

Helen D. Fauntleroy; Clementine H. Rasberry; Jane D. Trahan v. U.S. General Accounting Office

Docket Nos.: 46-701-15-84; 47-701-15-84; 48-701-15-84

Date of Decision: March 24, 1986

Cite as: Fauntleroy, et al. v. GAO (3/24/86)

Before: Jaffe, Chair; Brown, James, and Kaufmann, Members

Motions to Dismiss

Class Actions

Authority of PAB

DECISION OF PAB

In these consolidated cases, we consider the July 30, 1985 decision of the Presiding Member granting the Agency's motion to dismiss petitioners' individual claims of discrimination, pursuant to the petitioners' motion to reopen and reconsider the Order of the Presiding Member.

The central issue here is whether petitioners are bound by the terms of settlement in a class action of which they are arguably a part when they have continued to pursue pre-existing separate, individual actions during the entire pendency of the class proceedings, even after the period to opt in or opt out of the class has expired.

A secondary issue of this case regards the possibility of a conflict of interest of the Office of General Counsel of the Personnel Appeals Board and the Board's issuance of an Order to Show Cause why the Office of the General Counsel of the Board (PAB General Counsel) should not be disqualified from representing the petitioners in these proceedings. We have considered that issue in a separate decision.

FACTUAL BACKGROUND

Petitioners Clementine H. Rasberry and Helen D. Fauntleroy are GAO evaluators, GS-347-13; Petitioner Jane D. Trahan is a GAO evaluator, GS-347-14. In August 1983 petitioners Rasberry and Fauntleroy were informed that they had not made the best qualified list (BQL) under the Merit Selection Program (MSP) for GS-14 in the Federal Personnel and Compensation Division. At that same time petitioner Trahan was informed that she had not made the best qualified list under the MSP for GS-15, also in the Federal Personnel and Compensation Division.

In October 1983 petitioners filed discrimination complaints with the General Accounting Office (Agency) alleging racial discrimination because of their non-selection under the MSP. Petitioners' complaints also alleged reprisal because of their involvement in the case of Fogle v. GAO, a class action employment discrimination case filed against the Agency earlier.

On August 23, 1983 another class action employment discrimination complaint was filed against the Agency. This second class action, Mason v. GAO, was filed on behalf of all Black male professionals denied promotion because of the Agency's use of the MSP. Mason alleged both disparate treatment and disparate impact discrimination. The relief requested in Mason included validation of the MSP and promotion for each class member. On November 3, 1983 Mason was amended to include Black women.

On May 3, 1984 the petitioners invoked the jurisdiction of the Personnel Appeals Board (PAB or Board). This was before the Agency issued its final decision on petitioners' formal discrimination complaints, but more than 80 days after petitioners had filed their complaints. On June 15, 1984 the Agency issued its final decision on petitioners' complaints, and found no discrimination.

On February 2, 1985 the last notice to class members requiring that they opt in or opt out of the Mason class was issued. The notice required that the class members exercise their right to opt in or opt out within 30 days.

In March 1985 the PAB General Counsel completed its investigation of the petitioners' complaints. Following that investigation, the petitioners' withdrew their reprisal claims. The substantive claims of petitioners which remained were identical to the substantive claims of the Mason class.

On March 27, 1985 the General Counsel filed a petition for review on behalf of petitioners, claiming discrimination because of denial of promotion. Petitioners no longer asserted reprisal. As relief, petitioners requested retroactive promotion, back-pay and validation of the MSP. On April 26, 1985 the Agency filed a motion to dismiss petitioners' individual claims, essentially on the basis that petitioners' individual claims were encompassed by Mason, which was being settled, along with Fogle.

On May 8, 1985 the PAB General Counsel filed an opposition to the Agency's motion for dismissal, and on May 22, 1985 the Agency filed a reply to petitioners' opposition. On July 30, 1985 the Presiding Member granted the Agency's motion to dismiss the individual claims of petitioners. On September 6, 1985 the petitioners filed a motion for reconsideration of that decision. The Board deferred ruling on petitioners' motion for reconsideration until resolution of the petitioners' objections to the Mason settlement, which was then pending in the Agency process.

On October 16, 1985 the Hearing Officer in the Mason case issued a ruling denying the petitioners the right to opt out of the Mason settlement. In that same ruling, the Hearing Officer allowed petitioners to reserve their right to a pro rata share of the Mason class settlement, pending the outcome of their appeal to this Board of the Presiding Members' decision dismissing their individual claims.

On October 23, 1985 the Comptroller General issued a decision accepting the Hearing Officer's recommendation denying the petitioners' right to opt out of the Mason class, but denying the petitioners the right to reserve any benefits under the Mason settlement while this motion for reconsideration was being decided.¹

On October 29, 1985 while this motion for reconsideration was pending, the petitioners filed a motion for extraordinary relief. In that motion the petitioners requested that the Board allow petitioners to proceed with their individual claims while reserving benefits under the Mason class settlement. We granted petitioners' motion.

OPINION

Petitioners have asked for reconsideration of the decision of the Presiding Member granting the Agency's motion to dismiss their individual claims. In the decision the Presiding Member found that the petitioners had waived any right to opt out of the Mason class by their failure to respond to earlier notices. The Presiding Member also held that petitioners' attempts to object to the settlement of the Mason class action were untimely.

In passing on a motion to dismiss, the facts in the case must be viewed in the light most favorable to the party opposing the motion. Scheuer v. Rhodes, 416 U.S. 232 (1974). A motion to dismiss can be sustained only if it appears that the petitioners can prove no set of facts on which they may prevail. Conley v. Gibson, 355 U.S. 41, 45 (1957); Gordon v. National Youth Work Alliance, 675 F.2d 356, 359 (D.C. Cir. 1982). When viewing the facts in this case in the light most favorable to petitioners, there can be no doubt that petitioners have at all times attempted to pursue their individual claims in this matter separate and apart from the class.

In considering whether a lawful waiver of petitioners' individual claims occurred, we must be mindful of the fact that petitioners and the class representatives of Mason and Fogle have alleged employment discrimination as the prohibited personnel practice by which they are aggrieved. The vehicle for resolving employment discrimination claims for Federal employees is Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e, *et seq.* (Supp. II 1972). Brown v. GSA, 425 U.S. 820 (1976); Nolan v. Cleland, 686 F.2d 806 (9th Cir. 1982).

The Supreme Court has consistently stated that Title VII is a remedial statute and, therefore, is essentially equitable in nature. Civil rights statutes such as Title VII are to be liberally construed in order to achieve the broad Congressional objective of eradicating discrimination. "The provisions of [Title VII] are intended to give the courts wide discretion exercising their equitable powers to fashion the most complete relief possible...." 118 Cong. Record 7166, 7168 (quoted in Franks v. Bowman Transportation Co., 424 U.S. 747, 763 (1975); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); United Airlines v. McDonald, 432 U.S. 385 (1977)).

The July 30, 1985 decision of the Presiding Member was based on several main premises. The Presiding Member found that the petitioners' claims are encompassed by the Mason class action because petitioners' claims are identical to the Mason class claims. Both the Mason claims and the claims of petitioners are based on race, and the issue raised by both sets of claims is denial of promotion in mid-level grades for the position of evaluator. The relief requested by Petitioners is back pay, retroactive promotion and validation of the MSP, which is the same relief sought in Mason.

The Presiding Member further found that petitioners' individual claims should be dismissed because petitioners, like all Mason class members, received two notices--in April 1984 and February 1985--notifying them that they had 30 days within which to either expressly opt in or opt out of the Mason class, and their failure to opt out was an affirmative act to opt into the class. Petitioners claim that they were never given proper notice as to the force and effect of their decision to elect under the class notices. The Agency asserts that petitioners were given proper notice on two separate occasions and simply failed or refused to opt out. It is clear that until their individual claims of reprisals were withdrawn, petitioners were pursuing a separate, distinct cause of action from that of the Mason class members. It was only after the withdrawal of the retaliation claims that the Agency filed its motion to dismiss petitioners' individual claims, based on the failure of the petitioners to opt out prior to the expiration of the time limit for opting

in or out of the class.

Petitioners claim that if they had known the exact status of their claims regarding the Mason class, they would have made the appropriate decision in opting in or out. Petitioners' affidavits show that they made a consistent effort to ascertain the exact effect of the 30-day option notices, but were unable to get definitive advice from any of the counsel representing them. At no time did petitioners ever express an intent to waive their individual claims. To the contrary, interpreting the facts in the light most favorable to petitioners, petitioners' conduct suggests an intent to maintain their individual claims. In fact, there is no evidence in the record that petitioners engaged in any conduct which would indicate an intention to relinquish their individual claims. For instance, petitioners were represented by Kerry Scanlon before Scanlon became counsel for the Mason class. After Scanlon was retained by the Mason class members, he asked petitioners to join the Mason class. Petitioners refused, even after Scanlon explained to them that their refusal would require him to resign as their counsel, and petitioners would have to seek other representation. Moreover, petitioners had originally sought to have the Board review their reprisal claims, and withdrew their reprisal claims only in order that they could continue to be represented on their individual claims by the PAB General Counsel. The Presiding Member could not determine, for the purposes of adjudicating a motion to dismiss, that petitioners intended to abandon their individual claims. Waiver is an intentional abandonment of a known right, and must be knowing, voluntary and express. Alexander v. Gardner-Denver, 415 U.S. 36, 52 n.15 (1975); E.E.O.C. v. T.I.M.E.-D.C. Freight, Inc., 659 F.2d 690 (5th Cir. 1981); U.S. v. Trucking Employers, Inc., 561 F.2d 313 (D.C. Cir. 1977).

Again, viewing the facts in the light most favorable to the petitioners, the petitioners failed to expressly opt out because they were misled by the Agency into believing that there was no need to do so. All parties concerned felt that, as long as petitioners continued their reprisal claims, they were both in and out of the Mason class. Throughout the pendency of the Mason class action, the Agency continued to process petitioners' individual complaints through its EEO procedures. Even after the Mason class was certified, the Agency continued to process petitioners' individual claims. For instance, the class notice was issued on April 10, 1984 specifying a 30-day opt-out period. Subsequent to the expiration of that period, the Agency requested additional investigation into petitioners' individual claims. Also, in the GAO Recommended Final Agency Decision of June 11, 1984--issued more than two months after the final opt-out notice to the Mason class--petitioners claims were specifically noted as being separate from those of the Mason class.

Moreover, the Agency waited until April 1985 to bring its action for dismissal of petitioners' individual claims. If the Agency had at any time previous to that motion felt that petitioners were barred by the Mason action from pursuing their individual claims, then the Agency could have brought an action to consolidate the various claims pursuant to Rule 42 of the Federal Rule of Civil Procedure. Cf., Tucker v. Arthur Anderson & Co., 73 F.R.D. 316 (S.D.N.Y. 1976); Fields v. Wolfson, 41 F.R.D. 329 (S.D.N.Y. 1967). The mere fact that the Agency failed to bring its motion to dismiss until after the petitioners' claims had run the course of the Agency administrative procedure is a clear indication that the Agency did not consider petitioners' claims to be subsumed by the Mason class action. We must also be mindful of the fact that petitioners' claims predate those of the Mason class. Where class members have filed separate individual claims before the pendency of a class action, they will be allowed to continue to pursue their individual claims. Lo Re v. Chase Manhattan Bank, 19 FEP Cases 1366, 1371 n.4 (S.D.N.Y. 1979); Women's Committee v. National Broadcasting Co., 76 F.R.D. 176 (S.D.N.Y. 1979); McCubbrey v. Boise Cascade Home & Land Corp., 71 F.R.D. 62, 68 (N.D. Cal. 1976).

Petitioners have also argued in their brief in opposition to the Agency's motion to dismiss, that the notice they received informing them of their right to opt in or opt out of the Mason class was defective. We agree. In Title VII class actions, careful consideration to the requirements of Federal Rule 23 is indispensable. East Texas Motor Freight Systems v. Rodriguez, 431 U.S. 395, 405 (1977). See also, Holmes v. Continental Can Co., 706 F.2d 1144 (5th Cir. 1983). The notice provisions for class actions are set out at rule 23(c)(2) of the Federal Rules of Civil Procedure, which states that the notice to class members shall be the "...best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court may exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel." Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 176 (1974); Air Line Stewards v. Stewardesses Ass'n. v. American Airlines, Inc., 490 F.2d 636 (7th Cir. 1973). Class members prosecuting independent actions are due special notice, and the notice language should alert them to the effect of the opt-out procedures on their ongoing litigation. McCubrey v. Boise Cascade, *supra*, at 68; Supermarkets General Corp. v. Grinnell, 490 F.2d 1183 (2d Cir. 1974). The April 10, 1984 notice to the class sent out by the Agency did not include a provision similar to 23(c)(2)(C), above, to the effect that class members could remain in the class but have their own individual counsel. Nor did the notice specially recognize petitioners' individual claims. A number of courts have held that the class action disposition will not have a *res judicata* effect on class members' individual claims if the notice is inadequate. Penson v. Terminal Transport Co., 634 F.2d 989 (5th Cir. 1981); Johnson v. General Motors Corp., 598 F.2d 432 (5th Cir. 1979).

The questions of whether individual class members will be allowed to proceed with individual claims in the face of a properly resolved class action is a matter of discretion for the Court. Cooper v. Federal Reserve Bank of Richmond, 35 FEP Cases 1 (U.S. 1984); NAACP v. New York, 413 U.S. 345, 364-369 (1973). The pivotal consideration in such a decision is whether or not the partition prejudices the parties. Hill v. Western Electric Co., 672 F.2d 381, 385 (4th Cir. 1982); Brown v. Eckerd Drugs, Inc., 663 F.2d 1268 (4th Cir. 1981); vacated on other grounds, 457 U.S. 1128 (1982). Class members with individual claims have been allowed to adjudicate their claims even after the liability stage of an action has been completed. Sledge v. J.P. Stevens & Co., 585 F.2d 625 (4th Cir. 1978). In this instance, the Agency is not prejudiced by the delay in resolving petitioners' claims, since the Agency has always had notice of the pendency of petitioners' actions, if not the exclusive control over them. Cooper v. Federal Reserve Bank, *supra*; Edwards v. Boeing Vertol Co., 750 F.2d 13 (3d Cir. 1984) on remand from U.S. Supreme Court, 35 FEP Cases 96.

The precedent cited herein makes clear, and the Board so holds, that even where the notice and opt-out provisions of Rule 23 have been complied with, the trier of fact is still given great equitable latitude to allow individual class members to proceed with their individual claims, even at the relief stage of the proceedings. Here, petitioners should have had the right to opt in or out of the class at the time of the withdrawal of their retaliation claims, and since there was no valid notice requiring them to do so at that time, we hold that they now have that right. Therefore, we conclude that the Presiding Member erroneously interpreted applicable law under Title VII and the Federal Rules of Civil Procedure. Accordingly, we order that the Presiding Member's Order of July 30, 1985 granting the Agency's motion to dismiss is reversed, and petitioners' individual claims before the Board are reinstated for further proceedings.

Notes

1. We do not reach the question of the weight, if any, to be accorded to the determination reached in the Agency's internal process.