

James B. Dowd v. U.S. General Accounting Office

Docket No. 91-03

Date of Decision: December 18, 1992

Cite as: Dowd v. GAO (12/18/92)

Before: Personnel Appeals Board, en banc (Alan S. Rosenthal, Chair; Nancy A. McBride, Vice Chair; Isabelle R. Cappello, Leroy D. Clark and Paul A. Weinstein, Members)

Affirmative Action

Class Actions

Certification Requirements

Reopening and Reconsidering

Authority of PAB

DECISION

This matter is before the Board on Petitioner's Amended Motion for Class Certification. Petitioner seeks certification of a class of disabled veterans employed by the General Accounting Office from January 1974 to the present.

Petitioner filed his first Motion for Certification of a Class on May 5, 1992. Pursuant to a July 7, 1992 order of Administrative Judge McBride, Petitioner filed his Amended Motion for Certification of a Class on July 27, 1992. Respondent's Opposition to Petitioner's Amended Motion for Certification of a Class was filed on August 20, 1992.

Background

Petitioner filed this case in March 1991 alleging that GAO has deprived him and other similarly-situated disabled veterans of certain statutorily-mandated veterans' preference rights by its failure to establish affirmative action plans for veterans and by its failure to give them preferences in promotion and advancement. The relief sought by Petitioner includes the establishment of mandated affirmative action plans, retroactive promotions, back pay, damages, costs and attorneys' fees.

In February 1992, the Board issued a Decision on Respondent's Motion and Petitioner's Cross-Motion for Summary Judgment. The Board treated Respondent's Motion for Summary Judgment as a motion to dismiss for failure to state a claim upon which relief may be granted. The motion was granted in part and denied in part. It was granted with respect to Petitioner's claim for entitlement to a preference in promotion and advancement for disabled veterans, because Counsel for Petitioner conceded at oral argument that this was not an issue. It was also granted with respect to Petitioner's claim of a statutory obligation on the part of GAO to provide affirmative action for disabled veterans. The Board ruled that the Veterans' Readjustment Assistance Act of 1972, as amended, (VRAA), which requires affirmative action for disabled veterans in executive branch agencies, does not cover GAO. However, the Board, sua sponte,

ruled that GAO, by its own Order 2306.1, obligated itself to provide affirmative action for disabled veterans. For this reason, Respondent's motion to dismiss was denied in part.

Because there was no dispute that GAO had not implemented an affirmative action program for disabled veterans, the Board granted, in part, Petitioner's Cross-Motion for Summary Judgment. The effect on this ruling is that Petitioner has established the elements of liability: existence of a duty and breach of that duty. Still undetermined is the question whether Petitioner, or anyone else, was harmed by the failure of GAO to implement affirmative action and, if so, whether he, or anyone else, is entitled to a remedy.

Petitioner subsequently filed a Motion for Reconsideration of the question of whether he was entitled to the application of a preference in promotion and advancement actions. The Board considered Petitioner's motion and ruled in an en banc decision of July 2, 1992 that Petitioner was not entitled to any preference in promotion or advancement on account of his status as a disabled veteran.

Following the February 24, 1992 en banc decision of the Board on the Motion and Cross-Motion for Summary Judgment, Board Member Nancy A. McBride was designated Administrative Judge for this matter. The Board has decided, however, to consider and decide, en banc, the motion for certification of a class. Oral argument on the motion was held before the full Board on September 30, 1992, Petitioner having withdrawn his request for an evidentiary hearing on the matter. Walter Charlton, Esq., argued the motion on behalf of the Petitioner, and Paul Thompson, Esq., argued on behalf of Respondent.

In accordance with Board rulings on the Motion and Cross Motion for Summary Judgment and on the Motion for Reconsideration, the ultimate issue to be determined in this matter is what, if any, cognizable injury did Petitioner suffer as a result of GAO's failure to implement an affirmative action program for disabled veterans as required by GAO Order 2306.1¹ and to what, if any, relief is Petitioner entitled.

Motion for Certification of a Class

In this matter, Petitioner seeks to represent all others similarly situated. The proposed class is defined to include:

Every person hired by the United States General Accounting Office subsequent to January 1, 1974 who was a disabled veteran preference eligible and who was entitled by reason of the failure of the United States General Accounting Office to establish and implement mandated affirmative action program(s) for the benefit of disabled veterans and who was damaged by GAO's failure to provide applicable preferences and benefits in accordance with GAO's Rules & Regulations. Petitioner's Amended Motion for Certification of a Class, p.2.

Requirements for Class Certification

Our ruling on a request for class certification is governed by 4 C.F.R. §28.18(g) which provides in pertinent part:

One or more employees may file a petition for review as representative of a class of employees in any matter within the Board's jurisdiction. For the purpose of determining whether it is appropriate to treat an appeal as a class action, the administrative judge will be guided, but not controlled, by the applicable provisions of the Federal Rules of Civil Procedure.

The Board has previously determined that the matters raised by the Petition are within its jurisdiction, although the original scope was narrowed by the Board's decisions on the Motion and Cross-Motion for Summary Judgment and on the Motion for Reconsideration. In accordance with the prescription of 4 C.F.R. §28.18(g), we will examine the Amended Motion for Certification of a Class and the arguments for and against certification in light of the applicable provisions of the Federal Rules of Civil Procedure.

The Board must first consider whether Petitioner has satisfied the four prerequisites of Rule 23(a). Under that Rule, a class action may be brought 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.

Additionally, the action must meet one of several requirements under Rule 23(b). Petitioner seeks to maintain this action under Rule 23(b)(2) which requires a finding that "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole."

Discussion and Analysis

While we believe that Petitioner's class definition needs some refinement, we conclude that he has met the necessary prerequisites for the maintenance of a class action.

On a motion for class certification, the inquiry is limited to whether the requirements for class certification have been met; the court may not consider the merits of the claim. Eisen v. Carlisle and Jacquelin, 417 U.S. 156, 178, 94, S.Ct. 2140, 2152-53, 40 L.Ed. 2d 732 (1974).

Prior to undertaking the analysis of the requirements of Rule 23(a), we note that implicit in the prerequisites of the Rule are two additional requirements, namely the existence of an identifiable class and membership of the named representative in the proposed class. In Re A.H. Robins Co. Inc. 880 F.2d 709, 728 4th Cir. 1989; Gomez v. Illinois State Board of Education, 117 F.R.D. 394 (N.D. Ill. 1987). The implicit requirements are deemed satisfied. An identifiable class may be found if members can be ascertained by reference to objective criteria. Gomez at 397. Petitioner has proposed a class whose members can be ascertained by objective criteria--disabled veterans employed by GAO from January 1974 through the present. The members have in fact, been identified (Pet.Ex. A) and the Petitioner is a member of the class.

The first of the four mandatory prerequisites of Rule 23(a), numerosity, is not an issue. There are approximately 187 persons in the proposed class and GAO has conceded that, if all other conditions for class certification have been met, numerosity will not be contested.

In determining whether the Petitioner's claim meets the commonality requirement of Rule 23(a)(2), we must consider whether there are questions of law or fact common to the class. Rule 23(a)(2) does not require that every question raised by the dispute be common, but the common question or questions must be substantial enough that judicial economy favors a single suit. Green v. Cady, 90 F.R.D. 622 (E.D. Wisc. 1981). In the case before us, the questions presented are whether GAO violated a legal duty by its failure to implement an affirmative action program for disabled veterans and, if so, were Petitioner and the putative class members harmed by such failure and are they entitled to any remedy.

The first question clearly is a significant common question; all members are complaining of the same conduct or practice by the Respondent, that is, the failure to implement an affirmative action plan. On the surface, however, this question has been decided by the Board's determination that GAO did in fact violate a duty when it failed to establish an affirmative action program as mandated by its own regulations. What remains in question is the nature and extent of any consequent harm suffered by disabled veterans employed by GAO and the appropriate remedy for any such harm. This may be, as Respondent points out, a highly individualistic inquiry.

If the questions of individual damages were, in fact, the only issues remaining then commonality would not be satisfied. But implicit in the inquiry as to injury is the question of the scope and content of the duty to provide an affirmative action program. Until a conclusion is reached on the meaning of GAO's self-imposed duty to provide affirmative action, it is impossible to determine whether any individual or class of individuals was harmed by its absence.

Determining the meaning of GAO's duty to provide affirmative action for disabled veterans clearly presents a mixed question of law and fact that is common to all members of the proposed class. The fact that questions of individual relief may at some later date predominate over the common questions of law and fact presented does not mandate denial of certification. Moreover, as provided in FRCP 23(c) and 23(d), the Board may alter or amend a class or order granting class certification, may permit class certification with respect to particular issues and may make appropriate orders to prevent undue complication in the presentation of evidence. The Board or the Administrative Judge will be mindful of this discretion throughout these proceedings and may modify the order granting class certification accordingly.

The third requirement of Rule 23(a) is that the claims or defenses of the representative parties be typical of the claims or defenses of the class. A representative's claim is typical if it arises from the same event, practice or course of conduct that gives rise to the claims of the other class members, and if the claims of the representative are based upon the same legal theory. Johns v. Rozet, 141 F.R.D. 211, 216 (D.C.C. 1992), citing Covelo Indian Community v. Watt, 551 F.Supp. 366, 377 (D.D.C. 1982), citing EEOC v. Printing Industry of Metro Washington, D.C., Inc., 92 F.R.D. 51, 54 (D.D.C. 1981).

There has been no showing of any defenses unique to Mr. Dowd or of any atypical circumstance in his case. It is not required that the factual background of the named representative's case be identical with that of other members of the class, but only that the disputed issue occupy essentially the same degree of centrality to the named plaintiff's claim as to that of other members of the proposed class. Bishop v. New York City Department of Housing Preservation and Development, 141 F.R.D. 229, 238 (S.D.N.Y., 1992), citing Burka v. New York City Transit Authority, 110 F.R.D. 595, 604-605, (S.D.N.Y., 1986). Accordingly, we conclude that the Petitioner has satisfied the typicality requirement of Rule 23(a)(3).

Finally, the proponent of a class action must show that the representative parties will fairly and adequately protect the interests of the class. The adequacy of representation requirement is understood to have two components. First, the named representative must be free of such unique circumstances as might cause his interests to conflict with those of other members of the class. The named representative must also appear willing and able to see the litigation through to completion. Johns v. Rozet at 217, citing Littlewolf v. Hodel, 681 F.Supp. 929, 936 (D.D.C. 1988), citing National Association for Mental Health, Inc. v. Califano, 717 F.2d 1451, 1458 (D.C. Cir. 1983). The second component relates also to the competence of the named representative's counsel to conduct the litigation.

There is nothing about Mr. Dowd's situation that would put him in conflict with other members of the proposed class. It further appears that Mr. Dowd is willing and able to follow this matter to completion.

With respect to the adequacy of the class representative's counsel to handle the matter at hand, we look primarily at technical expertise, relevant experience and financial resources of counsel in evaluating satisfaction of this requirement. However, several matters of counsel's performance before the Board in this matter have raised some concern. Counsel has demonstrated, on more than one occasion, a lack of familiarity with or a disregard for matters of record, including his own pleadings. Some of petitioner's pleadings have asserted matters of no merit whatsoever. The Petition survived Respondent's motion to dismiss due to the recognition by the Board of an applicable GAO Order, not on account of any legal theory advanced by Counsel for Petitioner.

The Board has considered the performance observed by it and, on balance, concludes for the time being that Counsel is capable of providing adequate representation for Petitioner and the class that he seeks to represent. In reaching this determination, the Board considers the credentials of Petitioner's Counsel and of those with whom he may associate, and the absence of any evidence from Respondent tending to show inadequate representation. Future evidence to the contrary could lead to a decision to decertify the class. The Board is also satisfied with counsel's uncontradicted statement that he has the resolve and resources to see this matter through. We, therefore, consider this requirement to be satisfied.

Having met all the requirements of Rule 23(a), the petitioner must also satisfy one of the standards of Rule 23(b). The case falls within the ambit of Rule 23(b)(2), which provides:

The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive or corresponding declaratory relief with respect to the class as a whole...

The fact that Petitioner and the proposed class seek damages in addition to equitable relief does not prevent certification of the class under this subsection. Bishop at 240, citing Ventura v. New York City Health and Hospitals Corp., 125 F.R.D. 595, 601 (S.D.N.Y., 1989).

Definition of Class Certified

The class certified by the Board is as follows: all disabled veterans covered by Order 2306.1 and employed by GAO at any time during the period October 1, 1980 through January 17, 1992, the time period reflecting the effective date of Order 2306.1, the only source of GAO's duty to provide affirmative action for disabled veterans. The Board's definition of the class eliminates disabled veterans whose employment with GAO did not include service within the relevant time period.

The Board's definition of the class also eliminates that part of petitioner's proposed definition limiting class membership to those disabled veterans who were "damaged by GAO's failure to provide applicable preferences and benefits in accordance with GAO Rules and Regulations." (emphasis added). Individual harm must of course be proved to show individual entitlement to damages or other individual relief. But class membership does not depend on first proving damage caused by the contested practice or conduct. In fact, such a notion would undermine the primary benefits of class litigation, *i.e.*, judicial economy and classwide res judicata.

As previously stated, the Board may later exercise the discretion contemplated by Rule 23(c)(4) to limit the class treatment to particular issues. Rule 23(c)(4) provides in pertinent part: "When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues..." It may develop that inquiry into matters pertaining to individual relief completely eclipses common questions, in which case a modification of this order will be considered.

ORDER

In accordance with the foregoing, the motion for certification of a class is hereby **GRANTED**. The class shall consist of disabled veterans employed by GAO from October 1, 1980, through January 17, 1992. Administrative Judge McBride shall resume the conduct of further proceedings in this case.

Notes

1. GAO Order 2306.1, Chapter 10, required the development of annual affirmative action program plans for employment of handicapped individuals, including disabled veterans and set forth five required components of such plans.