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NOTES

EMPLOYMENT RIGHTS OF HANDICAPPED INDIVIDUALS: STATUTORY AND JUDICIAL PARAMETERS

The right of handicapped individuals to obtain and maintain employment free from practices that are discriminatory in intent or effect is a nascent legal doctrine. Significant federal legislation requiring the elimination of discriminatory barriers and the implementation of affirmative action programs has considerably expanded employment opportunities for the handicapped. Sections 503¹ and 504² of the Rehabilitation Act of 1973, and regulations promulgated thereunder by the Departments of Labor and of Health, Education and Welfare,³ provide the federal government's primary operative mechanisms for the enforcement of employment rights of the handicapped. In addition to these statutory provisions, the constitutional guarantees of equal protection and due process may provide the handicapped with a remedy in appropriate discrimination cases.⁴ At the present time, however, it is unlikely that Title VII will be amended to bring the handicapped within its protections.⁵ Consequently, in the absence of a uniform national standard, the employment rights of the disabled in the private sector remain subject to whatever differing legislation the states may enact.⁶

1. 29 U.S.C. § 793 (Supp. V 1975) (prohibiting employers receiving federal contracts in excess of \$2500 from discriminating against the handicapped).

2. 29 U.S.C. § 794 (Supp. V 1975) (prohibiting recipients of federal assistance from discriminating against or denying benefits of programs to the handicapped solely because of the handicap).

3. 41 C.F.R. § 60-741 (1978); 45 *id.* § 84; 43 Fed. Reg. 2138 (1978) (to be codified in 45 C.F.R. § 85).

4. See, e.g., *Davis v. Bucher*, 451 F. Supp. 791 (E.D. Pa. 1978); *Gurmankin v. Costanzo*, 411 F. Supp. 982 (E.D. Pa. 1976). See generally Burgdorf & Burgdorf, *A History of Unequal Treatment; The Qualifications of Handicapped Persons as a "Suspect Class" Under the Equal Protection Clause*, 15 SANTA CLARA LAW. 855 (1975); Note, *Equal Employment and the Disabled: A Proposal*, 10 COLUM. J. L. & SOC. PROB. 457 (1974) [hereinafter cited as *Proposal*]; Note, *The Right of Handicapped Children to an Education: The Phoenix of Rodriguez*, 59 CORNELL L. REV. 519 (1974); Note, *Abroad in the Land: Legal Strategies to Effectuate the Rights of the Physically Disabled*, 61 GEO. L.J. 1501 (1973).

5. 42 U.S.C. §§ 2000e to 2000e-17 (1970 & Supp. V 1975); see notes 178-79 *infra* & accompanying text.

6. See Wright, *Equal Treatment of the Handicapped by Federal Contractors*, 26 EMORY

Although little case law interpreting the statutory and constitutional rights of handicapped individuals is available, litigation is burgeoning. Recent federal court decisions reveal a judicial inclination to afford broad meaning and application to the statutory mandates.⁷ The expansive readings of the statutory definition of handicapped individuals amplify the potential impact of the Rehabilitation Act for federal contractors and for recipients of federal funds covered by the Act.⁸ Additional interpretative issues arising under the Act include what the "reasonable accommodation" obligation imposed by the Act entails⁹ and whether an individual is "qualified" for particular employment despite a handicapping condition.¹⁰

The depressed employment status of handicapped individuals is both a product of prejudice and ignorance and of justifiable occupational restrictions imposed by debilitating conditions.¹¹ In response to those factors, legislative and judicial action in the area of employment rights of the handicapped seeks to maximize the unrealized labor potential of this historically mistreated portion of society within the limitations of legitimate economic and physical constraints.¹² By analyzing existing legislation, regulations, and case

L.J. 65, 65 (1977); *Proposal*, *supra* note 4, at 462. Concerning the prohibition of state laws that may be inconsistent with federal statutory provisions, see 45 C.F.R. § 84.10 (1978); *Id.* § 84 app. A, subpt. A, no. 14, at 408.

7. See *Davis v. Southeastern Community College*, 574 F.2d 1158 (4th Cir. 1978), *cert. granted*, 47 U.S.L.W. 3463 (Jan. 9, 1979) (No. 78-711); *United Handicapped Fed'n v. Andre*, 558 F.2d 413 (8th Cir. 1977); *Davis v. Bucher*, 451 F. Supp. 791 (E.D. Pa. 1978); *Crawford v. University of N.C.*, 440 F. Supp. 1047 (M.D.N.C. 1977); *Barnes v. Converse College*, 436 F. Supp. 635 (D.S.C. 1977); *Drennon v. Philadelphia Gen. Hosp.*, 428 F. Supp. 809 (E.D. Pa. 1977); *Sites v. McKenzie*, 423 F. Supp. 1190 (N.D. W. Va. 1976). *But cf.* *Doe v. New York Univ.*, 442 F. Supp. 522 (S.D.N.Y. 1978) (exhaust administrative remedies first); *Wood v. Diamond State Tel. Co.*, 440 F. Supp. 1003 (D. Del. 1977) (no private cause of action intended under § 503 of Rehabilitation Act); *Moon v. Roadway Express, Inc.*, 439 F. Supp. 1308 (N.D. Ga. 1977) (no private cause of action authorized by § 793 of Rehabilitation Act); *Rogers v. Frito-Lay, Inc.*, 433 F. Supp. 200 (N.D. Tex. 1977) (same).

8. An individual need only have a record of, or be regarded as having, a handicap in order to qualify for the Act's protection. See note 16 *infra* & accompanying text.

9. 45 C.F.R. § 84.12 (1978); 41 *id.* § 60-741.6(d); see notes 89-91 *infra* & accompanying text.

10. 45 C.F.R. § 84.3 (1978); 41 *id.* § 60-741.2; see notes 134-36 *infra* & accompanying text.

11. See U.S. BUREAU OF LABOR STANDARDS, DEP'T OF LABOR, BULL. NO. 234, *WORKMEN'S COMPENSATION & THE PHYSICALLY HANDICAPPED WORKER* 5 (1961); Burgdorf & Burgdorf, *supra* note 4, at 857-58; Herlick, *Rehabilitation of Industrially Injured Workers*, 2 *WORKMEN'S COMPENSATION* L. REV. 495 (1975); *Symposium on the Rights of the Handicapped—Historical Overview: From Charity to Rights*, 50 *TEMPLE L.Q.* 953 (1977).

12. The federal regulations detail the prohibitions against the discrimination and the employer's obligation to accommodate reasonably the qualified handicapped worker, absent an affirmative showing by the employer that undue hardship would result from such accommo-

law interpreting the statutory mandates, this Note will provide a survey of the current status of employment rights of the handicapped and suggest an administrative framework for alleviating weaknesses in existing government programs.

DEFINITIONAL AND STATISTICAL FRAMEWORK

The Rehabilitation Act defines a handicapped individual as

any individual who (A) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and (B) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services. . . . [S]uch term means any person who (A) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (B) has a record of such an impairment, or (C) is regarded as having such an impairment.¹³

Although individuals with severe handicaps are the principal concern of the Act,¹⁴ persons having physical or mental disabilities of a lesser degree also are protected.¹⁵ Indeed, the Act extends to individuals with no disability if the recipient of federal funds or the federal contractor perceives the individual as handicapped and treats him as such.¹⁶ The regulations also define as handicaps certain condi-

dition. 45 C.F.R. § 84.12 (1978); 41 *id.* § 60-741.6(d). Defining the proper balance between these requirements to the mutual satisfaction of both the employer and the handicapped employee has proved futile. See notes 95-98 *infra* & accompanying text.

13. 29 U.S.C. § 706(6) (Supp. V 1975). "Major life activities" include communication, ambulation, self-care, socialization, education, vocational training, transportation, and housing, as well as employment.

14. 45 C.F.R. § 84 app. A, subpt. A, no. 3, at 403-04 (1978).

15. In the appendix to the final regulations issued by the Department of Health, Education and Welfare implementing the antidiscriminatory mandates of § 504 of the Rehabilitation Act, the Secretary notes, "The Department continues to believe, however, that it has no flexibility within the statutory definition to limit the term to persons who have those severe permanent, or progressive conditions that are most commonly regarded as handicaps." *Id.* § 84 app. A, subpt. A, no. 3, at 403.

16. This would include (1) individuals with a record of a handicapping condition, such as mental or emotional illness, cancer, and heart disease; (2) individuals who have been misclassified as having a handicap, such as a misdiagnosis of mental incapacity; and (3) individuals regarded as having a handicap that substantially impairs employability but which technically is not a mental or physical limitation, such as disfiguring scars or other cosmetic abnormalities. *Id.*; 41 *id.* § 60-741 app. A, at 397; see Wright, *supra* note 6, at 68-69. An employer may consider prior history of a disability relevant to the position sought under proper circumstances. See, e.g., *Spencer v. Toussaint*, 408 F. Supp. 1067 (E.D. Mich., 1976) (denial of employment as city bus driver based upon prior history of mental illness).

tions that are voluntary at their inception, such as alcoholism and drug addiction.¹⁷

The most significant restriction on the statutory definition of handicapped is the phrase "substantially limits"; the precise meaning of this phrase remains unclear.¹⁸ In the context of employment, a substantial limitation relates to the "degree that the impairment affects employability."¹⁹ The Act, however, applies only to individuals whose impairments are mental or physical; conditions such as homosexuality or economic disadvantage do not qualify an individual for protection under the Act despite the substantial limitations such "handicaps" might impose on employability.²⁰ Judicial interpretations of the definition of a handicapped individual are consistent with these statutory guidelines.²¹

17. 45 C.F.R. § 84 app. A, subpt. A, no. 4, at 404-05 (1978). The regulations, however, do not prohibit the employer from considering these conditions in assessing the individual's qualifications for employment or promotion. The employer merely is prohibited from denying the applicant employment solely on the basis of the addiction. *See Davis v. Bucher*, 451 F. Supp. 791 (E.D. Pa. 1978) (ex-heroin addicts); *Beazer v. New York City Transit Auth.*, 399 F. Supp. 1032 (S.D.N.Y. 1975), *aff'd*, 588 F.2d 97 (2d Cir. 1977), *cert. granted*, 46 U.S.L.W. 3792 (June 27, 1978) (No. 77-1427) (ex-heroin addicts).

Commentators have criticized the definitional approach of the legislation for being overbroad and for rendering effective implementation infeasible. Central among the concerns voiced by critics of the definition is that the severely handicapped, who are most in need of protection, will receive diffused and unsatisfactory attention. Moreover, the lack of common characteristics among members of the class labeled "handicapped" arguably places unwieldy burdens on employers. *See, e.g., Wright, supra* note 6, at 106. The regulations acknowledge these criticisms but reject the argument that the severely handicapped are inadequately protected as a result of the broad definition. 45 C.F.R. § 84 app. A, subpt. A, no. 3, at 403 (1978).

18. The Secretary observed in the Appendix to the HEW regulations that "the Department does not believe that a definition of this term is possible at this time." 45 C.F.R. § 84 app. A, subpt. A, no. 3, at 403 (1978).

19. "[A] handicapped individual is substantially limited if he or she is likely to experience difficulty in securing, retaining or advancing in employment because of a handicap." 41 *id.* § 60-741.2.

20. Absent a concomitant physical or mental disability, discrimination on the basis of such handicaps must be redressed by alternate means. 45 *id.* § 84 app. A, subpt. A no. 3, at 403.

21. A handicap was found in the following cases: *Davis v. Southeastern Community College*, 574 F.2d 1158 (4th Cir. 1978), *cert. granted*, 47 U.S.L.W. 3463 (Jan. 9, 1979) (No. 78-711) (hearing impairment); *Gurmankin v. Costanzo*, 556 F.2d 184 (3d Cir. 1977) (blindness); *Kampmeier v. Nyquist*, 553 F.2d 296 (2d Cir. 1977) (vision in only one eye); *Davis v. Bucher*, 451 F. Supp. 791 (E.D. Pa. 1978) (former heroin addiction); *Crawford v. University of N.C.*, 440 F. Supp. 1047 (M.D.N.C. 1977) (deafness); *Duran v. City of Tampa*, 430 F. Supp. 75 (M.D. Fla. 1976) (epileptic); *Drennon v. Philadelphia Gen. Hosp.*, 428 F. Supp. 809 (E.D. Pa. 1977) (epileptic); *Bartels v. Biernat*, 427 F. Supp. 226 (E.D. Wis. 1977) (mobility-handicapped); *Spencer v. Toussaint*, 408 F. Supp. 1067 (E.D. Mich. 1976) (mental illness). No handicap was found in the following decisions: *Grimard v. Carlston*, 567 F.2d 1171 (1st

Current estimates reveal that eleven to thirty-five million Americans suffer from handicaps.²² The number of employable individuals within this category is estimated conservatively between seven and fourteen million.²³ These figures, however, fail to reflect the number of "non-traditionally" handicapped persons included under the Rehabilitation Act.²⁴

Only a small percentage of the handicapped actually are employed.²⁵ Despite statistics indicating that handicapped workers perform as well or better than nonhandicapped employees,²⁶ the handicapped have the highest unemployment rate of any group in the United States.²⁷ A primary factor contributing to this situation is employers' fear that hiring the disabled will increase insurance costs. The available research indicates, however, that this concern is unfounded.²⁸ Moreover, the societal benefits of maximizing the labor potential of handicapped persons through accommodation and suitable placement clearly outweigh the speculative costs of such practices.²⁹ Indeed, the federal statutory mandates may make the failure to comply more expensive than the voluntary adoption of affirmative hiring practices.³⁰

Cir. 1978) (fractured ankle); *Federal Employees for Non-Smokers' Rights v. United States*, 446 F. Supp. 181 (D.D.C. 1978) (non-smokers); *Doe v. New York Univ.*, 442 F. Supp. 522 (S.D.N.Y. 1978) (mental disability).

22. S. REP. NO. 1297, 93d Cong., 2d Sess. —, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 6373, 6421; *Hearings on H.R. 8395 Before the Subcomm. on the Handicapped of the Senate Comm. on Labor & Public Welfare*, 92d Cong., 2d Sess. 570-71 (1972) [hereinafter cited as *Senate Hearings*]; NATIONAL INSTITUTES ON REHABILITATION AND HEALTH SERVICES, REPORT OF THE NATIONAL WORKSHOP ON REHABILITATION AND WORKMEN'S COMPENSATION 2422 (1971).

23. See *Senate Hearings*, *supra* note 22, at 265; 118 CONG. REC. 3321 (1972) (remarks of Sen. Williams).

24. See DeLury, *Equal Job Opportunity for the Handicapped Means Positive Thinking and Positive Action*, 26 LABOR L.J. 679, 681 (1975). Congressional estimates of the number of handicapped persons under § 504 coverage range from 28 to 50 million. S. REP. NO. 1297, 93d Cong., 2d Sess., reprinted in [1974] U.S. CODE CONG. & AD. NEWS 6373, 6400, 6406.

25. S. REP. NO. 319, 93d Cong., 1st Sess. 8 (1973) (estimates only 800,000 employed); 118 CONG. REC. 3321 (1972) (remarks of Sen. Williams).

26. See U.S. BUREAU OF LABOR STANDARDS, DEP'T OF LABOR, BULL. NO. 234, WORKMEN'S COMPENSATION AND THE PHYSICALLY HANDICAPPED WORKER 6-8 (1961); Herlick, *supra* note 11, at 498-99.

27. Address by Dr. Andrew S. Adams, U.S. Dep't of HEW, reprinted in J. REHAB. 18 (May-June, 1976).

28. See generally Herlick, *supra* note 11.

29. See, e.g., *Halderman v. Pennhurst State School & Hosp.*, 446 F. Supp. 1295, 1312 (E.D. Pa. 1977) (noting decrease in amount of financial support society must provide and the increased revenue from income taxes that results when retarded are employed).

30. Incentive for implementing affirmative action mandates may derive from the annual

THE STATUTORY PROVISIONS

Section 503—Federal Contractors

Section 503 of the Rehabilitation Act³¹ and the regulations promulgated thereunder³² require that employers entering into procurement contracts or subcontracts in excess of \$2500 with any federal agency or department take affirmative steps to employ qualified handicapped individuals.³³ This requirement applies to those who contract with the government for the furnishing of nonpersonal property or services such as construction, utility, research, or transportation.³⁴ As a result of this broad coverage, section 503 applies to approximately one-half of all businesses in the United States.³⁵

Although section 503 does not require goals, timetables, or workforce analysis, the affirmative action policy guidelines do require outreaching efforts to notify applicants and employees of the contractor's obligation to employ and advance handicapped workers.³⁶ Federal contractors also must remove physical and systemic barriers that might impede a qualified handicapped person's efforts to secure or advance in employment.³⁷ The extent of this obligation,

tax savings available to employers that make their facilities accessible to handicapped workers. Also, sanctions such as potential back pay awards, fines, contract cancellations, or disqualification from future contracts deter employers from violating the Rehabilitation Act mandates. See Jackson, *Affirmative Action for the Handicapped and Veterans: Interpretative and Operational Guidelines*, 29 LABOR L.J. 107 (1978).

31. 29 U.S.C. § 793(a) (Supp. V 1975), which reads in pertinent part:

Any contract in excess of \$2,500 entered into by any Federal department or agency for the procurement of personal property and nonpersonal services (including construction) for the United States shall contain a provision requiring that, in employing persons to carry out such contract the party contracting with the United States shall take affirmative action to employ and advance in employment qualified handicapped individuals as defined in section 706(6) of this title. The provisions of this section shall apply to any contract in excess of \$2500 entered into by a prime contractor in carrying out any contract for the procurement of personal property and nonpersonal services (including construction) for the United States.

32. 41 C.F.R. § 60-741 (1978). The Department of Labor (DOL) issued the regulations; the Office of Federal Contract Compliance Programs (OFCCP) is charged with enforcement.

33. *Id.* §§ 60-741.4, 60-741.2.

34. *Id.* § 60-741.3. As such, § 503 generally includes defense contractors, space program contractors, construction companies, and equipment and supply merchants.

35. Special Report, *Affirmative Action: Opening Doors to Employment*, [1976] 1 AMICUS 16 (publication of the National Center for Law & the Handicapped).

36. 41 C.F.R. § 60-741.4(d),(f) (1978).

37. Physical accommodation is divided into facility modification, equipment modification, and job redesign. Systemic barriers consist of policies, practices, procedures, selection cri-

though, is limited by the contractor's size and resources and by the adequacy of the existing practices.³⁸ For contracts in excess of \$50,000 with contractors having fifty or more employees, section 503 imposes the further obligation of preparing a written affirmative action program subject to annual update and review.³⁹

The general principle established by the Rehabilitation Act is that handicapped persons may not be denied employment or advancement solely because of their handicap.⁴⁰ In compliance with this principle, federal contractors must limit any physical and mental requirements for employment to job-related factors.⁴¹ This limitation also applies to pre-employment inquiries regarding a disability and to any medical examinations required for employment.⁴² Thus, a handicapped applicant for employment must be evaluated solely according to his or her ability to perform the functions related to the particular job. Personnel policies, job requirements, and medical standards that exclude handicapped individuals on the basis of criteria irrelevant to job performance must be eliminated. For example, an otherwise qualified deaf individual cannot be barred from employment as a printer absent an affirmative showing by the federal contractor that hearing is essential to either job performance or safety.

Beyond requiring that job qualifications be related to actual performance, section 503 mandates that federal contractors make reasonable accommodation for the physical and mental limitations of

teria, or decision making criteria that may be discriminatory in effect. *See Id.* § 60-741.6(b); Jackson, *supra* note 30, at 109.

38. 41 C.F.R. § 60-741.6(f) (1978). Federal contractors must justify any criteria which tend to exclude handicapped persons by demonstrating that they arise from a legitimate "business necessity." *Id.* § 60-741-6(c)(2). Compare this requirement with § 504, which places the additional burden on recipients of HEW funds to show that alternative, less discriminatory criteria are unavailable. 45 *id.* § 84.13(a).

39. 41 *id.* § 60-741.5(a),(b).

40. 29 U.S.C. § 794 (Supp. V 1975).

41. 41 C.F.R. § 60-741.6(c)(2) (1978). The regulation provides:

Whenever a contractor applies physical or mental job qualification requirements in the selection of applicants or employees for employment or other change in employment status such as promotion, demotion, or training to the extent that qualification requirements tend to screen out qualified handicapped individuals, the requirements shall be related to the specific job or jobs for which the individual is being considered and shall be consistent with business necessity and the safe performance of the job.

Id.

42. *Id.* § 60-741.6(c)(1)-(3).

the disabled worker.⁴³ Failure to accommodate may be justified by showing that undue hardship would result.⁴⁴ Factors relevant to a determination of undue hardship include business necessity and financial costs.⁴⁵ Thus, a deaf applicant cannot be barred from employment if, for example, providing an interpreter would not impose an undue hardship.

Section 503 may be enforced only administratively.⁴⁶ A disabled individual who believes that a federal contractor has violated section 503 must file a complaint with the Department of Labor within 180 days of the alleged violation.⁴⁷ When a complaint is filed by an employee of a contractor, the employer is given an opportunity to resolve the dispute internally. If no agreement is reached between the employer and employee within 60 days, the Department, or other appropriate agency, will conduct an investigation. If the investigation reveals that the employer has not complied with the requirements of the Act, efforts will be made to secure compliance within a reasonable time.⁴⁸ If all informal means fail, other enforcement procedures available include: (1) judicial enforcement, (2) withholding progress payments, (3) termination of the contract, or (4) disqualification of the contractor from entering into future contracts.⁴⁹ The emphasis of the enforcement process clearly is placed upon informal, conciliatory resolution whenever possible.

Courts have viewed section 503's administrative enforcement mechanism as a basis for refusing to imply a private right of action.⁵⁰ This conclusion is based upon an application of the four criteria articulated by the Supreme Court in *Cort v. Ash*⁵¹ for determining whether a private remedy is implicit in a federal statute:

First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted,—that is, does the statute create a fed-

43. *Id.* § 60-741.6(d).

44. *Id.*

45. *Id.*; see note 78 *infra* & accompanying text.

46. 29 U.S.C. § 793(b) (Supp. V 1975).

47. 41 C.F.R. § 60-741.26 (1978).

48. *Id.*

49. *Id.* § 60-741.28.

50. *E.g.*, *Wood v. Diamond State Tel. Co.*, 440 F. Supp. 1003 (D. Del. 1977); *Moon v. Roadway Express, Inc.*, 439 F. Supp. 1308 (N.D. Ga. 1977); *Rogers v. Frito-Lay, Inc.*, 433 F. Supp. 200 (N.D. Tex. 1977); *Wright*, *supra* note 6, at 90-91. See also *Crawford v. University of N.C.*, 440 F. Supp. 1047 (M.D.N.C. 1977) (discusses but does not decide the issue).

51. 422 U.S. 66 (1974).

eral right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?⁵²

Under both the second and third criteria of the *Cort* test, section 503 arguably does not confer a private remedy. The explicit grant of an administrative remedy has been interpreted by the courts as reflecting an intent by the Congress not to provide a private right of action; to allow such an action would be incompatible with the underlying purposes of the legislative scheme.⁵³ The failure of efforts to extend Title VII⁵⁴ to include handicapped individuals further supports this determination.⁵⁵ Although there is authority to the contrary,⁵⁶ future efforts to enforce section 503 through private judicial means most likely will prove unsuccessful.

Section 504—Recipients of Federal Funds

Section 504⁵⁷ and related regulations⁵⁸ apply to any employer re-

52. *Id.* at 78 (citations omitted).

53. *Wood v. Diamond State Tel. Co.*, 440 F. Supp. 1003, 1009 (D. Del. 1977). The court in *Wood* distinguished the legislative histories of §§ 503 and 504, the latter having been held to imply a private right of action, on the basis of the affirmative action covenant in § 503. The covenant, which is required by the Act to be inserted into all contracts with employers covered by § 503, merely imposes contractual duties on the employer. Thus, the range of duties assumed by a federal contractor under § 503 may not be extended beyond the terms of the contract to imply a private cause of action. The court also suggested that recognition of a private remedy would impair the legislative intent to encourage conciliatory resolution of disputes.

54. 42 U.S.C. §§ 2000e to 2000e-17 (1970 & Supp. V 1975); see note 178 *infra*.

55. *Rogers v. Frito-Lay, Inc.*, 433 F. Supp. 200, 202-03 (N.D. Tex. 1977).

56. *Drennon v. Philadelphia Gen. Hosp.*, 428 F. Supp. 809 (E.D. Pa. 1977). The court in *Drennon* viewed an implied right of action as the remedy which best fostered the Rehabilitation Act's purpose. Although the court's discussion centered primarily on § 504, the court concluded that "[a]lthough the legislative history does not mention section [503], that factor does not negate the existence of a private cause of action under that statute." *Id.* at 815.

57. 29 U.S.C. § 794 (Supp. V 1975).

58. 45 C.F.R. § 84.3 (1978); 43 Fed. Reg. 2136 (1978) (to be codified in 45 C.F.R. § 85.3). The § 84.3 regulations apply to recipients of funds administered by the Department of Health, Education and Welfare. Pursuant to Executive Order No. 11,914—which directed the Secretary of HEW to coordinate implementation of § 504 with all federal agencies administering

ceiving financial assistance from any federal agency.⁵⁹ This section provides that no qualified handicapped person "shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."⁶⁰ A broad definition has been applied to the term "Federal financial assistance" to encompass any grant, loan, contract, or other governmental assistance in the form of funds, personal services, and real or personal property.⁶¹

Section 504's general proscription of discrimination solely on the basis of a handicapping condition requires nondiscriminatory recruitment, hiring, advancement, wages, and other job-related incidentals.⁶² Employment practices which are discriminatory in intent or in effect are prohibited. To satisfy section 504's nondiscrimination mandate, a handicapped worker must receive "equal opportunity, not merely equal treatment."⁶³ "Thus, in some situations, identical treatment of handicapped and nonhandicapped persons is not only insufficient but is itself discriminatory."⁶⁴ This equal opportunity, however, need not produce the same result, same benefit, or same level of achievement for a handicapped worker as for a nonhandicapped worker.⁶⁵ For example, an employer reasonably may be required to accommodate applicants confined to wheelchairs, but the employer need not guarantee employment or advancement absent a showing that the denial of either was discriminatory.

funds—§ 85.3 of the regulations was added. Section 85.3 establishes the responsibilities, standards, and guidelines for enforcement of § 504 of the Rehabilitation Act. Each federal agency is responsible for issuing its own regulations consistent with the general provisions of the HEW guidelines. 43 Fed. Reg. 2137 (1978) (to be codified in 45 C.F.R. § 85.4). To avoid conflicting obligations, the regulations provide further that if more than one agency administers funds to a number of the same recipients, inter-agency cooperation is required. 43 Fed. Reg. 2137 (1978) (to be codified in 45 C.F.R. § 85.6).

59. 43 Fed. Reg. 2136 (1978) (to be codified in 45 C.F.R. § 85.2). Examples of employers that are affected include hospitals, universities, and nursing homes.

60. 29 U.S.C. § 794 (Supp. V 1975). In *Halderman v. Pennhurst State School & Hosp.*, 446 F. Supp. 1295 (E.D. Pa. 1977), Judge Broderick characterized § 504 as a codification of the constitutional right to equal protection. He noted that the section was introduced originally to the Congress as a bill to extend Title VII to include the handicapped. *Id.* at 1323.

61. 45 C.F.R. § 84.3(f) (1978).

62. 45 C.F.R. § 84.11 (1978); 43 Fed. Reg. 2138 (1978) (to be codified in 45 C.F.R. 85.52).

63. Summary Rule and Analysis of Comments by HEW Secretary Joseph A. Califano, Jr., 43 Fed. Reg. 2134 (1978) (to be codified in 45 C.F.R. § 85).

64. *Id.*

65. 45 C.F.R. § 84.4(b)(2) (1978).

Unlike section 503, affirmative action is not mandated by section 504, but remedial action and self-evaluation are required, and voluntary action is encouraged.⁶⁶ Recipients employing more than fifteen workers also must take steps to notify participants, beneficiaries, applicants, and employees of the employer's nondiscriminatory policy.⁶⁷ If the required self-evaluation reveals policies and practices that are discriminatory in intent or effect, the recipient must eliminate those effects.

Section 504's provisions regarding employment criteria mirror section 503's principle that these standards must be job-related.⁶⁸ Any employment tests used by the recipient of federal funds must be administered so that only skills relevant to actual job performance are determinative.⁶⁹ If a particular test or other selection criterion tends to exclude the handicapped, the recipient may not use it if alternative measures with less adverse effects are available.⁷⁰ This is true even if the particular test is relevant to actual job skills. Thus, tests that measure job-related skills, but that also test mental or physical skills unrelated to job performance, must be administered in a manner that emphasizes the relevant job skills and, ideally, does not reflect the irrelevant disability. For example, a written test may be employed to assess a job applicant's knowledge regarding the performance of a manual task. A deaf applicant, however, may perform poorly on such a test because of the severe language deficiency that normally results from a hearing loss, even though the applicant has the physical ability to perform the job. Under such circumstances, a practical, rather than a written, examination would be an appropriate alternative measure. Effective scrutiny of existing employment criteria to uncover such latent discriminatory effects thus requires knowledge of both the handicapping conditions and the collateral effects of particular disabilities.

Pre-employment inquiries about an applicant's handicaps are prohibited under section 504 to the extent that the inquiries do not

66. *Id.* § 84.6(a)-(c).

67. *Id.* § 84.8. Notification may include the posting of notices, the distribution of memoranda or other written communications, the placement of notices in the recipient's publication, or the publication of notices in newspapers or magazines. The notice should contain a statement that the employer does not discriminate on the basis of handicaps and the identity of the employee responsible for coordinating the recipient's compliance efforts.

68. *Id.* § 84.13; 43 Fed. Reg. 2138 (1978) (to be codified in 45 C.F.R. § 85.54).

69. 43 Fed. Reg. at 2138.

70. 45 C.F.R. § 84.13 (1978).

relate to legitimate interests of the employer.⁷¹ Although a recipient may question an applicant regarding his ability to operate a motor vehicle, if that is necessary to job performance, the employer may not ask whether the applicant's vision is impaired.⁷² Employers may inquire whether an applicant is handicapped if the information is voluntary and confidential and is used solely to further remedial or voluntary action to eliminate discriminatory practices or policies. The purpose of the inquiry, however, as well as the voluntary, confidential nature of the information, must be stated clearly, along with assurances that failure to provide the information will not adversely affect consideration of the application.⁷³ Similarly, employers may require pre-employment medical examinations only if all applicants are subjected to such examination and if the results of the examination are used in a nondiscriminatory, job-related manner.⁷⁴

The recipient of federal funds, like the federal contractor, is required to reasonably accommodate the physical and mental limitations of otherwise qualified handicapped workers.⁷⁵ This duty to accommodate may be avoided, however, if, after considering the size and character of the recipient's program and the nature and cost of the accommodation needed,⁷⁶ it imposes an undue hardship upon the recipient.⁷⁷ In contrast to section 503, section 504 suggests specific examples of the kinds of actions that would satisfy the requirement of reasonable accommodation.⁷⁸

Enforcement of section 504 is achieved through compliance with the complaint and enforcement procedures of Title VI of the Civil Rights Act of 1964.⁷⁹ As with section 503, the emphasis of the procedures is on informal, conciliatory methods of enforcement. A handicapped individual who believes that a violation of section 504 has

71. *Id.* § 84.14; 43 Fed. Reg. 2138 (1978) (to be codified in 45 C.F.R. § 85.55).

72. 45 C.F.R. § 84 app. A, subpt. B, no. 18, at 410 (1978).

73. *Id.* § 84.14(b).

74. *Id.* § 84.14(c).

75. *Id.* § 84.12; 43 Fed. Reg. 2138 (1978) (to be codified in 45 C.F.R. § 85.53).

76. 45 C.F.R. § 84.12(c) (1978).

77. 43 Fed. Reg. at 2138.

78. Reasonable accommodation may include: (1) making facilities used by employees readily accessible to and usable by handicapped persons, and (2) job restructuring, part-time or modified work schedules, acquisition or modification of equipment or device, the provision of readers or interpreters, and similar actions.

45 C.F.R. § 84.12(b) (1978).

79. *Id.* §§ 84.61, 80.6 to 80.10, 81.1 to 81.131.

been committed must file a complaint with the responsible Department official within 180 days of the violation.⁸⁰ The Department then will conduct an investigation to determine whether a violation has occurred; it will attempt to elicit voluntary compliance if a violation is discovered. Sanctions, ranging from suspension or termination of ongoing federal financial assistance to refusal to grant or continue assistance in the future,⁸¹ may be imposed if noncompliance cannot be corrected informally. These sanctions may be imposed, however, only after notice and opportunity for a hearing have been provided the noncomplying recipient.⁸²

Section 504 enforcement, unlike that of section 503, is not limited to pursuit of administrative remedies. The majority of courts that have considered this question have held that a private right of action is implicit in section 504.⁸³ Because the enforcement procedure adopted by section 504 parallels that of the Civil Rights Act of 1964, which permits a private remedy,⁸⁴ and because the section imposes an affirmative duty on recipients for the especial benefit of handicapped persons,⁸⁵ these courts have concluded that a private remedy

80. *Id.* § 80.7.

81. *Id.* § 80.8.

82. *Id.* § 80.8(c).

83. *E.g.*, *Davis v. Southeastern Community College*, 574 F.2d 1158 (4th Cir. 1978), *cert. granted*, 47 U.S.L.W. 3463 (Jan. 9, 1979) (No. 78-711); *Leary v. Crapsey*, 566 F.2d 863 (2d Cir. 1977); *United Handicapped Fed'n v. Andre*, 558 F.2d 413 (8th Cir. 1977); *Kampmeir v. Nyquist*, 553 F.2d 296 (2d Cir. 1977); *Lloyd v. Regional Transp. Auth.*, 548 F.2d 1277 (7th Cir. 1977); *Davis v. Bucher*, 451 F. Supp. 791 (E.D. Pa. 1978); *Barnes v. Converse College*, 436 F. Supp. 635 (D.S.C. 1977); *Drennon v. Philadelphia Gen. Hosp.*, 428 F. Supp. 809 (E.D. Pa. 1977); *Hairston v. Drosick*, 423 F. Supp. 180 (S.D. W. Va. 1976); *Sites v. McKenzie*, 423 F. Supp. 1193 (N.D. W. Va. 1976).

84. *See Barnes v. Converse College*, 436 F. Supp. 635, 638 (D.S.C. 1977); *Drennon v. Philadelphia Gen. Hosp.*, 428 F. Supp. 809, 815 (E.D. Pa. 1977). *See also Lau v. Nichols*, 414 U.S. 563 (1974). In *Lau* 2,800 school children of Chinese ancestry claimed that their right to a meaningful education was denied because they were unable to speak English. The Court relied on Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d), and HEW regulations promulgated thereunder, to provide relief to the school children. The Court noted that the Civil Rights Act conferred affirmative rights arising out of the school's contractual obligation as a recipient of federal funds to conform to the regulations' guidelines. The School had failed to meet these obligations, and the lower court was directed to fashion the appropriate remedy. 414 U.S. at 569.

When section 504 was amended in 1974, the Conference Committee's Joint Explanatory Statement noted, "This approach to implementation of section 504, which closely follows the models of [Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972] would . . . permit a judicial remedy through a private action." 120 Cong. Rec. 35017 (1974).

85. *See, e.g., United Handicapped Fed'n v. Andre*, 558 F.2d 413, 415 (8th Cir. 1977).

is consistent with legislative intent. Application of the *Cort* criteria to section 504 confirms this determination.⁸⁶ Moreover, handicapped individuals also may have a cause of action as third party beneficiaries of the contract between the recipient and the federal government.⁸⁷ A private cause of action, however, may be subject to the doctrine of exhaustion of administrative remedies.⁸⁸

APPLYING THE STATUTORY PROVISIONS

Reasonable Accommodation

Sections 503 and 504 require that recipients of federal financial assistance and federal contractors make reasonable accommodation for the physical and mental limitations of otherwise qualified handicapped applicants and employees unless the employer can demonstrate that accommodation would impose an undue hardship.⁸⁹ The

86. 422 U.S. 66 (1975); see notes 52-54 *supra* & accompanying text.

87. *Rogers v. Frito-Lay, Inc.*, 433 F. Supp. 200, 204 (N.D. Tex. 1977). The contract upon which handicapped workers may sue as third-party beneficiaries is the written assurance of compliance with section 504 that recipients must submit to the federal government. See Note, 79 W. VA. L. REV. 398, 405 (1977).

88. *E.g., Doe v. New York Univ.*, 442 F. Supp. 522 (S.D.N.Y. 1978). The court expressed reservations about applying the doctrine of exhaustion of administrative remedies:

Although the Court is not overly optimistic as to the expeditiousness or efficiency of such a scheme of administrative enforcement, particularly when it appears that HEW's enforcement machinery in other areas of civil rights complaints is ineffectual at best, it is simply too early to find this specific administrative remedy inadequate.

Id. at 523 (footnote omitted). Because of the often unsatisfactory nature of such administrative relief, preliminary injunctions have been issued to prevent irreparable harm. *E.g., Camenisch v. University of Tex.*, No. A-78-CA-061 (W.D. Tex. May 17, 1978); *Crawford v. University of N.C.*, 440 F. Supp. 1047 (M.D.N.C. 1977); *Barnes v. Converse College*, 436 F. Supp. 635 (D.S.C. 1977).

89. 45 C.F.R. § 84.12 (1978) (recipients of HEW funds); 43 Fed. Reg. 2138 (1978) (to be codified in 45 C.F.R. § 85.53) (recipients of federal funds from all other agencies); 41 C.F.R. § 60-741.6(d) (1978) (covering federal contractors). The language used in and the obligations imposed by each of the regulations is virtually identical. 45 *id.* § 84 app. A, subpt. B, no. 16, at 408-09 (1978).

Although § 503 imposes the stricter obligation of affirmative action as contrasted with § 504's nondiscriminatory mandate, the regulations view this distinction as irrelevant to the "reasonable accommodation" requirement. Although affirmative action requires self-initiated efforts to integrate handicapped persons into the labor force, reasonable accommodation obligations do not arise until the individual applicant or employee makes his particular needs known to the employer. A recipient or federal contractor obviously need not accommodate a deaf worker by providing an interpreter until such person actually is employed. In contrast, affirmative action obligations might require the federal contractor to actively solicit applications from deaf individuals through outreach and notice programs and to anticipate

scope of the reasonable accommodation obligation, however, has been defined in general rather than specific terms.

In order to qualify for protection under the Rehabilitation Act, the handicapped applicant first must show that he is qualified to perform the particular job.⁹⁰ In some circumstances, the applicant's qualification may be determined with reference to the employer's obligation to make "reasonable accommodation"; some handicapped persons may be qualified to perform certain job skills only if reasonable accommodation is made for their handicaps. Thus, if a disabled applicant can demonstrate that but for the employer's failure to provide reasonable physical modifications or other accommodations the applicant would be qualified for employment, the employer then has the burden of showing undue hardship as a justification for his failure to accommodate.⁹¹

Reasonable accommodation may include modification of work schedules, job restructuring, physical modification, relocation of particular jobs or offices to more readily accessible areas, or provision of interpreters or readers.⁹² Whether a particular attempt at accommodation imposes an undue hardship on the employer is determined by the size and type of the employer's operation and the nature and cost of the necessary accommodation.⁹³ Beyond these general parameters, however, a reasonableness standard has not

the needs of prospective handicapped employees even though no individual handicapped applicant or employee has applied. Thus, affirmative action and reasonable accommodation duties call for dissimilar consideration.

90. See note 135 *infra* & accompanying text.

91. The regulations are consistent in requiring that the employer demonstrate undue hardship sufficient to excuse accommodation. 45 C.F.R. § 84.12 (1978); 43 Fed. Reg. 2138 (1978) (to be codified 45 C.F.R. § 85.53); 41 C.F.R. 60-741.6(d)(1978). Thus, accommodation is presumed to be reasonable unless it imposes an undue hardship on the contractor or recipient. Jackson, *supra* note 30, at 112.

92. 45 C.F.R. § 84.12(b) (1978). The appendix to § 84 of the regulations expands on these provisions:

Reasonable accommodation includes modification of work schedules, including part-time employment, and job restructuring. Job restructuring may entail shifting non-essential duties to other employees. In other cases, reasonable accommodation may include physical modifications or relocation of particular offices or jobs so that they are in facilities . . . that are accessible to and usable by handicapped persons. If such accommodations would cause undue hardship to the employer, they need not be made.

Id. § 84 app. A, subpt. B, no. 16, at 409.

93. The size of a program refers to the number of employees, the number and type of facilities, and the employer's budget; the type of operation refers to the composition and structure of the workforce. *Id.* § 84.12(c).

been articulated. Although area-wide planning rather than case-by-case analysis has been recommended as a more efficient and effective approach to "reasonable accommodation" evaluations,⁹⁴ this approach has not been adopted. Rather, the existing regulations maintain that the varying circumstances of an individual employer's operation precludes the implementation of a uniform standard or test and that the general nature of the reasonable accommodation requirement permits the flexibility necessary to deal with these varying circumstances.⁹⁵ Consequently, recipients and federal contractors must examine the case-by-case judicial and administrative interpretations of the statutory guidelines to determine whether they have satisfied these requirements.

94. See, e.g., Note, *Affirmative Action Toward Hiring Qualified Handicapped Individuals*, 49 S. CAL. L. REV. 785, 787 (1976). The student author suggests that the reasonableness of an accommodation expenditure should be evaluated according to a cost/benefit analysis of the goal of effectively integrating handicapped workers at the lowest possible cost. The criteria for effective integration would include whether the overall expenditures were at least equalled by the benefits received in return and whether the same benefit might be achieved at a lower cost. The efficiency of an expenditure would be determined by comparing the overall taxpayer cost to the overall taxpayer benefit. Thus, an expenditure deemed inefficient in a particular case might be justified in the larger context of overall taxpayer benefit. Implementation of a cost/benefit analysis would require area-wide planning rather than case-by-case adjudication. Otherwise, it would be impossible to determine whether a particular contractor might accommodate a specific handicap more efficiently than another contractor. Area-wide planning would permit the gathering of empirical data necessary to implement accommodation goals effectively.

This approach has appeal, particularly given the virtual absence of precise reasonableness standards. Moreover, this approach minimizes the possibility that a particular contractor might be forced to assume substantial accommodation costs when another contractor could accommodate the employee at significantly less expense. The cost/benefit analysis, however, seemingly would exclude accommodation that did not produce a benefit at least equal to the cost incurred. No such limitation is suggested by existing regulations or statutory provisions. The analysis also would narrow the handicapped individual's already limited choice of employers by forcing the applicant to work for the employer chosen for him by area-wide planners. Finally, the overall taxpayer benefit may be irrelevant when the individual contractors, and not the taxpayers, are required to fund the necessary accommodations.

95. 45 C.F.R. § 84 app. A, subpt. B, no. 16, at 409 (1978), which states:

The weight given to each of these factors in making the determination as to whether an accommodation constitutes undue hardship will vary depending on the facts of a particular situation. Thus, a small day-care center might not be required to expend more than a nominal sum, such as that necessary to equip a telephone for use by a secretary with impaired hearing, but a large school district might be required to make available a teacher's aide to a blind applicant for a teaching job. Further, it might be considered reasonable to require a state welfare agency to accommodate a deaf employee by providing an interpreter, while it would constitute an undue hardship to impose that requirement on a provider of foster home care services.

Judicial Interpretation

The decisions construing reasonable accommodation disclose the uncertain boundary separating the duty to accommodate from the limitation of undue hardship. Acknowledging the reciprocal nature of these provisions, courts have defined reasonableness in terms of time,⁹⁶ technology,⁹⁷ and cost.⁹⁸ Although there are no cases interpreting reasonable accommodation in employment, judicial application of section 504 in contexts other than employment help to clarify the scope of the employer's accommodation obligation.

In *Lloyd v. Regional Transportation Authority*,⁹⁹ the Court of Appeals for the Seventh Circuit concluded that equal treatment of the handicapped within the meaning of section 504 cannot be achieved merely by providing equal facilities if access to these facilities is foreclosed by the absence of adequate public transportation.¹⁰⁰ In *Lloyd*, the court asserted that, in order to provide the handicapped with services "as effective as those provided to others," public transportation systems must take affirmative steps to meet the needs of mobility-handicapped persons.¹⁰¹ The standard applied to accommodation efforts by transportation authorities is "genuine, good-faith progress in planning service for wheelchair users and semiambulatory handicapped persons that is reasonable by comparison with the service provided to the general public and that meets a significant fraction of the actual transportation needs of such persons within a reasonable time period."¹⁰²

Applying the reasoning of the court in *Lloyd*, the Court of Appeals for the Eighth Circuit in *United Handicapped Federation v.*

96. *E.g.*, *United Handicapped Fed'n v. Andre*, 558 F.2d 413 (8th Cir. 1977); *Lloyd v. Regional Transp. Auth.*, 548 F.2d 1277 (7th Cir. 1977); *Vanko v. Finley*, 440 F. Supp. 656, 669 (N.D. Ohio 1977); *Bartels v. Biernat*, 427 F. Supp. 226 (E.D. Wis. 1977).

97. *E.g.*, *Bartels v. Biernat*, 427 F. Supp. 226, 232 (E.D. Wis. 1977) (technology necessary to implement some of proposed solutions not fully advanced); *Snowden v. Birmingham-Jefferson Co. Transit Auth.*, 407 F. Supp. 394 (N.D. Ala. 1975), *aff'd*, 551 F.2d 862 (5th Cir. 1977) ("special efforts" obligation to accommodate wheelchair population met within technological capabilities).

98. *E.g.*, *Davis v. Southeastern Community College*, 574 F.2d 1158, 1162 (4th Cir. 1978), *cert. granted*, 47 U.S.L.W. 3463 (Jan. 9, 1979) (No. 78-711); *Crawford v. University of N.C.*, 440 F. Supp. 1047, 1059 (M.D.N.C. 1977); *Barnes v. Converse College*, 436 F. Supp. 635 (D.S.C. 1977); *Hairston v. Drosick*, 423 F. Supp. 180 (S.D. W. Va. 1976).

99. 548 F.2d 1277 (7th Cir. 1977).

100. *Id.* at 1284.

101. *Id.* at 1283-84.

102. *Id.* at 1282 (quoting 23 C.F.R. § 450 app. B, no. 4, at 118-19 (1978) (emphasis omitted)).

*Andre*¹⁰³ viewed research, design, and planning for future accessibility of transportation facilities and services as insufficient compliance with the "good-faith progress" standard.¹⁰⁴ Instead, public transportation systems were obligated to modify the existing fleet of buses to conform to the regulations and guidelines, despite the significant cost that such changes would entail.¹⁰⁵

In *Bartels v. Biernat*,¹⁰⁶ the district court permanently enjoined the Milwaukee County Transit Board and Urban Mass Transit Administration from purchasing, operating, or funding buses that were not accessible to mobility-handicapped individuals until the Board could demonstrate that public transportation facilities and services were being made available to the disabled in a nondiscriminatory manner.¹⁰⁷ Defining the scope of the Board's obligation under section 504, the court stated that "[t]he [504] regulations do not require a full and immediate solution to the problem. What they do require is that the planning process show that special efforts are being taken to ensure that the mobility handicapped will be provided with services equivalent to the rest of the community."¹⁰⁸ Although the court in *Bartels* did not require the county board to provide immediate access for the disabled, the decision is not necessarily inconsistent with the determination of the court in *Andre* that plans for future accessibility are insufficient. In *Vanko v. Finley*,¹⁰⁹ the district court reconciled the conflicting conclusions in *Bartels* and *Andre*: "Vague plans for the indefinite future and second-rate transit for the mobility-handicapped will not satisfy the mandate of these federal laws, but instantaneous conversion to a transportation system that is comparable in every minute detail is not required either."¹¹⁰

103. 558 F.2d 413 (8th Cir. 1977).

104. *Id.* at 416.

105. *Id.*

106. 427 F. Supp. 226 (E.D. Wis. 1977).

107. *Id.* at 233.

108. *Id.*

109. 440 F. Supp. 656 (N.D. Ohio 1977).

110. *Id.* at 666. In its attempt to fashion an appropriate remedy, the court in *Bartels* succinctly identified the time, technology, and cost issues relevant in determining the reasonableness of accommodation:

The Court is confronted with countervailing problems. The plaintiffs are entitled to the benefits of a mass transit system, now. The statute does not allow the County to wait until the perfect solution is found. At the same time the technology necessary to implement some of the proposed solutions to the prob-

Lloyd and *Andre* indicate that the affirmative duty to reasonably accommodate the handicapped may involve substantial expense and that mere good-faith efforts to effect future changes may be insufficient. Although *Bartels* excludes the necessity of immediate, total accessibility, *Vanko* proscribes the use of vague future plans as a means of avoiding accommodation obligations while acknowledging that instantaneous compliance may be unrealistic.

These transportation cases demonstrate that federal contractors and recipients of federal funds may not satisfy the reasonable accommodation goal through indefinite assurances of future compliance with the mandates of sections 503 and 504. Furthermore, an employer may not claim an undue hardship merely because accommodation would involve substantial expense. The employer, however, may justify a reasonable delay in accommodation if immediate, total accommodation is not feasible.

The obligation to accommodate the handicapped short of undue hardship has generated conflicts in the area of education similar to those faced in the transportation cases. Section 504's regulations require educational institutions receiving federal assistance to eliminate discriminatory academic requirements that tend to exclude qualified handicapped applicants and students.¹¹¹ The regulations further stipulate that educational "auxiliary aids" must be provided for students with impaired sensory, manual, or speaking skills.¹¹² Decisions construing these regulations have focused on cost

lem is not fully advanced, nor has this Court seen any study of the particular problems facing Milwaukee County in this area. Adding to the difficulty is the fact that the County is operating a transit system with buses which average almost 15 years in age. The remedy must provide some access to the transit system for the plaintiff class and assure that additional improvements will be made without placing restrictions on the defendants that will necessarily result in collapse of the transit system.

427 F. Supp. at 232.

111. 45 C.F.R. § 84.44(a) (1978) provides:

A recipient . . . shall make such modifications to its academic requirements as are necessary to ensure that such requirements do not discriminate or have the effect of discriminating, on the basis of handicap, against a qualified handicapped applicant or student. . . . Modifications may include changes in the length of time permitted for the completion of degree requirements, substitution of specific courses required for the completion of degree requirements, and adaptation of the manner in which specific courses are conducted.

112. *Id.* § 84.44(d)(1). The auxiliary aid provision provides:

A recipient . . . shall take such steps as are necessary to ensure that no handicapped student is denied the benefits of, excluded from participation in, or

as the primary factor in assessing the reasonableness of accommodation efforts.¹¹³ Because the regulations are specific regarding provisions for auxiliary aids, efforts to compel institutions to accommodate the handicapped have been uniformly successful, regardless of the cost.¹¹⁴ For example, in *Hairston v. Drosick*,¹¹⁵ the exclusion of a spina bifida child from a regular public classroom without justification was held to violate section 504 of the Rehabilitation Act.¹¹⁶ The district court concluded that "[s]chool officials must make every effort to include such children within the regular public classroom situation, *even at great expense to the school system.*"¹¹⁷ Decisions after *Hairston* have agreed with that court's conclusion that the affirmative conduct requirement of section 504 applies "even when such modifications become expensive."¹¹⁸

The significance of the education cases to employers subject to section 503 and 504 reasonable accommodation requirements is clear: the employer cannot resist efforts to compel accommodation simply because of expense. At what point expense becomes an undue hardship, however, remains subject to circumstantial determinations. In *Barnes v. Converse College*,¹¹⁹ a private college was required to supply funds for an interpreter to assist a deaf student during the summer session.¹²⁰ The cost to the school was \$750.¹²¹ Although the court correctly determined that the possibility of future expenditures was irrelevant to the reasonableness of the spe-

otherwise subjected to discrimination under the education program or activity operated by the recipient because of the absence of educational auxiliary aids for students with impaired sensory, manual or speaking skills.

113. See, e.g., *Davis v. Southeastern Community College*, 574 F.2d 1158, 1162 (4th Cir. 1978) *cert. granted*, 47 U.S.L.W. 3463 (Jan. 9, 1979) (No. 78-711); *Crawford v. University of N.C.*, 440 F. Supp. 1047 (M.D.N.C. 1977); *Barnes v. Converse College*, 436 F. Supp. 635 (D.S.C. 1977); *Hairston v. Drosick*, 423 F. Supp. 180, 184 (S.D. W. Va. 1976).

114. *Id.*

115. 423 F. Supp. 180 (S.D. W. Va. 1976).

116. *Id.*

117. *Id.* at 184 (emphasis supplied).

118. *Davis v. Southeastern Community College*, 574 F.2d at 1162 (remanding case to district court to consider the duty of a college to modify the nursing program to accommodate a hearing-impaired plaintiff under § 504 regulations). See also *Crawford v. University of N.C.*, 440 F. Supp. 1047 (M.D. N.C. 1977) (issuing preliminary injunctive relief requiring university to provide an interpreter or other means of communicating orally presented material to deaf graduate student); *Barnes v. Converse College*, 436 F. Supp. 635 (D.S.C. 1977) (holding that private college receiving federal funds is obligated to pay an interpreter for deaf student).

119. 436 F. Supp. 635 (D.S.C. 1977).

120. *Id.* at 639.

121. *Id.* at 637.

cific accommodation request, it expressed concern regarding the potential future burden Converse College would have to bear as a result of the accommodation obligation.¹²²

[I]f the federal government, in all its wisdom, decides that money should be spent to provide opportunities for a particular group of people, that government should be willing to spend its own money (i.e. our taxes) for such purposes and not require that private educational institutions use their limited funds for such purposes.¹²³

The court conceded that the college did receive federal assistance but observed that the federal funds were not granted to the college for the purpose of furnishing auxiliary aids.¹²⁴

Criticism of the reasonable accommodation obligation expressed in *Barnes* ignores the fact that the duty does not arise until specific handicapped persons request special concessions. Concerns regarding future expenditures of a similar nature, therefore, are irrelevant given the singular character of each accommodation of a specific handicap. Due to the diverse range of conditions classified as handicaps by federal legislation, any attempt to predict the cost or even the nature of potential accommodation needs would be futile. Moreover, as the number of handicapped individuals increases in a school or place of employment, the cost of accommodation does not necessarily increase concomitantly. One interpreter, for example, may serve several deaf students or workers effectively. Indeed, the expense incurred conceivably could decrease as the number of handicapped individuals increased. Furthermore, certain accommodations are single, nonrecurring expenses, such as providing ramps for mobility-handicapped individuals; no ongoing additional expense would be necessary as more disabled individuals enrolled in school or became employed. Finally, the court in *Barnes* failed to acknowledge the undue hardship exception to the accommodation obligation. For example, if the anticipated future deluge of deaf students did occur and if no reasonable accommodation method could be fashioned, then the college would be relieved of its accommodation duty upon a showing of this undue hardship.

122. *Id.* at 638-639.

123. *Id.* at 639.

124. *Id.* at 638.

Analogy to Title VII

Commentators have suggested that the language of the Rehabilitation Act may be defined by reference to interpretations of similarly worded provisions found in Title VII.¹²⁵ Although Title VII compels employers to accommodate reasonably the religious needs of employees in language similar to that used in sections 503 and 504,¹²⁶ an analogy between the statutes on this issue is inappropriate. In *Trans World Airlines v. Hardison*,¹²⁷ the United States Supreme Court examined the scope of the employer's statutory duty to accommodate an employee whose religious beliefs proscribed work on Saturdays. The majority concluded that TWA was not required to violate a valid union seniority system agreement to satisfy Title VII when abandonment of the seniority system would result in unequal treatment of other employees on the basis of their religious beliefs.¹²⁸ The airline had authorized the union steward to locate an employee willing to exchange shifts with the Sabbatarian plaintiff. Although the steward was unsuccessful, the Court determined that Title VII did not require the airline to resort to any alternative accommodation efforts.¹²⁹ Defining the scope of Title VII religious accommodation duties, the Court stated that expenditures beyond a *de minimis* amount would constitute an undue hardship within the meaning of the statute.¹³⁰ TWA, therefore, had satisfied the accommodation requirement and was not required to assume any further responsibility for the Sabbatarian's religious needs.

The standard of undue hardship in the accommodation of religious needs established by the Court in *Hardison* is inapplicable to handicap accommodation cases. Although the majority did not reach the question whether reasonable accommodation of the em-

125. See note 176 *infra*.

126. 42 U.S.C. § 2000e-2(a)(1) (Supp. V 1975). The regulations interpreting Title VII provide:

[T]he duty not to discriminate on religious grounds, required by section 703(a)(1) of the Civil Rights Act of 1964, includes an obligation on the part of the employer to make *reasonable accommodation* to the religious needs of employees and prospective employees where such accommodation can be made without undue hardship on the conduct of the employer's business.

29 C.F.R. § 1605.1 (1977) (emphasis supplied).

127. 432 U.S. 63 (1977).

128. *Id.* at 81.

129. *Id.* at 80.

130. *Id.* at 84.

ployee's religious beliefs would be contrary to the establishment clause of the first amendment, first amendment values underlie the Court's cautious approach to imposing accommodation duties.¹³¹ Such tension between competing first amendment values is absent in situations involving the reasonable accommodation of the disabled; no threat of discrimination against other employees is posed by efforts to accommodate the handicapped such as providing an interpreter or widening factory doors. Furthermore, limiting undue hardship to a *de minimis* standard in the context of employment opportunities for the handicapped would undermine the central purpose of the Rehabilitation Act and contravene specific regulations which describe appropriate accommodation methods necessarily involving more than *de minimis* expense.¹³² Finally, the repeated defeat of efforts to expand Title VII to include the handicapped suggests that handicapped persons merit separate, more extensive treatment.¹³³ Unlike ethnic background, race, religion, or sex, a handicapping condition often imposes physical restrictions on employability that legislators must acknowledge when framing employer obligations. Furthermore, in order to effectively and intelligently eliminate policies and practices that discriminate against the handicapped, a discrete body of knowledge regarding the primary and corollary effects of various disabilities is essential. Thus, although the comparison between Title VII and the Rehabilitation Act may be attractive in particular instances, Title VII is not dispositive of reasonable accommodation issues.

Beyond the decisions noted, little assistance is afforded employers subject to sections 503 and 504 in delineating the boundary between reasonable accommodation and undue hardship. Absent the adoption of a cost/benefit or an alternative empirical system of analysis, employer obligations will continue to be determined through case-

131. Justice Marshall's dissent noted the potential constitutional violation posed by the reasonable accommodation of religious beliefs when such accommodation compels employers to incur substantial costs. Marshall viewed this potential violation as an insufficient basis for denial of accommodation, however, and observed that "not all accommodations are costly, and the constitutionality of the statute is not placed in serious doubt simply because it sometimes requires an exemption from a work rule. Indeed, this Court has repeatedly found no Establishment Clause problems in exempting religious observers from state-imposed duties, even when the exemption was in no way compelled by the Free Exercise Clause." *Id.* at 90 (Marshall, J., dissenting) (citations omitted).

132. See note 92 *supra* & accompanying text.

133. See note 179 *infra* & accompanying text.

by-case interpretation of the general statutory guidelines. Although the current system creates uncertain standards, the flexibility necessary to deal with varying circumstances is retained. The available cases support the contention that a handicapped applicant or employee is justified in demanding accommodation of his or her specific needs, even at substantial expense to the employer. Whether the federal government, rather than an individual recipient or federal contractor, should bear the cost of accommodation is debatable. Because the reasonableness of an accommodation is defined in terms of undue hardship factors, however, an employer should not be burdened unreasonably by the legislative requirements. Moreover, existing technology may limit the extent of accommodation, and time constraints may operate to render immediate accommodation infeasible.

"Qualified Handicapped Person"

The phrase "qualified handicapped person" has created an additional problem of statutory interpretation.¹³⁴ Because the obligations of employers subject to sections 503 and 504 apply only to "qualified" disabled individuals, the meaning of this term is a principal factor in ascertaining when affirmative action or nondiscriminating duties arise. With respect to employment, the regulations define a qualified handicapped individual as "a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question."¹³⁵ The definition of "qualified," then is appurtenant to the legislative directive that job evaluations be restricted to job-related functions;¹³⁶ to be qualified, a handicapped person need only demonstrate the ability to execute those functions necessary to job performance. Performance of the essential skills, however, may entail reasonable accommodation for the individual's handicap.¹³⁷ Courts have expanded on these aspects of

134. 45 C.F.R. § 84.3(k) (1978); 41 *id.* § 60-741.2.

135. 45 *id.* § 84.3(k). Although the statute itself uses the phrase "otherwise qualified handicapped person," the omission of the word "otherwise" in the regulations signifies that the proper reading of the statute is to include persons qualified in spite of, rather than except for, their handicap. Otherwise, "a blind person possessing all the qualifications for driving a bus except sight could be said to be 'otherwise qualified' for the job of driving. Clearly, such a result was not intended by Congress." *Id.* § 84 app. A, subpt. A, no. 5, at 405.

136. See notes 41-43, 71-74 *supra* & accompanying text.

137. See notes 90-91 *supra* & accompanying text.

the statutory terminology in the contexts of education and employment.

In *Kampmeier v. Nyquist*,¹³⁸ the Court of Appeals for the Second Circuit affirmed a district court's denial of a motion for a preliminary injunction against public school authorities who refused to allow a student with vision in only one eye to participate in contact sports. The court determined that the school had demonstrated substantial justification for the exclusionary policy based upon the school's *parens patriae* interest in protecting the well-being of the students.¹³⁹ Noting that section 504 prohibits only the exclusion of qualified handicapped individuals, the court in *Kampmeier* stated that the medical evidence indicated that "children with sight in only one eye are not qualified to play in contact sports because of the high risk of injury."¹⁴⁰

As subsequent cases indicate, the *Kampmeier* court's interpretation of the term "qualified" is misguided. The statutory term "qualified" refers solely to the capacity to perform. Although the school may have a legitimate interest in protecting its students' vision, this concern is irrelevant to the determination of whether a particular child is qualified to play contact sports. Although the school might prohibit participation by reason of its *parens patriae* interest, this issue cannot be confused with the separate issue of capacity to perform. Similarly an applicant for employment with a history of heart trouble could not be labeled unqualified for employment merely because the employer is concerned for the individual's physical well-being. The employer, however, may demonstrate independently that the heart condition renders the applicant incapable of performing particular job functions.

In *Davis v. Southeastern Community College*,¹⁴¹ the Court of Appeals for the Fourth Circuit properly limited the definition of "qualified" to factors relevant to job performance.¹⁴² In *Davis*, the Fourth Circuit vacated a district court decision rendered prior to the

138. 553 F.2d 296 (2d Cir. 1977).

139. *Id.* at 300.

140. *Id.* at 299.

141. 574 F.2d 1158 (4th Cir. 1978), *cert. granted*, 47 U.S.L.W. 3463 (Jan. 9, 1979) (No. 78-711). The Fourth Circuit's opinion in *Davis* provides an articulate and accurate interpretation of the Rehabilitation Act's purpose and effect, and is a valuable precedent for subsequent efforts to enforce the statutory mandates.

142. *Id.* at 1161.

effective date of the regulations implementing section 504. The district court had interpreted "otherwise qualified" to mean that the handicapped individual had "to [be] otherwise able to function sufficiently in the position sought in spite of the handicap, if proper training and facilities are suitable and available."¹⁴³ The plaintiff in *Davis* suffered from a moderate to severe bilateral hearing loss which the lower court concluded rendered her unqualified for acceptance into the defendant-college's nursing program. The district court contended that the hearing impairment would prevent the applicant from safely performing her clinical training or her professional duties following graduation.¹⁴⁴ Citing the regulations implementing section 504, the court of appeals held that the trial court should not have considered the applicant's hearing loss in determining whether she was "otherwise qualified."¹⁴⁵ According to the Fourth Circuit, the district court's analysis should have been restricted to the applicant's academic and technical qualifications.¹⁴⁶ By shifting the emphasis to job-related criteria, the "otherwise qualified" terminology is given a meaning consistent with the legislative intent to eliminate discrimination based solely on the presence of a handicap.

A similar result was reached in *Duran v. City of Tampa*.¹⁴⁷ In *Duran*, the district court refused to grant a motion to dismiss the complaint of an applicant denied employment as a policeman solely because of his history of epilepsy. The court noted that the applicant's successful completion of numerous tests required of all applicants rendered him "otherwise qualified" for the position sought. Thus, the applicant's claim that the employer had violated the Rehabilitation Act showed a substantial likelihood of success.¹⁴⁸

The statutory language and judicial interpretations of the legislative provisions indicate that "otherwise qualified" cannot include qualifications unrelated to job performance. For example, a determination that a deaf applicant is unqualified cannot rest upon the applicant's deafness nor upon a legitimate fear that the employee may be subjected to a greater risk of injury because of the hearing

143. *Davis v. Southeastern Community College*, 424 F. Supp. 1341, 1345 (E.D.N.C. 1976).

144. *Id.* at 1345-46.

145. 574 F.2d at 1161.

146. *Id.*

147. 430 F. Supp. 75 (M.D. Fla. 1977).

148. *Id.* at 78.

loss. Instead, the employer must demonstrate that hearing is essential to relevant job functions and that reasonable accommodation would not compensate adequately for the applicant's incapacity.

CONSTITUTIONAL ISSUES

In addition to violating federal statutory provisions, employment policies or practices in the public sector that discriminate against handicapped individuals may contravene the constitutional guarantees of due process and equal protection. Determinations relevant to a constitutional inquiry include whether a rational relationship exists between a legitimate legislative purpose and the means chosen to effectuate that purpose or whether handicapped persons comprise a suspect class, thus requiring strict scrutiny of the regulations.

Due Process

In *Cleveland Board of Education v. LaFleur*,¹⁴⁹ the Supreme Court established a due process standard relevant to employment rights of the handicapped. The Court in *LaFleur* invalidated a mandatory maternity leave policy of the Cleveland Board of Education,¹⁵⁰ holding that the policy established an irrebuttable presumption¹⁵¹ of physical incompetency that was unsubstantiated by any rational relation to a valid state interest.¹⁵² The operation of the

149. 414 U.S. 632 (1974).

150. *Id.* at 651.

151. Judicial hostility to "irrebuttable presumptions" has been manifested in a variety of contexts. See *Vlandis v. Kline*, 412 U.S. 441 (1973) (invalidating state statute on ground that the statute's "irrebuttable presumption" of nonresidency for purposes of paying reduced tuition rates violated due process); *Stanley v. Illinois*, 405 U.S. 645 (1972) (invalidating state statute which irrebuttably presumed that all unwed fathers were incompetent to raise their children); cf. *Weinberger v. Salfi*, 422 U.S. 749 (1975) (reversing district court invalidation of duration-or-relationship Social Security eligibility requirements for surviving wives and stepchildren of deceased wage earners as irrebuttable presumptions).

The irrebuttable presumption analysis has been criticized as a confusion of due process and equal protection scrutiny and as "failing to recognize that irrebuttable presumptions are nothing more than statutory classifications." Note, *The Irrebuttable Presumption Doctrine in the Supreme Court*, 87 HARV. L. REV. 1534, 1556 (1974); see Simson, *The Conclusive Presumption Cases: The Search for a Newer Equal Protection Continues*, 24 CATH. U. L. REV. 217 (1975); See also Tribe, *From Environmental Foundations to Constitutional Structures: Learning from Nature's Future*, 84 YALE L.J. 545 (1975); Note, *Irrebuttable Presumptions: An Illusory Analysis*, 27 STAN. L. REV. 449 (1975).

152. 414 U.S. at 647-48, 651.

policy thereby served to interfere unreasonably with the constitutionally protected right to conceive and bear children.¹⁵³

Applying the rationale of *LaFleur*, the Third Circuit in *Gurmankin v. Costanzo*¹⁵⁴ affirmed a district court holding that a school district's refusal to consider blind applicants for positions as teachers for students with no visual impairment deprived a blind instructor, otherwise qualified to teach, of her due process rights. The district court viewed the importance of the interest asserted by the applicant and the relative ease with which a hearing on the issue of competency could be provided as justification for invalidating the school's irrebuttable presumption of incompetency.¹⁵⁵ Cases subsequent to *Gurmankin* similarly have invalidated irrebuttable presumptions of incapacity as violative of due process rights.¹⁵⁶ Even if a rational basis exists for concluding that some applicants of an excluded class may be ineligible for employment, due process re-

153. *Id.* at 644.

154. 556 F.2d 184 (3d Cir. 1977).

155. 411 F. Supp. 982, 992 (E.D. Pa. 1976), *aff'd*, 556 F.2d 184 (3d Cir. 1977). In the context of employment of the handicapped, analysis of the doctrine of irrebuttable presumptions is not subject to the refinement articulated in *Weinberger v. Salfi*, 422 U.S. 749 (1975). In *Salfi*, the Supreme Court reversed a district court finding that the duration-of-relationship Social Security eligibility requirements for surviving wives and stepchildren of deceased wage earners, which involved irrebuttable presumptions, were unconstitutional. The Court distinguished *Salfi* from *LaFleur* on the grounds that in *Salfi* no recognized liberty protected by the due process guarantee was implicated and that individual hearings on the issue whether a marital relationship was genuine would entail cumbersome judicial involvement in the legislative function. 422 U.S. at 772-73.

In employment cases involving handicapped applicants or workers, the objections raised in *Salfi* arguably are absent. The interest concerned, namely the right to work, traditionally enjoys respected status. See *Truax v. Raich*, 239 U.S. 33, 41 (1915). Moreover, strict scrutiny is applied to any attempts to place an outright ban on the employment of members of groups that have been subject to past discrimination. *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973) (aliens). Also, the individual determinations of capacity would not prove overly burdensome. See, e.g., *Davis v. Bucher*, 451 F. Supp. 791, 800 (E.D. Pa. 1978); *Beazer v. New York City Transit Auth.*, 399 F. Supp. 1032 (S.D.N.Y. 1975), *aff'd*, 558 F.2d 97 (2d Cir. 1977), *cert. granted*, 46 U.S.L.W. 3792 (June 27, 1978) (No. 77-1427). But see 27 DEPAUL L. REV. 1199 (1978) (criticizing *Gurmankin v. Costanzo* as a misapplication of the irrebuttable presumption doctrine and suggesting a means-ends rational basis approach to equal protection challenges to statutes or policies that discriminate against handicapped employees).

156. See, e.g., *Davis v. Bucher*, 451 F. Supp. 791 (E.D. Pa. 1978) (absolute bar to employment of former drug users); *Duran v. City of Tampa*, 430 F. Supp. 75 (M.D. Fla. 1976) (absolute bar to employment of any individual with a history of epilepsy); *Beazer v. New York City Transit Auth.*, 399 F. Supp. 1032 (S.D.N.Y. 1975), *aff'd*, 558 F.2d 97 (2d Cir. 1977), *cert. granted*, 46 U.S.L.W. 3792 (June 27, 1978) (No. 77-1427) (total exclusion for all former heroin addicts).

quires that an individual applicant be given an opportunity to demonstrate that the exclusionary practice is irrational as applied to him.¹⁵⁷

Equal Protection

Equal protection challenges to discriminatory employment practices and policies have not been as successful as the due process claims. Two standards of review have been used primarily in equal protection analysis: strict scrutiny and rational basis.¹⁵⁸ The result of the case is determined generally by the standard applied: strict scrutiny results in invalidation of the statute, whereas the statute survives application of a rational basis test.¹⁵⁹ In an attempt to afford handicapped individuals the shield of the strict scrutiny standard of review, commentators have urged that disabled persons possess the characteristics of a suspect class.¹⁶⁰

In *San Antonio Independent School District v. Rodriguez*,¹⁶¹ the Supreme Court defined the requirements of a suspect class. [T]he class [must be] saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."¹⁶² Although the handicapped historically have been a stigmatized and politically weak minority,¹⁶³ unequal treatment of the disabled often is justifiable because of the physical and mental limitations imposed

157. *Davis v. Bucher*, 451 F. Supp. 791, 799 (E.D. Pa. 1978).

158. See BARRON & DIENES, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICY* 569-75 (1975).

159. When the strict scrutiny standard is applied, a classification will be upheld only if it can be demonstrated that it was mandated by a compelling government interest. Application of the strict scrutiny test generally has proved fatal to the legislation challenged. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-6 (1978); Gunther, *Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972); see text accompanying note 168 *infra*.

160. See, e.g., Burgdorf & Burgdorf, *supra* note 4, at 902-08; Note, *The Equal Protection and Due Process Clauses: Two Means of Implementing "Integrationism" for Handicapped Applicants for Public Employment*, 27 DEPAUL L. REV. 1169, 1174-83 (1978).

161. 411 U.S. 1 (1973). See also *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938) (establishing the "discrete and insular minority" criteria for suspect class status). Given the varying nature and degree of disabling conditions, however, the handicapped as a group are neither discrete nor insular. Indeed, the definition of "handicapped" is subject to differing interpretation and affords no concrete guideline for suspect class treatment.

162. 411 U.S. at 28.

163. See *Fialkowski v. Shapp*, 405 F. Supp. 946, 959 & n.9 (E.D. Pa. 1975); *In re G.H.*, 218 N.W.2d 441 (S.D. 1974). See generally Burgdorf & Burgdorf, *supra* note 4.

by a handicapping condition.¹⁶⁴ Indeed, equal treatment of the disabled itself may prove discriminatory.¹⁶⁵ The handicapped thus differ significantly from groups that are properly labeled suspect classes. The alternative basis for strict scrutiny analysis, infringement of a fundamental right, similarly cannot be applied to cases involving the employment rights of the handicapped: public employment is not among the interests deemed fundamental by the Supreme Court.¹⁶⁶

The remaining option available to opponents of discriminatory employment policies and practices is to challenge the offending regulation using the less stringent rational basis standard of equal protection analysis.¹⁶⁷ Although the Warren Court invariably applied the rational basis standard to uphold statutes to equal protection challenges and applied the strict scrutiny standard to invalidate them,¹⁶⁸ recent Supreme Court decisions disclose a trend toward a less polarized approach to equal protection analysis.¹⁶⁹ This change is demonstrated by the expansion of suspect classifications¹⁷⁰

164. See *Gurmankin v. Costanzo*, 411 F. Supp. 982, 992 n.8 (E.D. Pa. 1976), *aff'd*, 556 F.2d 184 (3d Cir. 1977); *Proposal*, *supra* note 4. The Supreme Court impliedly acknowledged these limitations in dicta, stating "[w]hat differentiates sex from such a non-suspect classes as intelligence or physical disability, is that the sex characteristic bears no relationship to the ability to perform or contribute to society." *Frontiero v. Richardson*, 411 U.S. 677 (1973).

165. See note 64 *supra* & accompanying text.

166. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976). Fundamental rights expressly or implicitly guaranteed by the Constitution include the right to vote, to interstate travel, to have access to meaningful adjudication, to bear offspring, and to protection of other intimate personal liberties. See, e.g., *Shapiro v. Thompson*, 394 U.S. 618 (1969) (interstate travel); *Loving v. Virginia*, 388 U.S. 1 (1967) (right to marriage procreation); *Reynolds v. Sims*, 377 U.S. 533 (1964) (right to vote); *NAACP v. Button*, 371 U.S. 415 (1963) (freedom of association).

167. See, e.g., *McDonald v. Board of Election*, 394 U.S. 802, 809 (1969).

168. *Id.*

169. See *Gunther*, *supra* note 159. In *Weber v. Aetna Surety & Casualty Co.*, 406 U.S. 164 (1972), the Court emphasized that the legal burdens imposed by a state statute must bear a significant relationship to a legitimate state interest. *Id.* at 175. As articulated by the Court, the essential inquiry in equal protection cases is twofold: "what legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger?" *Id.* at 173. See also *Eisenstadt v. Baird*, 405 U.S. 438 447 (1972); *Reed v. Reed*, 404 U.S. 71, 76-77 (1971). Justice Marshall in particular has advocated abolition of the traditional equal protection polarized standards in favor of a means-oriented review. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 318 (1976) (Marshall, J., dissenting); *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 98 (1973) (Marshall, J., dissenting); *Dandridge v. Williams*, 397 U.S. 471, 514-21 (1970) (Marshall, J., dissenting).

170. See, e.g., *Frontiero v. Richardson*, 411 U.S. 677 (1973) (plurality) (sex); *Graham v. Richardson*, 403 U.S. 365 (1971) (alienage).

and by the creation of an intermediate standard of review.¹⁷¹ This intermediate standard entails a heightened level of scrutiny, depending on the "constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn."¹⁷²

The applicability of this newer equal protection standard is particularly appealing in cases of discrimination against the handicapped in employment. Although handicapped persons do not satisfy the formalistic suspect class qualifications, they historically have been subject to prejudice and political impotence; and although employment has not been recognized as a fundamental right, it is acknowledged to be an integral function of meaningful and productive participation in society. Thus, although the interests at stake are not subject to strict scrutiny, courts have refused to give constitutional ratification to regulations that infringe upon such interests.¹⁷³ The result has been judicial implementation of the hybrid irrebuttable presumption doctrine or, alternatively, determinations that no rational relationship whatsoever exists,¹⁷⁴ in order to render unconstitutional regulations that the traditional equal protection analysis would have left undisturbed.

As the movement away from polarized equal protection standards progresses, the focus of equal protection analysis will shift correspondingly to an examination of the values impinged upon and the countervailing state interest in the regulation. Coupled with this new focus, the disposal of the talismanic labels of suspect class and fundamental right should improve the likelihood that equal protection challenges to employment practices which discriminate against qualified handicapped persons will succeed.¹⁷⁵

171. See Gunther, *supra* note 159.

172. *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. at 99. (Marshall, J., dissenting).

173. See *id.*

174. *Davis v. Bucher*, 451 F. Supp. 791, 800 (E.D. Pa. 1978).

175. In a recent decision, however, the Supreme Court applied the rational basis standard to an equal protection challenge of the Foreign Service Act's mandatory retirement provision. *Vance v. Bradley*, 47 U.S.L.W. 4176 (1979). In *Vance*, the Court reiterated the principle that "judicial intervention is generally unwarranted no matter how unwisely [the Court] may think a political branch has acted." *Id.* at 4177. The legitimate statutory goal, assurance of the competence and the mental and physical reliability of Foreign Service personnel, was furthered by the means chosen, compulsory retirement at age sixty. Although overseas conditions are not always more strenuous than those of domestic placement and although not all individuals over sixty are incapable of meeting the physical and mental standards for Foreign

PRIVATE SECTOR EMPLOYMENT

A major criticism of the Rehabilitation Act of 1973 is that the legislation is not sufficiently comprehensive. Commentators maintain that because the Act applies only to recipients of federal assistance and to federal contractors rather than to all private employers, handicapped workers' freedom of choice is circumscribed in violation of their civil rights.¹⁷⁶ Absent a comprehensive federal statutory scheme, the power to regulate private sector employers exempt from sections 503 or 504 rests with the states. Although nearly all states have enacted legislation safeguarding the rights of the handicapped, the statutes vary greatly in the degree of protection offered.¹⁷⁷

Service, perfection of "mathematical nicety" of a classification is not required constitutionally. *Id.* at 4180 (quoting *Dandridge v. Williams*, 397 U.S. 471, 485 (1970)). As long as the line drawn by the classification is not irrational, the Court cannot overturn the statute. *Id.* at 4181.

Vance may signal a retreat by the Court to the traditional, mechanistic application of equal protection standards. The potential implication for the handicapped in public employment would be that, if any rational relation to a legitimate state purpose can be established, such as health, safety, or even administrative convenience, the statute barring the handicapped from employment would be upheld as constitutional. For example, a state-funded hospital's hiring policy that categorically excluded deaf applicants from employment as nurses would be upheld as rationally related to the legitimate goals of health and safety of its patients, even though some individuals might be capable of performing the job.

The Court in *Vance* did not apply the irrebuttable presumption doctrine, although the policy of mandatory retirement arguably constituted a conclusive presumption in violation of due process. Consequently, the continued vitality of that doctrine remains unclear.

176. Wright, *Equal Treatment of the Handicapped by Federal Contractors*, 26 EMORY L.J. 65 (1977); Proposed, *supra* note 4; Note, *Potluck Protection for Handicapped Discriminatees: The Need to Amend Title VII to Prohibit Discrimination on the Basis of Disability*, 8 LOY. CHI. L.J. 814 (1976); Note, *Access to Buildings and Equal Employment for the Disabled*, *Survey of State Statutes*, 50 TEMPLE L.Q. 1067, 1079 (1977); Note, *Civil Rights—Employment Rights of the Physically Handicapped*, 79 W. VA. L. REV. 398, 406 (1977).

177. ALA. CODE tit. 21, § 7-8 (1975); ALASKA STAT. § 18.80.220 (Cum. Supp. 1978); ARK. STAT. ANN. § 82-2901 (Repl. Vol. 1976); CAL. LAB. CODE § 1735 (Deering Cum. Supp. 1978); COLO. REV. STAT. § 24-34-801 (1973); CONN. GEN. STAT. ANN. § 31-126 (West Cum. Supp. 1978); D.C. CODE ENCYCL. § 6-1504 (West Cum. Supp. 1978); FLA. STAT. ANN. § 413.08(3) (West Cum. Supp. 1978); GA. CODE ANN. § 89-1702 (Cum. Supp. 1978); HAW. REV. STAT. § 21-378-2 (Repl. Vol. 1976); IDAHO CODE § 56-707 (1976); ILL. ANN. STAT. ch. 38, § 65-23 (Smith-Hurd Supp. 1977); IND. CODE ANN. § 16-7-5-6 (Burns Supp. 1978); IOWA CODE ANN. § 601D.2 (West 1975); KAN. STAT. § 44-413 (1973); KY. REV. STAT. § 207.150 (Repl. Vol. 1977); LA. REV. STAT. ANN. § 38-2315 (West Cum. Supp. 1978); ME. REV. STAT. tit. 5, § 4552 (1979); MD. ANN. CODE art. 49B, § 14 (Cum. Supp. 1978); MASS. GEN. LAWS ANN. ch. 149, § 24k (West Cum. Supp. 1978); MICH. COMP. LAWS § 37.1101-1605 (Cum. Supp. 1977); MINN. STAT. ANN. § 363.12 (West Cum. Supp. 1978); MISS. CODE ANN. § 43-6-15 (Cum. Supp. 1976); MO. ANN. STAT. §§ 286.200, .205 (Vernon Cum. Supp. 1978); MONT. REV. CODES ANN. § 64-304 (Cum. Supp. 1977);

In contrast to the restrictive scope of the Rehabilitation Act, Title VII of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, sex, or national origin by any employer in any industry affecting interstate commerce that employs fifteen or more persons.¹⁷⁸ Under the auspices of the broad-reaching commerce power, Title VII covers nearly all employers. The apparent similarity of problems faced by minorities and the handicapped has prompted a number of legislative proposals,¹⁷⁹ encouraged by favorable commentary,¹⁸⁰ to extend Title VII's comprehensive coverage to encompass handicapped individuals. These proposals, however, have been consistently unsuccessful.

Although incorporating certain procedural aspects of Title VII into the Rehabilitation Act might increase the protection afforded handicapped persons,¹⁸¹ the proposed alternative of consolidating

NEV. REV. STAT. § 613.330 (1973); N.H. REV. STAT. ANN. § 275-C (Cum. Supp. 1977); N.J. REV. STAT. § 10: 5-29.1 (Supp. 1978) (blind only); N.M. STAT. ANN. § 4-33-7 (Supp. 1975); N.Y. EXEC. LAW § 296 (McKinney Supp. 1972-1977); N.C. GEN. STAT. 128-15.3 (Cum. Supp. 1975); N.D. CENT. CODE § 25-13-05 (Repl. Vol. 1978); OHIO REV. CODE ANN. § 4112.02 (Page Supp. 1978); OR. REV. STAT. § 659.405 (1975); 43 PA. CONS. STAT. ANN. § (Purdon Supp. 1978-1979); R.I. GEN. LAWS § 28-5-7 (Cum. Supp. 1977); S.C. CODE § 43-33-60 (1976); S.D. COMPILED LAWS ANN. § 60-7 (1978); VT. STAT. ANN. tit. 21, § 498 (1978); VA. CODE ANN. § 40.1-28.7 (Repl. Vol. 1976); WASH. REV. CODE ANN. § 49.60.010 (Supp. 1977); W. VA. CODE § 5-11-9 (Cum. Supp. 1978); WIS. STAT. ANN. § 111.31 (West Cum. Supp. 1978-1979).

The statutes vary from mere establishment of committees on the employment rights of the handicapped to comprehensive enforcement of employment rights. Some states limit coverage to employees of state-funded programs or activities or contractors doing business with the state; others include the handicapped in state civil rights legislation covering race, religion, sex, and ethnic origin. Sanctions imposed for noncompliance with the statutes range from misdemeanor penalties to discontinuation of state funding.

178. 42 U.S.C. §§ 2000e to 2000e-17 (1970 & Supp. V 1975). Title VII provides in pertinent part:

It shall be an unlawful employment practice for any employer—

(1) to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin. . . .

Id. § 2000e-2(a)(1).

179. H.R. 1107, 95th Cong., 1st Sess., 123 CONG. REC. H209 (1977); H.R. 461, 95th Cong., 1st Sess., 123 CONG. REC. H193 (1977); H.R. 12,654, 93 Cong., 2d Sess., 120 CONG. REC. 2441 (1974); H.R. 13,199, 93d Cong., 2d Sess., 120 CONG. REC. 4976 (1974); H.R. 10,962 Cong., 1st Sess., 117 CONG. REC. 33,884 (1971).

180. See note 176 *supra*.

181. See 42 U.S.C. § 2000e-6(a) (Supp. V 1975). The remedies provided by Title VII include affirmative relief, back pay, preliminary injunctions, conciliatory relief, private actions, and damages. The statute also authorizes suits against a "pattern or practice" of discrimination, which "enables the [g]overnment to mount a coordinated attack on the largest or most

handicapped rights into Title VII is not practicable. The unique and complex nature of a handicapping condition necessitates treatment independent of Title VII.¹⁸² Separate treatment allows the development of legislative and administrative mechanisms adapted to the special needs of the disabled. This contention is supported by the critical distinction between the handicapped and the minorities protected by Title VII: a handicap may impose actual limitations on an individual's employability.¹⁸³ Cognizant of this distinction, sections 503 and 504 attempt to maximize the labor potential of the handicapped and to eliminate the discriminatory effects of prejudice and ignorance within valid physical, mental, and economic constraints. Therefore, the more feasible method of effectuating the employment rights of the handicapped is through reform and expansion of the protection afforded by the current Rehabilitation Act provisions, rather than through attempting to merge the disabled with civil rights legislation ill-equipped to respond to the special needs and problems of handicapped workers.

AN ADMINISTRATIVE PROPOSAL

Effective enforcement of the general standards established by the Rehabilitation Act would be furthered by the formation of an integrated advisory body at the federal level. The functions of this body would include research, publication, and recommendation. The creation of a coordinated council concerned solely with the employment opportunities of handicapped persons could provide informed guidance to employers and employees affected by the Act.

The research function would entail consultation with professionals, handicapped individuals, and employers regarding technology, industry patterns, and economic factors, as well as mental and

flagrant violators of Title VII." *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1229 (1971). Amendment of the Rehabilitation Act to provide for similar remedies would strengthen the enforcement of the Act's provision.

Employers, however, are less likely to intentionally violate the Rehabilitation Act. Rather, economic factors likely would encourage noncompliance.

The Title VII affirmative action requirements of goals, timetables, and workforce analysis are not repeated in the Rehabilitation Act. These requirements are more difficult to apply in the context of employment of handicapped individuals for the same reasons that inclusion of the disabled under Title VII coverage would prove problematic.

182. See note 133 *supra* & accompanying text.

183. See Wright, *supra* note 176, at 100-02.

physical characteristics of particular disabilities. In order to define such troublesome statutory terminology as "qualified handicapped individual," "job-related," or "reasonable accommodation" with any degree of specificity, empirical studies would have to be conducted in a systematic and categorical fashion. Potential areas of research concentration include (A) job analysis, (B) handicap analysis, (C) accommodation analysis, (D) job qualifications analysis, and (E) industry analysis. These areas then could be reduced to specific functions and related cost and technology factors. From this research, guidelines could be formulated for employers and employees. The following example demonstrates the operation and application of this analysis.

Job A is determined through research to consist of the essential functions x , y , z , w , & s :

- x = communication (oral, written, aural)
- y = mobility (walking)
- z = motor skills (fine motor, gross motor)
- w = specific job skills (typing)
- s = subjective factors (personality)

Handicap B is discovered to affect mobility (y) in the majority of cases.

The applicant with handicap B is a paraplegic confined to a wheelchair but possessing full use of all upper torso functions.

Accommodation C consists of the following modifications and expense:

- a) wheelchair / cost \$ x
- b) widened doors / cost \$ y
- c) ramps / cost \$ z
- d) bathroom facilities / cost \$ q

Job Qualifications D: The job tests and pre-employment inquiries used to evaluate an applicant's capacity to perform Job A consider:

- x = communication
- y = mobility
- z = motor

The qualifications may not evaluate functions other than those listed under Job A as essential; overbroad tests violate the provisions of the Act.¹⁸⁴

Industry Analysis E: Based upon empirical studies evaluating the size of the employer's business, type of operation, number of

184. See notes 69-70 *supra* & accompanying text.

employees, and annual profit, the reasonable budget allowable for accommodation for handicapped workers by Industry E is $\$R$.

Within each category (A-E), the input of professionals, handicapped individuals, and employers would be required to identify and quantify the various factors as accurately as possible.

In this example, an applicant possessing handicap B cannot perform the essential function y of Job A . If the cost of the accommodation C factors does not exceed $\$R$, however, the employer must make the accommodation necessary for handicap B ; if the cost of accommodation exceeds $\$R$, an undue hardship is imposed and no duty to accommodate arises. Job qualifications D must be limited to assessments of factors listed under A as essential to job performance. The threshold presumption that an applicant with handicap B cannot perform function y is rebuttable.

Research related to each of the above categories of analysis then would be published by the proposed advisory board and disseminated to employers and to government agencies concerned with rights of the handicapped. Finally, the advisory body would draft a recommended plan for voluntary, affirmative action hiring policies and procedures that state agencies could be encouraged to implement.

The proposed advisory body also might study and propose additional reforms, including (1) expansion of section 504 of the Rehabilitation Act to reach the remaining one-half of private employers, commensurate with the broad coverage provided under Title VII; (2) federal subsidy of the cost of accommodation exceeding the $\$R$ amount; or (3) an increase in tax exemptions allotted to employers accommodating handicapped workers. Moreover, establishment of the proposed advisory board generally would strengthen the enforcement, broaden the scope, and clarify the terminology of Rehabilitation Act provisions.

CONCLUSION

The right of qualified handicapped individuals to obtain employment free from discriminatory practices has been expanded by recent legislative and judicial action. The Rehabilitation Act of 1973 provides the primary vehicle for enforcement of these employment rights. The Act, however, suffers from generalized standards and

incomprehensive coverage. Modification of the Rehabilitation Act, rather than inclusion of the disabled under Title VII, is the appropriate remedy for these infirmities. Formation of a federal advisory board to research problems related to the employment of handicapped persons and to recommend solutions, expansion of section 504 to all private sector employers, and implementation of federal compensation and tax relief to employers who accommodate the handicapped would strengthen the enforcement provisions of the Act and clarify the statutory standards. Additional support for challenges to discriminatory employment practices may be drawn from the constitutional guarantees of equal protection and due process.

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