

## The D.C. Circuit Gives Agencies the Specifics About Informal Counseling

In a recent decision by the United States Court of Appeals for the D.C. Circuit, the court vacated a previous decision dismissing a class action discrimination case against the Federal Reserve Board for failure to exhaust administrative remedies. At issue was whether the individual complainants offered sufficient specific instances of discrimination during group counseling sessions or participated in the informal process “in good faith” thereby exhausting the administrative process before proceeding to Federal District court.

In *Artis v. Bernanke*, No. 09-5121 (D.C. Cir. Jan. 11, 2011), a group of secretaries alleged systematic discrimination on account of their race over several years. In a previous class action brought by many of these same secretaries, the D.C. Circuit affirmed the district court’s dismissal of their case for failure to exhaust administrative remedies. The issue in this initial case was that the secretaries claimed agency-wide discrimination even though all worked in the same division.

Thus, their claim was not specific enough. While the agency’s motion to dismiss the case was pending, *Artis* and other agency-wide secretaries initiated new counseling for their discrimination claims.

During group counseling sessions by the agency’s EEO counselor, all appellants submitted identical copies of the allegations at hand. The systematic discrimination included paying African-American secretaries less than their non-minority counterparts as well as withholding annual bonuses and workplace trainings, all of which were provided for non-minority secretaries.

While some women provided specific examples of discrimination over their careers, others only confirmed the general allegations. Due in part to this, the agency held that the appellants did not make a good faith effort to exhaust their administrative remedies “because they ‘declined to cooperate with the Board by failing to provide any meaningful information about specific instances of discrimination.’” However, the D.C. Circuit Court did not agree.

The Court held that the Federal Reserve Board’s demands for specific instances of discrimination to evidence the allegations in systematic, class action suits are extremely difficult to come by during the informal counseling stage of a complaint. Unlike in an individual federal employee’s claim, where allegations often stem from specific instances, system-wide allegations need statistical evidence often gathered during the discovery phase in the formal complaint process. In response to only certain appellant’s coming forward with specific instances while others did not, the court stated, “...this is irrelevant to the administrative exhaustion issue, since a single class agent may satisfy the counseling requirement as to the entire class.” *Artis v. Bernanke*, No. 09-5121 (D.C. Cir. Jan. 11, 2011) (citing *Blackmon-Malloy*, 575 F.3d at 704). Thus, the appellants satisfied their responsibilities during the informal counseling stage.

In what may be considered a “big win” for federal employees in class action discrimination

claims, the D.C. Circuit held that classes need not allege specific incidents of discrimination where the necessary information for doing so is in the Agency's possession, noting that "it would be perverse to dismiss a complaint for failure to provide adequate detail in counseling when all of the relevant data is in the employer's exclusive control." *Artis v. Bernanke*, No. 09-5121, at 8 (D.C. Cir. Jan. 11, 2011). The case will now move into the formal EEO phase.

What does this mean for federal personnel facing discrimination in the workplace? This means that Agencies cannot use the informal counseling stage as "a trap for unwary counselees" by placing the initial burden on the class to provide specific instances of discrimination where the Agency has sole control over such information. Instead, the informal process is designed to afford the agency and the employee the opportunity to investigate the complaint as well as opportunities for resolution and does not require a great deal of specificity with regard to details about the discrimination being complained of. With regard to class actions, the class need only offer evidence "adequate to create an inference that employment decisions were based on a discriminatory criterion under [Title VII]." *Artis v. Bernanke*, No. 09-5121, at 8 (D.C. Cir. Jan. 11, 2011) (citing *Segar v. Smith*, 738 F.2d 1249, 1267 (D.C. Cir. 1984)). Thus, as in *Artis*, if your claim involves specific information that the Agency has access to, but you do not, then you do not need to provide such in order to have complied with the Agency's counseling policy.

However, where you do have access to specific information regarding your claims, you are required to provide that information to the counselor for consideration. The bottom line is that you have to provide all of the information that you have regarding your claim, but if you need information from the Agency in order to prove your claim and you do not have access to that information, then you do not have an obligation to provide that information to the counselor in order to have complied with the Agency's counseling policy. That being said, it is always important to document everything you believe might be harassment or discrimination because it could be necessary to substantiate your claims at a later date.

If you are a member of a protected class among many who feel they are being discriminated in the workplace, each member of the class action complaint may not be required to provide specific instances of the discrimination, especially if the only way to prove the allegations is to acquire evidence from the agency. This is especially true in instances in which protected classes received less pay and benefits. As a note of caution, do not necessarily rely on the latest office gossip as to "who earns what" when considering a claim. As always, if you feel that you and many of your fellow employees are facing discrimination and are considering a class action claim, it may be fruitful to speak with an experienced attorney to help ensure your claims are not dismissed due to technicalities.

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