narrower class definition easily satisfies the numerosity require.

D. Adequacy

Adequacy of representation “is perhaps the most crucial requirement because the judgment will determine the rights of the absent class members.” *Bailey, et al. v. Dep’t of Veterans Affairs*, EEOC Request No. 05930156 (July 30, 1993). Adequacy requires that the agent of the class, or, if represented, the representative, will fairly and adequately protect the interests of the class. 29 C.F.R. 1614.204(iv). “The class representative should have no conflicts with the class and should either have sufficient legal training and experience to pursue the claim or designate an attorney with the requisite skills and experience.” *Sedillo v. Dep’t of Agric.*, EEOC Appeal No. 07A20071 (Aug. 7, 2002).

Mr. Jantz has no conflicts with the class he seeks to represent. His interests are squarely aligned with other TDEs at SSA. Mr. Jantz has repeatedly testified that he seeks relief on behalf

¹⁶⁹ See Drogin Decl. ¶3.

¹⁷⁰ *Id.*

of all TDEs who have been denied equal promotional opportunities. Furthermore, Complainant intends to vigorously pursue this case as a class action. Complainant is represented by the law firms Berger and Montague, P.C., Brown, Goldstein & Levy, LLP, Schneider Wallace Cottrell Brayton Konecky LLP, and one non-profit, Disability Rights Advocates. These organizations collectively have extensive experience in class action litigation, including claims of employment discrimination and disability discrimination.¹⁷² Class counsel have committed their resources to ensuring that the claims of the class are prosecuted fully and professionally in this proceeding.

V. CONCLUSION

For the reasons discussed above, Complainant respectfully requests that this matter be certified for class treatment.

Respectfully submitted,

Date: June 27, 2008

BERGER & MONTAGUE, P.C.
BROWN, GOLDSTEIN & LEVY, LLP
DISABILITY RIGHTS ADVOCATES
SCHNEIDER WALLACE
COTTRELL BRAYTON KONECKY, LLP


Attorneys for Complainant

¹⁷¹ See Drogin Decl. ¶4 and Table 1.

¹⁷² Declarations of Shanon J. Carson, Laurence W. Paradis, Todd M. Schneider and Daniel Goldstein in Support of Complainant's Motion for Class Certification.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY on this 27th day of June, 2008, that a copy of the foregoing Memorandum in Support of Complainant's Motion for Class Certification and proposed Order Granting Complainants' Motion for Class Certification and Setting Status Conference was hand delivered to:

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**IN THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
BALTIMORE DISTRICT OFFICE**

RONALD JANTZ, individually and on behalf
of all others similarly situated,

Complainant,

v.

MICHAEL J. ASTRUE,
Commissioner,
Social Security Administration,

Agency.

EEOC No. 531-2006-00276X
Agency No.: HQ-06-2518-SSA

Judge: David Norken

**[Proposed] ORDER GRANTING
COMPLAINANTS' MOTION FOR
CLASS CERTIFICATION AND SETTING
STATUS CONFERENCE**

Complainants' Motion for Class Certification came on for hearing on _____, 2008. After consideration of the papers and arguments presented by Complainant and the Social Security Administration ("Agency"), the Administrative Judge makes the following FINDINGS and ORDERS:

1. The Administrative Judge FINDS that Complainant has satisfied the requirements of 29 CFR § 1614.204 for certification as a class proceeding.
2. In light of the foregoing, the Administrative Judge orders that the following class be certified:

All current and former employees with targeted disabilities at the Social Security Administration at General Schedule Grade five and above who, on or after August 22, 2003, have been denied equal promotional opportunities.

or

All current and former employees with targeted disabilities at the Social Security Administration who, on or after August 22, 2003, have applied for and made a Best Qualified List for promotion, but have been denied equal promotional opportunities.

3. The Administrative Judge further orders that Complainant Ronald Jantz be appointed as the class representative; and that the following firms be appointed as class counsel: Berger & Montague, P.C.; Brown, Goldstein & Levy, LLP; Schneider Wallace Cottrell Brayton Konecky, LLP; and Disability Rights Advocates.
4. The hiring claims asserted by various applicants with disabilities who have sought employment with the Social Security Administration shall be addressed separately.

The Administrative Judge sets a conference for _____, 2008 at _____ to discuss the status of the separate hiring claims addressed above.

IT IS SO ORDERED.

Dated: _____, 2008

The Honorable David Norken
Administrative Judge