

On March 22, 2024, Class Agents filed a Motion to Remove Matthew Fogg as Class Agent, asserting that Mr. Fogg was no longer fairly and adequately protecting the interests of the class.⁴ Class Agents further argued that, despite Mr. Fogg's filing in federal court, the Commission retained jurisdiction over the Class's claims in the administrative process.

On April 9, 2024, the Agency filed its brief contending that Mr. Fogg's civil suit in district court deprived the Commission of jurisdiction and that the case should be administratively dismissed. The same day, Mr. Fogg filed a Motion to Strike Motion to Remove Matthew Fogg as Class Agent Due to Lack of Jurisdiction and Unethical Practices by Class Representatives' Counsel.⁵

On May 13, 2024, SAJ Alexander issued an Order granting Class Agents' Motion to Remove Matthew Fogg as a Class Agent and denying Mr. Fogg's Motion to Strike same. The Order further found that the Commission retained jurisdiction over the Class Claims because Mr. Fogg's civil action in federal court does not address "the same matter" and therefore is not a basis for dismissal of the administrative class complaint.

On May 24, 2024, SAJ Alexander issued an Order Regarding Fairness Adjudication informing the Parties that a Fairness Hearing would not be rescheduled and that the determination as to the fairness, adequacy, and reasonableness of the proposed Settlement Agreement would be based on the Parties' and objectors' written submissions. On June 13, 2024, SAJ Alexander issued an Order Granting Final Approval of Settlement Agreement and providing the required Notice of

⁴ On April 16, 2024, Class Agents filed a Reply in Support of Motion to Remove Matthew Fogg as Class Agent and on April 30, 2024, Class Agents filed an unopposed Motion for Leave to File Surreply in Support of Motion to Remove Matthew Fogg as Class Agent with accompanying Sur-Surreply.

⁵ On April 26, 2024, Mr. Fogg filed a Motion for Leave to File Surreply and Surreply further supporting his arguments.

More specifically, Mr. Fogg does not seek to appeal: (1) a decision accepting or dismissing all or part of a class complaint; (2) an agency's final action; (3) a final decision on a claim for individual relief under a class complaint; or (4) or a final decision on a petition pursuant to § 1614.204(g)(4). Indeed, because Mr. Fogg was removed as a Class Agent effective May 13, 2024, he is foreclosed from appealing under virtually all of the bases listed under § 1614.204(g)(4). *See Moehle v. Dep't of Transportation*, EEOC Appeal No. 0120080707 ("Because the record reveals that Complainant is not the individual identified as the class agent . . . we dismiss Complainant's appeal."). While the final ground for appeal is available to class members, like Mr. Fogg, he does not appeal under this basis and it is irrelevant to his claims on appeal.

Mr. Fogg's appeal should be further dismissed in its entirety, as he concedes it is an interlocutory appeal, which is impermissible. *See Fogg Appeal of Decision Retaining Jurisdiction* at p. 12- 13 ("For the reasons detailed above, Matthew Fogg respectfully requests that the Office of Federal Operations grant this interlocutory emergency appeal."). It is well-settled that "The Commission's regulations simply do not provide for interlocutory appeals from AJ's rulings on motions during the hearing process, and such appeals must be dismissed." *Complainant v. U.S. Postal Service*, EEOC Appeal No. 0720130038 (Feb. 6, 2015) (declining to hear an interlocutory appeal of an AJ's Order denying a motion to divide a class) (citing *McGowan-Butler v. Dep't of Justice*, EEOC Appeal No. 0120114035 (Jan. 25, 2013) (Commission regulations do not provide for interlocutory appeals of AJ ruling during the hearing process); *Complainant v. John F. Kelly*, EEOC Appeal No. 0120172334 (Aug. 3, 2017) ("[C]omplainant's purported appeal is premature. . . . The Commission considers final decisions and does not consider interlocutory appeals"); *Taylor v. Social Security Administration*, EEOC Appeal No. 07A50060 (May 5, 2006) (an AJ's rulings on motions associated with class

complainant] did not receive a fair and impartial hearing.” See *Burl M. v. Dep’t of the Navy*, EEOC Appeal No. 2022003038 (Jan. 26, 2023) (citing *Smith v. Dep’t of the Army*, EEOC Appeal No. 01880866 (May 11, 1988) (citing *Roberts v. Morton*, 549 F.2d 158 (10th Cir.), cert. denied; *Roberts v. Andrus*, 434 U.S. 834 (1977)). Mr. Fogg has made no such showing here.

C. OFO Should Deny Mr. Fogg’s Interlocutory Appeal on Equitable Grounds.

OFO has affirmed the Commission’s “inherent power to protect its administrative process from abuse by either party.” *Complainant v. Eric K. Shinseki*, EEOC Appeal No. 0720070045, at *7 (Sept. 25, 2009). Accordingly, OFO has acted within its “power to protect the integrity of the EEO process.” *Id.* Mr. Fogg’s request that OFO reopen the underlying matter and force the Parties to continue litigating a 30-year-old class complaint that was resolved through a Settlement Agreement that the Commission approved on June 13, 2024, is unjustified. To grant Mr. Fogg’s requested relief would effectively undermine the central purpose of Title VII in this class action litigation, to make class members whole for injuries allegedly suffered. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975). For these reasons, OFO is well within its equitable powers to deny Mr. Fogg’s relief in its entirety.

II. CONCLUSION

For the reasons and legal support set forth above, the Agency requests that OFO dismiss Mr. Fogg’s appeal in its entirety.

Dated July 12, 2024

Respectfully submitted,

LISA M. DICKINSON
General Counsel

/s/ Susan Amundson
Susan Amundson
Associate General Counsel

CERTIFICATE OF SERVICE

By my signature below, I hereby certify that a true and correct copy of the Agency's Statement In Opposition of the Interlocutory Appeal Filed by Matthew Fogg was electronically filed before the Office of Federal Operations via FedSEP and was served via electronic mail on this 12th day of July 2024 and subsequently via first class mail upon the following:

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/s/ Susan Amundson
Susan Amundson