

# Arthur L. Davis v. U.S. General Accounting Office

Docket Nos.: 31-201-09-83  
45-701-09-84

Date of Decision: August 3, 1984

Cite as: Davis v. GAO (8/3/84)

Before: Jaffe, Presiding Member

## Summary Judgment

## Class Actions

## DECISION OF THE PRESIDING MEMBER

### Background

On July 26, 1982, Arthur Lee Davis, filed a complaint of racial discrimination against the San Francisco Regional Office of the GAO. Mr. Davis listed six enumerated actions allegedly taken by management which were alleged to have the effect of discriminating against him on the basis of race. These actions were alleged to "have continued since August 18, 1976 and [to be] continuing to the present."

The complaint concerned 1) certain comments allegedly made by Agency supervisors; 2) an alleged lack of recognition of his work contributions; 3) the length of time between performance appraisals and counseling; 4) his rating by Agency officials (which was only a planned rating as of the date of the complaint); 5) alleged discriminatory job assignments; and 6) an alleged discriminatory failure to promote him from his present GS-12 position of Evaluator to a GS-13. Further, although the remedies sought included a halt to alleged unwarranted actions against Mr. Davis "and other Blacks" and a request that the Agency provide fair and unprejudiced treatment for Mr. Davis "and other Blacks," the complaint was clearly an individual complaint.

A question was presented as to whether Mr. Davis' July 26, 1982 complaint was subsumed in a prior class action pending before the Equal Employment Opportunity Commission filed by another GAO employee, Julian McKensy Fogle. The Formal Class Complaint in Fogle issued on February 8, 1980. The Fogle complaint includes broad allegations that the Agency has engaged in racial discrimination against all its Black professional employees (past, present, and future) with respect to all terms and conditions of employment including, but not limited to, recruitment and selection, work assignments, and promotions.

The April 14, 1981 issue of the Management News, an internal Agency publication distributed to all employees, contained a notice to the prospective members of the Fogle class complaint informing them of their right to opt-out of the class action within a 30 day period of the issuance of the Notice, dated April 12, 1981. There is no dispute that Mr. Davis was aware of the Fogle case and of his right to opt-out, but did not elect to opt-out of the Fogle class complaint.

On August 24, 1982, the Agency's Civil Rights Office rejected Mr. Davis' July 26, 1982 complaint on the basis of the Agency's conclusion that the matter was subsumed in the Fogle class complaint. The matter was appealed to the Board. The General Counsel, during the investigation of that matter, wrote to the EEOC requesting a ruling on the scope of the Fogle class complaint as it affected the claims contained in Mr. Davis' complaint. By letter, dated March 1, 1983, Sandy Waters, Esq., Supervisory Complaints Examiner at the EEOC, wrote to the Board's General Counsel, stating, in essence, 1) that Mr. Davis was a member of the Fogle class; 2) that GAO and EEOC regulations are silent as to the prospective treatment of an individual complaint of discrimination filed by a class member in a pending class complaint; 3) that Mr. Davis' complaint cites incidents occurring in June 1982, after the close of the 1981 class opt-out period, which are not unlike the types of violations at issue in Fogle and which are alleged by Mr. Davis to be continuing in nature; 4) that while the proof of class discrimination in Fogle could theoretically be expanded to include factual issues postdating the April 1981 notification date which defines the class, to do so would, in Ms. Water's opinion, require recertification of the class and thus renotification of all current and prospective class members; 5) that expansion of the Fogle class complaint to include the matters contained in Mr. Davis' complaint also would result in additional discovery and delay the hearing then scheduled for April 25, 1983 in the Fogle case; 6) that the proof and decision in Fogle will not pertain to management actions in 1982 and that, as a result, no conflict would be presented by separate fact-finding on the individual aspects of Mr. Davis' complaint; and 7) that Mr. Davis should be permitted to remain in the Fogle class as to his class-type continuing complaints, but permitted to pursue his July 26, 1982 complaint as to his allegations of individual discrimination.

On March 16, 1983, the General Counsel of the Board sent the Parties a letter confirming the agreement of all Parties that:

. . . the incidents complained of by petitioner . . . which occurred after April 12, 1981, would be considered to be under the jurisdiction of the GAO EEO complaint process and subsequent jurisdiction of the Personnel Appeals Board.

The General Counsel also noted in his letter that he had been advised that the Agency had begun processing Mr. Davis' complaint.

On July 20, 1983, Chester F. Relyea, Complaints Examiner at the EEOC's San Francisco, California District Office, wrote to the Agency (and others) concerning the Fogle case. Mr. Relyea indicated that the closing date of the Fogle case would be the time of the hearing in the Fogle case; while the formal class complaint was filed in 1980, the hearing in the Fogle case had not been held as of July 20, 1983. The concluding paragraph in Mr. Relyea's letter stated that:

As for Arthur L. Davis, I suggest that he be permitted to pursue those aspects of his claim which are peculiar to him before the GAO Personnel Appeals Board, but be required to rely on the Fogle proceeding for relief from his class-type claims.

On August 25, 1983, Mr. Davis received a letter from Alexander A. Silva, Director of the Agency's Civil Rights Office, advising Mr. Davis 1) that subsequent to the Agency's completion of its investigation of Mr. Davis' complaint and the sending of the Agency's investigative report to Mr. Davis, Mr. Relyea issued a recommendation which, in Mr. Silva's opinion, conflicted with Ms. Waters' March 1, 1983 recommendation concerning the processing of Mr. Davis' complaint; 2) that Mr. Silva carefully reviewed the complete case file and concluded that the Fogle complaint encompassed all of the issues in the July 26, 1982 complaint; 3) that the Agency "finds no aspects of your individual claim [which] are peculiar to

you"; and 4) that, accordingly, the Agency would not issue a final decision on the merits of the July 26, 1982 individual complaint.

Mr. Davis filed an appeal of the Agency's actions with the Board. By letter, dated October 7, 1983, the General Counsel advised Mr. Davis of his right to file a Petition for Review with the Board. The Petition for Review was filed with the Board on October 28, 1983. On November 16, 1983, the Agency filed a Motion to Dismiss the Petition for Review. By Order, dated February 2, 1984, the Agency's Motion to Dismiss the Petition for Review was denied.

On March 19, 1984, a telephone prehearing conference was held. On March 22, 1984, a Petition for Review was filed in Case No. 45-701-09-84. That case concerns the disposition of a complaint of racial discrimination, dated January 5, 1984, filed by the Petitioner with the Agency's Civil Rights Office. The January 5, 1984 complaint alleged a number of specific discriminatory acts by San Francisco Regional Office personnel, including reprisal for filing prior EEO complaints; refusal to promote him or to grant him "best qualified" status on the basis of race; disparate treatment; and a general pattern of discrimination by the Agency. On February 27, 1984, Mr. Silva wrote to the Petitioner notifying him that, with the exception of certain allegations concerning the Agency's Merit Selection Plan (which the Agency contended was beyond the scope of the Fogle case relying on an October 21, 1983 ruling from Mr. Relyea), the Civil Rights Office would not process Mr. Davis' January 4, 1984 complaint due to the Agency's position that the remaining subject matter of the complaint was subsumed by the pending Fogle class action. Hearings were held in the Fogle class action from February 21, 1984 through April 9, 1984.

In view of the similarity of the issues presented, the Parties agreed to consolidate Case No. 45-701-09-84 with Case No. 31-201-09-83, which concerned the question of the Agency's obligation to process Mr. Davis' July 26, 1982 complaint. The Board approved this consolidation by Order, dated April 4, 1984.

Pursuant to arrangements made at the prehearing conference, Stipulations of Fact were entered into by the Parties on April 2, 1984, cross-motions for Summary Judgment were filed on April 26, 1984 and replies were filed on May 10, 1984. There are no disputed issues of material fact and, I have determined that the subject matter of this Petition for Review is appropriate for resolution by Summary Judgment.

### **Contentions of the Petitioner**

The Agency agreed to process Mr. Davis' July 26, 1982 complaint on the merits; in exchange, the Petitioner withdrew his prior Petition which had been pending before the Board. The Petitioner fulfilled his part of the agreement. The Agency also acted in accordance with that agreement in that it investigated the complaint; shortly prior to issuing its decision, however, the Agency breached that agreement on the basis of its claim that the scope of Fogle had been expanded in time by the EEOC and, therefore, that the Petitioner's complaint was pre-empted by his being part of the Fogle class.

The Agency's agreement to process the Petitioner's July, 1982 discrimination complaint is binding. It is well recognized that an oral settlement agreement of a pending judicial matter is binding. Moreover, the strong policy of encouraging and supporting settlement of Title VII actions further requires that the Board enforce the Parties' settlement agreement in this case.

The later change in position by the EEOC concerning the scope of Fogle cannot justify the Agency's actions herein. The Agency's agreement is administrative res judicata. Further, the complaints of the Petitioner and the complaint in Fogle cover different time periods.

Fogle is an "across the board" type of class action. In General Telephone Company of the Southwest v. Falcon, 457 U.S. 147 (1982), the Supreme Court clearly held that:

Conceptually, there is a wide gap between (a) an individual's claim that he has been denied a promotion on discriminatory grounds, and his otherwise unsupported allegation that the company has a policy of discrimination, and (b) the existence of a class of persons who have suffered the same injury as that individual, such that the individual's claim and the class claims will share common questions of law or fact and that the individual's claim will be typical of the class claims. Id. at 157.

The principle that a person who is a member of a class action must opt-out in order to preserve individual rights to file complaints of discrimination does not apply herein for several reasons. First, the claims of Mr. Davis are individual, not class type claims. Accordingly, the pendency of the Fogle class action cannot justify a refusal to process his individual complaints. One is not part of the class and does not possess the same interest or injury if there are allegations special or unique to that person. The record establishes that Mr. Davis' claims of discrimination are uniquely personal in nature. The complaint of July 26, 1982 alleged that what occurred was part of a general pattern of discriminatory conduct by the Agency. The January 5, 1984 complaint alleges reprisal for filing prior EEO complaints and an atmosphere of racism in the San Francisco Office, not generalized complaints of discrimination as are involved in Fogle.

Second, there is a fundamental unfairness about the Agency's position herein. The notice to opt-out of the Fogle class action occurred in April, 1981, at a time when all concerned believed the scope of that action to be limited to events predating April 12, 1981. Mr. Davis' consent at that time to remain in the Fogle class certainly did not preclude his later filing a complaint protesting six very specific and individualized situations or waive his right of access to the GAO EEO process and subsequent jurisdiction of the Board. Mr. Davis was never notified prior to his decision not to opt-out that remaining in the Fogle class would result in his being forever barred from protesting future individualized acts of alleged Agency discrimination.

Fairness and equity require that Mr. Davis be permitted to pursue his individual complaint of discrimination independently from the Fogle class action. If, however, the Board should somehow conclude that the Agency's position concerning the scope of the Fogle class action is correct, then at a minimum, the Board must afford Mr. Davis a second opportunity to opt-out of Fogle since his failure to opt-out sooner must be viewed as the result of "excusable neglect."

Nor is the Board obligated to grant comity to the EEOC determinations in the Fogle case. The Board was statutorily granted jurisdiction over EEO claims that arose after October 1, 1980. This transfer of jurisdiction is supported by the plain language of Section 3(g)(3) of the Act, as well as the legislative history of the Act. The expansion of the Fogle action as it impacts on matters after that date is, therefore, within the Board's jurisdiction and the EEOC's determinations as to such matters are entitled to no deference by the Board.

### **Contentions of the Agency**

All of the allegations of the July 26, 1982 complaint are within the Fogle case. Fogle is an "across-the-board" attack on a wide range of the Agency's employment practices which seeks to establish an alleged pattern or practice of discrimination in nearly all aspects of GAO employment. The practices of which Mr. Davis complains -- performance appraisals, awards, and job assignments -- are expressly

included within the Fogle complaint. Further, as determined by Mr. Silva in his August 25, 1983 letter, the Fogle complaint also encompassed "all other terms and conditions of employment" which had not been specifically designated in the other, more detailed sections of the class complaint.

There was no proof that the April, 1981 opt-out notice in Fogle was defective. Moreover, any such claim is within the exclusive jurisdiction of the EEOC and is not a proper subject for adjudication by the Board. The EEOC Complaint Examiner, Mr. Relyea, specifically determined that no new notice was necessary.

Nor is there any legal support for the claim that Mr. Davis should be permitted a second opportunity to opt-out of the Fogle class action. Rule 23(c)(2), F.R.C.P., requires class members to affirmatively opt-out of the class action at the outset or to be forever bound by the judgment in the class suit. A Board Order sustaining Mr. Davis' position in this case would undermine the intent of F.R.C.P. Rule 23 and violate established legal principles underlying class litigation which bind members of the class to the resolution of the class action. Further, such a ruling would open the door to other members of the Fogle class filing their own complaints at any time in the future should they decide that their chances of success would be better in an individual rather than a class complaint.

Nor was there any agreement to process administratively the Petitioner's complaints in this case. The understanding of all concerned that the Agency would process portions of Mr. Davis' complaint was predicated upon the then universally held belief that the Fogle class action did not extend to events postdating April 12, 1981. When that material underlying assumption was modified by Mr. Relyea, the new EEOC examiner, the basis for any earlier agreement evaporated.

More significantly, the issue of whether or not there was an agreement to process Mr. Davis' complaint is irrelevant. The question presented herein is not whether a settlement agreement was entered into in this case, but whether the Agency has acted within the law and its discretion in terminating complaint processing.

Nor does the doctrine of administrative res judicata support the Petitioner's position herein. If the doctrine of administrative res judicata has any application to this proceeding, it would require that the decision of EEOC Complaints Examiner Charles Relyea to include within Fogle all matters up to the hearing date be deemed binding.

The EEOC retained continuing jurisdiction over actions that were pending on October 1, 1980. Neither the statute nor the legislative history provides any guidance on the question of pending cases. The general rule of law is that subsequent events will not oust a tribunal of jurisdiction which properly attached at a prior point in time. By way of analogy, it should be noted that the MSPB, which was created by Congress in 1978, assumed immediate jurisdiction only over those appeals which were in process at the FEAA due to the abolition of the FEAA; all appeals pending before other administrative bodies not abolished by the Civil Service Reform Act continued to be processed by those bodies.

The EEOC agreed with the Agency that the EEOC would retain jurisdiction over matters pending before the EEOC on October 1, 1980. This agreement is valid and should be upheld by the Board. The Agency's actions have been rational and responsive to the current position taken by the EEOC. While the procedural changes in position in the case may have caused Mr. Davis concern, this fact does not sanction a belated second opt-out from the Fogle class action. Mr. Davis is a member of the Fogle class and should be bound by any determination made in the course of that action. Accordingly, the Petitioner's Motion for Summary Judgment should be denied and Respondent's Cross-Motion for Summary Judgment should be granted.

## Decision

The Complainant and the Agency disagreed as to whether the allegations of discrimination encompassed by Mr. Davis' July 26, 1982 charge were subsumed by the class complaint in the Fogle case. The Agency relied upon the extremely broad wording of the Fogle complaint which was open-ended in terms of time, encompasses past, present, and future GAO Black professional employees and applicants, and which complained of Agency discrimination with respect to "all" terms and conditions of employment.

I agree that Mr. Davis has not opted-out of the Fogle class; that he was a member of that class; and that any "class" claims must be tried within the confines of the Fogle case. The Board, in its regulations, has indicated its preference for exhaustion of Agency remedies in EEO cases. 4 C.F.R. Section 28.47.

This holding does not resolve, however, the question of whether the subject matter of the July 26, 1982 and January 5, 1984 charges were "class" claims or "individual" claims. The effect of class action complaints on individual claims of discrimination was recently discussed in some detail by the United States Supreme Court in Cooper v. Federal Reserve Bank of Richmond, 467 U.S. 867 (1984), 22 GERR 1337 (No. 83-185) (June 25, 1984). The Court held in Cooper that an individual suit alleging racial discrimination filed by a former member of a class could properly proceed notwithstanding a recent judgment in the class action that an employer did not engage in a general pattern or practice of discrimination. The Court held that, while the class action judgment did not bar an individual suit entirely, the finding of the court that no general pattern or practice of discrimination was demonstrated was binding upon the former class member in his subsequent individual discrimination suit. The Court stated that:

The Bank argues that permitting the Baxter petitioners to bring separate actions would frustrate the purposes of Rule 23. We think the converse is true. The class-action device was intended to establish a procedure for the adjudication of common questions of law or fact. If the Bank's theory were adopted, it would be tantamount to requiring that every member of the class be permitted to intervene to litigate the merits of his individual claim. 22 GERR at 1341.

The Fogle class action is an across-the-board type of class action. The Parties stipulated that Mr. Silva's letter of August 25, 1983 fully set forth the Agency's reasons for terminating processing of the Petitioner's July 26, 1982 complaint. Mr. Silva's letter of February 27, 1984, stated that the processing of the Petitioner's January 5, 1984 complaint was being rejected for the same reasons as those set forth in the August 25, 1983 letter.

Mr. Relyea recommended that Mr. Davis be permitted to pursue those individual claims raised in the July 26, 1982 petition through the Agency's EEO procedures. The all-encompassing view of the scope of the class claims in Fogle asserted by the Agency in the August 25, 1983 and February 27, 1984 letters and in the course of this proceeding is inconsistent with the opinions of Mr. Relyea and Ms. Waters that some, if not all, of the claims asserted in the July 26, 1982 charge were "individual" rather than Fogle class complaints.

The Agency's contention that Fogle precludes claims of the type set forth in Petitioner's July 26, 1982 and January 5, 1984 charges is unpersuasive. To adopt such a broad interpretation of the scope of the Fogle class claims would effectively render all claims of discrimination filed by class members class rather than individual claims. The claims of discrimination asserted in the July 26, 1982 and January 5, 1984 charges appear capable of resolution regardless of whether or not the Agency is found in Fogle to have engaged in a classwide pattern or practice of racial discrimination. Accordingly, it is concluded that the Petitioner's

July 26, 1982 and January 5, 1984 charges of discrimination are "individual" rather than "class" claims and that the Agency is obligated to process those claims to decision pursuant to the Agency's EEO process.

This holding is particularly appropriate inasmuch as an employee should not be deemed to have waived his or her right to invoke this Board's jurisdiction with respect to individual claims of discrimination occurring after October 1, 1980 (the effective date of the GAO Personnel Act) absent clear and convincing evidence of a knowing and intelligent waiver. Such a showing was absent in this case given the failure of the Agency or the EEOC to notify the Petitioner of the expansion of the time period sought to be covered by Fogle and the failure of the Agency or the EEOC to grant the Petitioner an opportunity to opt-out of that expanded portion of the Fogle case.

Nothing in the language of the Act or in the legislative history supports the view urged herein by the Agency that this Board lacks jurisdiction over Petitioner's claims by virtue of the decision by the EEOC to expand the scope of Fogle (a matter pending on October 1, 1980 before the EEOC) to include new claims of discrimination which occurred after the date that Congress shifted to this Board the jurisdiction and responsibility for reviewing EEO complaints filed by Agency employees. It is not necessary in this case to rule concerning whether the Board will respect the EEOC's determinations concerning the scope of the Fogle case and the weight, if any, to be accorded any ultimate decision of the EEOC. All that is decided herein is 1) that Mr. Davis' charges of discrimination are "individual" rather than "class" claims; 2) that the Agency is obligated to process those charges through the Agency's EEO process and issue decisions on those charges; and 3) that this Board has jurisdiction over the subject matter of the instant Petition.

In view of the Decision in this matter, it is not necessary to rule with respect to the other contentions raised by the Parties. Despite the fact that the July 26, 1982 charges are now over two years old, the Petition for Review filed by Mr. Davis sought only that the Board order the Agency "to reinstate [the] individual complaint of discrimination and process it through a final agency determination." No resolution of the merits of the Petitioner's charges was sought in this Petition for Review and no findings concerning the merits are made herein.

## **Order**

The Petitioner's Motion for Summary Judgment is granted and the Agency's Cross-Motion for Summary Judgment is denied.

The Petition for Review in Docket No. 31-201-09-83 and Docket No. 45-701-09-84 is granted.

The Agency is directed to process forthwith through its EEO complaint procedures the charges of Arthur L. Davis, dated July 26, 1982 and January 5, 1984 and to issue a final Agency determination concerning those charges as provided in the Agency's EEO complaint procedures.