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Retired Marshal Can't Rep Class In Bias Action, DC Circ. Told

By **Matthew Bultman**

Law360, New York (April 20, 2016, 5:39 PM EDT) -- The federal government has urged the D.C. Circuit not to overturn a decision that denied certification to a class of African-American deputy U.S. marshals in a racial discrimination suit, arguing a retired marshal can't represent the best interests of the class.

Lawyers for the U.S. Department of Justice, which is representing the U.S. Marshal's Service, said Monday the retired deputy, Herman Brewer, hadn't shown anything that would compel the appeals court to reverse the decision of the lower court.

Brewer wanted to represent about 270 other deputy marshals in the suit, which claims black marshals have been denied numerous career-enhancing opportunities afforded to white coworkers. But a D.C. federal judge denied the request last fall, finding that as a retiree, Brewer wasn't eligible to seek injunctive relief.

Brewer has challenged the decision, and the DOJ argued to the appeals court that there is no precedent that establishes it was wrong for a court to deny certification when the sole representative isn't able to pursue the main form of relief sought for the class.

"Even were the court to accept most of petitioner's arguments, petitioner would still fail to establish that the district court committed any error in denying certification here," it wrote.

Similarly, the DOJ said Brewer hadn't shown that the district court abused its discretion when it did not allow other representatives to be substituted in his place. It contends this argument isn't so much an attack on the certification decision as it was a "thinly veiled challenge" to a separate order that refused to give Brewer a chance to amend his complaint.

"His true quarrel is with the district court's decision denying his motion for leave to amend the complaint," it wrote. "It is that decision — not the class certification ruling — that barred the participation of alternative class representatives."

The long-running case dates back to 2007, when another man, James Grogan, filed a complaint with the Equal Employment Opportunity Commission. Grogan sued in federal court a year later, claiming there were department-wide policies that hampered black deputies in terms of promotions, reassignments and awards.

The suit also claimed the Marshals Service had launched formal probes into actions by black deputies for which their white colleagues would not have been investigated.

Grogan later **settled his claims**, and by the time the plaintiffs sought class certification in the summer of 2014 Brewer was the only remaining plaintiff able to represent the class.

The problem, according to the district court, was that he had retired a few months earlier because of his age. Generally speaking, federal law enforcement officers must retire when they turn 57.

In September, the court denied his certification motion, in large part because it found Brewer's inability to pursue declaratory and injunctive relief meant that he could not adequately represent the proposed class.

In his opening brief to the D.C. Circuit in February, Brewer argued this type of ruling would preclude many former employees, including those terminated during litigation, from representing a class of workers.

In this case, it would also leave hundreds of class members "in the untenable position of having to abandon years of litigation and file new cases," he wrote.

Brewer is represented by David W. Sanford of Sanford Heisler Kimpel LLP.

The government is represented by Benjamin C. Mizer, Channing D. Phillips, Marleigh D. Dover and Joshua M. Salzman of the U.S. Department of Justice.

The case is In re: Herman Brewer, case number 15-8009, in the U.S. Court of Appeals for the D.C. Circuit.

--Additional reporting by Alex Lawson. Editing by Brian Baresch.

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