

JAMES B. DOWD v. U.S. General Accounting Office

Docket No. 91-03

Date of Decision: May 13, 1993

Cite as: Dowd v. GAO, Docket No. 91-03 (5/13/93)

Before: Nancy A. McBride, Administrative Judge

Headnotes:

Class Action

Continuing Violations

Timeliness, General

MEMORANDUM AND ORDER

By its order of December 18, 1992, the Board determined that Petitioner was entitled to maintain this action on behalf of himself and all others similarly situated. The class was defined as follows:

"[A]ll 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..."

In determining whether an appeal should be treated as a class action, the Board is guided, but not controlled, by Rule 23 of the Federal Rules of Civil Procedure. 4 C.F.R. § 28.18(g). The Board's regulations do not specifically provide that Rule 23 shall provide guidance on all issues related to the maintenance of a class action, but reason dictates that Rule 23 be consulted on such matters. Therefore, my analysis of the questions posed will be guided by applicable provisions of Rule 23 and relevant case law.

Respondent requested, in its Proposed Changes to Notice to Class Members, that the class definition be amended to limit class membership to "class members who were employed at GAO as of the date of the Notice of Petition for Review, April 2, 1991, or between April 2, 1991, and January 17, 1992." At the status conference this proposal was modified to propose going back two years from the date of the Notice of Petition for Review. Respondent cited no legal authority in support of either proposed change. When asked for the rationale behind the

proposed two-year period, counsel responded that there was need for some cut-off and that, by analogy, Title VII has a 180-day limitation built into it.

Petitioner objected to the proposed change and, similarly, offered no legal authority to support his position. He correctly noted that the proposed change was an attempt to raise a statute of limitations argument and that it was, in effect, a motion to reconsider the Board's order certifying a class.

Neither party addressed the rather difficult question of the applicable limitations period for individual class members in a class action in which a continuing violation is alleged. The most developed case law on this point is in the area of Title VII. Under Title VII case law, the predominant view appears to be that, in a class action alleging a continuing violation, the class must be limited to those individuals who were employed by the employer, and thus affected by the continuing violation, within the applicable charge filing period preceding the date of the class representative's charge.

The courts start with the premise that class membership is limited to those individuals who could have filed their own charges. Wetzel v. Liberty Mutual Insurance Co., 508 F.2d 239, 246 (3rd Cir. 1975); see also, Payne v. Travenol Laboratories, Inc., 673 F.2d 798, 814 (5th Cir), cert. denied, 459 U.S. 1038 (1982).¹ If an individual's claim had already become time-

¹ This rule, that class member must demonstrate that they could have filed timely claims when the class representative (continued...)

barred by the time the class representative files a charge, that individual's claim is not revived and he or she cannot become a member of the class. Domingo v. New England Fish Co., 727 F.2d 1429, 34 FEP Cases 584, 595 (9th Cir. 1984), modified on other grounds, 742 F.2d 520 (9th Cir. 1984).

As a general matter, a charge is timely under Title VII if it is filed by a private sector employee within 180 days following the alleged unlawful act (300 days in states having state nondiscrimination statutes) or if a federal employee initiates precomplaint counseling within 30 days from the alleged violation. Thus, class membership would generally be limited to those individuals who were victims of specific alleged violations within the applicable time period (i.e., 180, 300 or 30 days) prior to the filing of the class representative's charge, as those are the individuals who could have filed timely charges when the class representative filed his or her charge. However, when the complaint alleges a "continuing violation," a charge will be timely if it has been filed any time that the alleged unlawful practice or policy was in effect and that the charging

¹(...continued)
initiated the class action, appears to be generally applicable to class actions and not unique to Title VII. See, Slack v. Stiner, 358 F.2d 65 (5th Cir. 1966) (potential intervenors had never been class members, and thus their claims had not been preserved during the pendency of the class action, where their claims were already barred by the statute of limitations when the class action was commenced); Perry v. Beneficial Finance Co., 81 F.R.D. 490 (W.D.N.Y. 1979) (in class action under the Truth in Lending Act, class must be limited to those who received a loan within the one year statute of limitations period preceding the filing of the class complaint).

party continued to be affected by it. Thus, in cases involving continuing violations, the courts have permitted the class to include all individuals who were employed by the company during the relevant "charge filing period" prior to the filing of the charge, whether or not they were alleging that specific acts were taken against them during that period. Domingo, supra; McKenzie v. Sawyer, 684 F.2d 62, 72 n.8 (D.C. Cir. 1982); Wetzel, supra; Griffin v. Casey, 42 FEP Cases 1423, 1429-30 (M.D. Fla. 1987); Avagliano v. Sumitomo Shoji America, Inc., 103 F.R.D. 562, 577-78 (S.D.N.Y. 1984); Leach v. Standard Register Co., 94 F.R.D. 621, 625 (W.D. Ark. 1982). However, individuals who left the company's employment more than the applicable number of days before the filing of the class representative's charges are excluded from the class. Id. The rationale is that the continuing violation ceased as to those employees at the time they left the company and that they would have had to file a charge at that point, or with the charge filing period in order to have a timely claim. Id. Cf., Taylor v. Bunge, 775 F.2d 617 (5th Cir. 1985) (legal claims mature at discharge; violation cannot be said to "continue" after that point).

There are, it should be noted, several district court cases that have, without discussion, defined the class as including all persons affected by the employer's practices during the life of the continuing violation, irrespective of when the charge was filed and their employment status at such time. EEOC v. Chicago Miniature Lamp Works, 640 F. Supp. 1291, 41 FEP Cases 911 (N.D.

Ill. 1986).² See also, EEOC v. Rymer Foods, 50 FEP Cases 787 (N.D. Ill. 1989) (class defined as blacks subjected to discrimination in recruitment and hiring beginning in 1979, even though charge not filed until 1985).³

The majority position, limiting class membership to those who could have filed timely charges when the class representative filed, makes sense when analyzed as a statute of limitations issue. In a continuing violation case, it does, however, create some anomalous results. For example, an individual who is employed at the time the class representative files his or her charge will be considered a member of the class and will, as a result, be able to obtain relief for parts of the "continuing violation" that predated the charge filing period. Another individual who terminated employment before the beginning of the charge filing period will not be a member of the class and will

² Although this particular decision of the district court was never reviewed, the Seventh Circuit did subsequently reverse the district court's finding of liability in this case. 947 F.2d 292 (7th Cir. 1991). The circuit court's opinion does not address any issues concerning the certification or definition of the class.

³ In Key v. Gillette Co., 90 F.R.D. 606, 50 FEP Cases 1608 (D. Mass. 1981), the court certified a broad class including all females who were employed, who sought employment, or who were deterred from seeking employment in managerial, professional, supervisory or administrative positions during the years 1968-1975, even though the class representative's charge was not filed until 1973. The court rejected, with little discussion and no relevant citation of authority, the defendant's motion to limit the class. 50 FEP Cases at 1611. In a subsequent opinion, following trial, the district court decertified the class on the grounds of inadequate representation. 40 FEP Cases 1621. The First Circuit affirmed the decertification without reaching the issue of the definition of the class. 782 F.2d 5, 50 FEP Cases 1623 (1st Cir. 1986).

not be entitled to relief, even though that individual may have suffered discrimination at the exact same time as the class member. This result makes sense if one recognizes that the court is not giving relief for discrete acts of discrimination but for a continuous process of discrimination. The former employee simply did not file and did not have the benefits of a representative filing while the process still affected him or her. The "current employee" class member on the other hand has the benefit of a timely filing, and the court proceeds to consider appropriate relief. In fashioning that full relief, the court takes into account the total impact of the "continuous process" of discrimination on that individual, even if it encompasses events spanning several years.

On balance, I am of the opinion that the majority opinion should be followed by the Board. Only those individuals who themselves could have filed a timely charge at the time of the filing of the class representative's charge can be class members. The class will, therefore, be limited to persons who were employed by GAO within the charge filing period.

The question remains: What is the applicable charge filing period from which to measure GAO employment status? The cases considered above were Title VII cases and therefore the 30-, 180- and 300-day limitations periods were used. The instant case is not a discrimination case and Title VII time limits, therefore, do not apply.

Applying the majority position under Title VII to Dowd, the class should be limited to those disabled veterans who were GAO employees within the relevant period preceding the filing of Petitioner's charge with the General Counsel of the Personnel Appeals Board. The charge was filed on November 20, 1990. Employees are required to file charges concerning prohibited personnel practices within 20 days of the alleged unlawful act. Therefore, under the foregoing analysis, an individual had to be an employee of GAO as of a date on or after October 31, 1990.

The definition of class members is hereby amended to read as follows:

All disabled veterans covered by Order 2306.1 and employed by GAO at any time during the period October 31, 1990 through January 17, 1992, the last effective date of Order 2306.1

II) Whether class members should be given notice of the right to opt out of the action.

Under the federal rules, a class must satisfy all of the prerequisites in Rule 23(a) and fall within one of three subsections of Rule 23(b). In addition to meeting the requirements of Rule 23(a), Petitioner contended, and the Board found, that the class in this case satisfied the requirements of 23(b)(2), that is, 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."

For cases certified under Rule 23(b)(3), Rule 23(c) prescribes a mandatory notice requirement and a right to opt out of the class. There is no such requirement for notice in a 23(b)(2) action. The Supreme Court has held that the Rule 23(c)(3) mandatory notice requirement in 23(b)(3) actions "is inapplicable to class actions for injunctive or declaratory relief maintained under subdivision (b)(2)." Eisen v. Carlisle and Jacquelin, 417 U.S. 156, 171 n. 14, 94 S. Ct. 2140, 2149 n. 14, 40 L. ED.2d 732. The Court has not, however, said that notice is prohibited in all but (b)(3) classes, nor has it specifically considered whether the opt-out choice may be extended beyond subsection (b)(3). Allen v. Isaac, 100 F.R.D. 373 (1983).

FRCP 23(d)(2) expressly permits the court to issue appropriate orders, including the giving of notice, where to do so would promote fairness and protect the interests of unnamed class members. It is on this basis that notice is being ordered in the instant case. The case before us presents a hybrid (b)(2)/(b)(3) class. This is a fairly typical pattern with the request for injunctive and declaratory relief relating to a (b)(2) class and the requests for individual relief and back pay relating to a (b)(3) type of action.

Courts have almost uniformly found it to be within the court's discretion to extend the right to opt out to class

members of a (b)(2) or a hybrid class. See, Williams v. Burlington Northern Inc., 832 F.2d 100,103 (7th Cir. 1987) (District Court could have provided for opting out, but it did not abuse discretion by not doing so.); County of Suffolk v. Long Island Lighting Co., 710 F. Supp. 1407, 1420 (ED NY 1989) (Under Rule 23(d), courts have the discretionary power to allow the exclusion of class members in 23(b)(1) and 23(b)(2) class actions, so-called "mandatory" classes.)⁴

Having concluded that an opt-out provision is permissible in a (b)(2) action and in view of the fact that both parties to this case have requested that class members be given the opportunity to opt out, a provision authorizing opting out has been included in the required notice appended to this order.

III. The content of notice regarding exposure of class members to liability for costs and fees.

The notice proposed by Respondent included the following language: "[P]rospective class members who do not remove themselves from the class may be obligated to share in paying certain fees and costs arising in connection with this proceeding."

Respondent did not cite any legal authority in support of the inclusion of the proposed language. Petitioner objected to

⁴ In Holmes v. Continental Can Co., 706 F.2d 1144 (7th Cir. 1983), the court ruled that the right to opt-out must be extended to members of a (b)(2) class because the merits of many monetary damages and back pay claims in the case were uniquely individual to particular class members. Id. at 1145.

the proposed language, but he was unclear on his view of the liability, if any, of class members for costs and attorney's fees.

Respondent's proposed notice does not identify the circumstances under which a class member may incur costs and fees, nor does it specify the type of fees for which they may become obligated. Under law and regulation applicable to proceedings before this Board, there appear to be no circumstances under which class members, other than the named Petitioner class representative, could be liable for cost or fees.

In a proceeding before this Board, there is no question of liability for any of Respondent's fees or costs. Even if Respondent prevails, there is no provision in law or regulation that would allow an award of its fees and/or costs from petitioner. Pursuant to 4 CFR § 28.89, Petitioner as prevailing party, may submit a request for the award of reasonable attorney fees and costs. There is no provision allowing for a comparable recovery by respondent when it prevails.

As to petitioner's expenses, "a class representative bears the burden of these in any class action." Moore v. National Association of Securities Dealers, Inc., 762 F.2d 1093, 37 FEP Cases 1749 (D.C. Cir. 1985). The class representative's ability to bear these costs is one the consideration in determining whether the adequacy of representation prerequisite for class certification has been satisfied.

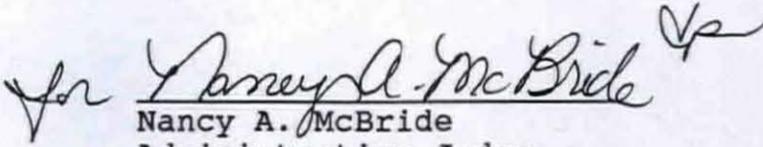
Of course, if Petitioner prevails in this matter, his fees and costs may be recovered from the respondent 4 CFR § 28.89. But if Petitioner does not meet the standards for recovery of costs and attorney's fees or if Respondent is deemed the prevailing party, then Petitioner remains liable for his own costs and fees according to whatever agreement exists between him and his counsel. Class members who have not voluntarily agreed to share in these expenses would not be bound to do so.

Because there was some confusion on this point and because of the importance of potential class members making informed decisions regarding participation in the action, this question will be addressed in the notice to class members.

In accordance with the foregoing, I have prepared the notice that appears as Appendix 1 to this memorandum and order. Respondent shall cause this notice, and the accompanying Notice of Decision to Opt-Out of Class Action, to be served by first-class mail to the last address known to it of each class member on or before May 25, 1993. Respondent shall further cause a copy of the notice to appear one time in its publication, Management News, on the next available date of publication.

SO ORDERED.

DATE: May 13, 1993


Nancy A. McBride
Administrative Judge

APPENDIX I

NOTICE

TO: ALL DISABLED VETERANS EMPLOYED BY GAO ANY TIME DURING THE PERIOD OCTOBER 31, 1990 TO JANUARY 17, 1992.

Notice is hereby given to you that the Personnel Appeals Board of the General Accounting Office has, by order dated December 18, 1992, certified a class consisting of all disabled veterans employed by GAO during the period October 31, 1990 to January 17, 1992. You are further notified as follows:

1. The class has been certified with respect to a Petition filed by James Dowd on behalf of himself and similarly situated individuals. Petitioner, Mr. Dowd, has complained about the failure of GAO to implement affirmative action for disabled veterans.

2. The Board has decided that Mr. Dowd may represent, as named Petitioner, disabled veterans employed by GAO during the period October 31, 1990 through January 17, 1992. During this period, GAO committed the agency to establish an affirmative action program for disabled veterans, through GAO Order 2306.1.

3. In this class action, the Board may decide the following: the content of GAO's self-imposed duty to provide affirmative action for disabled veterans; the harm, if any, caused by GAO's failure to implement an affirmative action program for disabled veterans; the appropriateness of any class-wide corrective action and/or individual relief. The relief sought by petitioner includes affirmative action for disabled veterans, retroactive promotion, back pay, costs and attorneys fees.

4. Counsel for the petitioner and for the members of the class included in this action is Walter T. Charlton, Esq. whose address is 2009 N. 14th Street, Suite 410, Arlington, Virginia, 22201 and whose telephone number is (703)525-8387. If you wish to receive further information about this matter, you should address such questions to Mr. Charlton and not to the Board.

5. If any class member wishes to appear in his or her own behalf, such class member may enter an appearance through counsel of his or her own choosing.

6. You have the right to remove yourself from the class and from this proceeding. However, in the event GAO is ordered to take corrective action with respect to the class as a whole, it may be impossible to separate you from such class-wide action. You may remove yourself from the class and from this proceeding by mailing the attached Notice of Decision to Opt-Out of Class Action to the Clerk of the Board, PAB, UCPII/Suite 830, 441 G Street, N.W., Washington, D.C. 20548. This form should be mailed on or before June 15, 1993.

7. If you do nothing you will be a member of the class and your interests will be represented by the class representative, Petitioner James Dowd, and by his counsel, Walter T. Charlton. You will be bound by any decisions made in this case. If individual relief is found to be an appropriate remedy, class members will be given the opportunity to present individuals claims.

8. The fees and costs associated with prosecuting this matter on behalf of the class are being borne by Petitioner, Mr. Dowd. If

Petitioner prevails, he may seek from the Board payment by Respondent of his costs and attorney's fees. If Respondent prevails, Petitioner will be responsible for his own fees and costs, but he will not be liable for those of Respondent.

9. The Personnel Appeals Board has required that this notice be sent to you to advise you of the nature of the pending proceedings. The Board does not endorse the position advanced by any party to the proceeding and it cannot advise you if you may be entitled to any individual relief.

TO: Clerk of the Board, Personnel Appeals Board

NOTICE OF DECISION TO OPT-OUT OF CLASS ACTION.

I have reviewed the contents of the Board's "Notice to All Disabled Veterans Employed by GAO Any Time During the Period October 31, 1990 to January 17, 1992."

I am a disabled veteran who was employed by GAO at some time during the period October 31, 1990 to January 17, 1992. I understand that the class is seeking corrective action and damages from GAO on account of the agency's failure to implement affirmative action for disabled veterans, with GAO Order 2306.1, as in effect at the time.

I do not wish to be a member of the class. I waive my right to any benefit that may accrue to members of the class as a result of this litigation, except such as may inadvertently accrue to me by virtue of my status as a person who meets the definition of a class member. Please note my exclusion from the class and from any further proceedings in this matter.

Name: _____

Employee I.D.: _____

Address: _____

Phone: _____

Dates of GAO employment: _____

Current or most recent GAO position: _____

Signed: _____ Date: _____

PLEASE MAIL THIS NOTICE BY JUNE 15, 1993 TO:
CLERK OF THE BOARD
PERSONNEL APPEALS BOARD
UCP II/SUITE 830
441 G STREET, N.W.
WASHINGTON, D.C. 20548