

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

**Docket No. 91-03**

**Date of Decision: June 22, 1993**

**Cite as: Dowd v. GAO, Docket No. 91-03 (6/22/93)**

**Before: Nancy A. McBride, Administrative Judge**

**Headnotes:**

**Affirmative Action**

**Class Action**

**Continuing Violations**

**Veterans Rights**

**MEMORANDUM AND ORDER**



deprived him and other similarly-situated disabled veterans of certain statutorily-mandated veterans' preference rights by its failure to establish affirmative action plans for veterans and by its failure to give them preferences in promotion and advancement. The relief sought by Petitioner includes the establishment of mandated affirmative action plans, retroactive promotions, back pay, damages, costs and attorneys' fees.

In February 1992, the Board issued a Decision on Respondent's Motion and Petitioner's Cross-Motion for Summary Judgment. The Board treated Respondent's Motion for Summary Judgment as a motion to dismiss for failure to state a claim upon which relief may be granted. The motion was granted in part and denied in part. It was granted with respect to Petitioner's claim for entitlement to a preference in promotion and advancement for disabled veterans, because Counsel for Petitioner conceded at oral argument that this was not an issue. It was also granted with respect to Petitioner's claim of a statutory obligation on the part of GAO to provide affirmative action for disabled veterans. The Board ruled that the Veterans' Readjustment Assistance Act of 1972, as amended, (VRAA), which requires affirmative action for disabled veterans in executive branch agencies, does not cover GAO. However, the Board, sua sponte, ruled that GAO, by its own Order 2306.1, obligated itself to provide affirmative action for disabled veterans. For this reason, Respondent's motion to dismiss was denied in part.

Because there was no dispute that GAO had not implemented an affirmative action program for disabled veterans, the Board

granted, in part, Petitioner's Cross-Motion for Summary Judgment.

Petitioner subsequently filed a Motion for Reconsideration of the question of whether he was entitled to the application of a preference in promotion and advancement actions. The Board considered Petitioner's motion and ruled in an en banc decision of July 2, 1992, that Petitioner was not entitled to any preference in promotion or advancement on account of his status as a disabled veteran.

In accordance with Board rulings on the Motion and Cross Motion for Summary Judgment and on the Motion for Reconsideration, the ultimate issue to be determined in this matter is what, if any, cognizable injury did Petitioner suffer as a result of GAO's failure to implement an affirmative action program for disabled veterans as required by GAO Order 2306.1<sup>2</sup> and to what, if any, relief is Petitioner entitled.

In December 1992, the full Board certified this as a class action, defining the class as:

[A]ll disabled veterans covered by Order 2306.1 and employed by GAO at any time from October 1, 1980 through January 17, 1992, the time period reflecting the effective date of Order 2306.1.

On May 13, 1993, the Board, acting through the single

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<sup>2</sup>GAO Order 2306.1, Chapter 10, effective from October 1, 1980 through January 17, 1992, required the development of annual affirmative action program plans for employment of handicapped individuals, including disabled veterans, and set forth five required components of such plans.

administrative judge designated to hear this case, issued an order prescribing the notice to be given to class members. This order amended the class definition, limiting class membership to:

All disabled veterans covered by GAO Order 2306.1 and employed by GAO at any time during the period October 31, 1990 through January 17, 1992, the last effective date of Order 2306.1.

The modification of the class did not affect the scope of relief to which members may be entitled; it merely established that class membership was limited to individuals who could themselves have filed a charge as of October 31, 1990, the date on which the class representative filed his charge with the PAB's General Counsel.

At a status conference held in this matter on February 4, 1993, Mr. Jay Jennings appeared and he asked to be heard. He presented orally an argument that is summarized as follows: Even though the affirmative action requirement of the VRAA, as amended in 1984, did not apply to GAO, it did apply prior to that time, i.e., from 1974 to 1984. Because the class certified by the Board included all persons employed by GAO from October 1, 1980 through January 17, 1992, the Board should consider the applicability of VRAA to the class and expand class membership back to 1974, the effective date of VRAA.

Mr. Jennings subsequently submitted the written motion that is the subject of this memorandum and order. That motion seeks

reconsideration and revision of the Board's earlier ruling that the affirmative action provision of the VRAA did not, at any time, apply to GAO.

#### DISCUSSION

##### A. Applicability of VRAA Affirmative Action Requirement to GAO.

The main thrust of Mr. Jennings's motion is the same as that advanced by Petitioner and rejected by the Board in its February 1992 decision on the motion and cross-motion for summary judgment. The issues were briefed by the parties and thoroughly considered by the Board at that time. The question presented in both instances is whether the requirement for affirmative action for disabled veterans contained in 38 U.S.C. §2014(c) applied to GAO at any relevant time.

The provision in question is as follows:

Each department, agency and instrumentality in the Executive branch (1) shall include in its affirmative action plan for the hiring, advancement and placement of handicapped individuals in such department, agency or instrumentality as required by section 501(b) of Public Law 93-112 (87 Stat. 391), a separate specification of plans (...) to promote and carry out such affirmative action with respect to disabled veterans...

Section 2014 of Title 38 is part of Chapter 42, "Employment and Training of Disabled and Vietnam Era Veterans." Section 2011 contains the definitions applicable to Chapter 42, except as modified by a 1984 amendment, codified at §2014(a), which defines

coverage terms applicable to §2014 only. The 1984 amendment added a new subsection (a) to §2014, which subsection provides that, for purposes of §2014 only, the term "agency" means "a department, agency or instrumentality in the Executive branch." This subsection limits the applicability of the definition section that is otherwise applicable to Chapter 42 of Title 38, as set forth at 38 U.S.C. §2011(5). There it is provided that:

"department or agency" means any agency of the Federal Government ..., including any Executive agency as defined in section 105 of Title 5 and the United States Postal Service and the Postal Rate Commission, and the term "department, agency or instrumentality in the Executive branch" includes the United States Postal Service and the Postal Rate Commission.

The Board concluded that GAO is an Executive agency as defined in section 105 of Title 5 and, therefore, is a department or agency within Chapter 42 of Title 38, except for §2014. In addition to the analysis set forth in the February 1992 decision, it is also noted that, by reference to Title V, §105, GAO is included in the definition of "department or agency" and it is not similarly included in the definition of "department, agency or instrumentality." By contrast, the United States Postal Service and the Postal Rate Commission are specifically included in both terms. "Department, agency or instrumentality" is the precise term used to define coverage under §2014, both before and after the 1984

amendment.

We think it plain that the VRAA, as enacted in 1974, did not include GAO within the coverage of §2014(c). The 1984 Amendments only serve to strengthen this view. Mr. Jennings argues that, as enacted and as amended, §2014(c) should be interpreted to include GAO within its coverage. We are not unmindful of the overall congressional purpose to accord GAO employees protection comparable to those enjoyed by their counterparts in the Executive branch. But because the statutory language is plain and unambiguous, we have no reason to go beyond it. The request to reconsider the previous ruling that U.S.C. §2014(c) does not apply to GAO is, therefore, denied.

B. Applicable Dates for Class Membership.

Mr. Jennings also contends that the class should be expanded to include all disabled veterans employed by GAO from 1974 to the present. The precise arguments for expanding the class are not entirely clear, but several are suggested. These arguments are closely related to the question of whether 38 U.S.C. §2014(c) applies to GAO, but they will be considered separately.

The argument advanced orally at the status conference relates to the class originally certified, i.e., disabled veterans employed by GAO from October 1, 1980 through January 17, 1992. Although the class definition has subsequently been amended to limit class membership to disabled veterans employed by GAO from October 31, 1990 to January 17, 1992,<sup>3</sup> this argument will be addressed in light

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<sup>3</sup>Memorandum and Order, May 13, 1993.

of the class as originally certified.

The argument is premised on a view that the VRAA affirmative action requirement applied to GAO from its enactment in 1974 through the effective date of the 1984 Amendments, but concedes that, after the 1984 Amendments, the requirement no longer applied to GAO. It is argued that, during the period 1980 to 1984, GAO was covered by, and its employees were protected by, GAO Order 2306.1 and 38 U.S.C. §2014(c). The argument seems to be that inasmuch as persons employed during 1980 to 1984 will have their claims heard regarding a failure to implement GAO Order 2306.1, they should also have their claims heard regarding 38 U.S.C. §2014(c). These rights "vested" and asserted deprivations of such rights should, therefore, be heard even at this time. The argument continues that if this group is going to be heard on its claims arising under §2014.1(c), then the class should be expanded to include disabled veterans employed from 1974 to 1980. Such individuals were not employed during the effective period of Order 2306.1, but their claims regarding §2014(c) should, nonetheless, be heard.

The fact that the class certified is now defined to include only those disabled veterans employed by GAO from October 31, 1990 to January 17, 1992 makes this particular argument moot. However, even if the class were as originally certified, and, even if §2014 applied to GAO between 1974 and 1984, the argument is without merit. In the first place, the dates defining membership in a class asserting rights under one statute or rule do not entitle the class to raise rights under other rules or statutes in effect

during some or all of the same time.

Secondly, the argument confuses and blurs the distinction between a continuing violation and the continuing effects of a past violation. The continuing violation theory allows relief for specific harm suffered outside the statutory limitation period, provided the violation is present and continuing within the statutory limitation period. By contrast, the continuing effects of a past violation do not provide the basis for an action if the violation itself occurred outside the statutory limitation period. See United Air Lines v. Evans, 431 U.S. 533, 14 F.E.P. 1510 (1977). Thus, even if rights vested and the violation of such rights caused injury, a claim must be asserted within the prescribed charge-filing period, even if the effects of the alleged harm are perpetuated beyond that period.

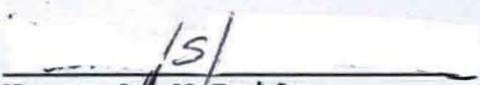
In the case of a prohibited personnel practice under the rules of the PAB, a charge must be filed within twenty days of the alleged prohibited practice. If the violation is a continuing one, the charge may encompass harm that occurred more than twenty days before the charge. If, however, the violation is not ongoing, whether because a challenged practice has ceased or because an asserted statutory obligation has been eliminated, then a charge must be filed within twenty days of the cessation of the practice or the change in statutory obligation. Even though a past violation may have caused harm which continues into the present, it is not actionable after twenty days have passed from its last occurrence.

Even if Mr. Jennings were correct in the view that §2014(c) applied to GAO from 1974 until the effective date of the 1984 Amendments, this would not provide any basis for expanding the class membership. The continuing violation theory allows redress for injury suffered prior to the statutory period when the violation continues; this theory does not apply to continuing effects of past discrimination.

In addition to expanding the class back to 1974, Mr. Jennings also requests that it be expanded forward, to the present. The only basis upon which to grant such a request would be a continued obligation to provide affirmative action to disabled veterans employed at GAO. We have expressly held that the VRAA does not impose such an obligation. The duty to provide such affirmative action was a self-imposed one contained in GAO Order 2306.1. This obligation ceased when GAO rescinded the order, effective January 17, 1992. Individuals who began employment with GAO after that date have no rights to assert regarding any failure to implement Order 2306.1. No such duty ever ran to them. There is no basis, therefore, to extend the dates applicable to class membership beyond January 17, 1992.

ORDER

Wherefore, upon consideration of Mr. Jennings' Motion to Amend the Dates of the Notice to the Class and for Reconsideration as to the Applicability of the Vietnam-Era Veterans Readjustment Act of 1974 to the General Accounting Office and upon consideration of Respondent's Opposition thereto, and for the reasons set forth above, the Motion is DENIED.

  
Nancy A. McBride  
Administrative Judge

Date: June 22, 1993