

Carolann Cosella, *et al.* v. U.S. General Accounting Office

Docket Nos: 94-03; 94-04; 94-05

Date of Decision: August 10, 1994

Cite as: Cosella, *et al.* v. GAO (8/10/94 order)

Before: Nancy A. McBride, Vice-Chair, for the Board *en banc*

ORDER DENYING CLASS CERTIFICATION

These consolidated cases were initiated on May 19 and 20, 1994, by three petitions for review filed on behalf of a total of seven named petitioners. The Cosella petition stated that it was also filed on behalf of "the entire staff of the Philadelphia Regional Office of the United States General Accounting Office on November 10, 1993." (Cosella Petition, p. 1.) The Margallis petition contained almost identical language (Margallis petition at p. 1), and the Ballard petition stated that it was filed on behalf of "all aggrieved employees and former employees of the Philadelphia Regional Office. . . ." (Ballard Petition at p. 1.) On July 5, 1994, the petitioners filed a formal motion for class certification requesting that the Board certify a class "consisting of all employees of the Philadelphia Regional Office (PRO) on November 9, 1993." The agency opposed this motion. The Board has considered petitioners' motion, and the agency's response, and has decided to deny the motion.¹

Once an action is certified as a class action, all members of the class will be bound by the outcome of the proceeding whether favorable or unfavorable. Because of the need to protect the due process rights of the absent class members, the Federal Rules of Civil Procedure require courts to assure that there is adequate representation for the class before permitting any case to proceed as a class action. See, Fed. R. Civ. p. 23(a). Courts have generally interpreted this provision as requiring representation by an attorney. See, *e.g.*, *Oxendine v. Williams*, 509 F. 2d 1405 (4th Cir. 1975); *Ethnic Awareness Organization v. Gaarion*, 568 F. Supp. 1186 (E.D. Wisc. 1983); Wright, Miller and Kane, *Federal Practice and Procedure*, §1769.1 at p. 380 (West 1986). While the Board is not prepared at this time to adopt a rule that attorney representation will always be required in order to maintain a class action before the Board, the Board concludes that in this case it would not be appropriate to certify a class action without competent legal counsel to represent and protect the interests of the class members.

In the present case, petitioners challenge both the agency's decision to close the Philadelphia Regional Office and the manner in which that office closure is being effected. They have raised

¹ The parties were notified by telephone on July 12, 1994, of the Board's intention to deny the motion. Thus, the parties knew prior to the evidentiary hearing that this case would proceed as an action on behalf of the named petitioners only.

numerous legal theories to invalidate several agency decisions concerning the closure. The agency has, in response, challenged the Board's jurisdiction to review some of the matters raised by petitioners, and has also challenged the legal sufficiency of many of the petitioners' theories. The Board identified five different factual issues for an evidentiary hearing held on July 14 and 15, 1994. In short, this is a complex case involving numerous, difficult legal issues. In the circumstances of this case, the Board concludes that it would not be appropriate to permit the petitioners' representatives, who are not attorneys, to represent and bind a class of employees. This is not meant in any way to disparage the diligence or skills of the petitioners' representatives. The Board has, on a number of occasions, taken notice of the analytic skills and obvious dedication that the representatives have brought to their tasks in this case. Nonetheless, the sophisticated legal issues involved in the present case make it inappropriate to certify a class represented only by lay persons.²

EFFECT OF THIS DENIAL OF CLASS CERTIFICATION UPON PURPORTED CLASS MEMBERS

Denial of a motion for class certification is a significant event which has specific legal consequences for members of the purported class. Because the petitioners and the class they sought to represent do not have legal representation, the Board will briefly summarize the effect of this order on class members.

Under the Board's procedural regulations, an employee generally must file a charge alleging unlawful action by the agency within 20 days after the effective date of the action or within 20 days after the employee knew or should have known of the action. See, 4 C.F.R. §28.11(b); see also 4 C.F.R. §28.98 for special rules applicable to charges of discrimination. Such required filing periods are referred to as "statutes of limitations" or "limitations periods." The filing of a class action "tolls" or suspends the running of the statute of limitations as to all purported members of the class. *Crown. Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983). When a motion to certify the class is denied, the statute of limitations begins to run again as to all purported class members. *Id.* A purported class member who wishes to pursue his or her claim on an individual basis must act promptly after the denial of class certification, and file his or her charge within the time that remained on the limitations period on the date that the class complaint was filed.

For the reasons stated above, the petitioners' motion to certify this proceeding as a class action is hereby denied.

SO ORDERED.

² Additionally, the Board notes that the petitioners failed to fulfill the proper prerequisites to asserting the discrimination claim as a class action. The Board's regulations require that a complaint of discrimination be filed with GAO, in accordance with GAO Order 2713.2, before relief on behalf of a class is sought before the Board. 4 C.F.R. §28.97(a).