

# **Fred Jimenez v. U.S. General Accounting Office**

**Docket No. 81-701-CA-86**

**Date of Decision: March 23, 1987**

**Cite as: Jimenez v. GAO (3/23/87)**

**Before: Kaufmann, Chair; Brown, Cappello, James, Kaplan, Members**

**Class Actions**

**Certification**

## **ORDER**

This matter comes before the Board on a Petition for Review filed pursuant to the Board's procedures governing class action employment discrimination charges, 4 CFR Section 28.45. Petitioner has appealed the GAO Final Agency Decision of August 25, 1986 which accepted in full the recommendation of an independent hearing examiner that Petitioner's discrimination complaint not be certified as a class action.

## **FACTUAL BACKGROUND**

On June 6, 1986 Petitioner filed a formal complaint of discrimination accusing the GAO of utilizing "numerous systemic management practices and policies resulting in discrimination against Hispanics." Petitioner's complaint charged the GAO with practices dealing with "...hiring, performance assessment, promotions, training, adjudication of grievances, job assignments, attrition, special assignments, and various other agency processes hav[ing] an overt or systemic adverse impact on Hispanics."

On June 11, 1986, pursuant to GAO Order 2713.2, the Agency referred Petitioner's complaint to a hearing examiner who is required to obtain additional evidence from the GAO and the putative class agent, and within 25 days, recommend to the Comptroller General whether or not a class action should be certified.

On June 30, 1986, the hearing examiner entered an order that concluded that Petitioner's complaint lacked the requisite specificity to meet the minimal requirements for class certification. The hearing examiner's preliminary order also noted that the Petitioner was without counsel and, therefore, there was little likelihood that Petitioner could meet the requirements to adequately protect the interests of the class. As provided for in the GAO rules, the hearing examiner allowed Petitioner an additional ten (10) days from receipt of the order to cure the complaint's lack of specificity. Petitioner was also advised that, "...if he does not obtain counsel, the hearing examiner has serious doubts about whether class certification can be recommended."

On August 16, 1986 the hearing examiner submitted a recommended decision to the Comptroller General in which he found that Petitioner's complaint failed to meet the minimum criteria for class certification and recommended that the class not be certified. The hearing examiner noted that the Petitioner failed to provide any evidence supportive of his class allegations, but had rested his case entirely on his complaint form and supporting affidavit. The hearing examiner noted that the bare allegations in Petitioner's complaint were insufficient to satisfy the minimum class action requirements of the GAO regulations,

Order 2713.2, Chapter 4, Section 3(d)(7).

On August 25, 1986 the Comptroller General issued the Final Agency Decision accepting the hearing officer's recommendation that the Petitioner's complaint not be certified as a class action.

On September 15, 1986 Petitioner appealed the Final Agency Decision to the Board. Petitioner submitted no evidence or information in support of his Petition for Review. Instead Petitioner submitted a copy of the statement he filed with his formal complaint at the GAO Civil Rights Office. That statement, as we noted earlier, contained only general allegations that GAO was utilizing a personnel management system that universally discriminated against Hispanics.

On October 14, 1986 the Agency filed a Response to the Petition for Review. In that Response the GAO essentially recited the history of the Petitioner's proceeding in the GAO civil rights administrative process, and analyzed the procedure by which the hearing officer reached his decision to recommend that Petitioner's action not be certified as a class action.

The Board received no further submissions from the Petitioner, and noting that fact, on January 9, 1987 we issued an order requiring the Petitioner to show cause why the Petition for Review should not be dismissed.

On January 30, 1987 the Petitioner, through newly-obtained counsel, filed a response to the show cause order. Included in support of this response were affidavits from Petitioner and from his counsel, which restated the allegations in Petitioner's complaint without further information. We now determine whether Petitioner's original submissions to the Civil Rights Office, plus the additional submissions from Petitioner's counsel to this Board, meet the requirements for certification of the class.

## **DECISION**

We have carefully reviewed the entire record in this matter, and we are convinced that the GAO Final Agency Decision refusing to certify Petitioner's complaint as a class action was correct. The submissions made by the Petitioner--both to GAO and to this Board--are not, of themselves, sufficient to meet the requirements for certification as a class action.

Under the GAO regulations, in order for a complaint to be certified as a class action, it must meet the following minimum specifications: a) The class is so numerous that a consolidated complaint of the members of the class is impractical. b) There are questions of fact common to the class. c) The claims of the agent are typical of the claims of the class. d) The agent or representative will fairly and adequately represent the interests of the class. GAO Order 2713.2, Chapter 4, Section 3(d)(7).<sup>1</sup>

Briefly, we address Petitioner's claims under these requirements.

The Supreme Court has consistently held that a potential class agent must demonstrate that he possesses the same interests and has suffered the same harm as the class he seeks to represent. General Telephone Co. of the Southwest v. Falcon, 457 U.S. 147, 156 (1982); East Texas Motor Freight System, Inc., v. Rodriguez, 431 U.S. 395, 403 (1977). Otherwise, the Court has reasoned, there is significant potential for the absent class members to be unfairly bound by an adverse judgment. Falcon, supra, at 161. Thus, a class action may not be certified unless it passes a rigorous analysis to ensure that the requirements of Rule 23 are met. Id. Here, Petitioner has alleged no specific harm to himself in either his administrative complaint

or his Petition for Review. However, it is a matter of record that Petitioner has before this Board appeals of a denial of a within-grade increase and a demotion, flowing from alleged adverse performance appraisals by specific supervisors, but no allegations as to general discriminatory policies or practices.

The test for satisfying the numerosity requirement of Rule 23 involves more than a purely quantitative measurement. Hence, Petitioner may meet the dictates of the Rule by showing that the number of Hispanics who have suffered the same harm as Petitioner has suffered cannot be estimated at this time, and, therefore, joinder of all such claims is impracticable. Holsey v. Armour & Co., 743 F.2d 199, 217 (4th Cir. 1984), cert. denied, 105 S. Ct. 1395. Phillips v. Joint Legislative Committee, 637 F.2d 1014, 1022 (5th Cir. 1981), cert. denied, 456 U.S. 960 (1982); DeMarco v. Edens, 390 F.2d 836, 845 (2nd Cir. 1968). Petitioner has advanced no evidence or information that would meet the numerosity requirement, except to say that there are more than 135 Hispanic employees in all of GAO. The only information relevant to the number of Hispanics who are similarly situated to Petitioner was provided by the GAO investigator, who stated that in all of GAO, only one Hispanic had been denied a within-grade increase, and only 4 of 93 Hispanics evaluated in 1984 and 2 of 97 Hispanics evaluated in 1985 received borderline or unsatisfactory ratings. Thus, it is doubtful that Petitioner can satisfy the numerosity requirement of Rule 23.

Rule 23(a)(2) requires common questions of law and fact. In order to meet this commonality requirement, the Petitioner would have to show that the GAO has made decisions with respect to the class members' employment based on the national origin of the class members. Holsey, supra; Paxton v. Union National Bank, 688 F.2d 552, 561-562 (8th Cir. 1982). Petitioner has advanced no evidence or information to show that any of GAO's employment policies or procedures have an adverse impact on Hispanics.

By failing to allege how he has been harmed by GAO policies vis a vis other class members, Petitioner fails to meet the typicality requirement of Rule 23(a)(3). In order to show that his claim is typical, Petitioner would have to allege that the treatment he has received from GAO, and the resultant harm, is typical of the effect of GAO's employment practices on the members of Petitioner's class. Falcon, 457 U.S. at 158.<sup>2</sup>

Finally, we do not think Petitioner can adequately protect the interests of the class. Petitioner has advanced no information which supports an inference that Petitioner has the necessary resources to carry this type of complex action and obtain adequate relief for the class. Nor has Petitioner's counsel placed any evidence on the record which indicates that she has experience in civil rights litigation.

A class action complaint must meet all of the requirements of Rule 23(a), as a threshold. Clearly, Petitioner's claim fails to meet these requirements. Our view of the record before us does not allow a conclusion that GAO erred in refusing to certify Petitioner's claim as a class action.

The Petition for Review is dismissed.

## Notes

1. The criteria for GAO class certification requirements are derived from Rule 23 of the Federal Rules of Civil Procedure, which allows class actions only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class. Rule 23(a), F.R.C.P.

2. Falcon also stands for the generally accepted principle that the requirements of Rule 23(a), especially typicality and commonality, tend to merge. 457 U.S. at 157 n.13.