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WORKPLACE ACCOMMODATIONS POLICY HIGHLIGHTS 2.05

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Overview

Improved access to assistive technology for individuals with disabilities was the primary goal of the authors of the Assistive Technology Act of 2004 (AT Act) [**H.R. 4278**], which was signed into law by President Bush on October 25, 2004. The bill makes states responsible for evaluating the effectiveness of their AT programs and explaining how they will use their AT grants to foster development in areas such as employment for persons with disabilities. Aging workers was the topic of a September hearing by the Senate Special Committee on Aging. The hearing followed the release of survey information from the American Association of Retired Persons (AARP), which stated that many Americans plan to work past the retirement age of 65. Issues including workplace accommodations for aging workers were discussed by Committee members and witness speakers.

The Eleventh Circuit Court of Appeals reviewed the case of *Access Now v. Southwest Airlines* [02-16163], which asserts that the Americans with Disabilities Act (ADA) applies to the Internet. The Court rejected the appeal without commenting on the ADA issue. In its opinion, the Court stated that the plaintiff had made a new argument in the appeal and that it could not review the current argument (or the abandoned old argument). In other judicial news, a class action lawsuit has been filed in Pittsburgh against United Parcel Service (UPS), alleging that the company's policy of requiring a "full" medical release without restrictions in order to return to work violates the ADA. This is the second disability rights class action suit brought against UPS in the past year. In 2003, deaf and hard of hearing UPS employees charged discrimination under Title I of the ADA because the company failed to provide them with interpreters, along with the technology to warn them of emergency evacuations. The plaintiffs also charged disability discrimination in that the company would not allow deaf and hard of hearing drivers to operate trucks weighing less than 10,000 pounds. UPS settled the case out of court, with the exception of the deaf/hearing-impaired truck driver issue. A District Court judge found that UPS did violate Title I and ruled that the company must allow deaf and hard of hearing parcel truck drivers.

"You're Hired! Success Knows No Limitations!" was selected by the Department of Labor (DOL) as the theme of October's National Disability Employment Awareness Month. The month serves as an opportunity to educate the American public about issues related to disability and employment. The DOL also announced the New Freedom Initiative (NFI) Award winners, which included an individual, along with several businesses and non-profits, which have served as an example to other employers on how to effectively train, recruit, and hire individuals with disabilities.

At Deadline

EEOC Receives Top Rating for Small Business Outreach in SBA National Ombudsman's Report

11.10.2004 – [<http://www.eeoc.gov/press/11-10-04.html>]

EEOC Report Highlights States' Efforts to Employ People with Disabilities

10.29.2004 – [<http://www.eeoc.gov/press/10-29-04b.html>]

EEOC Provides Restauranters and Other Food Service Employers Information on Disabilities Act Compliance

10.28.2004 – [<http://www.eeoc.gov/press/10-28-04.html>]

EEOC Obtains \$1.29 Million Jury Verdict Against Dupont for Disability Discrimination

10.25.2004 – [<http://www.eeoc.gov/press/10-25-04.html>]

EEOC and FDA to Roll-Out Guide for Restauranters Addressing Overlap of Disabilities Act and Food Code Rules

10.22.2004 – [<http://www.eeoc.gov/press/10-22-04.html>]

New EEOC Fact Sheet Addresses Employment Rights of People with Intellectual Disabilities

10.20.2004 – [<http://www.eeoc.gov/press/10-20-04.html>]

**Legislative/
Policy Activities**

Assistive Technology Act of 2004 Receives Presidential Approval

10.26.2004 - The Assistive Technology Act of 2004 [**H.R. 4278**] (AT Act) was signed by President Bush on October 25, 2004. The bill was passed in the Senate on September 30, followed by the House on October 8. The Act, authored by House Education and the Workforce Committee member Howard P. "Buck" McKeon (R-CA), requires states to spend the majority of their assistive technology funds on activities that directly benefit individuals with disabilities, thus allowing them

greater access to assistive technology. States are held accountable for how they spend their funds. The Act requires that states submit a detailed application that explains how they will use the funds and how these activities will foster development for people with disabilities in the areas of education, employment, telecommunication or information technology, and/or community living. States are also required to continually evaluate the effectiveness of their programs that provide assistive technology to individuals with disabilities. Legislation supporting the State AT Programs was scheduled to sunset on September 30, 2004; however the AT Act of 2004 eliminates this sunset provision. View H.R. 4278 at [<http://www.thomas.loc.gov>].

[U.S. House of Representatives Committee on Education and the Workforce: <http://edworkforce.house.gov/press/press108/second/10oct/at100804.htm>;

Assistive Technology Act Programs: <http://www.ataporg.org>;

Ability Magazine: <http://www.abilitymagazine.org>]

Senate Committee Holds Hearing on Older Workers

09.20.04 – The Senate Special Committee on Aging held a hearing on older workers titled, “Breaking the Silver Ceiling: A New Generation of Older Americans Redefining the New Rules of the Workplace.” The hearing follows the release of survey results by the American Association of Retired Persons (AARP) stating that 70 percent of baby boomers plan to work into their retirement years or never retire; half indicated that they plan to work into their 70’s. View AARP survey results at [http://research.aarp.org/econ/boomers_envision.html]. The hearing focused on the impact of people who remain in the workforce past the current retirement age of 65. Many of these individuals will experience age-related disabilities such as visual and hearing impairments that will require some sort of workplace accommodation to retain their current level of productivity. Among those testifying were Senator John Glenn; Jack Valenti, ex-head of the Motion Picture Association of America; Ed Potter, president of the Employment Policy Foundation, and Victoria Humphrey, Executive Director of Human Resources for Volkswagen. A webcast of the hearing, and member and witness statements are available (in PDF) at

[<http://aging.senate.gov/index.cfm?Fuseaction=Hearings.Detail&HearingID=54>].

Transcripts of the hearing will be available at a later date.

[U.S. Senate Special Committee on Aging: <http://aging.senate.gov/>]

Department of Labor Awards \$2.4 Million in Telework Grants

09.16.04 – Secretary of Labor, Elaine L. Chao, awarded \$2.4 million in telework grants to three agencies in Michigan, Virginia, and Connecticut (Resource Inc., Minneapolis, MN, (\$829,526); Virginia Commonwealth University, Richmond, VA, (\$829,925); and The Workplace Inc., Bridgeport, CT, (\$755,423)). According to Secretary Chao, “Today’s grants will help expand telework employment opportunities for newly returning veterans with disabilities, as well as others with disabilities.” The grants further the goals of President Bush’s New Freedom Initiative, which has specifically encouraged telework as a way to integrate people with disabilities into the workforce. The grants are funded through the Department of Labor’s Office of Disability Employment Policy (ODEP). The projects will run for 36 months, focusing on the development and implementation of strategies that will produce a large number of telework positions for people with disabilities.

[DOL: <http://www.dol.gov/opa/media/press/odep/ODEP20041796.htm>]

Council Meets on Inclusion of People with Disabilities In Emergency Preparedness

09.20.04 – On July 22, 2004, President Bush created the Interagency Coordinating Council on Emergency Preparedness and Individuals with Disabilities. [See a copy of the order at the White House website:

<http://www.whitehouse.gov/news/releases/2004/07/20040722-10.html>]. This month, the Council held its first meeting at the Department of Homeland Security (DHS), the agency in charge of setting the Council’s agenda. A number of policy initiatives were announced at the meeting. These include:

- Almost \$1 million committed to emergency preparedness research by the National Institute for Disability and Rehabilitation Research (NIDRR). Funding would include research into improving exit/egress of individuals with disabilities from buildings, developing web-based software to assist people with disabilities in emergency preparedness skills, and other programs. A two-day conference held in October will focus on these issues.
- A report on involving employees with disabilities in emergency management planning created by the Department of Labor’s Office of Disability Employment Policy is being distributed to state emergency coordinators, as well as to public and private sector employers across the country. View the report entitled, “Emergency Preparedness for People with Disabilities: An Interagency Seminar of Exchange for Federal Managers,” at [<http://www.dol.gov/odep/pubs/ep/>].

- A technical assistance document entitled “Making Community Emergency Preparedness and Response Programs Accessible to People with Disabilities” has been created by the Department of Justice’s Civil Rights Division, and it provides information to local officials as guidance for interpreting Title II of the Americans with Disabilities Act. View the document at [<http://www.usdoj.gov/crt/ada/emergencyprep.htm>].
- Establishment of a National Citizen Corps Council subcommittee on emergency preparedness for people with disabilities. This subcommittee will conduct outreach to the disability community on this issue.

The Interagency Coordinating Council’s task is to facilitate cooperation among Federal, State, and local governments. For more information about the Council’s first meeting, see. [Department of Homeland Security: <http://www.dhs.gov/dhspublic/display?content=4024>].

New Freedom Initiative (NFI) Award Winners Announced

10.25.2004 - The NFI Award winners were announced in October, giving recognition to five businesses, three non-profits, and one National Football League player. The individual and organizations selected have demonstrated “exemplary and innovative efforts to train, recruit and hire people with disabilities.” The awardees will be honored by Secretary of Labor, Elaine L. Chao at a ceremony in November. For a list of the NFI Award Winners, visit <http://www.dol.gov/opa/media/press/odep/ODEP20042039.htm>. [Department of Labor: <http://www.dol.gov/odep/>]

October Celebrated as National Disability Employment Awareness Month

10.08.04 – The theme of October’s National Disability Employment Awareness Month was “You’re Hired! Success Knows No Limitations!” as selected by (DOL) Secretary of Labor Elaine L. Chao. The month serves as an opportunity to educate the American public about issues related to disability and employment. It also functions to expand employment opportunities for people with disabilities. The Department of Labor’s Office of Disability Employment Policy (ODEP) is responsible for coordinating the month’s activities. One of those activities is Disability Mentoring Day, held October 20, 2004 in partnership with the American Association of People with Disabilities (AAPD). This event allows people with disabilities to spend time with someone in their career-field of choice, providing a career exploration experience for the person with a disability, and an educational experience about the potential of persons with disabilities to the employer. More information about Disability Mentoring Day is available at [<http://www.dmd-aapd.org/>]. [ODEP: <http://www.dol.gov/odep/>; National Organization on Disability: <http://www.nod.org/content.cfm?id=1442>]

Judicial Activities Appeals Court Rejects Appeal in Website Accessibility Case

09.24.04 – The U.S. Court of Appeals for the Eleventh Circuit upheld a lower court's decision that the Americans with Disabilities Act (ADA) does not apply to the Internet. The case, *Access Now v. Southwest Airlines* [02-16163], was brought by a man who is blind and who had extreme difficulties ordering tickets from Southwest Airlines' website because of its navigation bar. Access Now, the non-profit advocacy organization filing the lawsuit, argued in 2002 that the Southwest.com website is a place of public accommodation under Title III of the ADA, meaning it must be accessible to people with disabilities. The District Court dismissed the lawsuit, saying the language in Title III of the ADA clearly and plainly did not apply to Internet websites.

On its appeal, Access Now took a different tactic, arguing that Southwest Airlines itself is a public accommodation providing travel services (protected by the ADA). As a result, Access Now argued, Southwest is not allowed to discriminate in its provision of these services over the Internet. The Court of Appeals said that Access Now had failed to make this argument in its original lawsuit, doing nothing to demonstrate the connection between the Southwest.com website and any other supposed place of public accommodation. Consequently, the Court said that judicial procedure did not allow it to review this new argument or the abandoned old one, and it dismissed the appeal without addressing the applicability of the ADA to the Internet. To read a copy of the Court's opinion (PDF), see [<http://www.ca11.uscourts.gov/opinions/ops/200216163.pdf>] [U.S. Court of Appeals for the Eleventh Circuit: <http://www.ca11.uscourts.gov/>]

Court Rules UPS Must Allow Hearing Impaired Truck Drivers

10.22.2004: A U.S. District Judge has ruled that UPS violated Title I of the ADA when it denied jobs driving parcel delivery trucks to deaf and hard of hearing employees. Over 1,000 would-be drivers brought the class-action case against UPS claiming discrimination on the basis of disability. A company spokesperson said public safety was the reason UPS denied the plaintiffs jobs operating delivery trucks (weighing less than 10,000 pounds). Federal requirements state that the drivers of trucks weighing more than 10,000 pounds must meet certain vision and hearing requirements, and that the drivers become certified. Companies are allowed to establish their own regulations for trucks weighing less than 10,000 pounds. UPS is considering an appeal. Last year, UPS made a \$10 million settlement in the same case and agreed to provide interpreters to deaf and

hearing-impaired employees and to alert them of emergency evacuations by providing them with text telephones and vibrating pagers. [Associated Press Online, 10/22/2004 and *The New Standard*, http://newstandardnews.net/content/?action=show_item&itemid=1156]

Second Circuit Reverses Judgment on “Essential Functions”

07.04 – In *Rodal v. Anesthesia Group of Onondaga, P.C.*, 369 F.3d 113 (2nd Circuit 2004), the Second Circuit reversed summary judgment for an employer (Anesthesia Group of Onondaga, P.C.) because the court questioned whether the plaintiff’s request for a modified work schedule was a reasonable accommodation for an anesthesiologist with cancer. The Second Circuit also questioned whether or not the ability to work nights and weekends should be considered an essential function of the job and whether the anesthesiologist was considered an “employee” under the ADA. The suit was originally brought by Stewart Rodal, an anesthesiologist with the Anesthesia Group. Upon learning he had a rare form of cancer in 1995, Rodal requested a modified schedule that did not include nights or weekends. This request was granted for six or seven months, but Rodal was asked to return to night and weekend work when he began working again full-time. Rodal took disability leave in 1999, after the Anesthesia Group did not respond to his request for a permanent no-nights/no-weekends schedule. In 2000, he filed a complaint with the Equal Employment Opportunity Commission (EEOC). The EEOC would not take the case on the grounds that Rodal was a shareholder and the director of the company; not an employee. He sued the group under Title I of the ADA for failing to accommodate his disability. The district court granted the Anesthesia Group summary judgment.

The Second Circuit reversed and remanded the summary judgment. A reasonable accommodation request is deemed reasonable as long as an employer is not required to eliminate an essential function of the job. The court decided that working nights and weekends was not an essential function of Rodal’s job. The Anesthesia Group would have let him keep the schedule if they had been able to work out a compensation agreement. Even if an accommodation is reasonable, and employer is not required to make that accommodation if it imposes an “undue hardship.” The Anesthesia Group brought forth no evidence that the schedule modification would impose undue hardship, therefore the court could not dismiss it from its ADA duties. Finally, the court asked for a redetermination of Rodal’s employee status. [*Mental and Physical Disability Law Reporter*, Vol. 28, No. 4]

UPS Faces Class Action Lawsuit for Intentional Disability Discrimination

09.10.04 – A class action lawsuit has been filed against United Parcel Service (UPS) on behalf of individuals who were employees of the company from March 2000 to the present. The case has been filed in federal court in Pittsburgh. The UPS employees in the case claim that the company's policy of requiring a "full" medical release without restrictions in order to return to work after a medical leave of absence violates the ADA. The employees also claim that the company failed to meet with employees with disabilities to determine the extent of their disabilities and what workplace accommodations would help them perform the duties of their jobs. Instead, the company would conduct a medical investigation which, according to the employees, would result in the finding that the individual's disability prevented him/her from working at UPS, or that the nature of the individual's disability did not mandate UPS to comply with federal laws requiring the company to assist the worker to return to work. The accommodation of permanently disabled employees, along with UPS retaliation against workers who have filed workers compensation or disability claims were also addressed in the suit. "The plaintiffs seek a permanent injunction to enjoin UPS from engaging in discriminatory employment practices in violation of the ADA, as well as the implementation of policies that provide equal employment opportunities for persons with present, past, or perceived disabilities." (Atlanta Business Chronicle Online, 9/10/2004). [Atlanta Business Chronicle Online, <http://atlanta.bizjournals.com/atlanta/stories/2004/09/06/daily31.html>: PR Newswire, 9/10/2004]

Studies/Reports/ Publications

Charles, K.K. (2004) "The Extent and Effect of Employer Compliance with the Accommodations Mandates of the Americans with Disabilities Act" *Journal of Disability Policy Studies, Vol. 15: No. 2, 86-96.*

Kerwin K. Charles uses data from the National Institute on Aging's Health and Retirement Study to evaluate how well employers have complied with the accommodations portion of the Americans with Disabilities Act (ADA). He examines data before and after the passage of the ADA to 1.) "compare the receipt of accommodations by workers with disabilities"; 2.) determine whether or not the wage levels of accommodated workers have decreased; and 3.) determine whether the provision of workplace accommodations increased an employee's length of employment with an organization. Study results suggest that overall, the incidence of workplace accommodations increased with the passage of the ADA. However, this statement should be qualified in two ways. First, accommodations only increased 5% among workers with disabilities since the passage of the ADA, and these accommodations improvements were "concentrated in two or three

time-related adjustments, such as modifications to work schedules or to arrival and departure times from work.” The author found some evidence that the cost of accommodations from the ADA have been passed on to workers in the form of lowered wages. Finally, the results of the study showed that employer-provided accommodations seemed to increase an employee’s length of employment with a particular firm.

Wang, P.P., E.M. Badley, and M.A. Gignac (2004). “Perceived Need for Workplace Accommodation and Labor-Force Participation in Canadian Adults with Activity Limitations.” *American Journal of Public Health*. Vol. 94: No. 9, 1515-1518.

This study examines a survey of the Canadian workforce, attempting to identify the role that perceived need for workplace accommodation plays in the labor force participation of people with disabilities. The authors analyzed the responses of 25-64 year-olds to the 1991 Canadian Health and Activity Limitation Survey, a national survey of people with disabilities. Variables of interest included: labor-force participation status, physical activity limitations (divided into upper- and lower-body activity limitations), other sociodemographic variables, and the perceived need for workplace accommodations. Results from the study suggest that, when severe activity limitations are present, the perceived need for a workplace accommodation is likely to discourage a person with a disability from participating in the labor force. Lower-body limitation affected labor-force participation more than did upper-body activity limitation. Overall, the study found that an employee’s (or potential employee’s) perceived need for a workplace accommodation plays an important role in reducing the labor-force participation of people with physical disabilities.

**Other
Activities/Items
of Interest**

PBS Profiles Assistive Technologies as “Freedom Machines”

09.14.04 – The Public Broadcasting Service (PBS) television program P.O.V. profiled assistive technologies in its September 14, 2004 broadcast. The program features profiles of people who are using assistive technologies to carry out their daily activities, including their jobs, and it examines what is possible for technologies in the near future. The program, titled “Freedom Machines,” questions the nature of disability in the technological world. It also features a discussion of universal design concepts. More information about the program, including interviews and statistics, can be found online at

[<http://www.pbs.org/pov/pov2004/freedommachines/>].

[PBS: <http://www.pbs.org>]

Upcoming Events

California State University Northridge's (CSUN's) 20th Annual International Conference "Technology and Persons with Disabilities"

CSUN's annual conference will be held March 14-19, 2005 in Los Angeles, CA. This is a comprehensive, international conference, where all technologies across all ages, disabilities, levels of education and training, employment, and independent living are addressed. Registration information is available at [<http://www.csun.edu/cod/conf/>].



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The Office of Technology Policy and Programs (OTP), GCATT, produces a monthly newsletter, *Workplace Accommodations Policy Highlights*, which 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, MSPP, Research Scientist (lynzee.head@gcatt.gatech.edu) or Paul Baker, PH.D., Project Director, Workplace Accommodations Policy Initiatives (RERC) (paul.baker@gcatt.gatech.edu).