



WORKPLACE ACCOMMODATIONS POLICY HIGHLIGHTS 1.6

September / October 2003

Overview

This issue of the Workplace Accommodations Policy Highlights points out recent efforts by U.S. regulatory agencies to eliminate discrimination against persons with disabilities and promote the employment of persons with disabilities. For example, the Department of Transportation (DOT) recently reached settlements with three airlines, fining the airlines for not providing adequate stowage space for a passenger's standard-size folding wheelchair inside the cabin. The airlines did, however, receive back a portion of the penalties to increase access for persons with disabilities above what the DOT requires. The Equal Employment Opportunity Commission (EEOC) has produced a fact sheet providing information for employers on reasonable accommodations for potential employees with disabilities during the hiring process. The fact sheet, part of President Bush's New Freedom Initiative to advance employment opportunities for individuals with disabilities, coincides with "National Disability Employment Awareness Month" and also informs people with disabilities of their rights during the hiring process.

On the judicial front, the United States Supreme Court recently heard oral arguments in *Raytheon Co. v. Hernandez*, a case that will allow the court to clarify protections under the ADA for workers who are recovering drug addicts or alcoholics. Finally, at the annual World Congress on Disabilities, Avis Rent A Car System, Inc. announced its plans to implement the United States' first comprehensive accessibility program for travelers with disabilities. The rental car company's initiative, called "Avis Access," will offer specific services for drivers and passengers with disabilities, and will be of particular benefit to people with disabilities who travel as a function of their job. The accessibility program will reduce the level of uncertainty and stress associated with travel by people with disabilities.

NEW!

Colloquy on Workplace Accommodations and Disability Policy

In order to stimulate discussion of a variety of policy-linked topics pertinent to workplace accessibility issues for people with disabilities, the RERC on Workplace Accommodation is introducing a new section of the WAPH - the **RERC on Workplace Accommodation's Colloquy on Workplace Accommodations and Disability Policy**.

We will present a new set of questions, topics, or commentary on a quarterly basis, which we hope will generate discussion, additional insights, and comments to inform the policy "debate". Initially we will be conducting the colloquy via email and paper presentations, but ultimately we anticipate developing a new policy-linked web presence to provide a

platform for the virtual colloquy. A new set of topics will be posted each quarter, and we will publish responses in the following two issues. Please send your comments, suggestions or ideas for future quarterly topics to Lynzee Head, Editor (lynzee.head@gcatt.gatech.edu).

The topic for this quarter's colloquy is "**Standards of Accommodation Under the Americans with Disabilities Act (ADA).**" Under Title I of the ADA, employers must provide "reasonable accommodation" for individuals with disabilities unless they can prove that the accommodation would place an undue burden on the employing entity. Title III of the ADA requires public accommodations to make facilities accessible by removing structural barriers where "readily achievable." Although Titles I and III are aimed at separate goals (equal employment opportunity and full enjoyment of privileges in public), they overlap in their application. Public accommodations must meet both standards of accommodation set forth by the ADA: "readily achievable" accommodations for the public and "reasonable accommodations" for their employees. Commercial facilities must also make renovations and new constructions accessible under Title III in addition to their obligations under Title I. Some have suggested these separate standards create a tension in disability accommodation policy.

The questions for this colloquy then: Does the stricter standard for accommodating employees create tension (confusion?) among members of the business community when deciding how to make accommodations to the general public? To what extent do employers rely on general accessibility guidelines (such as those from the Justice Dept. or the Access Board) when complying with employee requests for accommodation? Do employers not covered by Title III feel pressured to make their workplace accessible? And if so, does this pressure come from anticipation of Title I requests from employees, or from another source?

Legislative/ Regulatory Activities

Airlines Fined for Poor Access for Persons with Disabilities

08.28.2003: The Department of Transportation (DOT) announced the issuance of orders reflecting settlements with three airlines (America West Airlines, Jet Blue Airways, and Southwest Airlines) regarding the carriers' accommodations for people with disabilities. The orders found that none of the three airlines provided a storage space for a passenger's standard-size folding wheelchair inside the cabin of the aircraft. The carriers were found to be in violation of the Air Carrier Access Act (ACAA) [<http://airconsumer.ost.dot.gov/rules/382SHORT.htm>] and DOT rules prohibiting discrimination against passengers with disabilities. ACAA regulations require that aircraft with 100 or more passenger seats and that were ordered after April 5, 1990 or delivered after April 5, 1992 have priority space in the cabin designated for stowage of at least one passenger's folding wheelchair. Each carrier was assessed specific penalties, and each is required to provide the required wheelchair storage space in the future. In addition, the three carriers will receive a specified credit for part of the penalties to make improvements in access for persons with disabilities above what is required by DOT rules. This legislation will benefit persons with disabilities who must use a wheelchair, and must travel as a function of their jobs. Thus, a job requirement of

business travel need not be an insurmountable obstacle for people requiring the use of a wheelchair. In this respect the legislation will contribute to the goal of integrating people with disabilities into the workplace. The DOT is investigating other carriers for possible violations of ACAA rules which, combined with the actions against America West, Jet Blue, and Southwest, are part of the DOT's ongoing effort to ensure nondiscrimination in air travel based on disability. [<http://www.dot.gov/affairs/dot09103.htm>]

Equal Employment Opportunity Commission (EEOC) Publishes Fact Sheet on Hiring Rights under the ADA

10.07.03: The EEOC has released a Fact Sheet for job applicants informing them of their rights under Title I of the Americans with Disabilities Act (ADA) [<http://janweb.icdi.wvu.edu/links/TitleIReg.htm>]. The fact sheet is part of President Bush's New Freedom Initiative to promote and encourage employment opportunities for individuals with disabilities, and coincides with National Disability Employment Awareness Month. The fact sheet outlines employer responsibilities, such as the provision of reasonable accommodation for applicants who need assistance during the interview and hiring processes. The document provides people with disabilities examples of specific accommodations to which they are entitled, such as provision of or modification of equipment, provision of materials in an accessible format, provision of sign language interpreters, and interviews in an accessible location. Applicants requiring accommodations from employers during the hiring process must inform the employer in advance and give reason for needing an accommodation. The fact sheet also explains the ADA's rules on when employers can seek medical information from prospective employees, defining what types of questions prospective employers may ask and what information applicants must divulge. EEOC Chair Cari M. Dominguez praised the Fact Sheet, and encouraged job applicants to focus on their qualifications rather than their disability during the hiring process. [<http://www.eeoc.gov/press/10-7-03.html>]

National Disability Employment Awareness Month Recognized by President Bush

10.03.03: President Bush issued a proclamation declaring October 2003 as "National Disability Employment Awareness Month." In his proclamation, the President urged Americans to consider the many contributions citizens with disabilities make to American society. President Bush noted the impact of the Americans with Disabilities Act (ADA) of 1990 in improving access to "education, government services, public accommodations, transportation, telecommunications, and employment opportunities." Although the nation has become stronger and more productive as a result of the ADA, many people with disabilities continue to encounter challenges to their full participation in society. The New Freedom Initiative, launched in February 2001, was established to address these challenges, including the challenge of integrating people with disabilities into the workforce. The President named several agencies that have made progress toward this goal, including the Department of Justice, the Social Security Administration, and the Department of Labor. The President also urged that Americans work to accomplish the goals of the New Freedom Initiative by helping people with disabilities "learn and

develop skills, engage in productive work, make choices about their daily lives, and participate fully in their communities.”
[<http://www.whitehouse.gov/news/releases/2003/10/20031003-15.html>]

Judicial Activities

Partial Vision and Disability Under the Americans with Disabilities Act (ADA)

09.02.03: In *Congleton v. Weil McLain*, sales representative Wesley Congleton, who became blind in one eye and was subsequently fired, failed to demonstrate that his firing was a violation of the ADA. In May 1999, Congleton was diagnosed with a detached retina. Although he underwent two surgeries to correct the condition, his left eye remains permanently impaired. Because the condition diminished his depth perception, Congleton often walks into objects and people, and cannot see objects clearly on his left side. Nevertheless, Congleton has learned to compensate for his loss of vision and can perform his normal daily activities. His only restriction when he returned to his job was that he avoid heavy lifting. After Congleton notified his employer that he would need time off for additional surgery, “his performance evaluation noted that he was out for three and a half months, and he was fired shortly thereafter.” Congleton brought suit under the ADA, the Pennsylvania Human Relations Act, and alleged retaliation under Title VII of the Civil Rights Act of 1964 for requesting a reasonable accommodation for his impairment (additional surgery).

Although the court found that the plaintiff had suffered an adverse employment action as a result of his impairment, it concluded that he was not substantially limited in the major life activity of seeing. The Court’s reasoning was that evidence was found that Congleton had “compensated for his impairment... [had]...never requested an accommodation from his employer... and... had not demonstrated that he was barred from performing a broad range or class of jobs.” Weil McLain received summary judgment, and Judge Bruce Kauffman noted that Congleton had failed to establish a *prima facie* case of disability discrimination or retaliation. Because Congleton admitted to needing no accommodation to perform his job, Judge Kauffman decided that no jury or reasonable people could find that Congleton’s condition substantially limited the major life activity of seeing. Congleton also admitted that he was able to accomplish the tasks of his job when he returned to work after the first surgery. Therefore, he was unable to show that the additional surgery was necessary to allow him to work. Congleton also claimed that Weil McLain perceived him as disabled as defined by the ADA, but the court found no evidence to uphold this claim. The importance of the Court decision is that it further clarifies the legal connection between reasonable accommodations and impairment of life activities in acts such as the ADA. [Employment Litigation Reporter Vol. 18(1) P. 7]

Supreme Court Examines Rights of Drug Users under the Americans with Disabilities Act (ADA)

10.09.03: The United States Supreme Court has heard oral arguments in *Raytheon Co. v. Hernandez*, a case that will allow the court to clarify protections under the ADA for workers who are recovering drug addicts or alcoholics. "The law specifically protects people who are clean after being treated for their addiction, but allows companies to discipline those who use substances on the job." The case involves Joel Hernandez, who quit his job at Hughes Missile Systems after his workplace drug evaluation tested positive for cocaine. After two years of rehabilitation, Hernandez reapplied for his former position but was denied the position based on an unwritten policy against rehiring workers who were fired for misconduct. Hernandez's suit claims the company's refusal to hire him is an instance of discrimination based on his past addiction, a violation of the ADA.

The suit also claims that the company's policy acts as an exclusionary qualification standard that prevents recovering drug addicts and alcoholics, along with other individuals with disabilities, from full inclusion in the workforce. Raytheon's (Hughes' corporate parent) Paul Grossman asserted in a brief to the court that the company does not discriminate against former drug addicts. Instead, according to Grossman, "the company treats identically all employees terminated for violating its personal conduct rules: they all lose their jobs, and they all permanently lose the right to be considered for future employment." The Bush administration sided with Raytheon, stating that a ruling in favor of Hernandez would undercut the effectiveness of workplace conduct rules, "which represent a legitimate effort by employers to promote workplace safety and productivity." The Hernandez case gives the Court the opportunity to clarify this provision of the ADA, although it may choose to resolve the case without deciding that question.

The case is being closely monitored by employment lawyers with an interest in zero-tolerance policies like Raytheon's. Disability rights advocates are also monitoring the case, hoping the Court will not restrict the provisions of the ADA in the manner requested by Raytheon. In either case, the larger public policy question concerns determination of the criteria necessary for a person to be considered disabled; and the criteria required for any act or law whose intent is to protect the rights of people with disabilities.

[\[http://news.findlaw.com/csmonitor/s/20031008/08oct2003104433.html\]](http://news.findlaw.com/csmonitor/s/20031008/08oct2003104433.html);
[http://www.boston.com/dailyglobe2/217/business/Raytheon_backed_in_job_bias_suit+.shtml\]](http://www.boston.com/dailyglobe2/217/business/Raytheon_backed_in_job_bias_suit+.shtml)

Other Activities & Items of Interest

Avis Access Accommodates Travelers with Disabilities

10.01.03: At the World Congress on Disabilities, Avis Rent A Car System announced its plans to implement the first comprehensive accessibility program for travelers with disabilities in the US. The rental car company's initiative, "Avis Access," will offer specific services for drivers and passengers with disabilities, including a 24-hour-toll-free number [1-888-TRY-HARDER] for customers with special travel needs, along with TTY/TDD access for those with a hearing impairment. Other complimentary services options include a transfer board to ease the driver or passenger from their

wheelchairs into the car seat, hand controls to allow drivers with limited leg function to accelerate or brake using a hand controlled device, and an additional driver fee waiver so that customers with visual impairment can rent an Avis car without incurring any additional driver fees for their designated driver. Because the accessibility program will reduce the level of uncertainty associated with transportation and ultimately decrease stress associated with travel, Avis Access will be introduced in the top 100 markets by year-end. The company hopes to target the estimated 49.7 million (Census 2002) Americans with mobility, hearing, or visual impairments, their families, and international visitors with disabilities who visit the United States and Canada. Avis Access will be of particular benefit to people with disabilities who travel as a function of their job. [<http://www.atnet.org/news/oct03/100105.htm>]

Office Supply Store Benefits Texans with Disabilities

09.19.03: TIBH Industries, a private, non-profit corporation that links Texans with disabilities with meaningful employment opportunities, announced the opening of the TIBH Central Store in Austin, Texas. The store allows state purchasers to procure a quality and competitively priced variety of office supplies created by individuals with disabilities. The store will be supplied by some of the 150 Community Rehabilitation Programs throughout Texas that employ a wide variety of individuals with disabilities. TIBH is the manager of the Texas State Use Works Wonders Program [http://www.purchaseplus.com/works_wonders.htm], created by the Texas State Legislature to increase employment and wages for Texans with disabilities. For the past 25 years, TIBH has fulfilled contracts with purchasers from state entities for various products and services. Governmental purchasers are bound by law to get competitive bids for these types of purchases. However, when purchasing from TIBH Industries or the TIBH Central Store, this requirement is waived. [PR Newswire; Financial News; 09/19/2003]

Senator Edwards Announces Disability Policy Initiative

10.08.03: As part of his campaign for the Presidency, U.S. Senator John Edwards (D-NC) announced his plan to increase employment opportunities for Americans with disabilities. The "Breaking Down Barriers" initiative calls for \$20 million to provide work experience for high school and college students with disabilities by building partnerships between schools and businesses and establishing programs that place students in the workplace. The initiative is intended to promote the successful integration of students with disabilities into the workforce, and to erode stereotypes and misconceptions held by employers about workers with disabilities. In addition to the new initiative, Edwards called upon the Social Security Administration to be accountable for helping people with disabilities find work and for the federal government to be a model employer with respect to persons with disabilities. [<http://www.johnedwards2004.com/page.asp?id=270>]

Studies/Reports and Publications

National Council on Disability (NCD) Urges Reauthorization of the Workforce Investment Act (WIA) and the Rehabilitation Act

08.01.03: According to an excerpt from the NCD's annual report, *National Disability Policy: A Progress Report*, the rate and level of employment among workers with disabilities remains significantly lower than for people without disabilities. The NCD recommends that Congress reauthorize the WIA and the Federal Rehabilitation Act to ensure that the United States' "mainstream labor force development and job placement has the capacity and the motivation to serve people with disabilities on the same basis as everyone else." The reauthorization of these acts would help to ensure that specialized resources and technical expertise are available to assist people with disabilities with integration into the mainstream workforce. The report also claimed that the three major tax incentives for employers to hire persons with disabilities (ADA Small Business Tax Credit, Work Opportunity Tax Credit, and Welfare-to-Work Tax Credit) have not achieved their goals because of an inadequate effort in publicizing and explaining the incentives to businesses and other interested parties. The NCD hailed the creation of the Office of Disability Employment Policy (ODEP) [<http://www.dol.gov/odep/>] as a significant step in addressing the challenges faced by workers with disabilities, and asked that the office conduct more targeted research on the effectiveness and accessibility of one stop centers. Such research would provide data useful in optimizing the allocation of resources to help integrate people with disabilities into the workplace. The NCD also recommended future research on the "nondiscrimination requirements in other federally supported or operated job training and employment development programs." [<http://www.ncd.gov/newsroom/news/r03-427.html>]

Stapleton, D.C. and R. V. Burkhauser, Eds. (2003). *The Decline in Employment of People with Disabilities: A Policy Puzzle*. New York: W.E. Upjohn Institute for Employment Research.

"Researchers agree that the employment rate for working-aged people with disabilities declined during the 1990s. What they don't agree on is the main cause for this decline. Some cite the increasing severity of disabilities while others argue that the easing of eligibility standards and increases in the relative benefits of Social Security disability programs (SSI and SSDI) are to blame. Still others argue that the passage and implementation of the ADA offers a rationale for the decline. This book swings open the doors on this debate. It presents the latest research on the employment woes of the working-aged population with disabilities in a way that is accessible not only to researchers, but to policymakers, advocacy groups, and grass-roots disability communities. *The Decline in Employment of People with Disabilities: A Policy Puzzle* begins with a documentation of the employment rate decline and ends by spelling out the implications of this decline for public policy. However, the bulk of the book provides a detailed examination of the various explanations for the puzzling decline in employment among the working-aged population with disabilities." [<http://www.upjohninst.org/publications/titles/depd.html>]



Lynzee Head, Editor: lynzee.head@gcatt.gatech.edu

This is a publication of the Rehabilitation Engineering Research Center on Workplace Accommodations supported by the National Institute on Disability and Rehabilitation Research of the U.S. Department of Education, grant # H133E020720. The opinions contained in this publication are those of the grantee and do not necessarily reflect those of the U.S. Department of Education

The Office of Technology Policy and Programs (OTP) produces a monthly newsletter, Workplace Accommodations Policy Highlights, for the purpose of identifying policy, regulatory framework and market factors that can be useful in reducing barriers to integrating people with disabilities into the workforce. These monthly highlights support the Center's other research efforts and provide people with disabilities and industry with a centralized source of information supportive of the principles of the ADA and other regulations whose intent is to promote fairness and equity for people with disabilities.

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), 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) (acward12@email.msn.com).