UNITED STATES OF AMERICA
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
NEW YORK DISTRICT OFFICE
33 WHITEHALL STREET, 5th FLOOR
NEW YORK, NEW YORK 10004

Sandra McConnell, et al,
Class Agent,

v.

John E. Potter, Postmaster General,
United States Postal Service,
Agency.

EEOC Hearing No. 520-2008-00053X
Agency No. 4B-140-0062-06

RECOMMENDATION GRANTING CLASS CERTIFICATION
AND
ORDER DENYING THE AGENCY'S MOTION TO DISMISS

I. Introduction

Sandra McConnell ("Class Agent") filed a formal complaint of discrimination with the Equal Employment Opportunity Commission ("EEOC") alleging that the United States Postal Service ("Agency") discriminated against all rehabilitation employees and limited duty employees on the basis of disability when the Agency implemented the National Reassessment Program ("NRP"). (Class Agent's Response to Agency's Opposition to Class Certification and Agency's Motion to Dismiss, 3 ("CA's Response to Agency's Opposition"); *see also* Class Agency's Motion to Certify Class Complaint, 1-3 ("CA's Motion to Certify")).

In her brief, the Class Agent laid out her claim in more specifics. The Class Agent asserted that:

1. The National Reassessment Process ("NRP") fails to reasonably accommodate employees,
2. The NRP targets disabled employees,
3. The NRP creates a hostile work environment,
4. The NRP fails to include an interactive process,
5. The NRP fails to include an individualized assessment,
6. The NRP wrongfully discloses medical information, and
7. The NRP has an adverse impact on disabled employees.

(CA's Response to Agency's Opposition, 5-14.)

A review of the Class Agent's claims reveals that the claims can be categorized into the following broader complaints:

1) The NRP fails to provide a reasonable accommodation, *see* claims 1, 2, 4, and 5,
2) The NRP creates a hostile work environment, *see* claims 2 and 3,
3) The NRP wrongfully discloses medical information, *see* claim 6, and
4) The NRP has an adverse impact on disabled employees, *see* claim 7.

Since adverse impact is one of the legal theories to prove the Class Agent's claims, it would be premature to address whether there is an adverse impact on disabled employees at the certification stage. This should be addressed during the merits phase. Each of the remaining allegations will be addressed below.

II. Procedural History

1. Class Agent timely contacted an EEO Counselor on June 19, 2006. (Class Agent's Motion to Certify Class Complaint ("CA's Motion to Certify"), 7.)
2. Class Agent's case went through the Merit Systems Protection Board ("MSPB") system, whereupon a trial took place on May 21, 2007. (*McConnell v. United States Postal Service*, MSPB Docket No. NY-0353-06-381-I-1 (May 21, 2007).)[1]
3. The MSPB Administrative Judge ("AJ") found that Class Agent failed to prove that the MSPB has jurisdiction over her appeal. (Agency's Opposition to Class Certification and Agency's Motion to Dismiss ("Agency's Opposition"), Ex. 12.) The MSPB AJ held that because she did not find jurisdiction, she could not consider the Class Agent's claim of disability discrimination. (*Id.* at 10.)
4. Class Agent filed a formal EEO complaint with the Agency, alleging that the Agency had discriminated against her "and all other similarly situated individuals." (CA's Motion to Certify, 7.)
5. In September 2007, the Agency accepted Class Agent's formal EEO complaint.
6. The Agency forwarded the complaint to the EEOC's New York District Office for a determination regarding class certification.

[1] Class Agent was *pro se* at the MSPB hearing.

7. The EEOC's New York district office issued an Acknowledgment and Order for Class Certification, dated October 24, 2007, assigning the undersigned AJ to make a determination regarding class certification.
8. In early November, the Agency explained that it was preparing for an arbitration regarding the NRP in late December, and asked that discovery schedule be held in abeyance for this case until after the arbitration. The Agency said that it was generating discovery for the arbitration and believed that it could offer much of the discovery used for the arbitration for the EEO action. The Agency was trying to avoid duplicating this process. The Class Agent was not opposed to this.
9. The Class Agent and the Agency agreed that the Complainant would give the Agency discovery requests as the Agency was preparing for the arbitration. After the arbitration, the Agency would provide the Class Agent with the relevant discovery produced for the arbitration.
10. The parties reconvened telephonically on January 14, 2008. At that point, the Agency indicated that the arbitration was in settlement talks and that discovery was essentially in limbo. At that time, the parties were given a 30 day discovery period and 30 days to provide a written brief. Thus, briefs were due on March 19, and replies were due on March 31.
11. The parties submitted a Joint Motion for Extension of Time to Submit Motions on February 26, 2008.
12. The parties' joint request was granted. In the Order, the parties were instructed that any motions to compel were due by March 14, 2008, parties' briefs were due by April 18, 2008, and replies were due on April 28, 2008.
13. The Class Agent submitted a Motion to Compel discovery, dated March 12, 2008.
14. The Agency submitted Opposition to the Motion to Compel, dated March 21, 2008.
15. A conference call was held on April 17, 2008. It was agreed that the parties would submit their briefs and then a ruling would be made on the Motion to Compel, after it was placed in better context.
16. The Class Agent submitted its Motion to Certify Class Complaint (without exhibits) via email on April 18, 2008. The Agency submitted its Opposition to Class Certification and Motion to Dismiss (without exhibits) via email on April 18, 2008.
17. In a telephone conference on April 22, 2008, the Class Agent's Motion to Compel was denied because the requested discovery was unnecessary at this time. Also during this conference call, the parties' requests for additional extensions were denied.

18. The Class Agent submitted its Response to Agency's Opposition to Class Certification and Agency's Motion to Dismiss via email (without exhibits) on April 28, 2008. The Agency submitted its Reply Brief (without exhibits) via email on April 28, 2008.

III. Material Facts

The National Reassessment Process

1. In 2004, the Agency began development of the National Reassessment Process ("NRP"). (CA's Motion to Certify, 9; Agency's Opposition, 11.)
2. According to Mr. Ronald E. Henderson, Manager of Health and Resources Management at the Agency, the goal of the NRP was to "standardize" the process used to assign work to injured-on-duty employees. (CA's Motion to Certify, 9; Agency's Opposition, 10.) Mr. Henderson stated during his deposition that he "wanted the standardization of the policy and how it was directed," and he "wanted to control." (CA's Motion to Certify, Ex. 7, 34, 35.)
3. "'Every employee who has sustained an approved compensable injury as determined by DOL and is in a limited or rehabilitation assignment has been or will be subject to review under the NRP.'" (CA's Motion to Certify, 8) (quoting Agency's discovery responses.)
    i. Limited duty employees are injured-on-duty employees whom the Agency expects will be able to return to their pre-injury positions as their medical conditions improve. (CA's Motion to Certify, 8) (citing Agency's discovery responses).
    ii. Rehabilitation employees are injured-on-duty employees who have reached a level of maximum medical improvement ("MMI"), and the Agency does not expect that they will be able to return to their pre-injury positions. (CA's Motion to Certify, 8) (citing Agency's discovery responses).
4. The NRP does not review non-disabled Agency employees or "light duty" employees (*i.e.*, those suffering injuries or illnesses that are not job-related). (CA's Motion to Certify, 9) (citing Agency's discovery responses).
5. The Agency initially implemented the NRP via pilot programs in different Agency districts, including the Western New York District in 2006. (CA's Motion to Certify, 9; Agency's Opposition, 11.)

6. The NRP was rolled out nationally in the beginning of FY-2007. (CA's Motion to Certify, 9) (citing Agency's discovery responses).
7. The NRP was divided into two phases: Phase 1 and Phase 2. (Agency's Opposition, 11.) At the time the Agency submitted its Opposition to Class Certification, Phase 1 had been implemented nationwide with 30 districts having completed the validation stage, while Phase 2 is currently underway in 26 of those districts. (Agency's Opposition, 11.)

Phase 1

8. In Phase 1, Agency headquarters directs that all limited duty and rehabilitation files are tabbed by district injury compensation specialists. (CA's Motion to Certify, Ex. 8, 1; Agency's Opposition, Ex. 7, 1.)
9. Headquarters personnel meet with senior management at the district level "to present the NRP Phase 1." (CA's Motion to Certify, Ex. 8, 1; *see also* CA's Motion to Certify, Ex. 8, 4; Agency's Opposition, Ex. 7, 1.)
10. The district level is instructed to review the medical records of all employees who are in a limited duty or rehabilitation assignment to ensure that the documentation is current. (CA's Motion to Certify, Ex. 8, 1; Agency's Opposition, Ex. 7, 1.)
11. If an employee's file is lacking current medical documentation, district level medical or injury compensation staff personnel requests an update from the employee. (CA's Motion to Certify, Ex. 8, 1; Agency's Opposition, Ex. 7, 1.)
12. If the Agency determines that the employee needs additional medical documentation, the employee is given a form letter that was generated at headquarters requesting new documentation. (CA's Motion to Certify, Ex. 8, 5.)
13. Any medical updates are noted in an NRP "worksheet," which is used throughout the entire NRP process to track each employee. (CA's Motion to Certify, Ex. 8, 2; Agency's Opposition, Ex. 7, 2.)
14. The employee is not told about the NRP at this time. (CA's Motion to Certify, 12, n.7.)
15. Agency management then verifies that, for every limited duty and rehabilitation employee, their current job offer matches the tasks actually being performed. (CA's Motion to Certify, Ex. 8, 2; Agency's Opposition, Ex. 7, 2.)
16. An NRP "workbook" or "activity file" is created for each employee tracked under the NRP. (CA's Motion to Certify, Ex. 8, 2-3; Agency's Opposition, Ex. 7, 2-3.)
17. The NRP workbook contains records relating to the employee's medical condition, modified job assignment, OWCP claims, and information related to any

"EEO/grievances/MSPB settlements or decisions pertinent to this claim." (CA's Motion to Certify, Ex. 8, 7.)

18. "After headquarters validates Phase 1 completion, the District is given authorization by USPS Headquarters to begin Phase 2." (CA's Motion to Certify, 13) (quoting Agency's discovery responses).

Phase 2

19. In Phase 2, a team leader from headquarters meets with district personnel to train them on Phase 2 of the NRP process. (CA's Motion to Certify, Ex. 8, 8; Agency's Opposition, Ex. 9, 1.)
20. The union is then informed of the NRP process. (CA's Motion to Certify, Ex. 8, 8; Agency's Opposition, Ex. 9, 1.)
21. The district level is instructed to update the NRP workbook to have all employees who have reached maximum medical improvement ("MMI") listed on the rehabilitation tab and the non-MMI employees listed on the limited duty worksheet. (CA's Motion to Certify, Ex. 8, 8; Agency's Opposition, Ex. 9, 1.)
22. The "Area NRP Team" meets with the "District Operations NRP team" and instructs them to canvas all offices/facilities within their area of responsibility and list all identified necessary work. (CA's Motion to Certify, Ex. 8, 8; Agency's Opposition, Ex. 9, 1.)
23. "Necessary Work is defined as any tasks that are determined by management as necessary for an operation and/or function. Necessary tasks are office or facility specific and must be approved by senior management." (CA's Motion to Certify, Ex. 8, 12.)
24. The Area and District NRP teams identify the local commuting areas for each installation. (CA's Motion to Certify, Ex. 8, 9; Agency's Opposition, Ex. 8, 2.)
25. The Area and District NRP teams meet to identify potential rehabilitation modified positions for all MMI less than one year employees within the local commuting area. (CA's Motion to Certify, Ex. 8, 9; Agency's Opposition, Ex. 8, 2.) NRP documentation states that "[e]very reasonable effort must be made to identify" these potential positions. (CA's Motion to Certify, Ex. 8, 9.)
26. If a district is unsuccessful in locating a rehabilitation modified position in a local commuting area, the district must contact the Area and Headquarters NRP Team Leaders

for assistance in expanding the search beyond the district boundaries. (CA's Motion to Certify, Ex. 8, 14.)[2]

27. The operations team member submits the Proposed Duties for Rehabilitation Modified Position worksheet to the employee's supervisor to identify a potential rehabilitation modified position. (CA's Motion to Certify, Ex. 8, 15.) The operations team member will instruct the supervisor to complete the worksheet for a potential rehabilitation modified position and return it to the operations team member. (*Id.*)
28. When the supervisor completes the form, the supervisor must list the "identified necessary tasks and the average approximate time for each identified task." The supervisors are instructed to include "as much information as possible" to aid the district NRP team when it completes the formal rehabilitation modified position job offer. (CA's Motion to Certify, Ex. 8, 15.)
29. The operations team member verifies proposed duties against necessary tasks identified by the supervisor against installation/facility necessary tasks master list. (CA's Motion to Certify, Ex. 8, 15.) If any changes are made, the operations team member will inform the employee's supervisor of the changes. (*Id.*)
30. If a rehabilitation modified position is found, the district NRP team will hold an interview with the affected employee. (CA's Motion to Certify, Ex. 8, 16.) "The interactive interview must be conducted exactly per the interactive interview script for job offers." (*Id.*) Headquarters directs who will be present at the meeting, which includes a note taker, an Injury Compensation representative, an "Operations Team member assigned to the function of each employee," a "District NRP Labor Relations Representative." (*Id.*)
31. If the employee has questions or chooses to use the 14 day timeframe before signing the modified position offer, a second interview will be held. (CA's Motion to Certify, Ex. 8, 17.)[3]
32. The NRP workbook will be updated to reflect any information obtained during the interviews. (CA's Motion to Certify, Ex. 8, 17.)
33. If, however, the Agency is unable to find a rehabilitation modified position to offer, the employee is brought in for a meeting where he or she is told that there is "no work available." (CA's Motion to Certify, Ex. 8, 18.)

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[2] In the Class Agent's case, a broader search was not performed because, according to the Agency, Class Agent "did not respond verbally or in writing that she wanted the Postal Service to look for available work in a different search area." (Agency's Opposition, 25.)

[3] The Agency noted that the second interview was added to the national process, and was not part of the pilot program. (Agency's Opposition, 34.)

34. Headquarters issued a very specific script that is supposed to be followed during the "no work available" meeting. (CA's Motion to Certify, Ex. 8, 18-21.)
35. During this first meeting, the employee is told about the NRP. (*Id.* at 19.)
36. Also during this first meeting, the employee is told that the Reassessment Team determined that the employee is in a "no work available status." (CA's Motion to Certify, Ex. 8, 20.)
37. The employee is told that there will be a second meeting in two weeks to "finalize the Reassessment Process." (CA's Motion to Certify, Ex. 8, 20.)
38. Again, headquarters directed that the District NRP team, monitored by the Area Injury Compensation Team member, will have the second meeting "in compliance with the script for the second interview." (CA's Motion to Certify, Ex. 8, 29.)
39. The employee is advised that if he or she brings back updated medical documentation within the next two weeks, the Reassessment Team will review it and make a determination if the documentation will change anything. (CA's Motion to Certify, Ex. 8, 20.)
40. If the employee does not bring in any new medical documentation, the second meeting is only to inform the employee of the final determination of no work available. (CA's Motion to Certify, Ex. 8, 20.)
41. Once an employee is placed in "no work available" status, the employee will be paid for the remainder of the week and then will be placed on Leave Without Pay / Injured-On-Duty ("LWOP/IOD") status. (CA's Motion to Certify, Ex. 8, 21.)
42. "All internal USPS activity due to the NWA determinations will be tracked." (CA's Motion to Certify, Ex. 8, 30.) The trackings will be "verified quarterly and reported to the Area NRP Operations and Injury Compensation Team Leaders." (*Id.*)

NRP Effects

43. As a result of the NRP in the three pilot districts of NY Metro, San Diego, and Western NY, 1,077 individual employees were reviewed. 290 (26%) returned to full duty, 413 (39%) changed assignments, and 182 (16%) had no work available. (Agency's Opposition, Ex. 9.)
44. A summary from the tracking reports for the Northeast area shows that of the 2,423 limited duty and rehabilitation positions, 71 employees were sent home, no job offer was made, or there was no work available to them. (CA's Motion to Certify, Ex. 10, 1.)

The Class Agent

45. Class Agent was a mail carrier in the Rochester, New York area. (CA's Motion to Certify, 4; Agency's Opposition, 14.)
46. On January 2, 1997, Class Agent slipped and fell on stairs while delivering mail. (CA's Motion to Certify, 19; Agency's Opposition, 14.)
47. After her accident, Class Agent underwent a surgical procedure called lumbar laminectomy. (CA's Motion to Certify, 29.)
48. After her surgery, Class Agent was diagnosed with "lumbar discogenic disease" and "lumbar spinal stenosis" with "severe breaking and facet arthropathy." (CA's Motion to Certify, 29.)
49. After her accident, Class Agent was unable to perform any kind of work for about a year. (CA's Motion to Certify, 29.)
50. Since her accident, Class Agent's treating physician placed Complainant on strict medical limitations. (CA's Motion to Certify, 29; Agency's Opposition, 14.)
51. Complainant's restrictions include working up to 4 hours, sitting up to 4 hours, walking up to 1 hour, standing up to 1 hour, or repetitive wrist or elbow movements up to 1 hour. (CA's Motion to Certify, Ex. 15, 5.) In addition, Class Agent is limited in her ability to push, pull, or lift more than 10 pounds. (*Id.*) Class Agent is completely limited in reaching, reaching above her shoulders, twisting, bending/stooping, or driving at work. (*Id.*)
52. Complainant currently remains under the strict medical limitations. (CA's Motion to Certify, 29; Agency's Opposition, 14-15.)
53. In January 1998, the Agency assigned Class Agent to a limited duty modified Carrier Technician position at the Henrietta Post Office. (CA's Motion to Certify, 20.)
54. In September 1999, the Agency offered Class Agent a modified Carrier Technician position at the Ridgemont Station. (CA's Motion to Certify, 20; Agency's Opposition, 15.)
55. The rehabilitation job offer letter stated that Complainant would work 4 hour shifts Monday through Saturday. (CA's Motion to Certify, Ex. 17.)
    i. The letter described the duties as:

    AMS duties, Safety Captian, carrier casing duties within physical limitation, carrier case labels, 3982 maintenance, checking vehicles, warming up vehicles in winter, delivering late arriving Express Mail and missent Priority Mail, answer the telephone and customer assistance by answering questions, handling and forwarding customer complaints and

providing information, and other duties as assigned or requested by your supervisor. (*Id.*)

ii. The letter noted Complainant's restrictions and stated that: "the work activities require good communication skills, simple grasping and normal handling of objects up to 10 pounds in weight. The work is mainly sedentary. Occasional walking short distances within the facility may also be required." (*Id.*)

iii. The letter also stated that "This position has been identified based on restrictions outlined by Dr. Silberstein above. As a US Postal Service employee, your physical limitations and job assignment will be subject to periodic review to determine the appropriateness of the assigned duties in conjunction with your disability status and operational needs." (*Id.*)

56. Complainant accepted the offer, and worked in the modified position until May of 2006. (CA's Motion to Certify, 21; Agency's Opposition, 15-16.)

57. Complainant was able to perform the essential functions of her modified position. (CA's Motion to Certify, 33-34; Agency's Opposition, 29, n.37.)

58. On May 19, 2006, Complainant was separated from her position as a result of the National Reassessment Process. (CA's Motion to Certify, 22-26; Agency's Opposition, 16-17.)

IV. The Class Complaint States an Actionable Claim of a Violation of the Rehabilitation Act

Before analyzing whether the proposed class meets the class action requirements, the threshold issue of whether the Class Agent states a claim must be addressed. The Agency argued that the Class Agent failed to state an actionable claim in violation of the Rehabilitation Act because, according to the Agency:

1. "Withdrawal of accommodation" is not a violation of the Rehabilitation Act,
2. Failure to engage in the interactive process does not violate the Rehabilitation Act, and
3. A policy of individualized assessment does not violate the Rehabilitation Act.

(Agency's Opposition, 19-25.)

EEOC Regulation 29 CFR § 1614.204(d)2) states that an Administrative Judge may dismiss the class complaint for any reasons listed in § 1614.107, including failure to state a claim. An Agency shall accept a complaint from any aggrieved employee or applicant for employment who believes that he or she has been discriminated against by that agency because of race, color,

religion, sex, national origin, age or disabling condition. 29 C.F.R. §§ 1614.103, .106(a); *see also Sorensen v. Department of the Army*, EEOC Appeal No. 0120065004 (June 14, 2007). The Commission's federal sector case precedent has long defined an "aggrieved employee" as one who suffers a present harm or loss with respect to a term, condition, or privilege of employment for which there is a remedy. *Diaz v. Department of the Air Force*, EEOC Request No. 05931049 (April 21, 1994).

The question as to whether an employee is aggrieved requires a consideration of whether the employee alleged unlawful discrimination regarding hiring, termination, compensation, or other terms, conditions, or privileges of employment. *Cobb v. Department of the Treasury*, EEOC Request No. 05970077 (March 13, 1997). Terms, conditions, or privileges of employment include, among other things, promotion, demotion, discipline, reasonable accommodation, appraisals, awards, training, benefits, assignments, overtime, leave, tours of duty, *etc.* (*Id.*) A complaint which alleges unlawful disparate treatment regarding a specific term, condition, or privilege of employment should not be dismissed for failure to state a claim. (*Id.*) Among other things, Class Agent alleged that the Agency, by removing her reasonable accommodation, forced her, as well as several others, for discriminatory reasons to terminate her position. Therefore, Class Agent states a claim. *Sorensen v. Department of the Army*, EEOC Appeal No. 0120065004 (June 14, 2007) (holding that the Agency improperly dismissed a complaint for failure to state a claim where the complainant alleged that by abolishing her position, the Agency forced her for discriminatory reasons to accept another position.)

In addressing each of the Agency's arguments more specifically, it is noted that in assessing whether a complaint should be dismissed for failure to state a claim, the allegations in a complaint must be taken as true and all reasonable inferences must be drawn in favor of the complainant. *Cobb v. Department of the Treasury*, Request No. 05970077 (March 13, 1997); *Bracy v. United States Postal Service*, EEOC Appeal No. 0120064053 (December 4, 2007).

In its first point, the Agency argued that the Agency created a "make-shift" position for the Class Agent and is not obligated to continue 'making up' work for the Class Agent. (*Id.* at 20-22.) However, Class Agent has presented sufficient evidence that, it taken as true, shows that the Class Agent was providing necessary work. Class Agent stated in a declaration that her "modified position kept [her] very busy." (CA's Motion to Certify, Ex. 1, 2.) Class Agent added that her "job included many necessary tasks that were not being handled by other employees." (*Id.*) Class Agent explained that she 1) handled change of address mail, 2) sorted large amounts of delivery point sequence ("DPS") mail, and 3) received customer complaint calls. (*Id.*)

Moreover, Kenneth A. Montgomery, a letter carrier at the Ridgemont post office, declared that Class Agent "performed a number of tasks during her employment at the Ridgemont station," and Class Agent "was busy during her entire shift." (CA's Motion to Certify, Ex. 2, 1.) Mr. Montgomery declared that he "never saw [Class Agent] sitting around." (*Id.*) Similarly, Richard Tiernan, also a letter carrier at the Ridgemont station, declared that Class Agent performed "important, necessary work for the office." (CA's Motion to Certify, Ex. 3, 1.) Mr. Tiernan added that after Class Agent was terminated, "many of the tasks she performed did not get done, because no one had time to do them." (*Id.*) Mr. Tiernan explained that the waste mail stack got so high, "it became difficult to move around the office and ultimately the office received a reprimand from the postmaster." (*Id.*)

Thus, the Agency's assertion that Class Agent's position consisted of mere 'made up' and unnecessary work conflicts with the evidence in the record.

It is also noted that the Commission places a continuing obligation on Agencies to provide a reasonable accommodation. *Tavarozzi v. United States Postal Service*, EEOC Appeal No. 01930804 (December 10, 1993) (holding that "[u]nless the agency can prove that an accommodation would be an undue hardship, the agency's duty to accommodate is absolute and continuing. If an agency cannot prove undue hardship, it has no option but to provide accommodation on a continuing basis until and unless doing so becomes an undue hardship.") At the same time, the Agency is not required to make work for a disabled employee. *Comerford v. Department of the Navy*, EEOC Appeal No. 01A44524 (July 21, 2006) (holding that the Agency was not obligated to continue making work for a Complainant who had been in a temporary position from April 2002 through September 2002, especially after she refused two vacant positions offered by the Agency). However, if an employee has been working in a position for years, it then becomes more difficult for an Agency to argue that the work assigned has been 'made up' the whole time. Commission case law holds that where a complainant has been working in a modified position for years, the Agency is prevented from arguing that the complainant is not qualified because that employee has not been performing the essential functions of the original position. *Dellinger v. United States Postal Service*, EEOC Appeal No. 07A40040 (September 29, 2005). In essence, the Agency cannot argue that a disabled complainant is not qualified to do a position which he or she has been doing for years. That same logic applies here as well. Where a complainant has been performing work for years, it becomes more difficult for the Agency to argue that it's been 'made up' work all along. And again, as stated above, the Class Agent has presented other evidence to show that the Class Agent's work was not "made up" and "unnecessary."

In its second point, the Agency argued that it cannot be liable because failure to engage in the interactive process alone is not a violation of the Rehabilitation Act. (*Id.* at 23-24.) The Agency argued that it did not need to engage further in the interactive process because the nature of the Class Agent's disability and the type of accommodation were provided several years ago. (Agency's Opposition, 23-24.) Thus, according to the Agency, there "is simply no need for a further interactive dialogue where the facts are already known." (*Id.* at 24.) The Agency added that this same premise is true for the "vast majority" of other employees assessed under the NRP. The Agency cited to the EEO Guidance, which states that when the disability and necessary accommodation are obvious, "there may be little or no need to engage in any discussion." (Agency's Opposition, 23) (citing Reasonable Accommodation and Undue Hardship Under the ADA, EEOC Notice No. 915.002 at 6, question 5 (October 17, 2002)).

However, the guidance cited by the Agency speaks to the scenario where the Agency offers a reasonable accommodation without much discussion because the need is obvious and likely easy to provide. (*Id.*) This is not the scenario presented in this case. Rather, in this case, the Agency is *removing* a previously-granted accommodation (as opposed to providing an accommodation where the need is obvious and easy to give). Because the Agency is dramatically affecting an employee's previously-granted accommodation, the Agency cannot argue that it needn't be involved in the interactive process. Arguably, the Agency's involvement in the interactive process should be at its height when it acts to remove an accommodation that is has been giving for years.

The Agency is correct to state that failure to properly engage in the interactive process, does not, by itself, demand a finding that complainant was denied a reasonable accommodation. *Bonds v. Department of Defense*, EEOC Appeal No. 0120053260 (March 30, 2007) (citing *Doe v. Social Security Administration*, EEOC Appeal No. 01A14791 (February 21, 2003)). Rather, to establish a denial of a reasonable accommodation, a complainant must establish that the failure to engage in the interactive process resulted in the agency's failure to provide a reasonable accommodation. (*Id.*) Here, the Class Agent is arguing that the Agency *removed* a reasonable accommodation – or in other words, failed to provide a reasonable accommodation by removing an existing accommodation. Thus, in this case, Class Agent's argument that the Agency failed to include an interactive process or individualized assessment *does* state a claim because the Agency's interactive process (or lack thereof) resulted in the removal of a reasonable accommodation. Whether or not the removal of the accommodation was a failure to provide a

reasonable accommodation is a question of fact more appropriate for the merits-based portion of the class certification process.

Also in regard to its second point, the Agency argued that even though it didn't need to be involved in the interactive process, it was "interactive." (Agency's Opposition, 24-25.) The Agency argued that it requested updated medical information, which confirmed that there was no medical improvement and Class Agent "remained unable to perform more than the sedentary administrative tasks up to four hours per day." (*Id.* at 24.) Further, the Agency argued, Class Agent's medical documentation was used to conduct "the thorough (but ultimately unsuccessful) search for available operationally necessary work that comported with her medical restrictions." (*Id.*) In addition, the Agency informed Class Agent at a meeting on May 19, 2006 that the Agency would search for a new assignment in a different local commuting area if she identified the area, but Class Agent did not respond verbally or in writing. (*Id.* at 25.)

However, Class Agent argued that the NRP failed to include a "meaningful" interactive process. (CA's Response to Agency's Opposition, 9.) Class Agent supported its allegation by highlighting that the Agency does not talk to an employee about the NRP until *after* a "no work available" decision has already been made. (*Id.*) In addition, once the discussion finally takes place, it is done during a "pre-scripted 'interview'." (*Id.*) Also, rather than having an immediate supervisor, who has the most first-hand knowledge of the employee's medical limitations, essential function of the modified position, and the preferences of the employee, determine limited duty and rehabilitation assignments, a multidisciplinary team consisting of Human Resources, medical and operations specialists takes on this responsibility. (*Id.* at 9-10.) Class Agent also argued that the NRP fails to recognize that employees are successfully performing their existing modified positions and that the NRP makes "top-down," headquarters-based decisions regarding disabled employees en masse. (*Id.* at 10-11.)

In *Walker v. United States Postal Service*, EEOC Appeal No. 0720060005 (March 18, 2008), the Commission recently upheld an Administrative Judge's decision to certify a class complaint in which one of the allegations was that the "[A]gency's headquarters develops and disseminates all policies and practices applied to rehabilitation program employees" regarding overtime. Similarly in this case, the Class Agent is arguing that the Agency's headquarters has developed and is implementing a policy and practice applied to rehabilitation program employees regarding reasonable accommodations. Thus, the Class Agent has offered sufficient evidence, for class certification purposes, to show that a nationwide policy negatively affects rehabilitation and limited duty employees.

The third point argued by the Agency is that the "mere fact that employees are being reassessed does not state an actionable claim for violation of the Rehabilitation Act." (Agency's Opposition, 25.) However, this argument ignores the thrust of the Class Agent's argument – that the standardization of the interactive process and control given to headquarters over the interactive process rendered it near meaningless so as to create a Rehabilitation Act violation. (CA's Motion to Certify, 1-2, 5.) More specifically, the Class Agent argued that the NRP targets disabled employees, creates a hostile work environment, fails to include an interactive process or an individualized assessment, wrongfully discloses medical information, and creates an adverse impact on disabled employees. (CA's Response to Agency's Opposition, 5-14.) Thus, the Class Agent is arguing much more than just the fact that disabled employees are being reassessed.

For these reasons, the Agency's Motion to Dismiss for failure to state an actionable claim is denied.

V. McConnell Has Standing Because She Is a "Qualified" Individual With a Disability

Before determining whether the class should be certified, the Class Agent must be able to show that she has standing to bring forth the class action. Here, the Agency argued that the Class Agent lacked standing because she is not a "qualified" individual with a disability protected under the Rehabilitation Act. (Agency's Opposition, 25-29.)

The Rehabilitation Act prohibits discrimination against a qualified individual with a disability in regard to the terms, conditions and privileges of employment. 29 U.S.C. § 791(g) (incorporating the standards of the Americans with Disabilities Act (ADA)); *see also* 29 C.F.R. § 1630.4(i). In making the determination of whether an individual with a disability is qualified, the crucial question is whether the individual can perform the essential functions of the particular position at issue.

The Agency's argument that the Class Agent did not have standing focused on whether the Class Agent is "qualified." The Agency's argument that Class Agent is not qualified fails because the argument is premised on the fact that the Complainant cannot perform the essential functions of her original position as opposed to her modified position. Commission case law dictates that, especially where the employee has been placed in a long-term limited duty or rehabilitation position, the determination as to whether the employee can perform the essential function of his

or her position turns on the essential functions of the limited duty or rehabilitation position, not the original position. *Dellinger v. United States Postal Service*, EEOC Appeal No. 07A40040 (September 29, 2005); *Iftikar-Khan v. United States Postal Service*, EEOC Appeal No. 07A40137 (2005). The Tenth Circuit noted in *Woodman v. Runyon*, 132 F.3d 1330, 1334 (10th Cir. 1997) that:

> To interpret "position in question" to refer only to plaintiff's qualifications for the original position, then, would render § 1614.203(g) meaningless. Requiring that plaintiffs demonstrate they are capable of performing their original job would disqualify the very individuals the regulation is intended to benefit. We think it obvious that "position in question" cannot be read so narrowly and remain consistent with the reassignment requirement.
> (*See* CA's Motion to Certify, 23-24.)

Here, the Agency does not dispute that the Class Agent was qualified to perform the essential functions of her rehabilitation position. (Agency Opposition, 29, n.37.) Thus, the Class Agent is "qualified" as defined by the Rehabilitation Act.

It is also noted that Complainant is disabled as defined by the Rehabilitation Act. Complainant's restrictions include working up to 4 hours, sitting up to 4 hours, walking up to 1 hour, standing up to 1 hour, or repetitive wrist or elbow movements up to 1 hour. (CA's Motion to Certify, Ex. 15, 5.) In addition, Class Agent is limited is her ability to push, pull, or lift more than 10 pounds. (*Id.*) Class Agent is completely limited in reaching, reaching above her shoulders, twisting, bending/stooping, or driving at work. (*Id.*) Commission case law directs that based on these restrictions, Class Agent is disabled. *Wesson v. United States Postal Service*, EEOC Appeal No. 05990963 (2001) (medical restriction of not lifting more than 10 to 15 pounds limited major life activity of lifting renders an individual as disabled); *Williams v. United States Postal Service*, EEOC Appeal No. 01973755 (2000) (medical restriction limiting employee to "no more than minimal bending, squatting or kneeling" supported finding that employee was individual with a disability).

VI. The Proposed Class Meets the Class Certification Requirements

A class complaint is a written complaint of discrimination filed on behalf of a class by the agent of the class alleging that: (i) the class is so numerous that a consolidated complaint of the members of the class is impractical; (ii) there are questions of fact common to the class; (iii) the claims of the agent of the class are typical of the claims of the class; and (iv) the agent of the

class, or, if represented, the representative, will fairly and adequately protect the interests of the class. 29 C.F.R. § 1614.204(a)(2). The burden is on the party seeking to certify a class to meet all four requirements. *Mastren v. United States Postal Service*, EEOC Request No. 05930253 (October 27, 1993). Failure of a party to meet any one of the four requirements is sufficient reason for dismissal. 29 C.F.R. § 1614.204(d)(2).

1. Commonality and Typicality

In addressing whether a class complaint warrants certification, it is important to first resolve the requirements of commonality and typicality in order to "determine the appropriate parameters and the size of the membership of the resulting class." *Fusilier v. Department of the Treasury*, EEOC Appeal No. 01A14312 (February 22, 2002) (citing *Moten v. Federal Energy Regulatory Commission*, EEOC Request No. 05960233 (April 8, 1997)). As a practical matter, "commonality and typicality tend to merge." *Hudson v. Dep't of Veterans Affairs*, EEOC Appeal No. 01A12170 (March 27, 2003). Here, Complainant has met the requirements of commonality and typicality.

Commonality requires that a complainant identify questions of fact common to the class. *Mastren*, EEOC Request No. 0593025. "Factors to consider in determining commonality include whether the practice at issue affects the whole class or only a few employees, the degree of local autonomy or centralized administration involved, and the uniformity of the membership of the class, in terms of the likelihood that the members' treatment will involve common questions of fact." *Id.* "Evidence used by courts to determine whether individual and class claims meet commonality include statistical evidence, anecdotal testimony by other employees showing that there is a class of persons who were discriminated against in the same manner as the individuals and evidence of specific adverse actions alleged." *Hines, et al. v. Dep't of the Air Force*, EEOC Request No. 05940917 (January 29, 1996).

In this case, Class Agent has shown that the Agency has a nationwide practice of targeting employees in rehabilitation or limited duty positions and adversely affecting their reasonable accommodations via the NRP. Thus, the practice at issue, the NRP, affects the whole class of rehabilitation and limited duty employees and not only a few employees. In addition, evidence shows that there is centralized administration involved as opposed to local autonomy. The whole point of the NRP was to standardize this process and give headquarters more control. Lastly, there are common questions of fact because all the employees involved were subjected to the same national process.

Typicality exists where the class agent demonstrates some "nexus" with the claims of the class, such as similarity in the conditions of employment and similarity in the alleged discrimination affecting the agent and the class. *Thompson v. U.S. Postal Service*, EEOC Appeal No. 01A03195 (March 22, 2001). Here, Class Agent has shown a sufficient nexus between her claim and the claims of other class members. Specifically, Complainant alleged that as a permanent rehabilitation employee with a disability, she was subjected to the NRP, and, as a result, lost her job. Complainant's claim is typical to the claim of the class since other purported class members, other permanent rehabilitation employees or limited duty employees with disabilities, have also been subject to the NRP, and, as a result, were negatively affected. Some examples of alleged negative effects of the NRP can be found in EEO complaints currently filed. A review of ten cases arising in the Salt Lake City District reveals that eight complaints are about new assignments, one complaint is about a 'no work available' determination, and one complaint is about being asked to provide updated medical information. (CA's Motion to Certify, Ex. 5, Agency's Supplemental Response to Interrogatory 13.) Thus, although the specific alleged harm may be different for various employees, the common link is that all of these people are asserting that they were in some way negatively affected by the NRP.[4]

The Agency argued that commonality and typicality cannot be met because "[d]isability actions are generally not well-suited for class treatment . . . ." (Agency's Opposition, 31.) However, the Commission has found that in certain cases, a large number of disabled persons can be an appropriate group for class certification. *Walker v. United States Postal Service*, EEOC Appeal No. 0720060005 (March 18, 2008); *Glover v. United States Postal Service*, EEOC Appeal No. 01A04428 (2001).

The Agency also argued that several recent Commission decisions undermine the Class Agent's arguments. (Agency's Reply Brief, 19-20.) In about four recently decided cases, the Commission held that the Agency improperly held complaints related to the NRP in abeyance. (*Id.* at 20; *see also* Agency's Reply Brief, Ex. 19.) A separate case, *Miles v. United States Postal* Service, Agency No. 4F-900-0010-08, is also challenging the legality of the NRP and is currently pending certification. (Agency's Reply Brief, 19.) The Commission specifically stated in its recent decisions that "it is impossible to determine whether or not the instant individual complaint is identical to the class complaint because the class complaint [in *Miles*] provides no

[4] It may be appropriate at some time in the future to sub-divide the proposed class into the following groups: 1) employees who were given a "no-work available" determination, 2) employees who were reassigned, and 3) employees who were asked for medical documentation but whose positions were unchanged.

definition of the class, including any temporal or geographic limitations." *Tran v. United States Postal Service*, EEOC Appeal No. 0120081481 (April 16, 2008) (exhibited in Agency's Reply Brief, Ex. 19.); *see also Law v. United States Postal Service*, EEOC Appeal No. 0120081405 (April 16, 2008); *Min v. Unites States Postal Service*, EEOC Appeal No. 0120081405 (April 16, 2008); *Marquez v. United States Postal Service*, EEOC Appeal No. 0120081228 (April 16, 2008). The Agency argued that because the Commission noted that the Class Agent in *Miles* and in other cases worked at different agency facilities and in different crafts, this supports its position that the claims here are unsuitable for class certification. However, this is not the case. Class complaints are most appropriate where complainants are spread across the country. And in the fact pattern relevant to this case, it is immaterial that the disabled employees work in different crafts. The noteworthy point is that all rehabilitation and limited duty employees have been subject to the NRP, regardless of their office location or craft. It is also of note that these recent decisions specifically said that it was "impossible" for the Commission to truly know whether the individual complaint should be held in abeyance since the class complaint did not include a specific definition. In this case, large amounts of discovery have revealed that the NRP is a national process, and it would be inappropriate at this stage to sub-divide the class into various geographic or craft divisions. The earlier Commission decisions were issued without the benefit of the necessary discovery completed for the sole reason of defining the class complaint.

2. Numerosity

29 C.F.R. § 1614.204(a)(2)(i) requires that a class be so numerous that joinder of the complaint is impractical. While there is no minimum number required to form a class, and an exact number need not be established prior to certification, courts have traditionally been reluctant to certify classes with less than thirty members. *Mastren*, EEOC Request No. 05930253.

When determining whether numerosity exists, other considerations include geographic dispersion, ease with which the class may be identified, the nature of the action, and the size of each claim alleged. *Wood v. Department of Energy*, EEOC Request No. 05950985 (October 5, 1998). Here, approximately 32,000 employees across the country have been subject to the NRP. (Agency's Opposition, 33-34.) As of March 31, 2008, the Agency identified 296 EEO complaints that have already been filed and challenge the NRP. (CA's Motion to Certify, Ex. 5, Supplemental Response to Interrogatory 13.) Clearly, the numerosity requirement is met in this case.

The Agency argued that the class should be limited to those subjected to the pilot program because a second interview was later added to the national process. (Agency's Opposition, 34-35.) However, this distinction raised by the Agency is too insufficient to require that the proposed class be divided in this way. If evidence is raised during future discovery as to the reasons the class complaint should be divided in this fashion, the Administrative Judge remains free to redefine a class, subdivide it, or dismiss it. *Hines v. Department of Air Force*, EEOC Request No. 05940917 (January 29, 1996).

3. Adequacy of Representation

The adequacy of representation requirement has two elements: 1) that the representative for the class be qualified, experienced and generally able to conduct the litigation, and 2) that the class agent's interests do not conflict with those of the remainder of the class. *Knopf v. Department of Interior*, EEOC Appeal No. 01871538 (November 5, 1987). Here, the Agency does not dispute that Complainant's representation is qualified. (Agency's Reply Brief, 21.) Rather, the Agency argued that Class Agent cannot adequately represent the interests of other rehabilitation and limited duty employees because she lacks standing as she is not a "qualified" individual with a disability under the Rehabilitation Act. (Agency's Opposition, 35, 25-29.) However, as discussed earlier, Class Agent is a "qualified" individual with a disability, and therefore, can adequately represent other qualified disabled employees.

The Agency also argued that Class Agent's interests will conflict with other members in her class because they will be fighting for the fewer remaining positions available as the amount of work as the Agency declines. (Agency's Reply Brief, 22.) However, this argument presupposes that most, if not all, of the employees in their positions were performing 'unnecessary' work. At this stage, the Class Agent has provided sufficient evidence to support that at least some of the scrutinized positions involved necessary work. Further, new and modified positions would also open up as the postal workforce declines.

VII. The Proposed Class Meets the Class Certification Requirements Under a Harassment Theory

For similar reasons to the above-analysis, Class Agent has met the four requirements necessary to certify a class under a harassment theory. Again, to be certified, a class agent must show that: (i) the class is so numerous that a consolidated complaint of the members of the class is impractical; (ii) there are questions of fact common to the class; (iii) the claims of the agent of

the class are typical of the claims of the class; and (iv) the agent of the class, or, if represented, the representative, will fairly and adequately protect the interests of the class. 29 C.F.R. § 1614.204(a)(2).

Here, the Class Agent argued that the NRP creates a hostile work environment for the class as a whole. (CA's Response to Agency's Opposition, 7.) The Class Agent argued that the NRP is:

> hostile to disabled employees in many ways: it targets a very large category of disabled employees for scrutiny and adverse job actions, reviews their medical records, troops them into pre-scripted 'show trials' with management teams to tell them their jobs have been eliminated, and belittles their efforts to seek a way to remain employed at the agency. Indeed, the evidence shows that the top Agency officials broadly generalized about injured-on-duty employees sitting idle, performing only 'make-work,' or that modified positions consisted of 'cobbled together' tasks.
> (*Id.* at 8.)

1. Commonality and Typicality

In this case, Class Agent has met the requirement of commonality. The Class Agent has shown that the Agency has a nationwide practice of subjecting rehabilitation and limited duty employees to similar scrutiny, 'pre-scripted' meetings, and alleged 'belittle[ment in] their efforts to seek a way to remain employed at the agency." (CA's Response to Agency's Opposition, 8.)

Thus, the practice at issue, the NRP, affects the whole class of rehabilitation and limited duty employees and not only a few employees. In addition, evidence shows that there is centralized administration involved as opposed to local autonomy. Lastly, there are common questions of fact because all the employees involved were subjected to similar treatment under the nationalized process.

The Class Agent has also met the requirement of typicality, or a nexus with the claims of the class, such as similarity in the conditions of employment and similarity in the alleged discrimination affecting the agent and the class. Class Agent alleged she was subjected to additional scrutiny and a 'pre-scripted' meeting with management to tell her that her job was eliminated. (CA's Response to Agency's Opposition, 8.) Class Agent also alleged that her efforts to remain employed at the Agency were "belittled." (*Id.*) Class Agent asserts that her experience was similar to other employees' experiences because all the employees were subject to similar scrutiny and pre-scripted meetings. In addition, Class Agent argued that the Agency

officials broadly generalized about injured-on-duty employees, thinking of all of them as performing only 'make-work.' (*Id.*; *see also* CA's Motion to Certify, 32, n.14.) Thus, Class Agent's allegation that the Agency created a hostile environment for disabled persons is typical to the Class Agent's claim because all rehabilitated and limited duty employees were subject to the same alleged harassing policy. *See Southerland v. United States Postal Service*, EEOC Appeal No. 0120034200 (November 22, 2006) (holding that a claim of hostile work environment is appropriate for class action "even though varying fact patterns support the claims or defenses of individual class members or there is a disparity in the damages claimed by the representative parties and other members of the class.")

2. Numerosity

As discussed earlier, the numerosity requirement is clearly met in this case as approximately 32,000 employees have been subject to the same allegedly harassing national policy. (Agency's Opposition, 33-34; CA's Motion to Certify, Ex. 5, Supplemental Response to Interrogatory 13.)

3. Adequacy of Representation

As discussed earlier, the adequacy of representation requirement has been met. The Agency does not dispute that Complainant's representation is qualified. (Agency's Reply Brief, 21.) In addition, the Class Agent is qualified. Lastly, there is insufficient evidence to show that the class agent's interests will conflict with the other class members.

VIII. The Proposed Class Meets the Class Certification Requirements Under a Wrongful Disclosure Theory

The Class Agent alleged that the NRP violates the Rehabilitation Act because confidential medical treatment is used for "cost savings" purposes rather than to review necessary restrictions on the work or duties of the employee and necessary accommodations. (CA's Response to Agency's Opposition, 11.)

1. Commonality and Typicality

Class Agent has met the requirement of commonality because the NRP is a national process that affects the whole class of rehabilitation and limited duty employees and not only a few employees. In addition, evidence shows that there is centralized administration involved as

opposed to local autonomy. Lastly, there are common questions of fact because all the employees involved were subjected to similar treatment under the nationalized process.

Class Agent has met the requirement of typicality because the Agency reviewed medical documents for Class Agent in the same or similar way that the Agency reviewed medical documents for all other rehabilitation and limited duty employees.

2. Numerosity

As discussed earlier, the numerosity requirement is clearly met in this case as approximately 32,000 employees have been subject to the NRP and have had their medical documents reviewed in a similar manner. (Agency's Opposition, 33-34; CA's Motion to Certify, Ex. 5, Supplemental Response to Interrogatory 13.)

3. Adequacy of Representation

The Agency does not dispute that Complainant's representation is qualified. (Agency's Reply Brief, 21.) In addition, the Class Agent is a qualified individual with a disability. Lastly, there is insufficient evidence to show that the class agent's interests will conflict with the other class members.

IX. Recommendation and Definition of Class

Based on the above reasons, it is recommended that the following class be certified:

> All permanent rehabilitation employees and limited duty employees at the Agency who have been subjected to the NRP from May 5, 2006[5] to the present, allegedly in violation of the Rehabilitation Act of 1973.

X. NOTICE TO THE AGENCY

Within 60 days of receipt of the report of findings and recommendations issued under 29 CFR § 1614.204(i), the Agency shall issue a Final Decision, which shall accept, reject, or modify the

[5] This date was chosen because it is 45 days prior to Class Agent's initial EEO Counselor contact of June 19, 2006. (CA's Motion to Certify, 7; *see also Walker v. United States Postal Service*, EEOC Appeal No. 0720060005 (March 18, 2008) (holding that the correct time frame for the class complaint to begin was the date forty-five days prior to the Class Agent's initial EEO contact)).

findings and recommendations of the Administrative Judge. The Final Decision of the Agency shall be in writing and shall be transmitted to the Class Agent by certified mail, return receipt requested, along with a copy of the report of findings and recommendations of the Administrative Judge. When the Agency's Final Decision is to reject or modify the findings and recommendations of the Administrative Judge, the Decision shall contain specific reasons for the Agency's action. Also, if the Final Order does not fully implement the Decision of the Administrative Judge, the Agency shall simultaneously appeal the Administrative Judge's Decision in accordance with § 1614.403. If the Agency has not issued a Final Decision within 60 days of its receipt of the Administrative Judge's report of findings and recommendations, those findings and recommendations shall become the Final Decision, and the Agency shall transmit the Final Decision to the Class Agent within 5 days of the expiration of the 60 day period. The Final Decision shall inform the Class Agent of the right to appeal or to file a civil action in accordance with 29 CFR § 1614.204(d) and of the applicable time limits.

The Agency shall use all reasonable means to notify all class members of the acceptance of the class complaint within 45 days of receipt of the Administrative Judge's Decision. 29 CFR § 1614.204(e)(1); *see also* EEO MD-110, 8-5, 8-6 (November 9, 1999). The Agency may file a motion with the Administrative Judge seeking a stay in the distribution of the notice for the purpose of determining whether it will file an appeal of the Administrative Judge's Decision. EEO MD-110, 8-6 (November 9, 1999).

Erin M. Stilp
Administrative Judge
(212) 336-3746 (Phone)
(212) 336-3624 (Fax)

Date: May 30, 2008