

**IN THE  
U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
WASHINGTON FIELD OFFICE**

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MATTHEW FOGG, et al.	)	
Class Agents	)	EEOC No. 570-2016-00501X
	)	
v.	)	
	)	
MERRICK GARLAND,	)	
U.S. Attorney General,	)	
Department of Justice,	)	
	)	
Agency.	)	

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Date: May 17, 2024

**MATTHEW FOGG’S MOTION FOR SANCTIONS AGAINST CLASS  
REPRESENTATIVES’ COUNSEL SANFORD HEISLER, SHARP, LLP**

COMES NOW Matthew Fogg (“Fogg”, “Class Spokesperson”), pro se, making a special appearance for the purposes of this motion only, and respectfully submits this Motion for Sanctions against Class Representatives’ Counsel Sanford Heisler, Sharp, LLP (“Class Law Firm” and CLF”) pursuant to the EEOC's inherent authority to control proceedings before it. This motion is grounded in the observed misconduct of CLF, which has severely impacted the integrity of the proceedings and prejudiced Mr. Fogg’s position in this case.

**Legal Standard for Imposing Sanctions**

The legal standard for imposing sanctions in federal EEOC cases includes demonstrating that the party’s conduct has been so egregious that it has significantly interfered with the justice process. Additionally, under the EEOC's inherent authority, sanctions may be imposed for conduct which abuses the adjudicatory process. EEOC Regulations at 29 C.F.R. § 1614.109(f)(3) set forth sanctions available to an Administrative Judge when either party fails,

without good cause, to comply with EEOC regulations or to respond fully and in a timely fashion to an order of an Administrative Judge.

Sanctions are also available to address improper conduct. All participants in the EEOC hearing process have a duty to maintain the decorum required for a fair and orderly proceeding. “Any person who engages in improper behavior or contumacious conduct at any time subsequent to the docketing of a complaint for a hearing is subject to sanction.” *See EEOC Management Directive-110, Ch. 7(V)*. A person's conduct is contumacious when it is “willfully stubborn and disobedient,” and it may include any unprofessional or disrespectful behavior. *See id.* A finding of contumacious conduct or disruptive behavior may be based on a series of disruptive incidents, a pattern of acts, or a single sufficiently obstructive episode. *See id.*; *see also Black's Law Dictionary* (6th ed. 1990). Specifically, the Administrative Judge may:

- (i) draw an adverse inference that the requested information, or the testimony of the requested witnesses, would have reflected unfavorably on the party refusing to provide the requested information;
- (ii) consider the matters to which the requested information or testimony pertains to be established in favor of the opposing party;
- (iii) exclude other evidence offered by the party failing to produce the requested information or witness;
- (iv) issue a decision fully or partially in favor of the opposing party; or
- (v) take such other actions as appropriate. 29 C.F.R. § 1614.109(f)(3).

Sanctions may be issued in order to effectuate the Commission’s inherent power to protect its administrative process from abuse by either party. *See, e.g., DaCosta v. Dep’t of*

*Education*, EEOC Appeal No. 01995992 (Feb. 25, 2000); *Card v. United States Postal Serv.*, EEOC Request No. 05950568 (Oct. 25, 1996); *Buren v. United States Postal Serv.*, EEOC Request No. 05850299 (Nov. 18, 1988). In *DaCosta*, the Commission stated that it must ensure “that agencies, as well as complainants, abide by its regulations. The procedures contained in the Commission’s Regulations are no more or no less than the necessary means to eliminate unlawful employment discrimination in Federal employment.” *DaCosta*, EEOC Appeal No. 01995992 (Feb. 25, 2000).

Sanctions must be tailored in each case to appropriately address the underlying conduct of the party being sanctioned. *See Hale v. Dep’t of Justice*, EEOC Appeal No. 01A03341 (Dec. 8, 2000); *Chere S. v. Gen. Serv. Admin.*, EEOC Appeal No. 0720180012 (Nov. 30, 2018). Factors pertinent to "tailoring" a sanction, or determining whether a sanction is even warranted, include:

- (1) the extent and nature of the noncompliance, including the justification presented by the noncomplying party;
- (2) the prejudicial effect of the non-compliance on the opposing party;
- (3) the consequences resulting from the delay in justice, if any;
- (4) the number of times the party has engaged in such conduct; and
- (5) the effect on the integrity of the EEO process as a whole. *Id.*

Sanctions may be used to deter the non-complying party from similar conduct in the future, as well as to equitably remedy the opposing party. *Id.* A showing that the non-complying

party acted in bad faith is not required for the imposition of sanctions. *See Cornell v. Dep't of Veterans Affairs*, EEOC Appeal No. 01974476 (Nov. 24, 1998).

### **Application of Sanction Standards in This Case**

In this unusual situation where Mr. Fogg seeks sanctions against his own legal counsel rather than the opposing party, the standards for sanctions remain applicable. CLF's actions — including unilaterally entering into unauthorized settlement agreements, failing to disclose key documents, and misrepresenting Mr. Fogg's positions and interests — directly contravene the principles of fair representation and undermine the judicial process due to CLF's improper behavior or contumacious conduct. These actions warrant sanctions as they have subverted Mr. Fogg's legal rights and the proper functioning of the justice system.

**Unauthorized Settlement Agreements and Misrepresentation:** CLF entered into settlement agreements with the Justice Department without Mr. Fogg's approval and failed to accurately represent his and, as the class spokesperson, the class agents', along with all class members, interests, both to the EEOC and to the Agency during settlement negotiations and in documents submitted to the EEOC administrative judge. Such actions are misleading and disrupt the EEOC's ability to judge based on true merits, and thus constitutes improper behavior and contumacious conduct.

**Failure to Disclose and Withholding of Documents:** CLF withheld crucial settlement documents from Mr. Fogg, including the full settlement agreement attached in their recent surreply motion, impairing his ability to make informed decisions and participate meaningfully in his case. This non-disclosure is a severe breach that impacts the transparency and fairness required in legal proceedings.

In addition, CLF appears to argue against itself, when it averred that Fogg intentionally left out Class claims concerning racial discrimination in promotions and hiring by the Justice Department from his Class Action Complaint filed in Federal Court for the District of Columbia the day prior to the Fairness Hearing (See Surreply, pp. 1-2 (“Fogg’s court filing excludes the other Class Agents’ claims and whole categories of claims, including claims regarding hiring and transfers. Given this posture, the Agency is remiss in attempting to erase the claims of the remaining Class Agents without any careful consideration of their due process rights, Supreme Court precedent governing the limited effect of a putative class action being filed, and the meaning of “final agency action.” The rights of the remaining Class Agents, and the Class as a whole, are at stake. Those rights cannot be erased based on the misguided whims of a single Class Agent.”)), when CLF did the same thing via the Memorandum of Understanding with DOJ which clearly exempted those claims and thus class interests from being fully resolved as set forth in the Settlement Agreement (CLF’s surreply, Ex. B, p. 2 (“The class shall release claims against the Agency alleging race discrimination in USMS policies and practices regarding promotions under the Merit Promotion Process, Management Directed Reassignments, and Headquarters Divisions assignments, and hiring and recruitment of Deputy U.S. Marshal positions from January 23, 1994 to the date on which the Settlement Agreement is fully executed.”))).

Additionally, CLF's actions seem contradictory, as highlighted when they criticized Fogg for allegedly omitting Class claims related to racial discrimination in promotions and hiring by the Justice Department from his Federal Court Class Action Complaint filed the day before the Fairness Hearing. CLF argued that this omission jeopardized the rights of the remaining Class Agents and the entire Class, accusing Fogg of undermining their due process rights (See

Surreply, pp. 1-2). Ironically, CLF had previously excluded these very claims in a Memorandum of Understanding with the DOJ, effectively shielding these issues from being fully addressed in the Settlement Agreement (CLF's surreply, Ex. B, p. 2).

While Fogg has indicated that these claims on promotion and hiring discrimination can be amended into his Class Action Complaint in Federal Court at a later date, CLF attempted to permanently waive any class rights to address these discriminations through an unauthorized proposed settlement agreement that could have been prematurely sanctioned by the EEOC Administrative Judge during or after the Fairness Hearing. Therefore, CLF's failure to disclose their own exclusion of these claims in the settlement discussions, while simultaneously arguing that Fogg's similar exclusions should lead to continued EEOC jurisdiction over the class action, places them in an untenable position of hypocrisy and justifies Fogg's carrying of the class complaint into Federal court in order to seek justice on those excluded claims and for a reasonable settlement agreement. This duplicity by CLF underscores the necessity for sanctions to address their contemptuous actions, as they have effectively cried wolf once too often, and now must face the consequences of their actions in safeguarding the rights and interests of the class they represent.

### **Requested Sanctions**

Given the severity of CLF's misconduct, Mr. Fogg requests the following sanctions:

Exclusion of Evidence: Exclude any evidence which CLF failed to disclose properly. This includes alleged statements made during and after the telephonic conference by the class agents that Matthew Fogg was intentionally excluded from, since their authenticity (via CLF's motions and prefabricated declarations composed by CLF that were not signed with wet signatures by each class agent (see CLF's Motion to Exclude Fogg and CLF Surreply, Exhibit

A)) is highly questionable under the circumstances, whereby CLF are extremely biased against Fogg due to his current Bar Complaint he filed against CLF prior to that meeting, and thus cannot be relied upon to ascertain the truth of the matter.

Monetary Penalties: Impose monetary sanctions to cover the costs incurred by Mr. Fogg due to these procedural violations, including the attorney fees that CLF would have expounded Composing Fogg's Opposition and Motion to Strike for lack of Jurisdiction, of approximately 4,000 dollars, and any additional costs that arose from the need to address these issues.

Warning and Reprimand: Issue a formal reprimand to CLF for their handling of this case.

Referral for Disciplinary Action: Refer the matter to the appropriate bar association for further investigation and possible disciplinary action against CLF.

Declaration of Jurisdiction: Issue a Finding that EEOC no longer has jurisdiction over the class action complaint and the District Court for the D.C. has proper jurisdiction.

### **Conclusion**

The actions of the Class Law Firm have not only violated the specific rules of procedure but have also generally abused the judicial process. It is within the court's discretion and authority to sanction such behavior to preserve the integrity of the legal process and ensure fairness in these proceedings and to ensure unfounded allegations and procedural missteps do not derail the class's pursuit of justice.

WHEREFORE, for the foregoing reasons, this Court should grant Matthew Fogg's MOTION FOR SANCTIONS AGAINST CLASS REPRESENTATIVES' COUNSEL SANFORD HEISLER, SHARP, LLP. A sample order is attached.

Respectfully Submitted on this 17th day of May, 2024,

/s/ /Matthew Fogg/ \_\_\_\_\_  
Dr. Matthew Fogg  
Named Class Agent  
Class Agent Spokesperson  
Chief Deputy U.S. Marshal, Ret.



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**ORDER**

Upon consideration of the motion filed by Matthew Fogg, requesting sanctions against the Class Representatives’ Counsel SANFORD HEISLER, SHARP, LLP (Class Law Firm (“CLF”)) for misconduct in the handling of this case, and upon review of the arguments and evidence presented, the Commission finds as follows:

The Commission hereby **ORDERS** the exclusion of any evidence which CLF failed to properly disclose. This specifically includes any alleged statements made during and after the telephonic conference from which Matthew Fogg was intentionally excluded. The authenticity of such statements, as presented through motions and prefabricated declarations composed by CLF, which lack wet signatures from each class agent, is highly questionable. The bias exhibited by CLF against Mr. Fogg, particularly noted due to his current Bar Complaint filed against CLF prior to that meeting, undermines the reliability of such evidence.

The Commission further **ORDERS** CLF to pay monetary sanctions to cover the costs incurred by Mr. Fogg due to these procedural violations. This includes attorney fees amounting to approximately \$4,000, which were expended in composing Mr. Fogg’s Opposition and Motion to Strike for lack of Jurisdiction, along with any additional costs that arose from addressing these issues.

CLF is hereby formally reprimanded for their handling of this case. This reprimand will be recorded and considered in any future dealings with the Commission.

The Commission refers CLF to the appropriate bar association for further investigation and possible disciplinary action. This referral is based on the patterns of behavior by CLF that appear to subvert the fairness and integrity of the judicial process.

The Commission **DECLARES** that it no longer holds jurisdiction over the class action complaint initiated by Matthew Fogg, et al., against the Department of Justice, as the matter has been rightfully moved to the federal court system due to the legal and procedural issues identified.

**SO ORDERED.**

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Date

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SHARON ALEXANDER  
EEOC Administrative Judge

## CERTIFICATION

I certify, under penalty of perjury, on 05/17/2024, that the statements in the foregoing motion are true to the best of my knowledge, information and belief.

## CERTIFICATE OF SERVICE

I certify, under penalty of perjury, on 05/17/2024, that I served a copy of the foregoing Notice on the EEOC by emailing a copy of the same to the Supervisory Administrative Judge Sharon Alexander, at [sharon.alexander@eoc.gov](mailto:sharon.alexander@eoc.gov) and [FoggClassAction@eoc.gov](mailto:FoggClassAction@eoc.gov), and emailed an electronic copy of the same to Agency Representatives at the following email addresses:

Susan Amundson: [Susan.Amundson2@usdoj.gov](mailto:Susan.Amundson2@usdoj.gov)

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and emailed an electronic copy of the same to the Class Representatives at the following email addresses:

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/s/ /Matthew Fogg/

Dr. Matthew Fogg

Date: 05/17/2024