

Thomas Taydus v. U.S. Government Accountability Office

Docket No. 07-03

Date of Decision: December 3, 2008

Cite as: Taydus v. GAO, No. 07-03 (12/3/08)

Before: Steven H. Svartz, Administrative Judge

Headnotes:

Class Action

Length of Service

Motions Practice

DECISION ON PETITIONER'S MOTION FOR CLASS CERTIFICATION

I. INTRODUCTION

Petitioner has filed a Motion for Class Certification (Pet. Motion). Subsequently, the Respondent (GAO or the Agency) filed an Opposition to the Motion for Class Certification, Petitioner filed a Reply thereto, and the Agency filed a Sur-Reply. This matter is addressed below.

II. POSITIONS OF THE PARTIES¹

Petitioner contends that his Motion for Class Certification meets the applicable standards established by the Board and, therefore, should be granted. Petitioner notes that in *Dowd v. GAO*, PAB Docket No. 91-03, slip op. at 3 (Dec. 18, 1992) (*Dowd*), the Board stated that "[p]rior to undertaking the analysis of the requirements of" Federal Rules of Civil Procedure (Fed. R. Civ. P.) 23(a), "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." According to Petitioner, these two additional requirements are met because the

¹ The parties' filings addressed two putative classes: Band IF employees who were over the age of forty at the time their performance was measured for FY 2002, and Band IF employees who had over five years' service at GAO at the time their performance was measured for FY 2002. On November 20, 2008, at the unopposed request of the Petitioner, his age discrimination claims were dismissed. *See* Decision on Petitioner's Motion to Admit Expert Report and Testimony into the Record (Nov. 25, 2008) at 5. Accordingly, the parties' arguments relating to the putative class of employees who were over the age of forty are moot, and will not be set forth herein.

evidence establishes that at least 90 employees, including Petitioner, had over five years' service at GAO at the time those employees' performance was measured for FY 2002.

Moreover, Petitioner asserts that the proposed class meets the four threshold requirements of Fed. R. Civ. P. 23(a) and that it falls within at least one of the three categories of cases set forth in Fed. R. Civ. P. 23(b). Specifically, Petitioner contends that the putative class is so numerous that joinder of all members is impracticable (the numerosity requirement); that the claim in the class rests on questions of law or fact common to the class (the commonality test); that the claim of the class representative is typical of those of the class (the typicality requirement); and that the representative party will fairly and adequately protect the interests of the class (the adequacy of representation requirement). Finally, Petitioner asserts that he has satisfied Fed. R. Civ. P. 23(b)(2), which authorizes a class action if "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." In this regard, Petitioner alleges that the Agency "had a practice of evaluating employees' work performance based on . . . length of GAO service[,] and certification is appropriate under this subsection. *Id.* at 6.

The Agency opposes the Motion for Class Certification. According to the Agency, Petitioner "cannot satisfy Rule 23's commonality or typicality requirements." Respondent's Opposition to Motion for Class Certification at 2. In this regard, the Agency contends as follows:

First, there is no evidence of a GAO-wide policy or practice in which employees with more than five years of GAO experience were to be rated lower than employees with fewer than five years of GAO experience. In addition, Petitioner's individualized experience with respect to his own performance appraisal cannot stand as a proxy for how any other Band I employee was treated. Moreover, even if there were evidence of a common practice, Petitioner's claims are not typical because his performance actually improved once he had been at GAO for more than five years.

Id. (emphasis in original).

III. ANALYSIS

Under the Board's regulations, in determining whether a claim may be treated as a class action, the Board is guided, although not bound, by the applicable provisions of the Fed. R. Civ. P. *See* 4 C.F.R. §28.18(f). As both parties acknowledge, the applicable provision of the Fed. R. Civ. P. is Rule 23, Class Actions. Under Rule 23, Petitioner has the burden of establishing that all of the prerequisites for class certification have been met. *Hartman v. Duffey*, 19 F.3d 1459, 1468 (D.C. Cir. 1994); *Lindsay v. Government Employees Insurance Co.*, 251 F.R.D. 51, 54 (D.D.C. July 3, 2008); *Dowd*, slip op. at 3-5.

Rule 23(a), "Prerequisites to a Class Action," sets forth four prerequisites, all of which must be established before consideration is given to the further requirements set forth in Rule 23(b), "Class Actions Maintainable." Specifically, Rule 23(a) states:

One or more members of a class may sue or be sued as representative parties on behalf of all 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.

Fed. R. Civ. P. 23(a). "Failure to adequately demonstrate any of the four [threshold requirements] is fatal to class certification." *Garcia v. Johanns*, 444 F.3d 625, 631 (D.C. Cir. 2006).

The Agency asserts that Petitioner has not established that the commonality and typicality requirements have been met. For the reasons stated below, I agree.

The commonality test is met "when there is at least one issue . . . the resolution of which will affect all or a significant number of the putative class members." *Lindsay*, 251 F.R.D. at 55 (internal citation and quotation marks omitted). The typicality requirement is met "[i]f the class representative's claims arise from the same events, practice, or conduct, and are based on the same legal theory as those of other class members[.]" *Id.* (quoting *Coleman v. PBGC*, 196 F.R.D. 193, 198 (D.D.C. 2000)). The Supreme Court has stated that "[t]he commonality and typicality requirements of Rule 23(a) tend to merge. Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *General Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 157 n.13 (1982). See also *Chennareddy v. GAO*, PAB Docket No. 85-704-CA-86 (Nov. 23, 1987) (*Chennareddy*). The Supreme Court further stated that "[s]ometimes the issues are plain enough from the pleadings to determine whether the interests of the absent parties are fairly encompassed within the named plaintiff's claim, and sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question." *Id.* at 160. Finally, the Court held that a class action "may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." *Id.* at 161.²

Petitioner contends that the commonality requirement has been met because "the issue of whether GAO's practice of assessing the performance of employees with over five years of GAO experience relative to the performance of employees with less than five years of GAO experience constituted a prohibited personnel practice is a question of law and fact common to each member of the proposed length of service class." Pet. Motion at 4-5. Similarly, Petitioner claims that the

² In *Dowd*, the Board noted that in determining whether the applicable class certification standards have been met, "the inquiry is limited to whether the requirements for class certification have been met; the court may not consider the merits of the claim." *Dowd*, slip op. at 3. I do not view that statement as being in conflict with the Supreme Court's statements quoted above, which ensure a judge's ability to consider relevant evidence in making determinations under Rule 23. See, e.g., *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 675-76 (7th Cir. 2001).

typicality requirement is met because "Petitioner's and the putative class's length of service claim arises from the same conduct and implicates the same legal theory." *Id.* at 5.

The underlying premise of Petitioner's commonality and typicality arguments is that GAO had a practice or policy of assessing certain employees' performance in an impermissible manner. However, Petitioner did not submit any evidence in his Motion that would support his contention in this regard. The Motion included two exhibits, only one of which (Exhibit 2) is relevant to the pending class claim.³ Exhibit 2 lists Band IF employees with more than 5 years of GAO experience. That exhibit addresses the number and identities of the putative class members, but provides no support for the commonality or typicality requirements. Moreover, Petitioner did not include any other evidence, whether in the form of affidavits or other materials, in support of his Motion. As such, the Motion consists of nothing more than unsupported allegations with respect to the commonality and typicality requirements. Such unsupported allegations do not withstand the "rigorous analysis" required by the Supreme Court for the certification of a class under Fed. R. Civ. Proc. 23(a). *See, e.g., Wagner v. Taylor*, 836 F.2d 578, 587 (D.C. Cir. 1987) ("Necessarily, the court must examine both the claims presented *and the showing in support of class certification* for their adherence to the requirements of Rule 23") (emphasis added).

I note that in his Reply, Petitioner states that he "presented evidence in his Opposition to Respondent's summary judgment motion which clearly establishes that employees with more than five years of GAO experience were rated lower relative to those with less than five years of GAO experience." Reply at 2. However, by Petitioner's own description, the evidence cited by Petitioner was submitted to establish that employees with more than five years of GAO experience were rated lower relative to those with less than five years of GAO experience. Petitioner does not assert that the cited evidence establishes the reason(s) for any such disparity. Thus, it does not provide support for the claim that the same legal theory, relating to an allegedly impermissible policy or practice of assessing employees' performance, applies to both Petitioner and the class members. Moreover, Petitioner cites no other evidence that supports his claim that during the relevant time period the Agency had a policy or practice of rating employees with more than five years of GAO experience lower relative to those with less than five years of GAO experience. Consequently, Petitioner has not made the necessary showing in support of his class certification claims. *See Chennareddy*, slip op. at 3 (finding petitioners' allegations not susceptible to class treatment where petitioners offered no evidence).

Accordingly, without ruling on whether the other requirements for class certification have been established in this case, I find that Petitioner has not supported his claim that the commonality and typicality requirements have been satisfied. Therefore, the Motion for Class Certification is denied.

SO ORDERED.

³ Exhibit 1, a listing of Band IF employees by age, related only to the subsequently-withdrawn age discrimination class claim and has no relevance to the pending class claim.