

# **James B. Dowd v. U.S. General Accounting Office**

**Docket No. 91-03**

**Date of Decision: October 4, 1994**

**Cite as: Dowd v. GAO (10/4/94)**

**Before: Nancy A. McBride, Vice Chair**

**Affirmative Action**

**Class Actions**

**Effect of GAO Regulations**

## **DECISION REGARDING LEGAL REQUIREMENT TO PROVIDE AFFIRMATIVE ACTION FOR DISABLED VETERANS**

### **Issue Presented**

The issue presented is the definition of the legal requirement of the Agency to provide affirmative action for disabled veterans during the period October 1, 1980 through January 17, 1992.

### **Background**

This case was filed with the Personnel Appeals Board on March 25, 1991. On February 24, 1992, the Board ruled on Petitioner's and Respondent's motions for summary judgment. In consideration of Respondent's motion, the Board dismissed all of Petitioner's claims except that related to the failure of the Agency to establish an affirmative action plan for disabled veterans. Petitioner had assigned as the legal basis for the requirement to provide affirmative action for disabled veterans, 38 U.S.C. § 4214(c) (Supp. III 1991) (Vietnam Era Veterans' Readjustment Assistance Act of 1974) [previously codified at 38 U.S.C. § 2014(c)]. The Board specifically rejected this contention, holding that GAO is not covered by the provision. However, a GAO order in effect from October 1980 to January 17, 1992 did provide for an affirmative action program for disabled veterans. On this basis, the Board did not dismiss Petitioner's claim.

In this limited sense, the Board granted, in part, Petitioner's motion for summary judgment, finding that, during the period October 1, 1980 through January 17, 1992, the Agency had an obligation to provide an affirmative action plan in accordance with the requirements of its own order, GAO Order 2306.1, Selective Placement Programs. The issue remaining for the Board's determination was identified as what, if any, cognizable harm was suffered by Petitioner as a result of the Agency's failure to establish an affirmative action plan for disabled veterans.

On December 18, 1992, the matter was certified as a class action. As modified on May 13, 1993, the class was determined to consist of all disabled veterans employed by GAO during the period October 31, 1990 through January 17, 1992. The class was certified based on the common question of the nature and scope of the legal obligation to provide affirmative action under GAO Order 2306.1, Selective Placement

Programs.

The parties proceeded with discovery, requesting and receiving numerous extensions. The matter was bifurcated by order of November 1993 to proceed to hearing first on the question of the scope of the Agency's legal obligation under GAO Order 2306.1 to provide affirmative action to disabled veterans. Bifurcation of the issues was deemed necessary because of the failure of Petitioners to identify the nature of the affirmative action to which they claimed entitlement or to advance a legal theory regarding the measure of their asserted damages.

A hearing was held on March 21, 1994. Post-hearing briefs were submitted on April 18, 1994. Reply briefs were submitted on May 2 and May 3, 1994.

### **Petitioners' Position**

In their post-hearing brief, Petitioners assert that Petitioners' Exhibits A, B, & C, the Agency's Affirmative Action Plans for Handicapped Persons Including Disabled Veterans, FY 1980-85, are in accordance with GAO Order 2306.1, dated October 1, 1980. (Petitioners' Post-hearing Brief, p. 1). Petitioners further "adopt as their affirmative response to the single issue for hearing, the plan(s) as designed, formally adopted and made binding on GAO under the Comptroller General's written authorization for those plans." (Petitioners' Post-hearing Brief, pp. 3-4). Finally, Petitioners contend that the three plans presented "are the plans which was (sic), and should have been, applicable for the entire period." (Petitioners' Post-hearing Brief, p. 17).

### **Respondent's Position**

Respondent contends that for fiscal years 1980-85 it had in place affirmative action plans for disabled veterans that satisfied the requirements of GAO Order 2306.1. *See*, Petitioners' Exhibits A, B, and C. It admits that from October 1, 1985 through July 17, 1991, no plan was in effect, a situation that it characterizes as a "hiatus associated with an administrative re-organization." (Respondent's Post-hearing Brief, p. 4). On July 18, 1991, the Agency promulgated a new "Affirmative Action Plan for Persons with Disabilities" (hereinafter "1991-92 Plan"). The 1991-92 Plan does not specifically mention disabled veterans, but the Agency contends that they are within its coverage and that the Agency was therefore in compliance with GAO Order 2306.1 upon promulgation of the 1991-92 Plan. Respondent's position is that for the period October 1, 1985 through July 18, 1991, the appropriate content of the affirmative action plan that was required under GAO Order 2306.1 is that contained in the 1991-92 Plan for Persons with Disabilities. Respondent argues that the 1991-92 Plan satisfies the objectives and elements of a plan required by GAO Order 2306.1. It further argues that the 1991-92 Plan constitutes the Agency's interpretation of a regulation adopted pursuant to an express legislative grant of rulemaking authority and is, therefore, entitled to controlling weight. (Resp. Post-hearing Brief, p. 5). Finally, Respondent maintains that, even if the Board were to reject Respondent's 1991-92 Plan as defining the affirmative action that would have been in effect from 1986 through 1992, it must also reject the purported assertion of Petitioner that Respondent's affirmative action plan for disabled veterans for the relevant period should have contained promotion goals.

### **Discussion**

The issue presented for decision at this stage of the proceedings is the precise legal obligation assumed by the Agency when it committed itself to an affirmative action plan for disabled veterans. The Board has previously determined that the Agency had no independent or external legal duty to develop or implement an affirmative action plan for disabled veterans. (En Banc Decision, Feb. 24, 1992).

In undertaking to provide an affirmative action program for disabled veterans, the Agency did not assume a readily defined legal obligation. In other contexts, the concept of affirmative action has varying meanings depending on the group or class on whose behalf it is conceived as well as on whether it is a voluntary effort or one mandated by statute, executive order, court decree or settlement agreement.

Affirmative action plans for women and minorities, for example, typically contemplate some race and/or sex-conscious action on the part of the employer to correct an acknowledged imbalance in its workforce. Statistical analyses compare the representation of women and minorities in certain job classes of the employer with their availability in the relevant labor market. Where an under-representation is found to exist, hiring and/or promotion goals are adopted to work toward reducing the imbalance. Such a process is mandatory for employers covered by Executive Order 11246<sup>1</sup> and may be permissible for others under Title VII of the Civil Rights Act of 1964.<sup>2</sup>

Affirmative action for handicapped individuals and for disabled veterans has not followed the same model. Such affirmative action is mandated for certain private employers and for the federal government.<sup>3</sup> Regulations promulgated to establish the requirements for affirmative action for handicapped individuals and for disabled veterans focus on recruitment and on identifying and removing barriers to equal opportunity.<sup>4</sup> The statutory and regulatory provisions governing affirmative action for handicapped individuals and disabled veterans do not establish requirements for goals<sup>5</sup> or for preferences.<sup>6</sup>

The parties to this proceeding have not argued that any of these other models of affirmative action is applicable to the question at hand, and I find no support for such a proposition.<sup>7</sup> I, therefore, conclude that the legal requirements that governed the obligation of the agency to provide affirmative action for disabled veterans during the period October 1, 1980, through January 17, 1992 are precisely those found in GAO Order 2306.1, as in effect during that time.

GAO Order 2306.1 had as its purpose the description of "selective placement programs for the employment of the physically handicapped, mentally restored, mentally retarded, rehabilitated offenders, alternatives to disability retirement, handicapped awards programs, unpaid work experiences, and affirmative action plans." GAO Order 2306.1, Chapter 1, Paragraph 1. The requirements for affirmative action pursuant to the Order are set forth in Chapter 10, "Affirmative Action Program Plans." Paragraph 1 enunciates the program goal, lists the areas to be addressed by GAO in setting program objectives, establishes the level of program responsibility and provides for evaluation of the program. Paragraph 2 identifies the five major components of the affirmative action program plans.

The essential elements of the required affirmative action program were as follows:

1. The program goal was to further a policy of equal employment opportunity for disabled veterans and to strive to ensure disabled veterans have a full measure of opportunities in hiring, placement and advancement.

2. The Agency was to set objectives that addressed such matters as management commitment, adequacy of resources and delegation of authority to accomplish program efforts. Of direct relevance to disabled veterans, the objectives were also to address including sources of disabled veterans in ongoing recruitment efforts and ensuring that disabled veterans received equal opportunities in hiring, placement and retention.

3. Annual affirmative action plans were to have five major components: 1) report of accomplishments for the previous years; 2) introduction to the plan; 3) program assessment and plan of action, describing the current status of the program as it related to the objectives and development of action items and target dates for the upcoming year; 4) a statistical report of handicapped employees; and 5) a statistical report of disabled veterans.

The affirmative action effort contemplated by this Order is a relatively modest effort, especially when compared with more aggressive affirmative action such as that directed toward women and minorities. But it is against the terms of this Order that the adequacy of the agency's effort and its potential liability for damages must be measured.

### **Findings and Conclusions**

I find that, during the period October 1, 1980 through September 30, 1985, the agency had in effect a series of three affirmative action plans. Petitioner and Respondent both assert that these plans satisfied the requirement of GAO Order 2306.1 and I concur with this view. Moreover, on the face of the plans, it is apparent that the plans were implemented at least insofar as it is relevant to disabled veterans. At least one specific recruiting source for disabled veterans was identified and the plans contained the major components identified in GAO Order 2306.1, including the statistics on disabled veterans.

Based on the foregoing, I conclude that the agency was in compliance with Order 2306.1 from October 1, 1980 through September 30, 1985.

Turning to the period October 1, 1985 through January 17, 1992, I find that the agency was not in compliance with GAO Order 2306.1 during this time and that the required effort was that outlined in GAO Order 2306.1.

The agency has taken the position that the plan that it developed in 1991 for Affirmative Action for Persons with Disabilities is what it would have and should have had in place for the period in question. This contention is rejected. In the first place, it simply cannot be known what action the Agency would have taken during a period in which it did not take action. The fact that it developed a certain plan in July 1991 falls well short of establishing that, had it developed a plan in 1986, it would have been that which it developed in 1991.

Petitioners argue that the three plans developed for fiscal years 1980-85 constitute the legal requirement for the affirmative action effort that the agency should have undertaken from October 1, 1985 through January 17, 1992.

The three actual plans developed pursuant to this GAO Order 2306.1 for fiscal years 1980-85 demonstrate what the Agency did for those years, and one could reasonably speculate that plans for 1986-90 would have resembled the three earlier plans. However, such speculation by the Board is not warranted.

Moreover, to the extent that the actual plans contained specific strategies on action items designed to implement GAO Order 2306.1 during the applicable plan years, they did not thereby supplant GAO Order 2306.1 and establish a different standard for what was required for affirmative action for disabled veterans.

The question before me is not what plan would have been in effect, for that calls for speculation as to what might have been, an endeavor for which this Board clearly is not suited. Rather, the question pending is a legal one: What was the Agency required to provide in fulfillment of its Order 2306.1? Therefore, I do not agree with the positions advanced by Petitioners or Respondent on this question.

Respondent's position for the relatively brief period of July 18, 1991 through January 17, 1992, is somewhat different. For this period, it contends, the 1991-92 Plan for Persons with Disabilities was in effect and fulfilled the requirements of GAO Order 2306.1. Respondent acknowledges that the 1991-92 Plan does not mention disabled veterans, but it asserts that they are, nonetheless, within its coverage.

In my view, the 1991-92 Plan does not satisfy the requirements of GAO Order 2306.1 because it does not specifically address disabled veterans.

In summary, I conclude that GAO was in compliance with GAO Order 2306.1 from October 1, 1980 through September 30, 1985. GAO was not in compliance with GAO Order 2306.1 from October 1, 1985 through January 17, 1992. Pursuant to GAO Order 2306.1, the following were the essential required elements of affirmative action for disabled veterans as it relates to the claims of this case:

1. Setting objectives to address equal opportunities for disabled veterans in hiring, placement and retention.
2. An annual affirmative action plan having among its components:
  - a) report of accomplishments for the previous years;
  - b) program assessment and plan of action, describing the current status of the program as it related to the objectives and development of action items and target dates for the upcoming year; and
  - c) statistical report of disabled veterans.<sup>8</sup>

### **Future Proceedings**

The parties may now proceed with a period of discovery to seek information related to the second phase of this proceeding, *i.e.*, the determination of what, if any, cognizable injury has been suffered by Petitioners as a result of the absence of affirmative action for disabled veterans, in accordance with GAO Order 2306.1, from October 1, 1985 through January 17, 1992.

Initial requests for additional discovery shall be served no later than October 28, 1994. The final cut-off date for discovery shall be December 9, 1994.