1977 WL 15444
United States District Court, N.D. California.
BERNARDI

v.
BERGLAND, SECRETARY, U.S. DEPT. OF AGRICULTURE

No. C-73-1110 SC.
|
Oct. 28, 1977.

Attorneys and Law Firms

Mary C. Dunlap, Joan Messing Graff, and Nancy L. Davis (Equal Rights Advocates, Inc.), San Francisco, Calif., for plaintiff.

John Milano, Special Appointed Assistant U.S. Attorney for the Northern District of California, for defendant.

Opinion

CONTI, District Judge: -

***1** Plaintiff filed this class action against the Forest Service of the United States Department of Agriculture alleging sex discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., as amended in 1972 to cover employees of the federal government. 42 U.S.C. § 2000e-16. The matter is now before the court on plaintiff's motion for an order certifying the action as a class action pursuant to Fed. R. Civ. P. 23.

Until January 1975, plaintiff was employed as a research scientist at the Pacific Southwest Forest and Range Experiment Station in Berkeley, California. In this action she alleges that she and other female Forest Service employees have been discriminated against with respect to placement, training opportunities, and promotions. Plaintiff proposes a class which would include "every female employee and/or ex-employee of the Forest Service of the United States Department of Agriculture who could have filed a timely charge pursuant to 42 U.S.C. § 2000e-16 and the regulations issued thereunder for alleged sex-discriminatory policies, practices, and/or actions, at any time on or after the thirtieth (30) day prior to December 5, 1972, when Gene C. Bernardi filed her individual charge of discrimination."

Before proceeding with the consideration of the merits of plaintiff's motion, two preliminary matters require discussion. Rule 23(c)(1) F.R.Civ.P. provides:

> As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subsection may be conditional, and may be altered or amended before the decision on the merits.

In Harriss v. Pan American World Airways, Inc., 74 F.R.D. 24, 36-38, 15 FEP Cases 1640, 1644-1646 (N.D.Ca. 1977), Judge Schwarzer indicated what this determination means:
The language of the rule is significant. It does not mandate the court at this stage of the proceeding to determine or "certify" the appropriate class or otherwise to undertake the task of defining the class; in fact, nowhere in Rule 23 is there any provision for "certification." The rule is limited to directing the court to determine whether the action may be maintained as a class action. In making that determination, the court must necessarily pass on the appropriateness of the class proposed by plaintiff, and perhaps by defendant, and arrive at its own tentative definition of the class on whose behalf the action may be maintained. Such a definition may be relevant to future discovery and to trial preparation, but it remains subject to change and does not establish the class which will be bound by the judgment.

***2** In actions under Rule 23(b)(2), a broad class may often be appropriate for adjudication of liability and class-wide injunctive relief. Where individual relief is also sought in such an action, such as back pay or retroactive seniority, different questions may arise as to whether a class action may be maintained to obtain that relief, and bifurcation of the liability and relief phases under Rule 42(b) will often be appropriate. The initial (c)(1) determination in such cases should therefore be regarded as having been made for limited purposes only (regardless of whether

bifurcation has been formally ordered), leaving open the question of class treatment in the subsequent phases of the litigation. Rule 23(c)(1), by providing that the determination "may be altered or amended before the decision on the merits", clearly authorizes this approach. [citations omitted]

Therefore, if the court determines that this action may be maintained as a class action and tentatively defines what it considers to be the appropriate class, this definition will not necessarily be binding should subsequent developments suggest a different class.

The second preliminary matter concerns the proper judicial attitude toward Title VII class actions. The Ninth Circuit expressed itself on this issue in Gay v. Waiters' and Dairy Lunchmen's Union, 549 F.2d 1330, 1334, 14 FEP Cases 995, 998 (9th Cir. 1977):

> [W]e conclude that in determining whether an action alleging discriminatory employment practices shall be allowed to proceed as a class action, a trial court must consider the broad remedial purposes of Title VII and must liberally interpret and apply Rule 23 so as not to undermine the purpose and effectiveness of Title VII in eradicating classbased discrimination.

This solicitude is particularly appropriate where a Rule 23(b) (2) class action is alleged.

The burden of establishing that an action may be maintained as a class action is on the class plaintiff. Harriss v. Pan American World Airways, Inc., supra. The mandatory requirements of Rule 23(a) must first be met. Wetzel v. Liberty Mutual Insurance Co., 508 F.2d 239, 9 FEP Cases 211 (3rd Cir. 1975). Rule 23(a) provides:

> 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.

***3** Each of these prerequisites will be considered in turn.

CLASS TOO NUMEROUS FOR JOINDER.

The figures provided by plaintiff indicate that as of December 22, 1972, the Forest Service employed 3,731 women. Even allowing for fluctuations since that date, joinder of such a large number of potential plaintiffs would be impracticable. Gay v. Waiters' and Dairy Lunchmen's Union, supra.

COMMON QUESTIONS OF LAW OR FACT.

In Harriss v. Pan American World Airways, Inc., supra at 41, 15 FEP Cases at 1648, Judge Schwarzer said:
Title VII cases which normally fall within Rule 23(b)(2) are likely to meet the common question requirement if they meet the (b)(2) test that the opposing party "has acted or refused to act on *grounds generally applicable to the class* ..." (emphasis added) A demonstration with some specificity of the existence of such grounds (i.e., more than the mere conclusory claim of race or sex-based discrimination) and their common application to a defined class should substantially satisfy the commonality requirement in Title VII cases.

Plaintiff in this case alleges a Rule 23(b)(2) class action. In the Affidavits of Sondra Martin and Bradley Angel, she offers statistical evidence to substantiate her allegations of sex discrimination by the Forest Service in placement, training opportunities, and promotions. This evidence is sufficient to establish commonality.

Judge Schwarzer also listed five criteria of commonality in Harriss. Defendant focuses on these and argues that they are not satisfied here. Specifically, he contends that the class proposed by plaintiff is geographically unmanageable, that each of the seventeen employing offices of the Forest Service is autonomous, that the nature of the hiring at the Pacific Southwest Forest and Range Experiment Station is special, and that only a small number of employees have been hired there since 1972. Defendant argues that the appropriate class would at most be composed of female employees hired at PSFRSF.

The court does not find this argument convincing. The challenged practice is that of excluding women from higher G.S. levels and from other than clerical positions in the Forest Service. This is clearly a practice having a classwide impact. While the proposed class includes a range of job categories, it is alleged that all women suffer similar discrimination. Finally, despite defendant's claim of a high degree of autonomy in each employing office, the Forest Service is a separate governmental agency and its overall personnel policies are generated in considerable part from its Washington, D.C. headquarters.

CLAIMS OR DEFENSES TYPICAL OF THE CLASS.

There is overlap between this requirement and the commonality requirement. What paragraph (a)(3) requires is a showing by the class action plaintiff that there is in fact a class needing representation. Taylor v. Safeway Stores, Inc., 524 F.2d 263, 11 FEP Cases 449 (10th Cir. 1975). In this case, plaintiff is a woman, she was employed by the Forest Service, and she alleges that she was denied a promotion because of her sex. She sued on behalf of all female Forest Service employees who were discriminated against in placement, training opportunities, and promotions because of their sex. Her claim is sufficiently typical.

FAIR AND ADEQUATE PROTECTION OF THE CLASS INTERESTS.

***4** Fair and adequate representation depends on two factors. First, the plaintiff's attorney must be qualified, experienced, and generally able to conduct the proposed litigation, and second, the plaintiff must not have interests antagonistic to the class. Wetzel v. Liberty Mutual Insurance Co., supra. Neither of these factors presents any difficulty in this case.

The affidavit of plaintiff's attorney indicates that she and other members of her law firm have had considerable experience in managing Title VII class actions. In addition, she has actively pursued discovery and successfully argued on appeal from an earlier order in this action before the Ninth Circuit.

Plaintiff's interest in this case is the same as that of the other members of the class, i.e., the elimination of sex discrimination. The fact that she is no longer an employee of the Forest Service does not pose a problem. Wetzel v. Liberty Mutual Insurance Co., supra. The relief plaintiff requests will benefit the other members of the class as well as herself.

In addition to meeting the mandatory requirements of Rule 23(a), the class must be maintainable under one of the subsections of 23(b). Wetzel v. Liberty Mutual Insurance Co. supra. Plaintiff in this case alleges a Rule 23(b)(2) class action. This subsection provides that an action may be maintained as a class action if "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."

Defendant argues that he has not acted on grounds generally applicable to the proposed class. He also argues that plaintiff cannot represent women in other job categories, or those who suffered discrimination in placement or training opportunities rather than promotion.

The court does not find this argument convincing either. Plaintiff alleges across the board deprivations of equal employment opportunity to female Forest Service employees in all positions and at all locations. The Ninth Circuit dealt with a similar situation involving racial discrimination in Gibson v. Local 40, Supercargoes & Checkers of the International Longshoremen's and Warehousemen's Union, 543 F.2d 1259, 13 FEP Cases 997 (9th Cir. 1976). It said:

> A class action may be maintained

> under Federal Rule of Civil Procedure 23(b)(2), alleging a general course of racial discrimination by an employer or union, though manifested in a variety of practices affecting different members of the class in different ways and at different times. Id. at 1264, 13 FEP Cases at 1001.

***5** See also Rich v. Martin Marietta Corp., 522 F.2d 333, 11 FEP Cases 211 (10th Cir. 1975). The same should be true where across the board sex discrimination is alleged, and no citation is necessary for the frequently voiced proposition that Rule 23(b)(2) has particular applicability in Title VII class actions.

The class proposed by plaintiff in this case meets the mandatory requirements of Rule 23(a) and is maintainable under Rule 23(b)(2). It is, therefore, hereby ordered that this action be maintained as a class action and the class is tentatively defined as plaintiff has proposed it.

All Citations

Not Reported in F.Supp., 1977 WL 15444, 18 Fair Empl.Prac.Cas. (BNA) 1180