



Homeland  
Security

_____	)	
Roberta Gabaldon and Courtney Schilling,	)	
	)	
<i>Class Agents</i>	)	
	)	
v.	)	Agency Case No. HS-CBP-00258-2017
	)	EEOC Case No. 450-2017-00086X
Alejandro N. Mayorkas, Secretary,	)	
U.S. Department of Homeland Security,	)	
	)	
<i>Agency</i>	)	
_____	)	

## **FINAL ORDER**

Pursuant to 29 C.F.R. § 1614.110(a), the U.S. Department of Homeland Security (Department), Office for Civil Rights and Civil Liberties (CRCL) hereby takes final action in the above-captioned complaint by issuing a Final Order.<sup>1</sup> Based upon a review of the entire evidentiary record, CRCL does **not** fully implement the Equal Employment Opportunity Commission (EEOC) Administrative Judge's (AJ) decision certifying this class complaint. Pursuant to 29 C.F.R. § 1614.110(a), a notice is attached to this Decision informing Complainant of the right to appeal to the EEOC or to file a civil action in Federal District Court. Also, a copy of EEOC Form 573 is attached for Complainant's submission to the EEOC's Office of Federal Operations, should Complainant decide to file an appeal.

## **PROCEDURAL HISTORY**

1. On October 14, 2016, Complainant-1 filed an individual and separate class complaint.
2. On November 14, 2016, U.S. Customs and Border Protection (CBP) forwarded the class complaint to the EEOC for a determination on class certification, and held the processing

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<sup>1</sup> Pursuant to the Homeland Security Act of 2002, *as amended*, 6 U.S.C. § 345, the Officer for Civil Rights and Civil Liberties (CRCL) shall ensure that the protection of civil rights and civil liberties is appropriately incorporated into Departmental programs and activities. On October 26, 2012, the Secretary for the Department issued Delegation Number 19003, which delegated to CRCL the authority to render final decisions on behalf of the Secretary in EEO complaints, pursuant to 29 C.F.R. § 1614.110, or administratively, when that regulation is not applicable.

of Complainant-1's individual complaint in abeyance pending a class certification decision from the EEOC.

3. By Decision dated April 21, 2023, an Administrative Judge (AJ) from EEOC's New Orleans Field Office granted the Class Agents' Motion for Class Certification and certified the class as follows:

All women who were employed as U.S. Customs and Border Protection ("CBP") Officers and Agriculture Specialists and were placed on temporary light duty pursuant to CBP's Temporary Light Duty Policy due to their pregnancy, at any time after July 18, 2016.

4. On April 21, 2023, CRCL received the AJ's decision.
5. On May 18, 2023, the AJ issued an Order granting the Agency's Motion For Stay of Class Membership Notification Requirements.

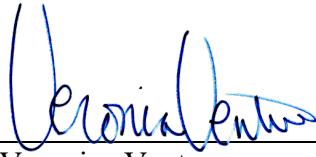
### **CLAIM AT ISSUE**

Whether CBP discriminated against employees on the basis of their sex (female/pregnancy) in violation of the Pregnancy Discrimination Act (PDA) of 1978, which amended Section 701 of Title VII of the Civil Rights Act of 1964, when they were removed from their work assignments and reassigned into other work assignments pursuant to the Agency's policies and/or practices because they were pregnant, without assessing whether they could continue to perform the essential functions of their positions of record with or without an accommodation and without according them the process and protections afforded to employees with comparable short-term disabilities.

### **ANALYSIS AND CONCLUSION**

Upon a complete review of the entire evidentiary record, it is the decision of CRCL to **not** fully implement the AJ's decision on the grounds that it is contrary to law, is based erroneous interpretations of material fact, and not supported by substantial evidence. Specifically, this Office finds the AJ procedurally erred in certifying the class in that the class complaint failed to identify the specific management policy or practice adversely affecting the class, pursuant to 29 C.F.R. § 1614.204(c). Additionally, this Office finds that the AJ erred in finding that the requirements of commonality, typicality, and numerosity were met, pursuant to 29 C.F.R. § 1614.204(a)(2), in that the record lacks a sufficient evidentiary basis from which to reasonably infer the operation of an overriding policy or practice of discrimination affecting all class members in the same manner, or that common questions of fact exist among the class; that the claims of the class agents are typical of the class; and/or that the number of persons possibly affected by the Agency's allegedly discriminatory practice and who may assert claims is so numerous as to make consolidated or separate complaints impractical. Finally, this Office finds that scope of the class as defined by the AJ is overly broad and vaguely defined given the allegations of underlying class complaint. Additional arguments appealing the decision may be raised in the appellate brief.

This is CRCL's final action in this matter and serves as notice of appeal to EEOC.

A handwritten signature in blue ink, appearing to read "Veronica Venture", is written over a horizontal line.

Veronica Venture

Deputy Officer, Office for Civil Rights and Civil Liberties  
Director for EEO & Diversity  
Department of Homeland Security

May 30, 2023

Date

CKW

## **NOTICE OF APPEAL RIGHTS**

You have the right to appeal to the Equal Employment Opportunity Commission (EEOC) or to file a civil action in an appropriate United States District Court.

All time periods are given in calendar days. If a time period expires on a Saturday, Sunday or Federal holiday, you may file on the next business day. If an attorney represents you, the time periods begin to run from the date that your attorney receives this decision.

### **FILING AN APPEAL WITH EEOC**

You have the right to appeal this decision to EEOC within 30 days of the day you receive this final decision. You have the right to submit an optional brief or statement within 30 days of the date you file the appeal. File your appeal, and any subsequent supporting statement or brief, by accessing EEOC's public portal, at [www.publicportal.eeoc.gov](http://www.publicportal.eeoc.gov). When you file your appeal through the EEOC's public portal, please be sure to select the appropriate DHS Component.

If you are unable to access the public portal, you may send the appeal by mail addressed to:

**U.S. Equal Employment Opportunity Commission  
Office of Federal Operations  
P.O. Box 77960  
Washington, DC 20013**

Or by personal delivery to:

**U.S. Equal Employment Opportunity Commission  
Office of Federal Operations  
131 M Street, NE  
Suite 5SW12G  
Washington, DC 20507**

Or by facsimile to (202) 663-7022.

At the same time you file an appeal and any subsequent supporting statement or brief with EEOC, you must also send a copy of your appeal or brief to:

**Associate Chief Counsel (Administration)  
Office of the Chief Counsel  
U.S. Customs and Border Protection  
Ronald Reagan Building, Room 4.4B  
1300 Pennsylvania Avenue, NW  
Washington, DC 20229**

And to:

**Executive Director, Privacy and Diversity Office  
U.S. Customs and Border Protection  
Ronald Reagan Building, Room 3.3D**

**1300 Pennsylvania Avenue, NW  
Washington, DC 20229**

And to:

**Office for Civil Rights and Civil Liberties  
Department of Homeland Security  
MS 0191  
2707 Martin Luther King Jr Ave SE  
Washington, DC 20528-0191  
[Crcl.eeo@hq.dhs.gov](mailto:Crcl.eeo@hq.dhs.gov)**

In your appeal to EEOC, you must state the date and method (for example, by certified mail or hand delivery) by which a copy of the appeal was sent to the Executive Director, Privacy and Diversity Office, U.S. Customs and Border Protection. You should use the attached EEOC Form 573, Notice of Appeal/Petition, to file your appeal. The form may also be found at [www.eeoc.gov/federal/directives/md-110\\_appendix\\_p.cfm](http://www.eeoc.gov/federal/directives/md-110_appendix_p.cfm). EEOC will dismiss your appeal if you do not file it within the time limits.

### **FILING A CIVIL ACTION**

You also have the right to file a civil action in an appropriate United States District Court within 90 days after you receive this final decision if you do not appeal to EEOC, or within 90 days after receipt of the EEOC's final decision on appeal. You may also file a civil action after 180 days from the date of filing an appeal with EEOC if there has been no final decision by EEOC.

If your claim is based on age discrimination, you should seek the advice of an attorney if you wish to file a civil action after expiration of the time limits noted above. The courts disagree about when a civil action must be filed and may permit an age discrimination complaint to be filed two years or more from the date of the alleged discrimination.

You must also comply with the following instructions:

- (1) You must name Alejandro N. Mayorkas, Secretary, Department of Homeland Security, as the defendant. Failure to provide his name and official title may result in dismissal of your case.
- (2) If you decide to file a civil action and if you do not have, or cannot afford, the services of an attorney, you may request that the Court appoint an attorney to represent you and that the Court permit you to file the action without payment of fees, costs, or other security. The grant or denial of the request is within the sole discretion of the Court. Filing a request for an attorney does not extend the time in which to file a civil action. Both the request and the civil action must be filed within 90 days of the date you receive the agency or EEOC final decision.

**Please note that due to the current pandemic and national health emergency, some District Courts may have changed their procedures for how to file a civil action. Please look at the specific instructions provided by the District Court in the jurisdiction in which you live for how to file a civil action.**

## NOTICE OF APPEAL/PETITION - COMPLAINANT

TO THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
OFFICE OF FEDERAL OPERATIONS  
P.O. Box 77960  
Washington, DC 20013

### Complainant Information: (Please Print or Type)

Complainant's name (Last, First, M.I.):	
Home/mailling address:	
City, State, ZIP Code:	
Daytime Telephone # (with area code):	
E-mail address (if any):	

### Attorney/Representative Information (if any):

Attorney name:	
Non-Attorney Representative name:	
Address:	
City, State, ZIP Code:	
Telephone number (if applicable):	
E-mail address (if any):	

### General Information:

Name of the agency being charged with discrimination:	
Identify the Agency's complaint number:	
Location of the duty station or local facility in which the complaint arose:	
Has a <b>final action</b> been taken by the agency, an Arbitrator, FLRA, or MSPB on this complaint?	<input type="checkbox"/> Yes; Date Received _____ (Remember to attach a copy) <input type="checkbox"/> No <input type="checkbox"/> This appeal alleges a breach of settlement agreement
Has a complaint been filed on this same matter with the Commission, <u>another</u> agency, or through any <u>other</u> administrative or collective bargaining procedures?	<input type="checkbox"/> No <input type="checkbox"/> Yes (Indicate the agency or procedure, complaint/docket number, and attach a copy, if appropriate)
Has a civil action (lawsuit) been filed in connection with this complaint?	<input type="checkbox"/> No <input type="checkbox"/> Yes ( <b>Attach a copy of the civil action filed</b> )

**NOTICE:** Please **attach a copy of the final decision or order** from which you are appealing. If a hearing was requested, please attach a copy of the agency's final order and a copy of the Commission Administrative Judge's decision. Any comments or brief in support of this appeal **MUST** be filed with the Commission **and** with the agency **within 30 days** of the date this appeal is filed. The date the appeal is filed is the date on which it is postmarked, hand delivered, or faxed to the Commission at the address above.

Please specify any reasonable accommodations you will require to participate in the appeal process.

Signature of complainant or complainant's representative:	
Date:	
Method of Service on Agency:	
Date of Service:	

## PRIVACY ACT STATEMENT

(This form is covered by the Privacy Act of 1974. Public Law 93-597. Authority for requesting the personal data and the use thereof are given below.)

1. **FORM NUMBER/TITLE/DATE:** EEOC Form 573, Notice of Appeal/Petition, February 2009
2. **AUTHORITY:** 42 U.S.C. § 2000e-16
3. **PRINCIPAL PURPOSE:** The purpose of this questionnaire is to solicit information to enable the Commission to properly and efficiently adjudicate appeals filed by federal employees, former federal employees, and applicants for federal employment.
4. **ROUTINE USES:** Information provided on this form may be disclosed to: (a) appropriate federal, state, or local agencies when relevant to civil, criminal, or regulatory investigations or proceedings; (b) a Congressional office in response to an inquiry from that office at your request; and (c) a bar association or disciplinary board investigating complaints against attorneys representing parties before the Commission. Decisions of the Commission are final administrative decisions, and, as such, are available to the public under the provisions of the Freedom of Information Act. Some information may also be used in depersonalized form as a database for statistical purposes.
5. **WHETHER DISCLOSURE IS MANDATORY OR VOLUNTARY AND EFFECT ON INDIVIDUAL FOR NOT PROVIDING INFORMATION:** Since your appeal is a voluntary action, you are not required to provide any personal information in connection with it. However, failure to supply the Commission with the requested information could hinder timely processing of your case, or even result in the rejection or dismissal of your appeal.

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You may send your appeal to:

**The Equal Employment Opportunity Commission  
Office of Federal Operations  
P.O. Box 77960  
Washington, D.C. 20013**

**Fax it to (202) 663-7022 or submit it through the Commission's electronic submission portal.**

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## Electronically Appealing this Agency Decision, Associating an Attorney/Representative and Submitting Documentation Using the EEOC Public Portal

The decision you have just received may be appealed to the Equal Employment Opportunity Commission (EEOC). As an alternative to mailing in your appeal, you may now file it using EEOC's Public Portal.

### WARNING!

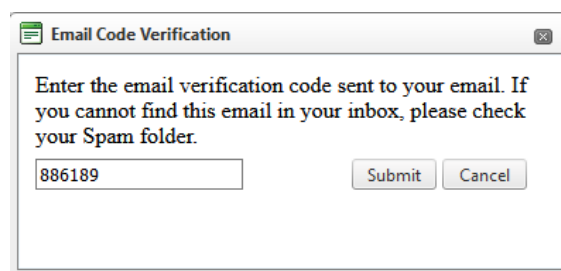
**Attorneys and non-legal representatives MUST NOT use the EEOC Public Portal to file appeals on behalf of their clients because the system will incorrectly list the representative as the complainant. Therefore, complainants MUST file appeals themselves through the EEOC Public Portal, regardless of whether they are being represented in their appeal.**

Here are the instructions for filing your appeal in the EEOC Public Portal:

1. The first step is registering for the Public Portal (if you are already registered in the Public Portal, you may skip to #5 below). Go to <https://publicportal.eeoc.gov/Portal/Login.aspx>, and click on the **Register** link on the upper, right-hand side of the page.



2. Read the EEOC Public Portal's Privacy Policy and click on the **OK** button.
3. Fill out the requested information, being sure to enter the information for the required fields designated by the red asterisk (\*). Please note that when you enter your Zip Code and press the **Tab** key, your City and State should auto-populate. Once you enter your email address, click the **Tab** key and then select **Validate**. The Portal will then send an email containing a verification code to the email address you entered. Go to that email account, open the email from "U.S. Equal Employment Opportunity Commission," copy or take note of the code, go back to the Create Account page, paste or enter the code in the box provided, and click **Submit**.



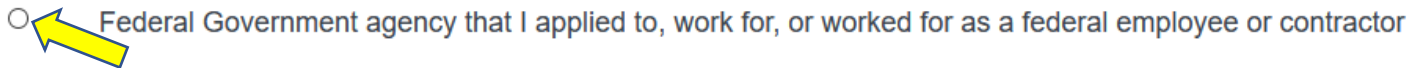
4. Enter at least one telephone number, enter a password twice (to confirm), select and provide the answer to two Security Questions, and click **Submit**. You will then be brought back to the Public Portal Home page.
5. Click on the **Filing with EEOC** icon.



Filing with EEOC



6. In the resulting page, click on the circle next to **Federal Government agency that I applied to, work for, or worked for as a federal employee or contractor**, and then click **Next**.



7. Read the information provided and click on any links of interest. When done, click **Next**.
8. In the resulting page, click on the circle next to **File a new appeal**. Then click **Next**.
9. Read the information on the next screen. Then click **Next**.
10. A **Confirmation** pop-up will appear reminding you that the EEOC Public Portal does not permit attorneys or representatives to file an appeal on behalf of a complainant. If you, as complainant, are filing the appeal, click **Yes**. If you are an attorney or representative, click **No** and instead have complainant file on their own behalf, naming you as their attorney or representative.
11. Read the information you will need to provide to the EEOC. Make sure that it is available so that you can answer the next questions. When you have gathered that information, click **Next**.
12. Review the **Information about you** page to ensure that it is correct. Upon confirming the information is accurate, click **Continue**.
13. If you **do not** have an attorney or representative, click on the circle for **No**, and click **Next** [**You may skip to #16 below**]. **IF YOU ARE REPRESENTED BY AN ATTORNEY OR REPRESENTATIVE**, click on the circle for **Yes**, and click **Next**.
14. Fill out the required information designated with a red asterisk (\*) (again, when you enter your attorney's/rep's Zip code and hit the **Tab** key, the City and State information will auto-populate), and when complete, click **Next**. The system will send a message to the email address you provided for your attorney/representative asking that they verify that they are representing you.

## Representative Information

(By providing this information you authorize EEOC to verify this person represents you.)

Is this person an attorney? \* ☒ Yes ☐ No

Prefix:	<input type="text"/>		
First Name: *	<input type="text" value="Amy"/>	Middle:	<input type="text"/>
Last Name: *	<input type="text" value="Attorney"/>	Suffix:	<input type="text" value="Esq."/>
Address(1): *	<input type="text" value="123 Lawyer Lane"/>	Address(2)	<input type="text"/>
Country: *	<input type="text" value="United States of America"/>	Zip Code:	<input type="text" value="20036"/>
City	<input type="text" value="WASHINGTON"/>	State:	<input type="text" value="District Of Columbia"/>
Phone Number:	<input type="text" value="(202) 555-8000"/>	(At least one phone number must be entered*)	
Cell Number:	<input type="text" value="e.g., 1234567890"/>	Email: *	<input type="text" value="ether42@netscapezs.com"/>

[Next](#)

[Back](#)

[Return Home](#)

15. In the resulting screen you can add another attorney/representative as necessary or edit the information of an existing attorney/representative. When complete, click **Next**.

16. On the **Agency Information** page, fill out the required information designated with a red asterisk (\*) (again, when you enter the agency facility's Zip code and click **Tab**, the City and State information will auto-populate). **When selecting the agency named in your complaint, be sure to select the appropriate component against which you brought your EEO complaint.** You can begin typing the agency/component and select it when it appears, or click on the magnifying glass icon and select the agency/component from the resulting list. The **Agency Complaint number** is the number assigned by the agency against which you filed the complaint – not the EEOC Hearing number. When complete, click **Next**.

## Agency Information

Agency named in your complaint:\*

ZZ FEDSEP TEST AGENCY X

Agency Complaint number:\*

EEO-1234

Insert

Location of duty station or local facility in which the complaint arose:\*

Address1

Address2

Country/Region\*

United States of America

Zip Code

20036

City\*

WASHINGTON

State

District Of Columbia

Next

Back

Return Home

17. In the second **Agency Information** page, answer the required information designated with a red asterisk (\*). If you requested a hearing before an EEOC Administrative Judge (whether/not a hearing was held), be sure to enter the Hearing Number assigned to your request. When complete, click **Submit Appeal**.
18. The EEOC Public Portal will send to the email address you entered into the Public Portal an initial letter acknowledging your appeal request and providing you with next steps and links to helpful resources.

## How to View Documents and Add Documents to Your Appeal

After electronically filing your appeal, you (and your attorney or representative if you have added them to your appeal) can then add documents that EEOC can use to determine whether the appeal is appropriate, and/or that helps support your appeal.

1. While still logged in, or after having again logged in to the Public Portal, click on the **My Cases** icon.



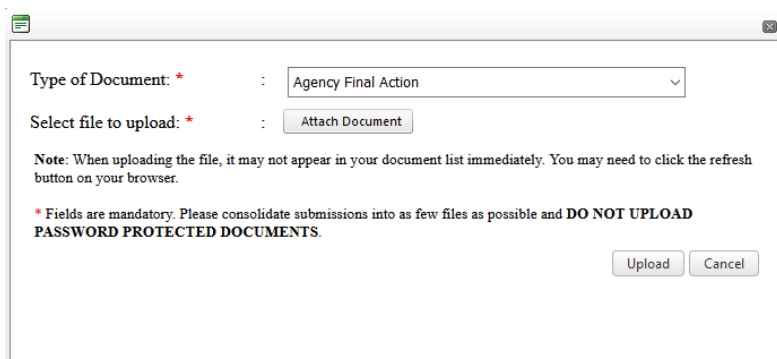
My Cases


2. Click on the link for the Appeal Number for which you are submitting documentation.

3. In the resulting **My Case** page, you can read the current status of your appeal, add or update attorneys/representatives, and, as directed by the information contained in the **My Documents** section, upload or review existing documentation.
4. To review existing documentation, click on the link for the particular file. Once you click **OK** acknowledging that it may take a while to download, you will be prompted to open the file in the appropriate program, usually Adobe Acrobat, or some other PDF reader. Once you click on your preferred program and click **OK**, the document will open for your review. If you wish, you can save the file to your computer. You can do this for any of the files listed in the **My Documents** section.
5. To add documentation to your appeal, e.g., the agency's final decision on your EEO complaint (**adding this document is strongly recommended**), supporting evidence, or (as permitted by EEOC's regulations) a statement or brief in support of your appeal), click on the **Upload** icon.

**Upload**

6. In the resulting window, select from the **Type of Document** drop-down what kind of document you are adding (e.g., "**Appeal**" if you wish to upload the EEOC Form 573 Notice of Appeal/Petition; "**Agency Final Action**" for the agency's decision on your EEO complaint), and then click on the **Attach Document** button. **DO NOT UPLOAD PASSWORD-PROTECTED DOCUMENTS.**

A screenshot of a web-based document upload window. The window has a title bar with a green icon on the left and a close button on the right. Inside, there is a form with two main sections. The first section is labeled "Type of Document: \*" and has a dropdown menu with "Agency Final Action" selected. The second section is labeled "Select file to upload: \*" and has a button labeled "Attach Document". Below these sections, there is a note: "Note: When uploading the file, it may not appear in your document list immediately. You may need to click the refresh button on your browser." and a warning: "\* Fields are mandatory. Please consolidate submissions into as few files as possible and DO NOT UPLOAD PASSWORD PROTECTED DOCUMENTS." At the bottom right of the form, there are two buttons: "Upload" and "Cancel".

7. You will then be presented with a **File Upload** screen, where you can navigate to where the file you wish to upload is located, select the file, and click **Open**. The file name will then appear in the **Select file to upload** window. Click **Upload**.
8. If the document you uploaded doesn't immediately appear in the list of documents, click once or twice on your browser's **Refresh** icon.  Then the document will appear in the list.
9. The Public Portal will send you and any attorneys/representatives you have added an email indicating that your document was successfully added to the appellate record.
10. Repeat Steps 5 through 8 for any other documentation you wish to upload. **Rather than submitting multiple, separate documents individually, make every effort to combine your documents into a single file.** For example, if you want to submit a statement in support of your appeal, and your statement refers to exhibits, combine the statement and exhibits into one document, and then submit that one document. Doing so allows for more efficient and effective review of your appeal file. We note that there are multiple smart phone apps available that allow you to "scan" multiple-page documents into a single digital file.

## **CERTIFICATE OF SERVICE**

For timeliness purposes, it shall be presumed that the parties received the foregoing on the date indicated below if sent via email or within five (5) calendar days after the date indicated below if sent by regular or certified mail. I certify that the foregoing final action, appeal rights, and appeal form were provided to the following:

Roberta Gabaldon  
(Via Email: *robertamay.gabaldon@cbp.dhs.gov*)

Gary Gilbert, Esq., Cori Cohen, Esq., and Shannon Leary, Esq. (*Complainant Representatives*)  
(Via Email: *gary-efile@gelawyer.com*; *sleary-efile@gelawyer.com* and *ccohen-efil3@gelawyer.com*)

Joseph M. Sellers, Esq., Harini Srinivasan, Esq., Megan Reif, Esq. (*Complainant Representatives*)  
(Via Email: *jsellers@cohenmilstein.com*; *hsrinivasan@cohenmilstein.com*; and *mreif@cohenmilstein.com*)

Russell Wardlow, Esq., and Mark Hannig, Esq. (*Agency Representatives*)  
(Via Email: *russell.d.wardlow@cbp.dhs.gov*; and *mark.w.hannig@cbp.dhs.gov*)

The Honorable Kevin C. Rung  
Administrative Judge  
EEOC—New Orleans Field Office  
(Via Email: *kevin.rung@eeoc.gov*)

Executive Director, Privacy and Diversity Office  
U.S. Customs and Border Protection  
Ronald Reagan Building, Room 3.3D  
1300 Pennsylvania Avenue, NW  
Washington, DC 20229  
(Uploaded and Notified Via Email)

  
CRCL EEO Specialist

\_\_\_\_\_  
May 30, 2023  
Date