



WORKPLACE ACCOMMODATIONS POLICY HIGHLIGHTS 2.03

May/June 2004

Overview

Over the past few months in Washington, quite a bit of disability related activity in both the legislative and regulatory arenas has occurred. The Committee on Education and the Workforce unanimously endorsed a bill (**H.R.4278**), which reauthorizes and amends the Assistive Technology Act of 1998 (AT Act) to include a program of grants to help states purchase AT devices and services. The Office of Personnel Management (OPM) announced plans to revise its hiring practices for persons with disabilities to ease the paperwork burden of current hiring practices faced by both applicants and agencies.

OPM also released the results of its annual report, *The Status of Telework in the Federal Government*. The number of employees teleworking continues to increase, growing from 90,010 in 2002 to 102,921 in 2003. Finally, the Department of Labor's Office of Disability Employment Policy (ODEP) released a report on emergency preparedness for people with disabilities. The report gives federal officials and workers key advice and comprehensive recommendations on ensuring a safe and secure environment for employees with disabilities.

In May, the Supreme Court issued a decision in the disability rights case *Tennessee v. Lane* (02-1667), making states potentially liable for damages for failing to make courthouses accessible to people with disabilities. The ruling held that states have no 11th Amendment immunity from suits charging that they have violated Title II of the Americans with Disabilities Act (ADA). States and the disability rights community predict future litigation involving Title II and rights considered "nonfundamental" such as higher education, social services and other public activities.

**Legislative/
Policy Activities**

House Committee Passes Bill to Reauthorize Assistive Technology Act (AT Act) of 1998

05.19.2004: The Committee on Education and the Workforce unanimously endorsed a substitute bill (**H.R.4278** - Improving Access to Assistive Technology for Individuals with Disabilities Act of 2004), which amends the AT Act to reauthorize and revise its programs. The major revision to the AT Act comes in the form of a program of grants to help States purchase AT devices and services. This grants program, which emphasizes addressing the AT needs of individuals with disabilities, revises and renames the current program of continuity grants for States that received funding for a limited period for technology-related assistance through establishing State administrative systems. The bill gives States options on the percentage of funds that are to be used for State level activities (alternative finance systems, device loan programs, device reutilization programs and device demonstration programs) and State leadership activities (public awareness, communication, information dissemination, material distribution, training, and technical assistance programs). The bill also directs the Secretary of Education to (1) provide funds to establish and maintain a National Public Internet Site to provide individuals with disabilities and the general public with technical assistance and information on increased access to AT devices, AT services, and other disability-related resources; and (2) make competitive grants to provide various forms of technical assistance. On June 14, the bill was passed by the House and currently awaits approval by the Senate.

[United States Congress;

<http://www.congress.org/congressorg/bill.xc?billnum=H.R.4278&congress=108>]

**Regulatory
Activities**

Senate Finance Committee Hearing on Power Wheelchair

04.28.04 - The Senate Finance Committee held a hearing to discuss Medicare/Medicaid-related fraud in the sale of motorized wheelchairs. Reports by the General Accounting Office (GAO) (GAO-04-716T) and the office of the Inspector General at the U.S Department of Health and Human Services (OEI-03-02-00600) showed a four-fold increase in total claims payments over the past four years, with a large number of claims not meeting current eligibility requirements. Representatives from the

Centers for Medicare and Medicaid Services (CMS) promised to enforce and strengthen these current eligibility standards, but disability activists warned that certain requirements, such as the rule requiring power wheelchairs to be used only "in the home", were already preventing power wheelchairs from getting into the hands of people who need them. This issue is important from an employment perspective, because power wheelchairs are used on the job by many people with disabilities. If denied this assistive technology, the employability of these individuals could decline.

[GAO Report "CMS Did Not Control Rising Power Wheelchair Spending": <http://www.gao.gov/atext/d04716t.txt>; HHS Office of Inspector General Report "Medicare Payments for Power Wheelchairs": http://64.233.161.104/search?q=cache:c1e59pmM_RwJ:oi.g.hhs.gov/oei/reports/oei-03-02-00600.pdf+OEI++03+-+02+-+00600+%2B+text&hl=en; Senate Finance Committee: <http://finance.senate.gov/sitepages/hearing042804.htm>]

Office of Personnel Management (OPM) in Early Stages of Hiring Reforms

05.25.2004: OPM Director Kay Cole James announced new measures that will facilitate the hiring of people with disabilities in the federal government. Frustration has arisen with the Schedule A hiring authority, which requires that the Veterans Affairs Department or a recognized rehabilitation agency certify that job seekers are legitimately disabled and are able to do a particular job. In many cases, a person's disability is obvious, and complying with the hiring process (including Schedule A) constitutes an impediment for the employing agencies and applicants with disabilities. Reforms to Schedule A allow agencies to certify disability in some cases, thus allowing a supervisor to employ a person with a disability in an expedited manner. The revisions are in an early stage, and OPM has asked that the Chief Human Capital Officers Council comment on the proposals before they are published in the Federal Register and opened to public comment. [Government Executive Magazine: http://www.govexec.com/story_page.cfm?articleid=28587&printerfriendlyVers=1&; American Association of Persons with Disabilities: <http://www.aapd-dc.org/News/disability/opmhiring.html>]

Reasonable Accommodation at the Movies: Theater's Companion Seating Policy Violates Title III of the Americans with Disabilities Act (ADA)

04.14.2004: American Multi-Cinema Inc.'s seating policies for companions to individuals who use a wheelchair during sold-out shows were found by the Ninth Circuit Court of Appeals to violate Title III of the ADA. The theater's policies stated that, during sold out movies, it could not demand that patrons relocate if they were sitting in seats designated for the companions of patrons who use a wheelchair. The case was brought forth by Robin Fortyune, a C-5 quadriplegic who, along with his wife, was prevented from attending a sold out show because two non-disabled patrons refused to vacate the companion seats they occupied. At the time, AMC's companion seating policy did not give the theater manager the authority to force the two non-disabled patrons to change seats. Fortyune was able to establish a claim under the ADA because AMC, a place of public accommodation, employed a discriminatory policy that failed to reasonably accommodate his disability. Along with a Title III violation, the Ninth Circuit found reasonable the District court's injunctive relief that AMC must ensure that companion seats are made available to the companions of patrons using wheelchairs, as long as they arrive 10 minutes or more before showtime and even if the seats are occupied upon their arrival. [*Robin Fortyune v. American Multi-Cinema, Inc.* (02-57013); Disability Compliance Bulletin, Vol. 28, No. 1]

United States Supreme Court Issues Decision In *Tennessee v. Lane* (02-1667)

05.17.2004: The Supreme Court issued a ruling in *Tennessee v. Lane*, holding that Title II of the Americans with Disabilities Act of 1990 (ADA), as it applies to cases involving the fundamental right of access to the courts, constitutes a valid exercise of Congress' authority to prohibit disability-based discrimination by the states. The ruling gives individuals with disabilities the right (under Title II) to seek monetary damages in court if a state does not provide accessible judicial services.

Title II of the ADA prohibits governmental entities from denying public services, programs and activities to individuals on the basis of their disability. The State of Tennessee was sued under Title II by several

individuals with disabilities who asserted that the State and a number of its counties had denied them physical access to its courts. One of the plaintiffs was a court reporter who alleged that the State's lack of accommodation denied her access to her job. When the case was brought forth, the State invoked its sovereign immunity under the Eleventh Amendment of the Constitution (which holds that a state government cannot be sued in federal court without its consent). However, in a 5-4 ruling, the Court broke its recent trend of backing states rights and backed Congress' authority under Title II.

The Court stated that discrimination against individuals with disabilities persists in many critical areas, such as access to public services. The Court also noted the "extensive record of disability discrimination" comprising the foundations of the ADA and said that these factors made clear that "inadequate provision of public services and access to public facilities was an appropriate subject for prophylactic legislation." [*Tennessee v. Lane* (02-1667) 315 F.3d 680] The Court stated that Title II does not require states to employ any and all means to make judicial services accessible or to compromise essential eligibility requirements for public programs. It requires "reasonable modifications" for eligible individuals that can be satisfied in a variety of ways. The Court cited cases such as *Boddie, Griffin v. Illinois* (351 U.S. 12) and *Gideon V. Wainwright* (372 U.S. 335) which make clear that ordinary considerations of cost and convenience alone cannot justify a State's failure to provide individuals with a meaningful right of access to the courts.

Disability advocates and the states rights community feel that the decision has both positive and negative aspects, and both sides claim that the language in the decision will back their arguments in the battles to come. Disability advocates are concerned that states will argue that *Lane* is limited to access to the courts or to fundamental rights only. They expect more litigation when it comes to nonfundamental rights such as access to higher education, social services and other public activities.

[Supreme Court: <http://supct.law.cornell.edu/supct/html/02-1667.ZS.html>; National Council on Disability <http://www.ncd.gov/newsroom/news/2004/r04-454.htm>; The National Law Journal; <http://www.law.com/jsp/article.jsp?id=1085626343719>]

Studies/Reports /Publications **2004 National Organization on Disability (NOD) Launches Quadrennial Survey of Americans with Disabilities**

06.03.2004: The NOD's national survey of Americans with disabilities has been distributed and will be released in late June. The survey, conducted every four years since 1986 by the Harris organization, examines ten key quality of life indicators and measures the differences in the responses of Americans with and without disabilities. The ten key indicators include: employment, income, education, health care, access to transportation, entertainment, socializing, religious and political participation, and life satisfaction. Also included in the survey are questions regarding concerns to people with disabilities such as the impact of the Americans with Disabilities Act (ADA) on their lives, and questions involving issues such as health care, finance and asset issues, and assistive technology. NOD President Alan Reich notes the importance of the 2004 survey results in the upcoming Presidential election. "These are issues that will be on the nation's agenda and that will demand a response from our government, from candidates for office and their political parties."

[NOD; <http://www.nod.org/content.cfm?id=1527>]

Book: *Disability Civil Rights Law and Policy*

Blanck, P., E. Hill, C.D. Siegal, and M. Waterstone (2004). *Disability Civil Rights Law and Policy*. St. Paul, MN: Thomson West.

2004: Authors Peter Blanck, Eve Hill, Charles D. Siegal and Michael Waterstone examine the basis and history of disability discrimination, along with the laws that led to the passage of the Americans with Disabilities Act (ADA) in their book *Disability Civil Rights Law and Policy*. The book, published by Thomson West, describes the ADA's definition of disability, how it has been interpreted and studied, and then reviews the three major titles of the ADA, including a review of the remedies available for various ADA claims and the procedures required to pursue them. For more information on this title, visit the publisher's website at <http://west.thomson.com/product/40116858/product.asp>.

Office of Personnel Management (OPM) Releases Annual Telework Report

05.20.2004: The U.S. OPM has released its annual report of federal agencies on telework implementation during 2003. The report summarizes findings from the 2003 telework survey and describes the major telework promotional activities undertaken by OPM in partnership with the General Services Administration (GSA) in 2003. Full text of the report, titled *The Status of Telework in the Federal Government 2004*, is available at <http://www.telework.gov/documents.asp>. One conclusion of the report is that the number of telework-eligible and teleworking employees in the federal government is growing steadily. The number of employees teleworking grew from 90,010 in 2002, to 102,921 in 2003. Most noteworthy is that from the first telework survey in April 2001 (when 53,389 employees were teleworking) until October 2003 (with 102,921 reported Federal teleworkers) there has been an overall increase of 93 percent in the number of employees teleworking. In its 1999 *Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act (revised 10/17/02)*, the Equal Employment Opportunity Commission (EEOC) said that allowing an individual with a disability to work at home may be a form of reasonable accommodation [<http://www.eeoc.gov/policy/docs/accommodation.html>]. In addition to providing job opportunities for those who already have disabilities, telework allows people who have partially recovered from injuries and/or illnesses to return to work more quickly because they can perform their duties at off-site locations. Additionally, it is a work arrangement that supports employees who have temporary or continuing health problems or who might otherwise have to retire on disability.

[OPM: <http://www.opm.gov/viewDocument.aspx?q=317>; Telework: A Management Priority: A Guide for Managers, Supervisors, and Telework Coordinators: http://www.telework.gov/documents/tw_man03/ch1.asp#h]

United States Department of Labor (DOL) Issues Report on

Emergency Preparedness for Federal Workers with Disabilities

05.17.2004: The DOL's Office of Disability Employment Policy (ODEP) has released a report titled *Emergency Preparedness for People with Disabilities: An Interagency Seminar of Exchange for Federal Managers* [<http://www.eeoc.gov/policy/docs/accommodation.html>]. The report gives federal officials and workers key advice and comprehensive recommendations on ensuring a safe and secure environment for the more than 120,000 employees with disabilities who work for the federal government.

The contents of the report are based on a December 2003 conference held by the DOL on emergency preparedness for people with disabilities in the federal government. This conference marked the first time the issue of emergency preparedness for people with disabilities had been addressed by the federal government. It was attended by 225 representatives from over 90 federal, state, and local offices and agencies. The report concludes that communicating with employees is critical to developing, implementing and maintaining emergency plans that address the unique needs of employees with disabilities. It urges senior level management "buy-in" and a total budget and personnel commitment by each agency. The report recommends that agencies review their emergency evacuation and assistance plans and build in flexibility for persons with disabilities by incorporating backup emergency support plans. Finally, the report stresses the importance of reviewing and practicing the plan with all employees so that they may become familiar with it and allow managers to evaluate the plan's strengths and weaknesses and make improvements. [DOL: <http://www.dol.gov/opa/media/press/odep/ODEP2004878.htm>]

United States Equal Employment Opportunity Commission (EEOC) Releases 2003 Federal Work Force Report

05.20.2004: The EEOC has released its Fiscal Year 2003 Annual Report on the Federal Workforce [<http://eeoc.gov/federal/fsp2003/index.html>]. These findings are used to inform and advise the President and the U.S. Congress on the state of equal employment opportunity (EEO) throughout the federal workforce. Data are presented both in individual agency profiles and in government-wide aggregate form. The report highlights a major area of concern, which is government-wide delays in the processing

of EEO complaints. According to EEOC Chair Cari M. Dominguez, "unless and until agencies address the inefficiency and ineffectiveness of the discrimination complaint process, the federal government will not maximize savings, and employees will not see prompt resolution to their complaints."

In FY 2003, federal employees and applicants filed 20,226 complaints alleging employment discrimination on the basis of age, race, color, sex, national origin, religion, age, disability and reprisal. This number represents a decline of about 8% from FY 2002. Agencies took an average of 267 days to investigate complaints, exceeding the 180-day time frame required by federal regulations. The average processing time for resolving complaints was 541 days, a significant increase from the 418 days in FY 2002. Agencies resolved 19,772 EEO complaints. Approximately 46% resulted in final action on the merits, 28% were settlements, and 1.3% resulted in a finding of illegal discrimination.

The number of employees with targeted disabilities has been steadily declining, resulting in a net loss of about 20% in the past ten years. By 2003, individuals with targeted disabilities were only 1% of the total workforce. The average grade level for people with targeted disabilities was 8.4, nearly two grades below the government-wide average of 10.1. These statistics indicate that a government-wide effort is needed to recruit and retain employees with disabilities. Efforts are already underway by the Office of Personnel Management (OPM) to make it easier for government agencies to hire individuals with disabilities (see article "OPM in Early Stages of Hiring Reforms").

[EEOC: <http://eeoc.gov/federal/fsp2003/summary.html>]

Women with Disabilities Twice Disadvantaged in Labor Market

O'Hara, B. (2004) Twice Penalized: Employment Discrimination Against Women with Disabilities. *Journal of Disability Policy Studies*, 15 (No. 1), 27-34.

05.2004: In his article *Twice Penalized: Employment Discrimination Against Women with Disabilities*, Brett O'Hara of the Social Security Administration examines wage discrimination during the initial stages of employment using panel data from the Survey of Income and Program

Participation (SIPP). O'Hara's thought is that women with disabilities are discriminated against based on their gender and disability status, thus rendering them twice disadvantaged in the labor market.

The study, published in *The Journal of Disability Policy Studies*, argues that wage discrimination begins with initial employment offers. The two types of employment transitions that were considered are a.) planned changes in employment, referred to as satisfactory employment transition, and b.) becoming employed after a spell of unemployment or because the former job was left for unsatisfactory reasons. Based on previous work by Baldwin and Johnson (2000), O'Hara created three groups of women based on the average level of prejudice toward their impairment. The sample consisted of three groups of women ages 18 to 63: 13,088 without disabilities (no disability or ND group), 1,069 categorized as LP (less prejudice) where people exhibited little, less, or no prejudice toward their impairment, and 389 categorized as MP (more prejudice) where people exhibited significant prejudice toward that impairment. The regressions and wage decompositions provide strong evidence of discrimination against women with disabilities who had MP impairments. The results for employment transitions were mixed. For satisfactory employment transition, the wage penalty increased by type of impairment. The data show that women with disabilities are less likely to make this type of employment change and, according to O'Hara, most likely know well the risks they may face when changing employers. Women with disabilities were more likely to make an unsatisfactory change in employment than women without disabilities, but the wage penalty for this type of employment transition had low variation.

O'Hara's policy recommendations are general (because the data are not definitive) and include improving the public's perception of disabilities and impairment in order to mitigate the effect of discrimination based on prejudice. He also suggests transparency in hiring practices for all women and the development of training programs to steer women away from jobs in the service sector (which holds the lowest paying, lowest skill level occupations) to increase wages and shrink the wage gap.

Voice Over Internet Protocol (VoIP) as a Reasonable

Other Items of Interest

Accommodation: Federal Communications Commission's (FCC) Internet Policy Working Group Holds "Solutions Summit" on Disability Access Issues

05.21.2004: Internet Voice, also known as Voice over Internet Protocol (VoIP), is a technology that allows a user to make telephone calls using a broadband Internet connection instead of a regular (or analog) phone line. VoIP is a direct substitution for the existing, heavily regulated technology of telephony and it avoids all of the toll charges of the traditional phone network. The technology has the potential to become a popular form of assistive technology for workers with disabilities. VoIP integrates the phone, voice mail, audioconferencing, e-mail, instant messaging and Web applications (like Microsoft Outlook) on one secure, seamless network. All applications can be accessed through voice, audio, or a combination of the two. This is a major benefit for people with disabilities, particularly those who are deaf and would be able to place and receive TTY (teletypewriter) compatible calls without the need for a legacy TTY device.

The FCC is concerned with the accessibility of the increasing number of IP-based services to people with disabilities. The FCC's Internet Policy Working Group held a "Solutions Summit" on disability access issues associated with IP-based communications services on May 7, 2004. Members of the disability community and industry were asked to participate as panelists and the summit was open to the public. Transcripts of the Solutions Summit are available at this time and can be accessed at

http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-247974A1.doc.

To view the entire VoIP Solutions Summit in streaming captioned video go to <http://www.fcc.gov/realaudio>.

[FCC: hraunfoss.fcc.gov/edocs_public/attachmatch/DA-04-1246A1.doc;

Business Week:

www.businessweek.com/technology/content/apr2004/tc20040428_4395_tc116.htm;

Computer World:

<http://www.computerworld.com/managementtopics/management/story/0,10801,93329,00.html>]

Baker Elected to *Assistive Technology* Journal Board

RERC Updates

06.2004: Dr. Paul M. A. Baker, Project Director of the Workplace RERC's Policy Initiatives to Support Workplace Accommodations, has been elected to the Editorial Board of *Assistive Technology*, the official journal of the Rehabilitation Engineering and Assistive Technology Society of North America (RESNA). RESNA is an interdisciplinary association for the advancement of rehabilitation and assistive technologies. Dr. Baker will be a member of the Editorial Board's Education and Policy group. *Assistive Technology* is an applied, scientific publication in the multi-disciplinary field of technology for people with disabilities. Its purpose is to foster communication among individuals involved in all aspects of the assistive technology arena.

RERC Hosts Successful State of Technology Conference on Mobile Wireless Technologies for Persons with Disabilities

06.2004: The RERC on Mobile Wireless Technologies for Persons with Disabilities hosted its State of Technology conference at the Georgia Centers for Advanced Telecommunications Technology (GCATT) in Atlanta, GA May 11-12, 2004. There was an extraordinary amount of interest in the conference and this interest was demonstrated by the high level of attendance at all of the sessions and roundtables. An archived webcast of the conference sessions is available, and conference proceedings and presentation slides will be available at a later date.

[http://www.tvworldwide.com/events/georgia_tech/040511/]

Workplace RERC Advisory Council Member Joins National Organization on Disability (NOD) Board

05.19.2004: Workplace RERC Advisory Council member Peter Blanck, Ph.D., J.D., Charles M. & Marion Kierscht Professor of Law at the University of Iowa and the Director of that University's Law, Health Policy and Disability Center, has been named to the board of directors of the National Organization on Disability (N.O.D.). Dr. Blanck is the lead author of "Disability Civil Rights Law and Policy", a newly published authoritative treatise that covers the history, development and details of the Americans with Disabilities Act and other disability law and legislation. According to Blanck, "The civil rights movement for America's 54 million citizens with disabilities has been enhanced significantly by two decades of dedicated work by the National Organization on Disability. I am honored to join the board of this important national group and to help it continue to grow and

board of this important national group and to help it continue to grow and succeed in its mission."

[National Organization on Disability: <http://www.nod.org/content.cfm?id=1524>;
University of Iowa Law, Health Policy and Disability Center:
<http://www.uiowa.edu/~ournews/2004/may/051004blanck.html>]

Upcoming Events

Workplace RERC at the Rehabilitation Engineering and Assistive Technology Society of North America (RESNA) Conference

06.2004: RESNA's 27th International Conference on Technology and Disability: Research, Design, Practice and Policy will be held June 18-22, 2004 at the Rosen Centre Hotel in Orlando, FL. The following is a list of Workplace RERC presentations, all taking place on Sunday afternoon.

- Factors for Success of Workplace Accommodations (Jesse Zolna)
- A Study of Advanced Manufacturing Technology as a Workplace Accommodation in a Manufacturing Environment (Scott Haynes)
- Safety Issues In The Manufacturing Environment For People With Disabilities (Bryan Black)
- Retrospective Analysis of User Needs for Workplace Accommodations (Tina Butterfield)
- Development of an Assessment Methodology for Identifying Accessibility Issues for People with Disabilities in a Manufacturing Environment (Puneet Taneja)



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Workplace Accommodations Policy Highlights 2.03

May/June 2004

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The Office of Technology Policy and Programs (OTP), GCATT, produces a monthly newsletter, *Workplace Accommodations Policy Highlights*, that reviews policy, regulatory framework and market factors that can be useful in reducing barriers to integrating people with disabilities into the workforce. The primary objectives of the Rehabilitation Engineering Research Center on Workplace Accommodation, a federal program funded by The National Institute on Disability and Rehabilitation Research (NIDRR), U.S. Department of Education, are to identify, design, develop, and promote new assistive devices and universally-designed technologies that will enable all individuals, and particularly those with disabilities, to achieve the greatest degree of independence and integration in the workplace. To accomplish its mission, the RERC engages in a comprehensive program of research, development, training, and information dissemination.

For further information on items summarized in this report, or if you have items of interest that you would like included in future editions, please contact the editor, Lynzee Head (lynzee.head@gcatt.gatech.edu) or Andrew Ward, PH.D., MPH, Project Co-Director, Workplace Accommodations Policy Initiatives (RERC) (andrew.ward@gcatt.gatech.edu).