

case in abeyance under existing Commission precedent or the regulations at 29 C.F.R. § 1614. Complainant did not file any response.

Notwithstanding the Agency's arguments, I find that given the pending civil action, the most prudent course of action with respect to this related administrative complaint is to dismiss the above-captioned complaint from the hearings process without prejudice and instruct the Agency to hold this administrative complaint in abeyance until a decision on certification is made in the Howard Class Complaint.¹ In reaching this conclusion, I note that EEOC's Management Directive 110 (EEOC MD-110) discusses how individual complaints are handled when there is an administrative class complaint filed in the administrative process. Specifically, the EEOC's Management Directive provides that:

[a]n individual complaint that is filed before or after the class complaint is filed and that comes within the definition of the class claim(s), will not be dismissed but will be subsumed within the class complaint. If the class complaint is dismissed at the certification stage, the individual complaint may proceed, unless the same or another basis for dismissal applies.

See EEOC MD-110 (Nov. 9, 1999) at 8-4 ¶ C. The Commission has also stated that individual cases subsumed in administrative class complaint should be held in abeyance pending a decision on certification. See e.g., Roos v. U.S. Postal Serv., EEOC Request No. 05920101 (Feb. 13, 1992) (holding individual complaint in abeyance pending certification decision in related class complaint); Carter-Jacobs v. Dep't of Transp., EEOC Appeal No. 01A40594 (Oct. 14, 2005) (same); Turner v. Dep't of the Navy, EEOC Appeal No. 01930730 (July 19, 1994) (same).

In the Howard Class Complaint, the Class states that it is seeking certification of a Class under Rule 23(b), and the Complaint does not specifically delineate Rule (b)(2) or (b)(3).² See Janet Howard et al. v. Carlos Gutierrez, Secretary, U.S. Department of Commerce (U.S. District Court, District of Columbia, No. 05-1968) (formal complaint) at p. 51 ¶ G. If the Federal District Court certifies the Howard Class under Rule 23(b)(3), Complainant may be able to opt out of the class complaint and waive any relief obtained in the Howard Class Complaint in order to pursue individual relief with this administrative complaint. Or, if the Federal District Court decides to certify the Howard Class under Rule 23(b)(2), then all individuals deemed members of the Howard Class Complaint would not have the right to opt-out, and their rights to pursue individual

¹ I agree with the Agency and note that outright dismissal of related administrative complaints is inappropriate where the District Court has not acted on the request for certification. See Hannigan v. U.S. Postal Serv., EEOC Appeal No. 01985004 (Nov. 18, 1999) (citing Phillips v. Dep't of the Navy, EEOC Appeal No. 01966913 (Sept. 4, 1997) and concluding that dismissal of underlying administrative complaint is improper when the District Court had not certified matter as a class complaint).

² Pursuant to Federal Rule of Civil Procedure Rule 23, parties to a class action may have the right to "opt-out" of the class action and pursue their own cause of action. See FED. R. CIV. P. 23(c)(2). Courts have noted that the opt-out provision applies to class actions maintained under FED. R. CIV. P. 23(b)(3), but not under FED. R. CIV. P. 23(b)(2). See Jefferson v. Ingersoll Intern. Inc., 195 F.3d 894, 896 (7th Cir. 1999).

administrative actions may be impacted by certification of a Class under this specific provision of the Federal Rules.

As evident from the above analysis, the rights of individuals such as Complainant in the above-captioned administrative matter will be impacted by whether or not the purported Class in Howard is certified as a Class, under which provision the Class is certified and ultimately, whether Complainant is a member of the Class if and as defined by the Federal District Court. Until a certification decision is rendered, the most prudent course of action would be to hold the above-captioned administrative complaint in abeyance until the Federal District Court has issued a decision regarding certification of the Howard Class Complaint, and all related appeals have been exhausted regarding any decision on certification.³

Although the Agency argues that the EEOC MD-110 does not authorize the Commission to hold in abeyance cases when class complaints are filed in Federal District Court, I note that the EEOC MD-110 is silent on this question, and it does not expressly preclude holding such cases in abeyance either. Moreover, the same policy considerations which apply when holding related administrative complaints in abeyance when there is an administrative class complaint would also apply with equal, if not greater force in the context of a Federal District Court class complaint. Given the complications with class certification under Rule 23 (b)(2), (b)(3), etc., as noted above, it is prudent to await a determination from the Federal District Court regarding the status of the Howard Class complaint. Furthermore, neither party will be prejudiced significantly regarding the record in the case, as a report of investigation has been compiled and statements and documents have been gathered from relevant management officials. Finally, I note that Complainant did not file an Opposition to the Notice of Proposed Dismissal, and I thus infer that she does not oppose holding this complaint (like her other administrative complaint) in abeyance.

Litigating this administrative complaint with a pending class complaint where the class agent is the Complainant opens up a host of potential problems. For example, if Complainant prevails in her class complaint, but not in this administrative complaint, then it would not be inconceivable for the Agency to then argue that principles of collateral estoppel or res judicata preclude individual relief on this particular aspect of her claim because it was adjudicated in an administrative forum. If the Federal Court rejected this argument, then the Agency would have to defend the same claim a second time before a second fact-finder. Such a result is contrary to principles of judicial economy. Moreover, principles of judicial economy would be eviscerated by the simultaneous litigation of a class complaint in the Federal District Court and numerous administrative complaints in the administrative process. Complainant would be prejudiced by having to focus on litigation in two different forums, with their respective deadlines and other pressures associated with litigating complex claims of discrimination. The Agency, with a staff of attorneys and with the assistance of the U.S. attorneys' office, is in a much better position to litigate

³ Finally, I note that there are several other administrative EEO complaints that are impacted by the Howard class complaint, and a similar Order is being issued in each of the respective cases. Judicial economy and consistency in the processing of these administrative complaints further supports the application of a uniform approach (dismissal of hearing requests and holding the administrative complaints in abeyance) with respect to all administrative complaints impacted by the Howard class Complaint).

claims simultaneously, and continued litigation of this claim is simply not prudent notwithstanding the delay that would result from waiting for a determination from the Federal District Court.

Accordingly, I **ORDER** that the hearings request in this case be **DISMISSED WITHOUT PREJUDICE** and **REMANDED** to the Agency to hold this matter in abeyance for the reasons set forth in this Order.⁴ Both parties shall monitor the course of the Howard Class Complaint, and either party may advise the Supervisory Administrative Judge of the Washington Field Office by letter or motion of its outcome and a proposed course of action for this administrative complaint based on relevant rulings by the Federal District Court in the Howard Class Complaint.

It is so **Ordered**.



Joel A. Kravetz
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⁴ To ensure clarity for all parties, I note that dismissal without prejudice does not preclude a hearing at some point in the future. If and as appropriate, a hearings request may be re-initiated by Complainant after the outcome of the Howard class complaint becomes known.

CERTIFICATE OF SERVICE

or 26/06

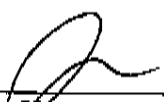
For timeliness purposes, it shall be presumed that the parties received the foregoing **ORDER** and any attachments within five (5) calendar days after the date they were sent *via* first class mail, or the same day if sent via facsimile or electronic mail. I certify that on **April 25, 2006**, the foregoing **ORDER** and any attachments were sent *via* facsimile to the following:

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Joel A. Kravetz
Administrative Judge