



# *“Americans Deserve to Work... Disabled or Not”*

A White Paper prepared for the

Women's and Fair Practices Departments of  
The American Federation of Government Employees

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# AFGE'S WOMEN'S AND FAIR PRACTICES DEPARTMENTS

## *“Americans Deserve to Work... Disabled or Not”*

*“For generations, society has viewed people with disabilities as citizens in need of charity. Through ignorance we tolerated discrimination and succumbed to fear and prejudice. But our paternalistic approach did no more to improve the lives of people with disabilities than labor laws restricting women in the workplace did to protect women.” – Senator Ted Kennedy*

### I. INTRODUCTION

Disabled employees are not being treated fairly in the federal and D.C. governments. The decreasing number of disabled government workers and the increasing number of discrimination cases being filed is a testament to that fact. Increasingly, many of AFGE's disabled members working in the federal and D.C. governments have been denied reasonable accommodations; they have been ignored and discriminated against due to their disabilities while their objections have been openly disregarded by management and the agency hierarchies. It is an outrage that government employers would deny Americans with disabilities the basic right to support themselves.

The Women's and Fair Practices Departments of AFGE advocate for the fair and equal treatment of all. The Departments and disabled government employees challenge federal agencies to treat employees fairly, adhere to laws and regulations, and remove barriers to equal employment opportunities. We challenge the federal and D.C. governments to be the nation's model employers by providing equal opportunity to all Americans – including Americans with disabilities.

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“The departments and disabled government employees challenge the commitment of federal agencies to treat them fairly, adhere to laws and regulations, and remove barriers to equal employment opportunities.”

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The percentage of federal employees with targeted disabilities remains very low, at less than two percent of the total federal work force,<sup>1</sup> and that percentage is declining. During 1997-2006, employees with targeted disabilities decreased by about 14.75 percent, while the federal government grew by 5.48 percent in employment. There were 28,671 disabled federal employees in 1997. As of 2006, that number has fallen to 24,442; the participation rate of people with targeted disabilities fell to 0.94 percent of the federal government's total work force, the lowest participation rate in over 20 years.<sup>2</sup> This decline is occurring while the number of workers with disabilities and chronic conditions is expected to grow as the work force ages and our veterans return

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home. This white paper will examine the social problem of the failure to employ disabled Americans, and then suggest creative solutions to the problem.

The Women's and Fair Practices Departments embrace the concerns of our disabled members by campaigning for: (1) the hiring, (2) the advancement, (3) the retention, (4) the resolution of discrimination claims filed, and (5) an increased awareness of the duty federal managers have to fulfill reporting requirements regarding disabled government employees. In response to these needs, the Women's and Fair Practices Departments have developed a Disability Campaign with three goals:

- 1) **Educate** our members, potential members, congressional and political leaders, agencies, and the American people on the rights and proper treatment of individuals with disabilities;
- 2) **Enforce** the laws, rules, regulations, executive orders, and collective bargaining agreements relating to individuals with disabilities and the government's role as a model employer; and obtain
- 3) **Equality** for disabled workers.

## II. HISTORY

American history has not been friendly to disabled workers. The popular view of the early 1900's was that disabled persons were to be pitied and given handouts because they were "dependant" on others<sup>3</sup>. Disabled Americans have often been referred to as "the handicapped" or "cripple," demonstrating the view that society held for persons with disabilities. The choice of terms applied to a person with a disability can be overlaid with stereotypes, patronizing attitudes, and other emotional undertones – just like racial and ethnic labels. It wasn't until 1990 that Congress recognized the need for an official shift in such terminology for legislative actions.<sup>4</sup>

Although legislative mandates and the gradual change in attitudes across our culture have brought about some improvements for disabled Americans, the successful employment of disabled workers remains an unresolved issue.

### **Disability Rights Movement**

The past decade has seen the growth of a disability rights movement. It is – like the civil rights movement before it – propelled by political, social, and legal changes in our society.

The disability rights perspective views people with disabilities as a minority group that has been subjected to discrimination and unfair treatment. This perspective stands in contrast to the "charitable perspective," which views people with disabilities as

unfortunate and deserving of pity and care-taking. It is also different from both the “medical perspective” that views people with disabilities as needing to be cured, and the “rehabilitation perspective” that views people with disabilities as needing experts and professionals to provide services to enhance their functioning. The disability perspective simply insists that qualified Americans with disabilities be treated fairly and permitted to contribute their own talents to the federal and D.C. work forces. That is not an unreasonable demand.

The history of the disability rights movement can be traced to the 1960’s and 70’s when people with disabilities began to organize themselves to gain greater access to society and to challenge widely-held stereotypic beliefs and attitudes. The determination of a group of students with disabilities to attend the University of California at Berkeley in the 60’s is often considered the pivotal effort that began the disability rights movement. Those students were led by Ed Roberts, a man often referred to as the father of the Disability Rights Movement. It was a battle to get Berkeley to accept him, because, as a dean explained, “We’ve tried cripples before and it didn’t work.”<sup>5</sup>

Disabled Americans know they are capable of working, but the status quo is slow to change. The challenge of the Disability Rights Movement is to help society realize that disabled Americans, like everyone else, deserve equal rights. The notion of disability rights is perhaps not so familiar as civil rights or women’s rights, but it must be remembered that not too very long ago, those movements, which now seem so mainstream, were burgeoning and radical.

### **Rehabilitation Act of 1973<sup>6</sup>**

The first major piece of legislation validating disability rights was passed in 1973. Section 501 of Rehabilitation Act of 1973 prohibits federal agencies from discriminating against their employees or applicants based on disability and requires each covered agency to establish an affirmative action program plan for the hiring, placement, and advancement of individuals with disabilities. The Equal Employment Opportunity Commission enforces Section 501 of the Rehabilitation Act.

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“In its broadest implications, the independent living movement is the civil rights movement of millions of Americans with disabilities. It is the wave of protest against segregation and discrimination and an affirmation of the right and ability of persons with disabilities to share fully in the responsibilities and joys of our society.”

~ *Ed Roberts, 1977*

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### **ADA of 1990**

The disability rights movement scored a major victory when the Americans with Disabilities Act (ADA) became law in July 1990.<sup>7</sup> The intention of the ADA was to guarantee full participation in American society for all people with disabilities – just as the Civil Rights Act of 1964 guaranteed the rights of all people regardless of race, sex, national origin or religion<sup>8</sup>. The ADA specifically prohibits discrimination in employment against a qualified individual with a disability. Congress passed this Act

with the intention of preventing unfair treatment toward people with current, past, or perceived disabilities, defined as “physical or mental impairment that substantially limit a major life activity.”<sup>9</sup>

In 1992, Congress reconciled the Rehabilitation Act and ADA by amending the Rehabilitation Act to apply the ADA standards to federal employment; the ADA’s employment standards apply to all non-affirmative action employment discrimination claims of individuals with disabilities who are federal employees or applicants for federal employment.<sup>10</sup>

The ADA was a milestone achievement. Since its enactment, people with disabilities have made meaningful strides toward societal inclusion and full participation. However, a number of Supreme Court decisions significantly reduced the protections available to people with disabilities in employment settings<sup>11</sup>. Over the past 17 years, the Supreme Court has weakened the ADA’s effectiveness by enforcing a narrow interpretation of the definition of disabled.

The Court required a plaintiff to prove that he or she was “disabled enough” to be protected by the ADA before even hearing the discrimination claim.<sup>12</sup> People with conditions like epilepsy, diabetes, HIV, cancer, and hearing loss who manage their disabilities with medication, prosthetics, or hearing aids were viewed as “too functional” to have a disability. While these same people may have been denied a job or fired because an employer mistakenly believes they cannot perform the job, they were denied the ADA’s protection from employment discrimination. This created a problem in which employers could say a person is “too disabled” to do the job but not “disabled enough” to be protected by the law.<sup>13</sup>

### **ADA Amendments Act of 2008**

Congress rejected the Court’s narrow interpretation of the ADA by passing the ADA Amendment’s Act of 2008, which was signed into law on September 25, 2008.<sup>14</sup> The Act specifically rejects the Court’s requirement that a person be “severely” limited in a major life activity in order to be defined as disabled. Unfortunately, the Act does not specify what level of limitation is necessary, which unfortunately means that the courts will have substantial discretion in determining exactly what level of limitation short of “severe” is required.

The Act also strikes down the court-created rule excluding individuals who are able to compensate for their disabilities with “mitigating measures” (such as hearing aids or artificial limbs) from coverage under the ADA. The Act was widely endorsed by the veterans’ community because it significantly strengthened employment protections for disabled veterans. Among the mitigating measures were those heavily relied on by disabled veterans, including the use of prostheses for amputees and the use of medication and therapy for veterans suffering from post-traumatic stress disorder (PTSD). Veterans suffering from epilepsy, diabetes, cancer and muscular dystrophy

were also adversely affected by the courts' interpretations of the ADA. WFP will advocate aggressively to ensure that courts do not once again water-down the protections Congress has provided for disabled workers

### **III. WHAT HAPPENED TO BEING THE MODEL EMPLOYER?**

Making the federal and D.C. governments into model employers for people with disabilities is a challenge that remains unmet. The federal government is the United States' largest employer. It is imperative that it maintain a dignified work environment. Equal opportunity in employment for all people, regardless of race, color, sex, age, religion, national origin, or disability, should be the common goal across all government agencies.

The government has passed a number of laws and regulations designed to advance this goal, but the problem remains.

#### **A. Notification of Federal Employees Anti-discrimination and Retaliation (No FEAR) Is Not Effective**

Congress passed the No FEAR Act in 2002, calling for federal agencies to be model EEO employers. No FEAR is designed to hold federal agencies accountable for violations of antidiscrimination and whistleblower protection laws. Federal employees, former employees, and applicants for employment are covered under this Act, which imposes reimbursement, reporting, and training requirements on the agencies. Unfortunately, No FEAR's ambitious goal has not been met. Disabled employees remain in fear of discrimination, as evidenced by the continuing litany of EEO complaints filed. *See Table 1.*

#### **B. MD-715 Lacks Proper Oversight and Enforcement**

In 2003, the Equal Employment Opportunity Commission (EEOC) developed Management Directive (MD) 715, which set new procedures for establishing and maintaining equal employment opportunity (EEO) programs under Section 717 of Title VII and affirmative action programs under Section 501 of the Rehabilitation Act.<sup>15</sup> MD-715 sets forth general reporting requirements for all federal agencies, reinforces the federal government's mandate to be a model employer and requires federal agencies to meet six essential elements of a model EEO program.<sup>16</sup> The directive focuses on the operation and evaluation of an EEO program and requires the identification and elimination of workplace policies, practices, procedures, and conditions that operate as barriers to equal employment opportunity. Agencies are required to evaluate their hiring, promotions, training, awards and disciplinary action policies, practices, procedures, assess barriers, and comply with federal law such as Title VII of the Civil Rights Act and the Rehabilitation Act.

The Commission issued instructions to agencies for implementing MD-715 in compliance with the EEO management directive. The Instructions discuss the model EEO program, require a barrier analysis to be conducted to identify triggers that impede equal employment opportunities, require development of an action plan to eliminate any existing barriers<sup>17</sup>, establish consistent forms for reporting about the agency's work force, require outreach to interested groups and labor organizations<sup>18</sup>, and establish other reporting requirements<sup>19</sup>.

Unfortunately, despite MD-715's noble intentions, equal employment opportunity for the disabled has not become a reality.

### **C. Leadership for the Employment of Americans with Disabilities Is Not Mandatory**

In 2006, the EEOC launched its LEAD (Leadership for the Employment of Americans with Disabilities) initiative, which challenged the federal government, in accordance with Congress' direction, to improve the overall employment rate for people with targeted disabilities.

Although LEAD encourages federal agencies to hire and advance more individuals with severe disabilities, it does not affirmatively create or require the development of employment opportunities for disabled Americans. LEAD attempts to address the problem of declining opportunities for the disabled through a purely educational and outreach approach.<sup>20</sup> Certainly, education is a necessary element of successful reform, but it cannot, by itself, break down the fundamental and systemic barriers facing disabled workers in the federal and D.C. governments. There is still no leadership for disabled employees.

### **D. Schedule A Hiring Authority**

Several hiring authorities designed specifically for use by and for people with disabilities are available for the federal hiring process. One of these hiring authorities is the Schedule A appointing authority, which allows for non-competitive appointment of individuals with disabilities. Schedule A was designed to provide job opportunities to persons with severe physical disabilities, psychiatric disabilities, and/or mental retardation. In FY 2006, only 326 individuals were hired under Schedule A, which amounts to 0.14 percent of all new hires.

It is not clear why Schedule A is so underutilized. From FY 2002 to FY 2006, people with targeted disabilities were hired at rates well below their participation rate in the federal work force (0.94 percent). Although the total number of new hires in the federal government decreased by 15.23 percent from FY 2002 to FY 2006, the number of new hires of people with targeted disabilities decreased at a higher rate, 23.15 percent, in that same period.<sup>21</sup> Schedule A could help bolster job access for disabled workers, but – for whatever reason – it is not being employed.

## **E. Laws Protecting the Federal Employment Rights of Veterans**

The federal workforce has applied some form of veterans' preference in hiring since the Civil War, particularly for disabled veterans and those who have served during periods of combat.

The Veterans' Preference Act of 1944 remains the primary source of statutory protection for veterans seeking competitive appointments in the federal sector. Under this law, veterans receive additional points above their civil service exam scores. (Generally, five points are awarded to those who served in combat, while ten points are awarded to service-connected disabled veterans and their family members.) This preference also protects eligible veterans during reductions-in-force (RIFs).

Disabled veterans and certain other groups of eligible veterans also receive hiring assistance through Veterans Recruitment Appointment (VRA) authority, a special hiring authority that originated as an Executive Order following the Vietnam War. More specifically, an eligible veteran can be appointed to a position up to a GS-11 without having to compete with other applicants. Veterans who are 30 percent or more service connected disabled can be appointed to appointments regardless of grade and they can be converted to career conditional status more quickly than other VRA-covered veterans.

Noncompetitive appointments are also available to disabled veterans who successfully complete VA training programs. Preference eligible veterans (regardless of disability) may receive hiring assistance for competitive positions open to candidates outside the agency through the Veterans Employment Opportunities Act (VEOA).

In addition, during the post-Vietnam era, Congress enacted Section 4214 of Title 38 to require agencies to promote employment and job advancement opportunities for veterans eligible for noncompetitive appointments and establish affirmative actions plans for hiring, placement and advancement of disabled veterans. These plans, known as Disabled Veterans Affirmative Action Program Plans (DVAAP) require agencies to submit yearly reports to OPM.

While both the number of veteran new hires and agencies' use of special appointing authority to hire veterans also increased over the past year, the agencies' use of 30 percent or more disabled veterans special appointing authority decreased. In contrast, the number and percentage of disabled veterans have continued to increase over the past four fiscal years.<sup>22</sup>

## **F. Title 38**

One of the most significant gaps in the current protection scheme for disabled veterans is the lack of uniform coverage for positions covered by federal personnel systems other than Title 5. Within the Department of Veterans Affairs Veterans Health Administration, the majority of employees are appointed under Title 38 rather than

Title 5, including doctors and registered nurses (“pure Title 38s”) and pharmacists, licensed practical nurses, psychologists and social workers (“hybrid Title 38s”).

In 2003, the U.S. Appeals Court for the Federal Circuit held in *Scarnati v. Department of Veterans Affairs*, 344 F. 3d 1246 (Fed. Cir. 2003) that the VEOA did not protect a VA psychiatrist who alleged that he was not selected for a position in the VA due to his disability because Title 38 gives the VA Secretary broad appointment authority. Although the court was silent as to whether the VEOA applies to hybrid Title 38s, the fact that the Secretary has broad appointment authority for these groups as well raises serious doubts as to whether Title 5 veterans’ preference protections apply to them either.

### **G. Direct-Hire Authority**

Direct-Hire Authority (DHA), implemented in 2003 by federal regulation (5 CFR part 337, subpart B), has also made it easier for selecting officials to bypass veterans in the hiring process. DHA rules clearly state that veterans’ preference does not apply when selecting individuals under DHA. Despite the elaborate process set forth in the DHA rules to establish a “severe shortage of candidates” or a “critical hiring need” in order to fill selected positions through direct hire, it is quite easy for an agency to qualify for DHA and pass over *all* preference eligible. In addition, OPM can decide independently if certain positions meet the criteria for DHA. The use of DHA should be strictly limited and pending proposals to increase the use of DHA for annuitants, Presidential Interns and Americorps alumnae, among other groups, should be rejected.

### **H. Outsourcing**

Outsourcing government functions to contractor performance has had a disproportionate adverse impact on disabled veterans, particularly those in low wage positions and those who entered federal government after rehabilitation for service-connected disabilities.

## **IV. CONTEMPORARY REALITY: THE FAILURE OF CURRENT LAW LEAVES DISABLED WORKERS WITH AN IMPOSSIBLE DREAM**

Although persons with disabilities have much to offer the workplace, federal and D.C. government employers have yet to treat them as qualified job seekers. People with disabilities continue to be underemployed and undervalued as government workers. It is imperative that those who can and want to work are supported in their efforts to do so.

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“The participation rate of federal employees with targeted disabilities has declined while the federal work force has actually grown.”

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The percentage of federal employees with targeted disabilities has declined each year since reaching a peak of 1.24 percent in FY 1993 and 1994. In FY 2006, the participation rate of people with targeted disabilities fell to .94 percent of the federal government’s

total work force, the lowest participation rate in 20 years. The participation rate of federal employees with targeted disabilities has declined while the federal work force has actually grown.<sup>23</sup>

Since FY 1985, the participation rate of permanently employed people with targeted disabilities has decreased at a disproportionately higher rate than that of the federal government's overall permanent work force. Although the permanent work force has decreased by 15.9 percent since FY 1985 and by 3.2 percent since FY 1995, the participation rate of people with targeted disabilities declined by 19.78 percent and 22.18 percent during those respective time frames.

Even when the total work force increases, the population of people with targeted disabilities still declines. Between FY 1997 and FY 2006, the permanent work force increased in five of the ten years. The participation rate of people with targeted disabilities during that same ten year period nonetheless decreased every year.<sup>24</sup> (Figure 1)

**Figure 1. Change in Employees with Targeted Disabilities vs. Permanent Work force in the Federal Government**

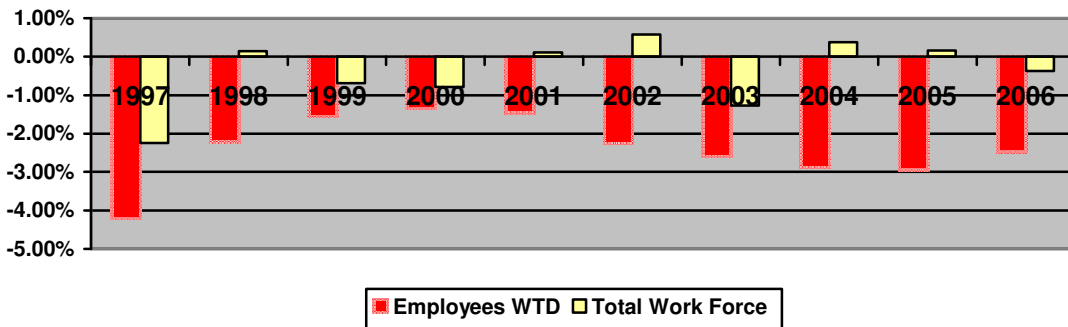


Figure 1. Source (*Improving the Participation Rate of People with targeted disabilities in the Federal Work force*): EEOC, January 2008.

The Women's and Fair Practices Departments realize the fact that the federal government is losing more people with targeted disabilities than it is hiring each year is a problem. Federal agencies are not effectively reaching out and communicating the availability of vacancy announcements to people with targeted disabilities. Agency programs should set goals and clearly define objectives to recruit, hire, and fully integrate disabled workers into the workplace.

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“[Disabled employees] were expected to complete work that was different than the work of their peers. As a result, many employees with disabilities just gave the job up because of the anxiety and aggravation due to agency threats. – AFGE member, Local 1151

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### Separation Challenges

The government is simply not retaining disabled workers. From FY 2002 to FY 2006, people with targeted disabilities have separated from the federal work force at nearly twice their rate of hire (Figure 2). Compare each year's separation rate for people with targeted disabilities (0.98 percent, 0.97 percent, 0.92 percent, 0.95 percent, and 0.92 percent respectively) to each year's hire rate for people with targeted disabilities (0.60 percent, 0.58 percent, 0.58 percent, 0.54 percent, and 0.55 percent respectively). Clearly, this is a problem.

Figure 2. Total New Hires v. Total Separations for People with Targeted Disabilities

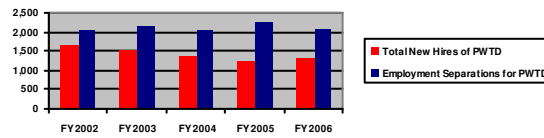


Figure 2. Source (*Improving the Participation Rate of People with targeted disabilities in the Federal Work force*): EEOC, January 2008.

The loss rate of disabled workers due to retirement is very high. In FY 2006, 39.41 percent of federal workers with targeted disabilities who separated from the federal government did so due to retirement – exceeding all other types of separations. The types of retirement include mandatory, disability, voluntary, special option, and in lieu of involuntary action. For the past four years the second highest separation reason has been quitting.<sup>25</sup>

There is a reason that disabled employees are leaving employment in the federal work force at such a rate. They are not receiving fair treatment once they are hired. Federal managers are supposed to achieve diversity in the federal and D.C. government by incorporating into their agency's plans, opportunities to ensure the advancement and development of all employees along their career paths. It is pointless to simply hire disabled workers to meet numbers goals and then not accommodate their disabilities so they leave the workforce. The government cannot legally or morally deny dignified employment and equal employment opportunities to disabled workers.

### Promotion Challenges

Another problem is the apparent lack of promotion opportunities available to disabled employees. The Women's and Fair Practices Departments conducted a survey of disabled members in order to determine the obstacles facing them. We found that lack of promotion opportunities was the largest concern.<sup>26</sup>

From FY 2002 to FY 2006, the number of promotions and rate of promotion for people with targeted disabilities decreased by 25.19 percent. In comparison, the rate of promotion for individuals with no disabilities and the rate of promotion for the total federal work force decreased by 3.99 percent and 4.36 percent, respectively, during the

same time period. People with targeted disabilities received promotions (0.70 percent) below their participation rate in the federal work force (0.94 percent) in FY 2006. <sup>27</sup>

Our disabled members reported bias and stereotyping as a major obstacle to obtaining promotions. The Women’s and Fair Practices Departments believe that one of the most important factors in creating a successful disability rights program is to ensure that issues of bias and stereotyping are addressed. Agencies should take affirmative action to ensure the fair and lawful treatment of disabled employees. Additionally, each agency should publish and be held accountable to a plan to train managers and supervisors on methods for promoting the retention and promotion of disabled employees.

**Harassment Challenges**

Harassment is a particular concern. Since FY 2002, harassment has been the most frequently alleged issue in complaints of discrimination filed by individuals on the basis of mental or physical disability. See *Tables 1 and 2*. Also, since FY 2002, the percentage of EEO complaints alleging harassment based on disability has steadily increased, peaking in FY 2006. As well, complaints involving reasonable accommodation or discipline issues have been consistently among the most frequently alleged issues. <sup>28</sup>

**Complaints Challenge**

**Table. 1 Top Three issues for EEO Complaints based on Mental Disability**

FY 2002	FY 2003	FY 2004	FY 2005	FY 2006
Harassment - 434	Harassment - 387	Harassment - 407	Harassment – 431	Harassment – 430
Discipline - 201	Discipline – 232	Discipline – 284	Discipline – 296	Reasonable Accommodation - 287
Terms of Employment – 178	Reasonable Accommodation - 180	Reasonable Accommodation - 177	Reasonable Accommodation - 228	Discipline - 254

Table 1. Source (*Improving the Participation Rate of People with targeted disabilities in the Federal Work force*): EEOC, January 2008.

**Table. 2 Top Three issues for EEO Complaints based on Physical Disability**

FY 2002	FY 2003	FY 2004	FY 2005	FY 2006
Harassment – 1,119	Harassment – 1,006	Harassment – 1,022	Harassment – 1,101	Harassment – 1,172
Terms of Employment – 844	Reasonable Accommodation - 747	Reasonable Accommodation - 801	Reasonable Accommodation - 846	Reasonable Accommodation - 849
Discipline - 544	Terms of Employment - 605	Discipline - 696	Discipline - 700	Terms of Employment - 675

Table 2. Source (*Improving the Participation Rate of People with targeted disabilities in the Federal Work force*): EEOC, January 2008.

### **Training Challenge**

It is common practice for selecting officials to maintain separate applicant lists to evade veterans' preference requirements. Currently, agencies are responsible for their own enforcement of veterans' preference rules. Additional training and greater oversight of current hiring practices would ensure that protections are uniformly applied to all eligible veterans. Oversight also is hampered by inadequate data collection. A tracking system, such as the EEOC Management Directive 715, would provide needed policy guidance and standards to agencies. Such a tracking system should include information about the number of preference eligibles who applied for each vacant position, and whether the applicant applied for and was turned down for other positions previously, in order to determine how many veterans were turned away from each vacant position. There is a need for additional oversight and training.

### **AFGE is Outraged**

The Women's and Fair Practices Departments have experienced a large increase in discrimination cases filed by members with disabilities. Some of the cases that have come to our attention are appalling in the blatant disregard for the individual's human rights. As these cases increase, there seems to be more and more disabled workers choosing not to fight at all, but rather to leave their jobs in order to avoid discrimination. *See Figure 1.* That is an awful trend that should be remedied.

This alarming decrease in federal government workers with disabilities cannot be ignored. Failed agency policies and procedures have resulted in continued hiring discrimination, forced resignation or retirement, unavailability of promotions, and a resulting increase in EEO cases filed.

Programs and initiatives require dedicated and sustained support from departmental and agency leadership to achieve success. It is important that leaders several layers deep in federal and D.C. agencies are committed to the equal treatment of disabled workers. Only such commitment can ensure the creation of a legacy of proper treatment that will last from administration to administration. Thus, a clearly articulated commitment of governmental and agency leadership to achieving the goal of greater inclusion for workers with disabilities in the federal work force is critical to making equality a reality.

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"I have never seen the agency reach out and educate the population on the ADA or reasonable accommodations for the disabled." ~ AFGE member, Local 2419

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Of course, leadership starts at the top. The numerous executive orders regarding disability rights demonstrate presidential awareness of the problem. If simply promulgating executive orders could guarantee disability rights, the problem would already be solved.

President Clinton issued several executive orders concerning EEO at the end of his presidency. EO 13163 ( July 26, 2000) *Increasing the Federal Employment Opportunities for Individuals with Disabilities*, was designed to address the need to hire qualified persons with disabilities, to increase efforts at outreach, and to increase the understanding of the reasonable accommodations available for persons with disabilities. The order set a goal for the federal government to hire 100,000 qualified individuals with disabilities over the next five years.

The second Clinton executive order, EO 13164 (July 26, 2000) *Requiring Federal Agencies to Establish Procedures to Facilitate the Provision of Reasonable Accommodation*, requires agencies to create a procedure subject to collective bargaining that facilitates the reasonable accommodation request, the interactive process, and the granting or denial of the request and requires agencies to create an informal dispute resolution process – separate from the statutory complaint process- for reconsideration of denials of reasonable accommodation requests. Agencies were given one year from date of order (July 26, 2001) to create and submit its procedures to the EEOC for review

The Bush administration also addressed disability rights. In 2001, President George W. Bush announced his *New Freedom Initiative* to build upon ADA requirements. The executive order tasks EEOC with taking a leadership role to implement employment goals that promote the full participation of people with disabilities in all areas of society. Full participation includes increasing access to assistive and universally designed technologies, expanding education and employment opportunities, and promoting full access to community life for individuals with disabilities.

Unfortunately, these executive orders have uniformly fallen short of their ambitious objectives, as evidenced by the declining participation rate of disabled workers in the federal workforce and the substantially undiminished number of EEO complaints filed. Therefore, the Women’s and Fair Practices Departments are working hard to encourage the next president to deliver real results for disabled workers, rather than just more words.

### **Horror Story Summaries of AFGE Members’ Disability Campaign Surveys**

Our members have reported a number of serious problems with the way the federal and D.C. government agencies fail to live up to their mandate to be model employers. The stories have a common theme. A disabled employee is hired, and then not properly accommodated, which leads to the employee being miserable and unable to perform to his or her potential. Often, the consequence is that the employee either languishes at an entry-level position with little chance for promotion or is pressured out of the agency through disability or early retirement. There is a great variety of individual stories that we received from our members; however, a sample can provide a sense of the challenges facing disabled employees.

### **Failure to Accommodate – Medical Care**

#### Employee A

Employee A is hearing impaired, but the disability is correctable with bi-lateral hearing aids. Over the first several years on the job, Employee A received numerous awards for outstanding performance, and she very much enjoyed her work.

Unfortunately, things changed after Employee A was diagnosed with cancer in 2005. After returning from a leave of absence, Employee A still needed to undergo regular chemotherapy treatments. Her managers belittled her for needing to miss work for those treatments, and they constantly pressured her to go onto disability status instead of seeking an accommodation at work. Employee A was ensured that she would be better off on disability status. After suffering months of harassment, Employee A finally gave in and went onto disability status. As a result, her income decreased from more than 42 thousand dollars per year to 13 thousand dollars per year. The tragedy is that Employee A is able to work, if only the agency would treat her with dignity and provide her with a reasonable accommodation. Is it really too much to ask that she be permitted a few hours off as necessary in order to treat her cancer?

### **Failure to Accommodate – Structural Facilities**

#### Employee B

Employee B is a disabled veteran with 26 years of civil service. His disability leaves him wheel-chair-bound, but he is still capable of work. Unfortunately, the agency failed to properly accommodate him by installing ramps and doorways that would allow him to move around the workplace. After years of requesting an accommodation and not receiving one, Employee B felt forced to retire and seek an administrative remedy. His administrative proceedings with the agency have drawn out over five years, and he still has no remedy. Such poor treatment of a disabled veteran is unworthy of the government. The process is clearly in need of reform.

### **Failure to Accommodate – Interpreters/Typists**

#### Employee C

Employee C is a government lawyer. He suffers from glaucoma, hypertension, arthritis, and depression. The agency initially accommodated Employee C's difficulty seeing by providing speech recognition software that could read text aloud to him. However, the accommodation was withdrawn – apparently when the agency's IT staff decided to stop supporting the program. The agency then provided a typist to assist Employee C with data entry, but the interpreter left the position. The position remained vacant for two years. Employee C contends that the agency's failure to accommodate him led to a deterioration of his condition.

To add insult to injury, Employee C was allegedly physically thrown out of his supervisor's office and cursed when he asked for advanced sick leave. Ironically, Employee C's supervisor is an administrative judge!

## **Failure to Accommodate – Access to Existing Facilities**

### Employee D

Wheel chair bound Employee D became the subject of a Baltimore Sun article when was awarded \$6,500 in damages against the agency because it had not taken decisive action to stop non-disabled employees from using bathroom stalls equipped for disabled employees, which resulted in Employee D having to urinate in his pants on three occasions.<sup>29</sup> The agency could have easily and cheaply prevented this problem. A simple e-mail to all employees may have been sufficient to discourage non-disabled workers from a practice that needlessly resulted in Employee D's repeated public humiliation.

### **Other Stories of Interest from Our Members in the Federal and D.C Agencies**

- A class action has been filed on behalf of employees with disabilities.
- Employees with disabilities are being denied upward mobility.
- A supervisor referred to a disabled employee as "high maintenance.
- Disabled employees are made to work in an unsafe environment.
- Buildings are not accessible to employees with disabilities.
- Disabled employees have been disciplined for seeking reasonable accommodations.
- Disabled employees are being subjected to a hostile work environment because of their disabilities.
- Disabled employees are being forced to undergo fitness for duty evaluations – placing their jobs at risk.
- Disabled employees are not protected in emergency situations because evacuation plans do not account for them and buildings lack adequate infrastructure (e.g. elevators).
- There are not enough bathrooms assessable to disabled employees.

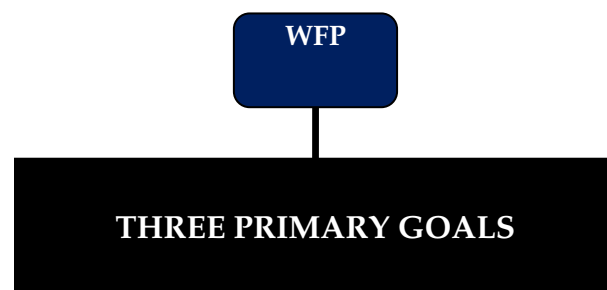
## **V. WHAT IS BEING DONE?**

- The Women's and Fair Practices Departments embrace the concerns of our disabled members and intend to campaign for: (1) hiring of disabled applicants, (2) advancement of disabled employees, (3) retention of disabled employees, (4) resolution of discrimination claims, and (5) increased awareness and understanding from federal managers of the reporting requirements for disabled government employees.
- The EEOC is challenging federal and D.C. agencies to raise the participation rates of people with disabilities to 2 percent of their work force by 2010.<sup>30</sup> We believe that goal is insufficiently ambitious.
- AFGE supported the ADA Amendment Act of 2008. The Act was signed into law on September 25, 2008. It is a first step toward ending the unintended interpretation of

the Act by the Supreme Court. WFP will forcefully advocate to ensure that the law is interpreted to protect employees and that it is enforced.

- AFGE challenged Department of Defense and Department of Homeland Security personnel rules that threaten the consistency of veterans' preference government-wide when reductions-in-force occur.

### **The Women's and Fair Practices Departments Have a Plan to Assist Disabled Government Employees**



#### **Three Primary Goals**

- **Education** of the AFGE members and potential members, congressional and political leaders, agencies, and the American people on the rights, and proper treatment of individuals with disabilities – including our disabled veterans.
  - **What Are the Women's and Fair Practices Departments doing?**
    - A forum was held at AFGE's 2008 Legislative and Grassroots Mobilization Conference entitled "Obstacles Disabled Americans Face in the Workplace."
    - A Women's and Fair Practices Departments Disability Fact Sheet has been distributed to AFGE members and placed on the federation website educating them on the current situation of disabled government workers.
    - This White Paper has been drafted, in order to educate our current and potential members, congressional and political leaders, and the American people about the need to support progressive reform in order to ensure that disabled workers are protected from invidious discrimination.
- **Enforcement** of the laws, rules, regulations, executive orders, and collective bargaining agreements relating to individuals with disabilities and the government's role as a model employer

- **What are the Women’s and Fair Practices Departments doing?**
  - A Women’s and Fair Practices Departments Disability Survey has been distributed to AFGE members to gather information on the current situation in different federal agencies.
  - The Women’s and Fair Practices Departments are working on cases for AFGE members regarding discrimination in the workplace for disabled federal employees.
  - The Women’s and Fair Practices Departments have developed contract language to protect employees with disabilities.
- **Equality** in the hiring, advancement, access to facilities, and treatment of disabled veterans and individuals with disabilities, including removal of barriers to equal employment opportunities, and the enactment of laws to eliminate loopholes in existing laws and rules – and thereby to ensure fair treatment with regard to conditions of employment for employees with disabilities.
  - **What are the Women’s and Fair Practices Departments doing?**
    - The Women’s and Fair Practices worked to support the passage of the ADA Amendments Act of 2008. The bill was signed into law on September 25, 2008. It becomes operative on January 1, 2009.
    - The Women’s and Fair Practices Departments’ Disability Campaign is about attaining equality for disabled government employees.
    - We are working with legislative and political leaders to address these concerns through oversight hearings and new regulations that will eliminate loopholes.
    - The Women’s and Fair Practices Departments are helping AFGE members to remove barriers to equal opportunity employment.
    - The Women’s and Fair Practices Departments are pursuing Congressional hearings regarding disability rights

## VI. CONCLUSION

The facts are clear: disabled Americans are exploited, taken for granted, treated unfairly and denied basic rights. Something must change for these Americans. This report is intended to make people aware of the large number of disabled government workers who are being pushed out of decent jobs or being excluded from work altogether. New hires with disabilities are a valuable addition, bringing enthusiasm and determination to the workplace. The government has a legal duty to treat disabled employees fairly, and it has a moral duty to be a role model for state and private employers everywhere. The time has come to embrace inclusive diversity in a real way.

## WFP Recommendations

1. Agency compliance with EEOC MD-715 reports
2. Increased EEOC enforcement efforts and litigation against federal agencies for discrimination based on disability
3. Increased funding dedicated to facilities for accommodations, including equipment and personal assistants
4. Increased EEOC and Congressional oversight
5. Recognition of the role of collective bargaining in pioneering disabled federal workers' rights
6. Creation of a cabinet-level Disability Rights Officer

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<sup>1</sup>Targeted disabilities are identified as blindness, deafness, partial paralysis, complete paralysis, mental illness, mental retardation, convulsive disorders, and distortion of limbs or spine. See <http://www.eeoc.gov/federal/report/pwtd.html>.

<sup>2</sup> United States, Equal Employment Opportunity Commission, *Improving the Participation Rate of People with Targeted Disabilities in the Federal Work Force* (Washington, D.C., OFO, 2008)

<sup>3</sup> 42 U.S.C. 12101 et. seq.

<sup>4</sup> "Federal Programs to Assist People with Disabilities: Federal Vocational Rehabilitation Programs, Federal Income Support for People with Disabilities," 18 Mar. 2008 <http://education.stateuniversity.com/pages/2316/People-With-Disabilities-Federal-Programs-Assist.html>

<sup>5</sup> "Independent Living: The Philosophy Behind Disability Rights" 18 Mar. 2008 <http://www.smc.edu/disabledstudent/Guide/34philos.htm>

<sup>6</sup> 29 U.S.C. 701 et. seq.

<sup>7</sup> 42 U.S.C. 12101 et. seq.

<sup>8</sup> 42 U.S.C. 2000(e) et. seq.

<sup>9</sup> See generally 29 C.F.R. 1630 et. seq.

<sup>10</sup> 42 USC 12111 et seq; 42 USC 12201-12204 and 12210.

<sup>11</sup> See *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002) (denying ADA coverage to a clearly disabled employee who was nonetheless deemed insufficiently disabled to qualify); *Albertson's Inc., v. Kirkingburg*, 527 U.S. 555 (1999) (applying an exacting individualized analysis to a plaintiff in order to determine whether his disability was substantially limiting enough to legally qualify as a disability); *Sutton v. United Airlines*, 527 U.S. 471 (1999) (holding that corrective and mitigating measures such as eye glasses must be taken into account when determining whether a person "disabled").

<sup>12</sup> *Id.*

<sup>13</sup> United States, Equal Employment Opportunity Commission, "ADA: Your Employment Rights as an Individual with a Disability", 21 Mar. 2005, 18 Mar. 2008 <<http://www.eeoc.gov/facts/ada18.html>>

14 Public Law No: 110-325. The Act explicitly rejects the Court's ADA jurisprudence. See N. 12, Supra. The Act calls for a "broad" interpretation of the ADA's language in order to promote the original purpose of the Act. However, it is uncertain how the E.E.O.C. and the courts will interpret this guidance.

15 As noted above, Title VII - Section 717 requires each federal agency to make all personnel actions free from discrimination based on race, color, religion, sex or national origin, maintain an "affirmative program of equal employment opportunity" for all employees and applicants, and submit annual plan and/or updates to EEOC for approval. Under the Rehabilitation Act - Section 501, agencies are required to make all personnel actions free from discrimination based on disability, maintain an "affirmative action program plan for the hiring, placement and advancement of people with disabilities," and submit annual plan and/or updates to EEOC for approval.

16 The six elements are: (1) commitment from agency leadership; (2) integration of EEO into the agency's strategic mission; (3) management and program accountability; (4) prevention of unlawful discrimination; (5) efficiency; and (6) responsiveness and legal compliance.

17 Agencies are instructed to develop corrective plans to address the identified causes of barriers, and if barrier is job-related, to explore alternatives that serve the same purpose and that have less impact on a particular group of employees. These plans should be designed to show measurable progress and hold agency officials accountable. The plans should allow for periodic reassessments to adjust plan if necessary. Finally, agencies must report their plan and progress to EEOC annually.

18 MD-725 identifies sources to contact to obtain information to identify potential barriers. They include: analyze work force statistics, review EEO complaints, talk to EEO and human resources staff, talk to unions and advocacy groups, conduct surveys, focus groups and exit interviews, review studies by outside agencies.

19 Under MD-715, federal agencies no longer focus solely on the participation rates of minorities, women and persons with disabilities. Rather, low participation rates are interpreted as a "trigger," alerting the agency to the possible existence of a barrier to equal opportunity. This regulation saw the EEOC abandon its previous goal, in place since 1983, of employing 5.95% employees with targeted disabilities. Instead, the commission has substituted a floating goal of matching the federal high, which continues to drop. Unfortunately, despite the requirement for filing reports, the Commission found in its 2008 report that 42 % of federal agencies do not establish goals for people with disabilities.

20 <http://www.eeoc.gov/press/10-4-06.html>

22 According to the Office of Personnel Management's Report to Congress, The Employment of Veterans in the Federal Government Fiscal Year 2007 (OPM, November 2008), the Federal Government employed 462,744 veterans during FY 2007, including 103,180 service-connected disabled veterans. Among disabled veterans, 54.3 percent were 30 percent or more disabled, thus entitling them to additional employment protections. Both the number of veterans working for the federal government, and the percentage of disabled veterans increased over the previous year. The FY 2007 increase in employment of 30 percent or more disabled veterans as percentage of all employees, all veterans and all disabled veterans was the largest during the past five years.)

23 "EEOC Issues Report on Federal Employment of Individuals with Targeted Disabilities" EEOC News 15 Jan. 2008.

24 United States, Equal Employment Opportunity Commission, Improving the Participation Rate of People with Targeted Disabilities in the Federal Work Force (Washington, D.C., OFO, 2008)

25 *Id.*

26 One third of the survey participants who stated that they were discriminated against cited the lack of promotion opportunities.

27 *Id.*

28 *Id.*

29 Melissa Harris, Restroom Access Case is Costly to SSA, The Baltimore Sun, Sept. 28, 2007, at G1.

30 "EEOC initiatives, pending legislation have effects on 2007 and beyond" Federal Human Resources Week 24, Dec. 2007: V14, I35.