

ARTHUR LEE DAVIS v. U.S. General Accounting Office

Docket No. 31-201-09-83

Date Issued: February 2, 1984

Cite as: Davis v. GAO, Docket No. 31-201-09-83 (2/2/84)

Before: Ira F. Jaffe, Presiding Member

Headnotes:

Class Action

Motion to Dismiss

Race Discrimination

**ORDER DENYING RESPONDENT'S MOTION TO DISMISS PETITION FOR
REVIEW**

PERSONNEL APPEALS BOARD
UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C.

ARTHUR LEE DAVIS,)
 Petitioner)
)
 v.) Docket No. 31-201-09-83
)
UNITED STATES GENERAL)
 ACCOUNTING OFFICE,)
 Respondent)

ORDER DENYING RESPONDENT'S MOTION TO DISMISS
PETITION FOR REVIEW

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 McKensey 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 scheduled for April 25, 1982 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 and there was no indication in this record that such a hearing had been held even as of the present time. 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 this 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. Attached to the Petition for Review were a number of exhibits which were the source of the factual background material set forth herein. On November 16, 1983, the Agency filed a Motion to Dismiss the Petition for Review. No response to the Agency's Motion to Dismiss was filed by the Petitioner.

Contentions of the Petitioner

The contention that Mr. Davis waived any right to opt-out of the Fogle class action ignores the fact that the notice to opt-out occurred in April, 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. Certainly, Mr. Davis was not 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. Mr. Davis' complaint of July 26, did not allege that what occurred was part of a general pattern of discriminatory conduct by the Agency. Further, the complaint covers a period of time which is not included in the Fogle complaint.

Fairness and equity require that Mr. Davis be permitted to pursue his individual complaint of discrimination independently from the Fogle class action. The Agency's position that Mr. Davis' failure to opt-out in April, 1981 precludes him from asserting his present claims is contrary to the doctrine that enlargement of the opt-out time periods in class actions will be permitted by courts where there has been "excusable neglect" in failing to have opted-out at an earlier date in the proceedings. See Penson v. Terminal Transportation Company, 634 F.2d 989 (5th Cir. 1981) (court authorizing belated opt-out of a F.R.C.P. Rule 23(b)(2) class action where an employee was within the defined class but was not notified of his ability to request

exclusion from the class action; employee permitted to pursue individual complaint of discrimination notwithstanding fact of judicial decision on the class action); In re Four Seasons Securities Laws Litigation, 493 F.2d 1288, 1290-91 (10th Cir. 1974) (good faith plus a reasonable basis for not complying with the opt-out time period constituted "excusable neglect" under F.R.C.P. Rule 6(b)(2); late opt-out permitted where the bank's delay in opting out was not designed to gain a tactical advantage and where there was no prejudice to the other parties which resulted from the late opt-out).

In addition, the doctrine of administrative res judicata obligated the Agency to follow through with its investigation and issue a determination on the merits with respect to the July 26, 1982 complaint. Having agreed to process Mr. Davis' complaint and having completed the investigatory phase of the process, the Agency was bound to follow through and issue the final determination on the merits regarding the July 26, 1982 complaint. See, e.g., Sunshine Anthracite Coal Company v. Adkins, 310 U.S. 381 (1940) (coal company held precluded from relitigating, in a tax collection proceeding, the question of the applicability of the Bituminous Coal Conservation Act of 1937 to its properties; held that judicial decision enforcing the holding of the National Bituminous Coal Commission that the Act applied to the company's lands was res judicata; Court noting that the Commissioner of Internal Revenue was merely

a tax collection agent and not a decision-maker as to the application of the underlying statute); Stuckey v. Weinberger, 488 F.2d 904, 911 (9th Cir. 1973) (doctrine of administrative res judicata barred second claim for Social Security disability benefits where same issue was determined conclusively against the claimant in a prior administrative proceeding and was not appealed to the courts).

Contentions of the Agency

The allegations of the July 26, 1982 complaint all fall 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 -- all are expressly included within the Fogle 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., require 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. See, e.g., Green v. Wolf Corporation, 406 F.2d 191, 197-98 (2d Cir. 1968), cert. denied, 395 U.S. 977 (1969) (reviewing the history of F.R.C.P. Rule 23 class actions and holding that Rule 23 class actions may be initiated in Securities Rule 10b-5 cases; court further holding that the particular case at bar was an appropriate one for certification under Rule 23(b)(3), F.R.C.P.); Officers for Justice v. Civil Service Commission of the City and County of San Francisco, 688 F.2d 615 (9th Cir. 1982) (overruling objections of an employee to a settlement of a class action lawsuit and refusing to permit the employee to opt-out of the litigation following notice to him of the terms of the settlement agreement); Chrapilwy v. Uniroyal, Inc., 71 F.R.D. 461, 463 (N.D. Ill. 1976) (court declines to permit employees to opt-out where the requests to opt-out were filed late; court further noting that voluntary dismissals of the action were permitted pursuant to F.R.C.P. Rule 41(a) with the approval of the court).

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.

The Penson and Four Seasons cases cited by Petitioner

are factually distinguishable and do not support his claim for a second opt-out opportunity.

The Sunshine Coal and Stuckey cases cited by Petitioner are also factually distinguishable and do not support his claim that the Agency violated any concept of administrative res judicata. If there is any administrative res judicata principle applicable to this case at all, it is that the decision of EEOC Complaints Examiner Charles Relyea to include within Fogle all matters up to the hearing date is binding.

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.

Decision

The Complainant and the Agency disagreed as to whether the allegations of discrimination encompassed by Mr. Davis' July 26, 1982 complaint 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, absent

the filing of an independent lawsuit, 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.

Procedurally, this case is in the posture of a Motion to Dismiss. No Answer has yet been filed to the Petition for Review by the Agency. It is well established that, for purposes of ruling upon a Motion to Dismiss, the allegations of the Complaint (in this case the Petition for Review) must be presumed true. The March 16, 1983 letter from the Board's General Counsel resolving Mr. Davis' prior petition to the Board recited an agreement that Mr. Davis' July 26, 1982 complaint would be considered under the Agency's EEO complaint process and subsequently under the jurisdiction of the Board. Further, evidence of this agreement is the fact that the Agency thereafter apparently investigated the merits of Mr. Davis' complaint and issued to him an investigation report. (See Mr. Silva's August 25, 1983 letter to Mr. Davis appended to the Petition for Review.)

Based upon this record, I find that there may well have been a binding Agency agreement to process Mr. Davis' complaint under the Agency's EEO complaint process. The March, 1983 agreement apparently was in settlement of a Board complaint. I am not persuaded on this record that, as a matter of law, the July 20, 1983 letter from Mr. Relyea to the Agency supercedes or invalidates any prior agreement to process Mr.

Davis' July 26, 1982 complaint. 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 herein by the Agency appear inconsistent with the belief of Mr. Relyea and Ms. Waters that some, if not all, of the claims asserted in the July 26, 1982 complaint were individual rather than Fogle class complaints. Further, 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 the opt-out date in Fogle absent clear and convincing evidence of a knowing and intelligent waiver.

In view of the disposition of this Motion, it is not necessary to rule with respect to the other contentions raised by the Parties. Nor, in view of the holding concerning the Agency's apparent agreement to process Mr. Davis' July 26, 1982 complaint (which was proved to a sufficient degree to overcome a Motion to Dismiss), is it necessary to rule at this stage concerning whether the Formal Class Complaint in Fogle properly includes the post-April 12, 1981 factual incidents complained of by Mr. Davis; the weight, if any, to be given by this Board to the EEOC's determination of the scope of the Fogle case; whether Mr. Davis may now opt-out of the Fogle class action; whether Mr. Davis may remain in the Fogle class action for purposes of class-wide claims while simultaneously pursuing those

individual claims contained in his July 26, 1982 complaint; or whether, or to what extent, the EEOC may properly expand the scope of the Fogle class action beyond the date on which this Board obtained jurisdiction over appeals of allegations of Agency discrimination.

Finally, it should be noted that the Petition for Review filed by Mr. Davis sought, as a remedy, 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 that complaint appears to have been sought in this Petition for Review, and no findings concerning the merits are made herein.

In summary, the record in this case is far from fully developed. The instant decision is a ruling on a Motion to Dismiss. As such, all of the facts contained in the Petition for Review must be assumed to be true. There is more than an ample basis in the Petition for Review for one to conclude: 1) that the Agency was bound, by agreement, to process the July 26, 1982 complaint to a final agency determination; and 2) that at least some, if not all of the charges made in the July 26, 1982 complaint were individual in nature and could properly be raised at this time before the Agency and ultimately the Board. Accordingly, I am persuaded that the Agency's Motion to Dismiss the Petition for Review lacks merit and must be denied.

Order

The Agency's Motion to Dismiss the Petition for Review
in Docket No. 31-201-09-83 is denied.

February 2, 1984


Ira F. Jaffe
Presiding Member