

JAMES B. DOWD v. U.S. General Accounting Office

Docket No. 91-03

Date of Decision: December 23, 1994

Cite as: Dowd v. GAO, Docket No. 91-03 (12/23/94)

Before: Nancy A. McBride, Administrative Judge

Headnotes:

Affirmative Action

Class Action

Continuing Violations

Damages/Compensatory Damages

Discovery

Evidence

Veterans Rights

DECISION

a decision on the relevance of the proposed comparison prior to the damages hearing, in the interest of conserving the resources of the class. In response to this request, the Administrative Judge ordered the parties to file briefs concerning "whether appropriate comparisons can be made between class members and other groups of GAO employees...." Memorandum and Order, December 12, 1994, pg. 3. The order went on to state that the Administrative Judge would issue a decision which, at the least, would "determine whether the results of affirmative action plans for women and minorities, as compared to the experiences of class members, provide a basis for determining damages to the class members." Id.

On December 16, 1994, both parties filed papers in response to the Administrative Judge's order.

Petitioner's Position

Petitioner's submission, entitled "Memorandum on Calculations of Damages for Disabled Veterans," is a discussion of the legal bases for orders of back and front pay as damage awards in discrimination cases. It should be noted that in making this argument, Petitioner fails to recognize that this case does not involve a violation of one of the Federal anti-discrimination statutes, but rather the rights of employees under an agency order voluntarily promulgated. More importantly, however, Petitioner's brief essentially ignores the issue which the Administrative Judge ordered the parties to address -- what comparisons can be made between the class members and other employee groups (i.e. women and minorities) which will be relevant in addressing the damages issue

in this matter. In Petitioner's subsequent Opposition to Respondent's Motion In Limine, filed on December 20, 1994, the relevant issues are more directly addressed. In summary, Petitioner argues that because disabled veterans were "underutilized" by the agency, they were entitled to the same type of affirmative action provided for women and minorities, who were similarly underutilized. Petitioner also argues that women and minorities were the only group of employees who benefited from an affirmative action plan for the entire period at issue (October 1, 1980-January 17, 1992), and therefore, they are the only valid comparators.

Respondent's Position

Respondent filed its submission in the form of a Motion In Limine, requesting that the Administrative Judge enter an order holding that any evidence comparing the benefits that accrued to women and minorities as a result of the agency's affirmative action plans applicable to them with the experiences of disabled veterans during the same period is irrelevant and inadmissible at the hearing on the damages issue. Respondent asserts that such a comparison is rendered irrelevant by the significant dissimilarities between the affirmative action plans applicable to women and minorities and the requirements for affirmative action for disabled veterans.

Discussion

The issue presented at this stage in the proceedings is what evidence will be considered relevant at the hearing on damages

concerning comparisons between class members and other groups of agency employees. Petitioner has requested this pre-hearing ruling in order to avoid unnecessarily expending the limited resources of the class in developing comparisons which the Board will rule are irrelevant or inappropriate.

As a starting point, the Board has already ruled that Respondent had no independent or external duty to develop or implement an affirmative action plan for disabled veterans. En Banc Decision, February 24, 1992. Rather, the agency's obligation to provide such an affirmative action plan flowed from its voluntary promulgation of GAO Order 2306.1, Selective Placement Programs. The issue to be determined at the damages hearing set for the week of April 24, 1995 is what, if any, cognizable harm resulted to the Petitioner class from Respondent's failure to establish and/or implement the affirmative action plan for disabled veterans as required by GAO Order 2306.1.

In order to prove such harm, Petitioner's counsel has asserted that he will introduce evidence comparing the employment histories of class members during the relevant period to the histories of other groups of employees. In particular, Petitioner argues that women and minorities, as the only employees who benefited from affirmative action plans for the entire relevant period of time, are the best comparators.

As the Board has already noted, 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. Decision, October 4, 1994.

Unlike its obligations to disabled veteran class members, GAO is subject to a statutory obligation to carry out an affirmative action program for women and minorities. These obligations toward women and minorities are defined by Title VII of the Civil Rights of 1964, as amended, which prohibits Federal agencies from engaging in employment discrimination based on race, color, national origin, religion or sex.¹ Each agency is required to develop "a national and regional equal opportunity program ... in order to maintain an affirmative program of equal employment opportunity for all such employees and applicants for employment." 42 U.S.C. §2000e-16(b). In addition to requiring affirmative action plans to achieve equal opportunity in the Federal work force, Title VII provides "... for the establishment of training and education programs designed to provide a maximum opportunity for employees to advance so as to perform at their highest potential." Id. Thus Congress envisioned a two-pronged approach that sought not only facilitate access to employment, but also to foster upward movement within the Federal work force.

A fundamental activity in the Title VII affirmative action planning process at GAO, as is typical of all Federal agencies, involves performing statistical analyses comparing the

¹ The General Accounting Office Personnel Act (GAOPA), 31 U.S.C. §732 et seq., grants employees and applicants for employment of GAO the protections granted to executive branch employees by Section 717 of the Title VII of the Civil Rights Act of 1964, as amended.

representation of women and minorities in certain job classifications and pay levels with the same group's availability in the relevant civilian labor market, using a variety of measures such as census data or degree-conferred data produced by the Department of Education.² Based upon these statistical analyses, hiring and/or promotion goals or targets are adopted to work toward reducing identified imbalances. It is important to note that goals are only set where underrepresentation is found to exist. See "EEO Oversight Report on GAO's Affirmative Action Planning Process," a report by the Personnel Appeals Board of GAO (February 1993).

Affirmative action planning for individuals with disabilities and disabled veterans has not followed the same model. GAO's affirmative action obligations during the relevant period towards individuals with disabilities was defined by GAO Order 2306.1, which included a commitment to develop annually an affirmative action plan comprised of components enumerated in the order. During the period of October 1, 1980 through September 30, 1985, the agency issued a series of three affirmative action plans which, at least on their face, covered disabled veterans as well as non-veteran individuals with disabilities.³ The Board has already

² Such statistical analyses and goal setting for women and minorities are mandatory for employers covered by Executive Order 11246, issued on September 24, 1965, reprinted, as amended, in 42 U.S.C. §2000e, note (1988).

³ These plans were prepared by the Handicap Program Coordinator in the agency's Civil Rights Office (CRO). In 1986, GAO reorganized its equal employment opportunity program, and a new Office of Affirmative Action Plans (OAAP) was created. This new office assumed responsibilities for developing and implementing the
(continued...)

found that these plans, as least as drafted, satisfied the requirements of GAO Order 2306.1. Decision, October 4, 1994, pg. 9.

These plans, and GAO Order 2306.1, did not mandate the setting of goals or targets similar to those in the affirmative action program for women and minorities.⁴ Rather plans for individuals with disabilities more modestly focused on: (1) recruitment as a vehicle for achieving a work force with roughly the same percentage of disabled employees as the rest of the Federal sector; and (2) identifying and removing barriers (physical and attitudinal) to equal opportunity for disabled employees. Specific goals to address identified imbalances may not have been required for a number of reasons. First, data on the availability of persons with disabilities who are work force age and available to work has been less available and/or refined than similar data for women and minorities. Second, disabilities, by their very nature, may be

³(...continued)
affirmative action plans for women and minorities. See GAO Order 0130.1.27. However, affirmative action planning for individuals with disabilities, including disabled veterans, appears to have fallen through the cracks during this period when it was unclear whether the CRO or the OAAP had responsibility for the disability program. A new affirmative action plan for persons with disabilities was not issued after 1985 until July 18, 1991. See "EEO Oversight Study of GAO's Employment of Persons With Disabilities," a report by the Personnel Appeals Board of GAO (September 1990).

⁴ Note, however, that veterans are eligible for a variety of employment preferences in Federal employment, which exist separately from affirmative action and which are not at issue in this case.

transitory or changing in nature and require treatment on a case-by-case basis.

Based on these significant differences in the affirmative action planning process, the Administrative Judge finds that Respondent is most probably correct in its assertion that the results of plans for women and minorities cannot be validly compared to the experiences of disabled veterans in assessing what damages are owed to class members as a result of the agency's failure to live up to the obligations which it undertook in GAO Order 2306.1. The issue of whether or not disabled veterans were "underutilized" at GAO is not dispositive here, as asserted by Petitioner. Rather, the issue is whether or not the comparison evidence presented by Petitioner involves groups of employees who were "similarly situated" to class members. If Petitioner cannot establish that proffered comparators are similarly situated, the evidence will have no value.

Therefore, possibly relevant comparisons that Petitioner might present would involve disabled veterans and other employees with disabilities⁵ during relevant time periods. Affirmative action plans for disabled veterans and other individuals with disabilities did exist, at least on paper, for fiscal years 1980-1985, and one could reasonably speculate that, had the disability program not administratively derailed in the subsequent years, plans for 1986-1991 would have resembled these earlier plans. It is conceivable

⁵ The term "handicapped employees" is used to identify these individuals in the agency's affirmative action plans issued between 1980-1985.

that Petitioner might be able to present evidence which assumes substantially similar plans would have been implemented in 1986-1991 and statistically extrapolates for those later years the benefits to individuals with disabilities under affirmative action plans for 1980-85. This information might then be compared to the experiences of disabled veterans.

Similarly, it may be relevant to compare the experiences of disabled veterans and other individuals with disabilities with the progress of the "average" GAO employee during the period in dispute. Clearly, one of the main purposes of affirmative action is to create a "level playing field" for all employees, and progress towards that goal might be relevant in the determining what harm, if any, was suffered by disabled veterans by the lack of an affirmative action plan.

Conclusion

The above discussion is intended as guidance to the parties for the presentation of evidence on the damages issue in this case. It should provide a clearer view to the parties of what comparative evidence the Administrative Judge will find probative and relevant. However, the Administrative Judge, while cautioning Petitioner's counsel to give considerable weight to this guidance, will not tie Petitioner's hands at this point in the proceeding. The parties must decide for themselves how to expend their resources to produce evidence for presentation at the damages hearing. The Administrative Judge is reluctant to rule legally invalid and inadmissible evidence that has not yet been developed or proffered.

Therefore, while the Administrative Judge concurs in principle with Respondent's position on the lack of comparability between women and minorities and disabled veterans, Respondent's Motion In Limine is denied.

SO ORDERED.

DATED: December 23, 1994

/s/
Nancy A. McBride
Administrative Judge