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NOTES

THE REHABILITATION ACT OF 1973: FOCUSING THE DEFINITION OF A HANDICAPPED INDIVIDUAL

In 1973, Congress passed the first major civil rights legislation for handicapped individuals—the Rehabilitation Act.¹ According to section 504 of the Act, “[n]o otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be . . . subjected to discrimination under any program or activity receiving Federal financial assistance.”² The statute defines a handicapped individual as a person who:

(i) has a physical or mental impairment which substantially limits one or more of such person’s major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.³

Section 504 raises two problems of interpretation. First, how should “handicapped individual” be defined? Second, what precisely constitutes “otherwise qualified”?

The second question has been the subject of numerous articles and much litigation.⁴ *Southeastern Community College v. Davis*,⁵ the first Supreme Court case involving the Rehabilitation Act, concerned the extent to which an employer was required to accommodate a handicapped individual. Commentators have proposed sug-

1. 29 U.S.C. §§ 701-96 (1982 & Supp. III 1985).

2. *Id.* § 794.

3. *Id.* § 706(8)(B).

4. See, e.g., Wegner, *The Antidiscrimination Model Reconsidered*, 69 CORNELL L. REV. 401 (1984); Note, *Employment Discrimination Against the Handicapped and Section 504 of the Rehabilitation Act: An Essay on Legal Evasiveness*, 97 HARV. L. REV. 997 (1984).

5. 442 U.S. 397 (1979).

gested guidelines, including cost-benefit analyses,⁶ for assessing the accommodation requirement.

In contrast, until recently, relatively few courts have addressed the preliminary question of what constitutes a handicap. Litigation involving section 504 often does not address the question because the employer stipulates that the plaintiff is handicapped.⁷ Indeed, fourteen years passed before the Supreme Court first addressed the fundamental issue of interpreting the definition of handicapped individual.⁸

Courts deciding the question of whether a plaintiff is "handicapped" have reached varied results. For example, courts have considered oversensitivity to cigarette smoke,⁹ transvestism,¹⁰ and contagious diseases¹¹ as handicaps. Yet individuals who are afraid of heights,¹² lefthanded,¹³ cross-eyed,¹⁴ or have cerebral palsy¹⁵ may not be handicapped. The line distinguishing the handicapped individual from others is, at best, blurred.¹⁶

6. Janis, *A Unified Theory for Section 504 Employment Discrimination Analysis: Equivalent Cost-Based Standards for "Otherwise Qualified" and "Reasonable Accommodation,"* 43 WASH. & LEE L. REV. 63 (1986).

7. See, e.g., *Strathie v. Department of Transp.*, 716 F.2d 227, 228 (3d Cir. 1983) (defendants agreed that plaintiff with hearing aid was handicapped); *Fitzgerald v. Green Valley Area Educ. Agency*, 589 F. Supp. 1130, 1132-33 (D. Iowa 1984) (employer conceded that plaintiff with hemiplegia, nocturnal epilepsy, and dyslexia was handicapped).

8. The Supreme Court first interpreted the definition of handicapped individual under the Rehabilitation Act in *School Bd. v. Arline*, 107 S. Ct. 1123 (1987). See *infra* text accompanying notes 96-102.

9. *Vickers v. Veterans Admin.*, 549 F. Supp. 85 (W.D. Wash. 1982).

10. *Blackwell v. United States Dep't of Treasury*, 639 F. Supp. 289 (D.D.C. 1986).

11. *School Bd. v. Arline*, 107 S. Ct. 1123 (1987).

12. *Forrisi v. Bowen*, 794 F.2d 931 (4th Cir. 1986).

13. *de la Torres v. Bolger*, 781 F.2d 1134 (5th Cir. 1986).

14. *Jasany v. United States Postal Serv.*, 755 F.2d 1244 (6th Cir. 1985).

15. *Pridemore v. Rural Legal Aid Soc'y*, 625 F. Supp. 1180 (S.D. Ohio 1985).

16. In the majority of cases brought under section 503 or 504, courts have determined or accepted that the following may be handicaps: tuberculosis (*School Bd. v. Arline*, 107 S. Ct. 1123 (1987)); blindness (*Norcross v. Sneed*, 573 F. Supp. 533 (W.D. Ark. 1983), *aff'd*, 755 F.2d 113 (8th Cir. 1985) (blind in one eye); *Nelson v. Thornburgh*, 567 F. Supp. 369 (E.D. Pa. 1983); *Gurmankin v. Costanzo*, 411 F. Supp. 982 (E.D. Pa. 1976), *aff'd*, 556 F.2d 184 (3d Cir. 1977), *appeal dismissed*, 614 F.2d 770 (3d Cir. 1980)); mental disorders (*Doe v. New York Univ.*, 666 F.2d 761 (2d Cir. 1981); *Carty v. Carlin*, 623 F. Supp. 1181 (D. Md. 1985) (manic depression); *Swann v. Walters*, 620 F. Supp. 741 (D.D.C. 1984) (paranoid schizophrenia)). But see *Guerriero v. Schultz*, 557 F. Supp. 511 (D.D.C. 1983) (foreign service officer's need for therapy was not a handicap); *Sisson v. Helms*, 751 F.2d 991 (9th Cir.), *cert. denied*, 474 U.S. 846 (1985); heart conditions (*Bento v. I.T.O. Corp.*, 599 F. Supp. 731

This Note analyzes the first question posed by section 504: How should a handicap be defined? The Note examines congressional intent, the regulations, and the courts' interpretations. The Note also analyzes particularly troublesome, unresolved issues in defining handicaps, including voluntary impairments, conditions that threaten danger to others, and the propensity for defining and interpreting "handicap" so expansively as to make it meaningless. The Note concludes by proposing a reasoned interpretation of the definition of handicapped. This proposed interpretation empha-

(D.R.I. 1984); *Smithberg v. Merico, Inc.*, 575 F. Supp. 80 (C.D. Cal. 1983); *Bey v. Bolger*, 540 F. Supp. 910 (E.D. Pa. 1982)); multiple sclerosis (*Pushkin v. Regents of the Univ. of Colo.*, 658 F.2d 1372 (10th Cir. 1981)); permanent osteoarthritis of knee (*Guinn v. Bolger*, 598 F. Supp. 196 (D.D.C. 1984)); epilepsy (*Kelley v. Bechtel Power Corp.*, 633 F. Supp. 927 (S.D. Fla. 1986); *Fitzgerald v. Green Valley Area Educ. Agency*, 589 F. Supp. 1130 (S.D. Iowa 1984)); dyslexia (*Fitzgerald v. Green Valley Area Educ. Agency*, 589 F. Supp. 1130 (S.D. Iowa 1984)); history of drug use (*Davis v. Bucher*, 451 F. Supp. 791 (E.D. Pa. 1978) (participants in methadone maintenance programs are handicapped individuals)); hypersensitivity to cigarette smoke (*Vickers v. Veterans Admin.*, 549 F. Supp. 85 (W.D. Wash. 1982). *But cf.* *GASP v. Mecklenburg County*, 42 N.C. App. 225, 256 S.E.2d 477 (1979) (nonsmokers harmed by cigarette smoke not handicapped as a matter of law under state law granting handicapped persons the right to full use of public facilities)); transvestism (*Blackwell v. United States Dept. of Treasury*, 639 F. Supp. 289 (D.D.C. 1986)); loss of index finger (*Smith v. United States Navy*, 573 F. Supp. 1361 (S.D. Fla. 1983)); alcoholism (*Simpson v. Reynolds Metals Co.*, 629 F.2d 1226 (7th Cir. 1980); *Tinch v. Walters*, 573 F. Supp. 346 (E.D. Tenn. 1983); *Davis v. Bucher*, 451 F. Supp. 791 (E.D. Pa. 1978)); congenital defects (*Bowen v. American Hosp. Ass'n*, 106 S. Ct. 2101 (1986)); paraplegic (*Simon v. St. Louis County*, 563 F. Supp. 76 (E.D. Mo. 1983)); loss of hearing (*Southeastern Community College v. Davis*, 442 U.S. 397 (1979); *Crane v. Lewis*, 551 F. Supp. 27 (D.D.C. 1982); *Doss v. General Motors Corp.*, 478 F. Supp. 139 (C.D. Ill. 1979)); and back abnormality (*E.E. Black, Ltd. v. Marshall*, 497 F. Supp. 1088 (D. Haw. 1980)).

Courts are less inclined to rule that a condition is *not* a handicap for purposes of section 504. For example, in *Tudyman v. United Airlines*, 608 F. Supp. 739, 745-46 (C.D. Cal. 1984), the court could find only one case in which a plaintiff was not handicapped. The case cited was *GASP v. Mecklenburg County*, 42 N.C. App. 225, 256 S.E.2d 477 (1979). Courts have found the following conditions not to be handicaps: excessive weight (*Tudyman v. United Airlines*, 608 F. Supp. 739 (C.D. Cal. 1984)); nonsmoking status (*GASP v. Mecklenburg County*, 42 N.C. App. 225, 256 S.E. 2d 477 (1979)); cerebral palsy discernible only by the use of sophisticated diagnosis equipment (*Pridemore v. Rural Legal Aid Society*, 625 F. Supp. 1180 (S.D. Ohio 1985)); lefthandedness (*de la Torres v. Bolger*, 781 F.2d 1134 (5th Cir. 1986)); strombosis (*Jasany v. United States Postal Serv.*, 755 F.2d 1244 (6th Cir. 1985)); knee injury (*Alderson v. Postmaster General*, 598 F. Supp. 49 (W.D. Okla. 1984) (sustained while fleeing from vicious dog when delivering mail)); visual impairment (*Padilla v. Topeka*, 238 Kan. 218, 708 P.2d 543 (1985) (vision with glasses was 20/20)); and acrophobia (*Forrisi v. Bowen*, 794 F.2d 931 (4th Cir. 1986)).

sizes the underlying policy of section 504, namely, providing protection against societal stigmas about handicapped individuals.

CONGRESSIONAL INTENT

Congress passed the Rehabilitation Act in 1973 to establish vocational rehabilitation services for handicapped individuals.¹⁷ The first three titles of the Act concern vocational rehabilitation services,¹⁸ research and training,¹⁹ and special federal responsibilities.²⁰ Title IV sets up the National Council on the Handicapped.²¹ The fifth title, simply called "Miscellaneous Provisions," includes four sections. Section 501²² prohibits discrimination against the handicapped by the federal government. Section 502²³ addresses the reduction of barriers to the mobility of handicapped individuals in public places. Section 503²⁴ forbids discrimination against the handicapped by government contractors. Finally, section 504,²⁵ the primary focus of this Note, forbids federally funded programs from discriminating against handicapped individuals.

The original definition in the 1973 Act described a handicapped individual as one who has "a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and [who] can reasonably be expected to benefit in terms of employability from vocational rehabilitation services provided pursuant to subchapters I and III of this chapter."²⁶ Evidently, Congress originally intended the definition to focus exclusively on employability. The proper scope of section 504 in the original act is unknown. The House and Senate Committee Re-

17. 29 U.S.C. §§ 701-796 (1982 & Supp. III 1985).

18. *Id.* §§ 720-751.

19. *Id.* §§ 760-762a.

20. *Id.* §§ 770-777f.

21. *Id.* §§ 780-785.

22. *Id.* § 791.

23. *Id.* § 792.

24. *Id.* § 793.

25. *Id.* § 794.

26. *Id.* § 706(7) (amended 1974).

ports concerning the Rehabilitation Act of 1973 include no mention of the breadth of section 504.²⁷

In 1974, Congress amended the Act and broadened the definition of handicapped individual under section 504.²⁸ According to the amended definition, a handicapped individual is a person who has a physical or mental impairment which substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.²⁹ A legislative history accompanied the new definition of section 504.³⁰ The history emphasized that the definition of handicapped individual was not limited to employment or to the individual's potential benefit from vocational rehabilitation services under titles I and III of the Act.³¹ Rather, Congress intended to establish a "broad government policy that programs receiving Federal financial assistance shall be operated without discrimination on the basis of handicap."³²

Congress passed a second amendment to the definition in 1978.³³ For purposes of sections 503 and 504, the amended definition of "handicapped individual" excludes

any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others.³⁴

27. See H.R. REP. NO. 93-244, 93d Cong., 1st Sess. (1973); H.R. REP. NO. 93-500, 93d Cong., 1st Sess., *reprinted in* 1973 U.S. CODE CONG. & ADMIN. NEWS 2076, 2143; S. REP. NO. 93-318, 93d Cong., 1st Sess., *reprinted in* 1973 U.S. CODE CONG. & ADMIN. NEWS 2076, 2076.

28. 29 U.S.C. § 706(7)(B) (1982).

29. *Id.*

30. S. REP. NO. 93-1297, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 6373.

31. *Id.* at 6388.

32. *Id.* at 6390.

33. Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, § 122(a)(6), 92 Stat. 2955, 2984-85 (codified at 29 U.S.C. § 706(8)(B) (1982)).

34. 29 U.S.C. § 706(7)(B) (1982).

THE REGULATIONS

The Department of Health, Education, and Welfare, instructed by Congress to implement regulations,³⁵ had an unusually difficult job.³⁶ The Act offered no guidelines about what constituted unlawful discrimination. Although the legislative history of the 1974 amendments offered some guidance in clarifying the intended scope of section 504, important decisions remained for the Department. Specifically, the Department had two formidable tasks: defining "handicapped individual" more precisely to supplement the statute's definition and deciding whether drug and alcohol addicts, poor people, elderly people, and homosexuals should be included as handicapped individuals.³⁷ Consequently, the HEW took three years to promulgate section 504 regulations.³⁸

In the final regulations, the Department defines "physical impairment" as follows: "Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine"³⁹ A "mental impairment" is "any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities."⁴⁰ Finally, the regulations define "a major life activity" as "functions such as caring for one's self, performing manual tasks,

35. S. REP. NO. 93-1297, 93d Cong., 2d Sess., reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 6373, 6391. Congress emphasized the importance of consistent agency regulations. Congress delegated responsibility to the Department of Health, Education, and Welfare to coordinate section 504 regulations because of the Department's experience with problems of handicapped people and other types of discrimination. *Id.*

36. See generally R. SCOTCH, FROM GOOD WILL TO CIVIL RIGHTS 60-120 (1984) (description of HEW's efforts in writing the section 504 regulations); Engebretson, *Administrative Action to End Discrimination Based on Handicap: HEW's Section 504 Regulation*, 16 HARV. J. ON LEGIS. 59 (1979) (examination of the drafting of regulations under section 504).

37. R. SCOTCH, *supra* note 36, at 59.

38. In 1974, Congress urged HEW to complete section 504 regulations before the end of 1974. "Delay beyond this point would be most unfortunate since the Act . . . was enacted over one year ago" S. REP. NO. 93-1297, 93d Cong., 2d Sess., reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 6373, 6391.

39. 45 C.F.R. § 84.3(j)(2)(i)(A) (1987).

40. *Id.* § 84.3(j)(2)(i)(B).

walking, seeing, hearing, speaking, breathing, learning, and working.”⁴¹

The appendix to the regulations clarifies the meaning of “handicapped” under the Act.⁴² The appendix analyzes the three parts of the statutory and regulatory definition. The first part includes individuals who, in fact, have physical or mental impairments that substantially limit one or more major life activities. In developing this definition, the Department did not list all mental or physical impairments covered by the Act “because of the difficulty of ensuring the comprehensiveness of any such list.”⁴³

The appendix states next that an impairment is not a handicap unless it substantially limits one or more major life activities. The Department offered no insight when it defined the phrase “substantially limits,” however, noting that “a definition of this term [was] [not] possible at [that] time.”⁴⁴ The Department also examined whether the definition of handicapped was unreasonably broad.⁴⁵ A number of comments suggested that the Act cover only “traditional” handicaps.⁴⁶ The Department rejected this definition because it did not allow for the appropriate flexibility. Nevertheless, the Department stated that it would direct its enforcement efforts against discrimination toward people with “severe handicaps that were the focus of concern in the Rehabilitation Act of 1973.”⁴⁷

Next, the Department stressed that the definition of handicapped applies only to physical and mental handicaps. This characterization specifically excludes environmental, cultural, and economic disadvantage, as well as prison records, age, or homosex-

41. *Id.* § 84.3(j)(2)(ii).

42. *Id.* pt. 84, app. A at 344.

43. *Id.* The appendix lists some examples of diseases and conditions covered by the Act: “orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and . . . drug addiction and alcoholism.” *Id.*

44. *Id.* at 345.

45. *Id.*

46. *Id.*

47. *Id.*

uality.⁴⁸ The Department also clarified its intention that physical and mental impairments include specific learning disabilities.⁴⁹

Part two of the statutory and regulatory definition includes people with a record of an impairment. This part was intended to apply to people with a history of a handicapping condition, as well as to people who have been inappropriately classified as having such a condition. Examples of this classification include people "with histories of mental or emotional illness, heart disease, or cancer," or "persons who have been misclassified as mentally retarded."⁵⁰

The third part of the definition includes "any person who is regarded as having a physical or mental impairment that substantially limits one or more major life activities."⁵¹ The appendix gives examples of this category as people with limbs, disfiguring scars, and people who are treated as if they were handicapped.⁵²

In formulating the regulatory definition, the Department addressed the issue of drug abusers and alcoholics. Many of the comments advocated excluding drug abusers and alcoholics from the act altogether.⁵³ However, the Department relied on a legal opinion from the Attorney General stating that drug addiction and alcoholism constituted "physical or mental impairments."⁵⁴ Accordingly, drug abusers and alcoholics are handicapped if the impairment substantially limits one or more of their major life activities. The Attorney General's opinion, coupled with "a medical and legal consensus that alcoholism and drug addiction are diseases,"⁵⁵ convinced the Department to classify drug abusers and alcoholics as handicapped individuals. This classification means that an employer may consider alcoholism and drug abuse under the second issue—determining whether the individual is "otherwise qualified."

48. *Id.* The Department noted that the regulations would include as "handicapped" a person with any of the excluded characteristics who also had a physical or mental impairment. *Id.*

49. *Id.* Specific learning disabilities, defined by section 602 of the Education of the Handicapped Act, include "perceptual handicaps, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia." *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

Consequently, if the employer shows that the addiction or alcoholism prevents adequate job performance, he has the right to refuse to hire the handicapped individual.⁵⁶

INTERPRETATION BY THE COURTS

E.E. Black, Ltd. v. Marshall

The United States District Court for the District of Hawaii was the first court to analyze thoroughly the question of what constitutes a handicap. In *E.E. Black, Ltd. v. Marshall*,⁵⁷ an employer brought suit under section 503 of the Rehabilitation Act. Section 503 requires government contractors to "take affirmative action to employ and advance in employment qualified handicapped individuals."⁵⁸ Because "handicapped" is defined identically in sections 503 and 504,⁵⁹ the interpretation of the Hawaii court is relevant.

George Crosby applied to work as an apprentice carpenter for E.E. Black, Ltd. ("Black"), a general construction contractor. A pre-employment physical required by Black revealed that Crosby had a partially sacralized transitional vertebra, a congenital back anomaly. Black refused to hire Crosby based on the diagnosis.⁶⁰

Crosby filed a complaint alleging that Black had refused to hire him because of the back abnormality.⁶¹ After an investigation, the United States Department of Labor issued a complaint charging Black with violation of section 503 of the Rehabilitation Act.⁶² The administrative law judge found that Crosby had an impairment but one that did not substantially limit a major life activity.⁶³ The judge stated that to prove a substantial limitation, the impairment

56. *Id.* at 346.

57. 497 F. Supp. 1088 (D. Haw. 1980).

58. 29 U.S.C. § 793 (1982).

59. The definition of handicapped individual given in 29 U.S.C. § 706(6) (1982) applies to §§ 503 and 504. 29 U.S.C. § 706(6)(B) (1982).

60. 497 F. Supp. at 1091. A second physician examined Crosby several weeks later and concluded that Crosby's condition would not hinder his performance as an apprentice carpenter. *Id.* at 1091-92. Although Black received a letter including the recommendation of the second physician, Crosby was not hired. *Id.* at 1092.

61. *Id.* Crosby filed with the State of Hawaii Department of Labor, which referred his complaint to the United States Department of Labor. *Id.*

62. *Id.*

63. *Id.* at 1093.

must have "impeded activities relevant to many or most jobs."⁶⁴ Crosby, therefore, was not a handicapped individual for the purposes of section 503.⁶⁵

The Department of Labor appealed to the Assistant Secretary of Labor.⁶⁶ The Assistant Secretary found the requirement that the impairment "impede activities relevant to many or most jobs" too narrow. Rather, a plaintiff must only prove that the impairment excluded the type of employment that the individual "[was] currently capable of performing."⁶⁷ Because the impairment prevented Crosby from working for the employer he desired, Crosby qualified as a handicapped individual under section 503.⁶⁸

Black filed for judicial review of the Assistant Secretary's decision.⁶⁹ The district court concluded that an "impairment" was "any condition which weakens, diminishes, restricts, or otherwise damages an individual's health or physical or mental activity."⁷⁰ Emphasizing that Congress intended a broad definition, the court denied Black's challenge that the statute was unconstitutionally vague.⁷¹

The court then considered the appropriate definition of "substantially limited." The court believed the administrative law judge's interpretation too restrictive because it failed to consider the particular individual.⁷² On the other hand, the court found the Assistant Secretary's interpretation too broad. By failing to adequately stress the word "substantial," the Assistant Secretary's interpretation potentially defined a handicap as any disqualification for *one* job.⁷³ The court declined to focus on the impairment in the abstract, but instead emphasized the individual job seeker: "This necessitates a case-by-case determination of whether the impairment or perceived impairment of a rejected, qualified job seeker, constitutes, for that individual, a substantial handicap to employ-

64. *Id.* at 1094.

65. *Id.* at 1093.

66. *Id.* at 1094.

67. *Id.*

68. *Id.* at 1095.

69. *Id.* at 1095-96.

70. *Id.* at 1098.

71. *Id.*

72. *Id.* at 1099.

73. *Id.*

ment.”⁷⁴ The criteria for a case-by-case determination included the number and types of jobs from which the impaired individual was disqualified, the geographical area to which the applicant had reasonable access, and the individual’s job expectations and training.⁷⁵

The court next applied its standards to the facts. First, Crosby was indeed impaired. Black perceived that Crosby’s back problem “weakened, diminished, and restricted [his] physical activity.”⁷⁶ Second, the impairment substantially limited a major life activity. Crosby’s goal was to become a journeyman, which required numerous hours of carpentry practice. The court presumed that all employers offering the same job would use the same requirement. Crosby would therefore be substantially limited in his goal of becoming a journeyman. Thus, the disqualification from the job with Black constituted a substantial handicap generally to the type of employment sought by Crosby.⁷⁷

Tudyman v. United Airlines

In *Tudyman v. United Airlines*,⁷⁸ the United States District Court for the Central District of California was the next court to analyze at any length the definition of handicapped. Tudyman applied to United Airlines for a job as a flight attendant. United Airlines rejected him because he weighed fifteen pounds more than the maximum weight allowed for a man of his height. His excess weight was due to a body-building program. United Airlines moved for summary judgment because, inter alia, Tudyman was not a handicapped individual for the purposes of section 504. The court agreed.⁷⁹

Tudyman argued that the maximum weight requirements substantially limited a major life activity, namely, his ability to be employed by United Airlines.⁸⁰ The court acknowledged that the regulations include “work” as a major life activity. Furthermore, the court stressed that the definition should not be applied so narrowly

74. *Id.* at 1100.

75. *Id.* at 1100-01.

76. *Id.* at 1102 (emphasis omitted).

77. *Id.*

78. 608 F. Supp. 739 (C.D. Cal. 1984).

79. *Id.* at 740-41.

80. *Id.* at 744-45.

as to require that an employee be excluded from *all* employment in order to prove that the impairment substantially limited a major life activity.⁸¹ Nevertheless, the court rejected the plaintiff's argument that the inability to be hired by one employer is sufficient to prove that an impairment has substantially limited a major life activity. "A person who exceeded the maximum weight for a United flight attendant because he is an avid body builder is not limited in a major life activity—he is only prevented from having a single job."⁸²

The court also considered the cause of Tudyman's alleged impairment. His extra weight was not the result of a disorder mentioned in the regulations, but was a voluntary condition. The court distinguished between a self-initiated body-building program and an involuntary weight problem, and explained that section 504 did not protect voluntary impairments.⁸³

The court thus held that, as a matter of law, Tudyman's weight did not qualify as a handicap under section 504. Tudyman did not have a physical impairment, was not substantially limited in a major life activity, and was not perceived as such. If any person who fails to meet a job qualification is classified as a handicapped individual, the court reasoned, the term "handicapped" would become "a meaningless phrase."⁸⁴

Jasany v. United States Postal Service

The United States Court of Appeals for the Sixth Circuit faced the same issue of defining a "handicapped individual" in *Jasany v. United States Postal Service*.⁸⁵ Jasany, a postal worker who suffered from a mild case of strabismus, or crossed eyes,⁸⁶ filed a complaint alleging that the Postal Service fired him because he was handicapped.

As an employee for the Postal Service, Jasany operated a mail sorting machine. Jasany developed eye strain, headaches, and ex-

81. *Id.*

82. *Id.* at 746.

83. *Id.* See *infra* text accompanying notes 112-25 (related discussion of voluntariness as a factor in defining handicaps).

84. 608 F. Supp. at 746.

85. 755 F.2d 1244 (6th Cir. 1985).

86. *Id.* at 1247.

cessive tearing. A doctor attributed these symptoms to the combination of the visual work required to operate the machine and the strabismus. Jasany refused to operate the machine and was fired.⁸⁷

The district court held that, although Jasany was a handicapped individual, he nevertheless was not a "qualified handicapped individual."⁸⁸ Jasany appealed, arguing that section 504 required the Postal Service to make reasonable accommodations.⁸⁹

The court of appeals disagreed with the district court's finding that Jasany was a handicapped individual for the purposes of section 504.⁹⁰ The district court held that, because the strabismus impaired Jasany's ability to work on the machine, the impairment substantially limited a major life activity, namely, work.⁹¹ The Sixth Circuit rejected this conclusion, applying the *E.E. Black, Ltd. v. Marshall*⁹² logic that "an impairment that interfered with an individual's ability to do a particular job, but did not significantly decrease that individual's ability to obtain satisfactory employment otherwise, was not *substantially* limiting within the meaning of the statute."⁹³ Because Jasany's condition affected only his ability to operate the sorting machine, it did not substantially limit his ability to be employed generally. Jasany therefore failed to show that he was a handicapped individual for the purposes of the Act.⁹⁴

The court of appeals in *Jasany* also outlined the proper burden of proof in similar cases. Under section 504, the plaintiff has the burden of establishing a *prima facie* case by proving the existence of an impairment that substantially limits a major life activity. Once a *prima facie* case is presented, the defendant bears the burden of proof to demonstrate that reasonable accommodation is not

87. *Id.* Because Jasany refused to operate the machine, his supervisor ordered him to take a Fitness for Duty Examination. The results of the examination disqualified him for future employment as a machine operator.

88. *Id.* at 1248.

89. *Id.* at 1251.

90. *Id.* at 1250.

91. *Id.* at 1248.

92. 497 F. Supp. 1088 (D. Haw. 1980). See *supra* notes 57-77 and accompanying text.

93. *Tudymen*, 608 F. Supp. at 1248.

94. *Id.* at 1250. The court noted that both before his eye strain and after his firing, Jasany was active in school, work, sports, and "all other normal daily activities of every kind whatsoever without limitation." *Id.* at 1247.

feasible. Thus, a court need not address the second issue of reasonable accommodation unless the plaintiff has established a prima facie case that he is a handicapped individual.⁹⁵

School Board v. Arline

A recent United States Supreme Court case involving a Rehabilitation Act issue was *School Board v. Arline*.⁹⁶ In *Arline*, the Supreme Court first addressed the issue of what constitutes a "handicapped individual" under section 504.⁹⁷ The issue in *Arline* was whether a teacher with tuberculosis was a handicapped individual under section 504.⁹⁸ The school board argued that, although a contagious disease may be an impairment, Arline was not dismissed because she was impaired but because the tuberculosis threatened the health of others.⁹⁹ Rejecting the school board's distinction between the contagious effects of a disease and the disease's physical effects on a claimant, the Court held that tuberculosis was a handicap.¹⁰⁰

The Court first concluded that because tuberculosis is a physiological condition affecting the respiratory system, Arline had a physical impairment as defined by the federal regulations. In addition, because Arline was hospitalized for the tuberculosis, the impairment substantially limited one or more life activities, as re-

95. *Id.* at 1249-50.

96. 107 S. Ct. 1123 (1987).

97. *Arline* was the fourth case involving the Rehabilitation Act before the Supreme Court. The first case was *Southeastern Community College v. Davis*, 442 U.S. 397 (1979), which involved the second question posed by section 504: what constitutes reasonable accommodation? The plaintiff's handicap was undisputed. *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624 (1984), was the second Supreme Court case involving the Rehabilitation Act. The issue was whether the Act created a private right of action. *Alexander v. Choate*, 469 U.S. 287 (1985), the third Supreme Court case involving the Act, also addressed the duty of an employer to modify a program to accommodate people with handicaps.

In 1988, the Supreme Court decided *Traynor v. Turnage*, 108 S. Ct. 1372 (1988), a case of more limited significance. One issue in *Traynor* was whether a Veterans Administration regulation, which classified alcoholism as "willful misconduct" for purposes of granting extensions of a limitation period for benefits, violated section 504 of the Rehabilitation Act. In a narrow holding, the Court concluded that the Veterans Administration's definition did not violate section 504. *Id.* at 1383.

98. *Arline*, 107 S. Ct. at 1125.

99. *Id.* at 1130 & n.6.

100. *Id.* at 1128.

quired by the regulations.¹⁰¹ Thus, the Court held that Arline was a handicapped individual for purposes of section 504.¹⁰²

UNRESOLVED ISSUES

E.E. Black, Ltd. v. Marshall,¹⁰³ *Tudyman v. United Airlines*,¹⁰⁴ and *Jasany v. United States Postal Service*,¹⁰⁵ sensibly sought to interpret "substantially limits a major life activity" to strike a balance between requiring only disqualification from *one* job, at one extreme, and requiring disqualification for *all* jobs, at the other extreme. *E.E. Black, Ltd.* offered the most useful standard by listing factors to consider in a case-by-case determination of the plaintiff's employment circumstances.¹⁰⁶ *School Board v. Arline*¹⁰⁷ analyzed another issue: whether the definition of handicapped included contagious disease. Significantly, the Court adopted an expansive definition of handicapped individual.¹⁰⁸

Despite the insights provided by these four cases for interpreting "handicapped individual," many unresolved questions remain. Some of the more troublesome issues still unanswered include the voluntary nature of a condition,¹⁰⁹ the threat a condition may pose to others,¹¹⁰ and the problem caused by defining "work" as a major life activity (the bootstrap problem).¹¹¹

These three problems, which the next sections of this Note discuss, reflect an underlying tension: what is the proper balance between the clear intent of Congress for a broad interpretation of section 504, on the one hand, and the necessity to impose some categorical limits on the definition of "handicapped individual," on the other hand. Courts have struggled to achieve a reasonable balance by drawing the line to distinguish voluntary from involuntary

101. *Id.* at 1127.

102. *Id.*

103. 497 F. Supp. 1088 (D. Haw. 1980).

104. 608 F. Supp. 739 (C.D. Cal. 1984).

105. 755 F.2d 1244 (6th Cir. 1985).

106. 497 F. Supp. at 1100-01.

107. 107 S. Ct. 1123 (1987).

108. *Id.* at 1127.

109. See, e.g., *Tudyman*, 608 F. Supp. at 746.

110. See, e.g., *Arline*, 107 S. Ct. at 1128-30.

111. See, e.g., *Tudyman*, 608 F. Supp. at 746; *E.E. Black, Ltd. v. Marshall*, 497 F. Supp. 1088, 1099 (D. Haw. 1980).

conditions, by excluding conditions that threaten danger to other people, or by including conditions that prevent a person from being hired by a particular employer. These three distinctions, though superficially appealing, are not satisfactory as fixed rules for defining a "handicapped individual."

Voluntary Conditions as Handicaps

Should a line be drawn between voluntary and involuntary conditions? In *Tudyman v. United Airlines*, the court interpreted the issue of the voluntariness of a condition as relevant to what constitutes a handicap.¹¹² The court cited *Davis v. Bucher*¹¹³ for the proposition that drug abuse was a voluntary condition. The court in *Davis* held that drug abuse constituted a handicap under section 504 based on HEW's analysis of the issue.¹¹⁴ *Tudyman* suggests that the court in *Davis* would have used voluntariness as a factor to show that a condition was not a handicap if the Department had not expressly categorized drug abuse as a handicap.¹¹⁵

The court next cited *Vickers v. Veterans Administration*¹¹⁶ as authority for using voluntariness as a factor. In *Vickers*, the court held that an employer was not unlawfully discriminating against an employee who was oversensitive to cigarette smoke because the employer made a reasonable effort to accommodate this handicap.¹¹⁷ One significant fact in *Vickers* was that the employee did not take action to prevent the problem. The employee could have closed a door or moved his desk to reduce his exposure to smoke.¹¹⁸

The court in *Tudyman* improperly interpreted *Vickers* as support for using the voluntary nature of a condition as an element negating the finding of a handicap.¹¹⁹ In *Vickers*, the factor of voluntariness was relevant only to the issue of whether the employer had reasonably accommodated the employee. Significantly, the vol-

112. 608 F. Supp. at 746.

113. 451 F. Supp. 791 (E.D. Pa. 1978).

114. *Id.* at 796.

115. *See Tudyman*, 608 F. Supp. at 746.

116. 549 F. Supp. 85 (W.D. Wash. 1982).

117. *Id.* at 87, 89. The court in *Vickers* declined to decide whether the Veterans Administration had a duty to the plaintiff.

118. *Id.* at 89-90.

119. *Tudyman*, 608 F. Supp. at 746.

untary nature of the plaintiff's condition was *not* used to determine whether he was "handicapped."¹²⁰ Furthermore, moving a desk or closing a door were means by which the plaintiff could mitigate the effects of the handicap, *not* indications that the plaintiff voluntarily chose to be oversensitive to cigarette smoke. Accordingly, the court's use of *Vickers* as support for the use of voluntariness as a factor in defining a handicap was wholly misplaced.

In an attempt to justify a distinction based on the voluntariness of a condition, the court in *Tudyman* made a weak final argument. Congress amended the Act in 1978 to exclude certain drug and alcohol abusers.¹²¹ The amendment reflects congressional intent to exclude alcoholics and drug abusers who either cannot perform the duties of the job or threaten property or the safety of others. Based on the clear language of the statute, therefore, the distinction is between alcoholics and drug abusers who are able to perform the job and pose no danger to others, on the one hand, and those unable to perform who do pose a danger, on the other hand.

The court, however, interpreted the amendment as distinguishing between voluntary and involuntary impairments: "The 1978 amendment to the Act gives additional indication that § 504 was not intended to protect those with voluntary 'impairments' from employment discrimination as it specifically excepted some present drug and alcohol abusers from the definition of handicapped individual."¹²² The conclusion reached by the court is clearly incorrect. Not all alcoholics or drug abusers who can perform a job and pose no threat of danger, and thus are protected by section 504, are involuntary abusers. Conversely, not all alcoholics or drug abusers who cannot perform a job and do pose a threat are suffering from a voluntary condition.

The statutory language does not suggest that those with voluntary impairments are unprotected by the Act. Such a distinction is artificial. For example, although an addiction may cause involuntary conduct, an addict has the option of voluntarily seeking help. The first drink for an alcoholic may be voluntary, the remaining

120. Rather, the fact was significant in the court's discussion of whether the plaintiff was otherwise qualified. See *Vickers*, 549 F. Supp. at 89-90.

121. 29 U.S.C. § 706(7)(B) (1982). See *supra* text accompanying note 34.

122. *Tudyman*, 608 F. Supp. at 746.

drinks involuntary. Another example is a person afflicted with AIDS. The sexual conduct may have been voluntary, but the resulting disease involuntary.

These examples illustrate the difficulties posed by a categorical exception for "voluntary" handicaps. Such an exception is unsatisfactory for several reasons. First, some handicaps that may at first be labeled "voluntary" may not after greater scrutiny be voluntary at all. Obesity and alcoholism may ostensibly be within the individual's power to control. Yet experts regard some forms of alcoholism¹²³ and obesity¹²⁴ as diseases over which the individual has little control.

Second, handicaps that ostensibly seem "involuntary" may indeed be within an individual's control.¹²⁵ For example, epilepsy is an involuntary handicap, but an individual can control the disease with medicine. If a person refuses to take medicine, the handicap is arguably not involuntary, but self-imposed.

Handicaps that Threaten Danger to Others

Another troublesome issue involves impairments that threaten danger to others. Did Congress intend for dangerous conditions to be classified as handicaps? Congress amended the Act in 1978 to exclude from the definition of "handicapped individual" drug

123. Thomas Seessel, executive director of the National Council on Alcoholism, maintains that "to say alcoholism is voluntary is to stand the definition on its head, because alcoholism is an addiction, a loss of control." Neal, *Is Alcoholism a Disease?*, 74 A.B.A.J. 58, 62 (Feb. 1988). In *Traynor v. Turnage*, the Supreme Court held that a conclusive presumption that all alcoholism not motivated by mental illness is willful is not inconsistent with section 504. 108 S. Ct. 1372, 1383 (1988). In supporting its argument, the Court noted authority contesting the classification of alcoholism as a disease. Even if alcoholism is a disease, the Court suggested the disease may be willful: "[E]ven among many who consider alcoholism a 'disease' to which its victims are genetically predisposed, the consumption of alcohol is not regarded as wholly involuntary." *Id.*

124. See Bierman, *Obesity*, in CECIL TEXTBOOK OF MEDICINE 1372-79 (L. Smith & J. Wyngaarden, eds. 1982); see generally Comment, *The Rehabilitation Act Of 1973: Protection for Victims Of Weight Discrimination?* 29 UCLA L. REV. 947 (1982) (exploring obesity as a handicap under the Act).

125. "Individuals suffering from a wide range of disabilities, including heart and lung disease and diabetes, usually bear some responsibility for their conditions. And the conduct that can lead to this array of disabilities, particularly dietary and smoking habits, is certainly no less voluntary than the consumption of alcohol." *Traynor v. Turnage*, 108 S. Ct. 1372, 1391 (1988) (Blackmun, J., dissenting).

abusers and alcoholics who threaten danger to others or property.¹²⁶ Yet, classification of all alcoholics and drug abusers as handicapped individuals makes more sense analytically. Alcoholics who are unable to keep a job surely have an impairment which substantially limits a major life activity. An employer has the right not to hire the category of alcoholics and drug abusers who would be unable to perform the job or would pose a threat, not because they are unprotected by anti-discrimination legislation, but because they are not "otherwise qualified." Indeed, the regulations adopt this interpretation.¹²⁷

The statutory definition, then, puts the burden of proof on the employer to show that an alcoholic or drug abuser is otherwise qualified only if the individual can perform the duties of the job and does not threaten others. If the alcoholic or drug abuser cannot perform the duties or poses a threat, no prima facie case can be made that he is even handicapped. Under no circumstances would the employer have the burden of proof for this category of individual.

Although such a result may be desirable from an employer's perspective, the reasoning is unsound. Surely, dangerous abusers are at least as handicapped as non-dangerous abusers if their impairment substantially affects a major life activity. Accordingly, the more logical way to exclude dangerous abusers is to emphasize that they are not "otherwise qualified."

The 1978 amendment demonstrates Congress's concern for protecting the safety of other employees and the property of the employers. A similar concern of the School Board of Nassau County, Florida led to the *Arline* litigation. The school board argued that a contagious disease was not a handicap because it threatened the

126. 29 U.S.C. § 706(7)(B) (1982). The legislative history indicates that the 1978 amendment was meant to "exclude alcoholics and drug abusers in need of rehabilitation from the definition of 'handicapped individual.'" H. R. REP. NO. 1149, 95th Cong., 2d Sess., reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 7312, 7333-34.

127. In the appendix to the HHS regulations, the agency includes drug addicts and alcoholics within the definition of handicapped individuals. The concern about alcoholics and addicts that cannot perform the job and pose a danger to others is consumed under the "otherwise qualified" issue. "[W]hile an alcoholic or drug addict may not be denied services or disqualified from employment solely because of his or her condition, the behavioral manifestations of the condition may be taken into account in determining whether he or she is qualified." 45 C.F.R. pt. 84, app. A at 346 (1987).

health of others.¹²⁸ The Supreme Court disagreed: "It would be unfair to allow an employer to seize upon the distinction between the effects of a disease on others and the effects of a disease on a patient and use that distinction to justify discriminatory treatment."¹²⁹

The Court therefore properly rejected a categorical exclusion of all contagious diseases from the Act's definition of handicapped individual. Rather, if an individual with a contagious disease has an impairment that substantially limits a major life activity, he or she is handicapped.¹³⁰

The primary question in the case of an individual with a contagious disease is whether the individual is "otherwise qualified." Courts must determine the extent to which an employer must "reasonably accommodate" the individual. Indeed, after determining that a person with a contagious disease could be a handicapped individual under section 504, the Supreme Court remanded the case to the district court to decide if Arline was "otherwise qualified."¹³¹

The *Arline* reasoning should be the guide for analysis of all handicaps that may threaten danger to others. Denying protection to a person with an impairment that substantially limits one or more major life activities because the condition may threaten others results in adding a third prong to the statutory definition: (1) an impairment (2) that substantially limits a major life activity (3) but does not threaten the danger of others or property.

The addition of this third prong is exactly what Congress did with respect to drug abusers and alcoholics in the 1978 amendment. Public policy, however, favors the right of an employer to refuse to hire dangerous individuals because the individual cannot perform the job, *not* because the dangerous individual is not "handicapped." Viewing the danger-to-others question as an otherwise qualified issue, then, rather than adding a third prong limiting the definition of handicap, makes more sense.

128. *School Bd. v. Arline*, 107 S. Ct. 1123, 1128 (1987).

129. *Id.*

130. *Id.* at 1129-30.

131. *See id.* at 1130-32.

A person posing a significant risk of spreading a contagious disease will likely not be otherwise qualified for a job. The result for the plaintiff would be the same as if the limitation were part of the definition of handicapped. Yet, the burden of proof would be distributed in a way that is more consistent with the intent of the Act. If the person with a contagious disease showed that he was handicapped, the employer would have to prove that it would not be feasible to accommodate the individual. Although seemingly harsh from the employer's perspective, denying the "handicapped" classification to an employee who may pose a risk to others undermines a fundamental purpose of the Act—preventing stigmas about handicaps. To force an employee with AIDS, for example, to prove that he poses no threat to others in order to even make a *prima facie* case that he is handicapped flies in the face of the policy behind section 504. As *Arline* makes clear:

Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment. Few aspects of a handicap give rise to the same level of public fear and misapprehension as contagiousness. . . . The Act is carefully structured to replace such reflexive reactions . . . with actions based on reasoned and medically sound judgments.¹³²

If a person with an impairment that substantially limits a major life activity is not hired due to a putative threat of danger to others, the employer should bear the burden of showing the threat.

The Bootstrap Dilemma

A third troublesome issue is posed by the definition of "major life activities." According to the regulations, major life activities "means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."¹³³ Arguably, if an employer fired or refused to hire the plaintiff based on an impairment, such an impairment, by definition, substantially limited a major life activity—the ability to work

132. *Id.* at 1129.

133. 45 C.F.R. § 84.3(j)(2)(ii) (1987).

for that employer. Any impairment, therefore, that is the basis of adverse action by an employer, is a handicap.

Courts have commented about this bootstrapping problem. In *Tudyman v. United Airlines*, for example, the court cautioned that if the failure to qualify for a job constitutes a limitation on a major life activity, then "anyone who failed to obtain a job because of a single requirement which may not be essential to the job would become a handicapped individual because the employer would thus be viewing the applicant's failure as a handicap."¹³⁴ The court noted that such an interpretation would make the term handicapped "a meaningless phrase."¹³⁵

The United States Court of Appeals for the Fourth Circuit noted the same problem in *Forrisi v. Bowen*.¹³⁶ An employee suffering from acrophobia argued that he was fired in violation of section 504.¹³⁷ The court warned against classifying the employee as a handicapped individual solely on the grounds that he could not perform the duties of a particular job. Although his impairment obviously limited a major life activity, the plaintiff could not prevail simply because his acrophobia limited—indeed, halted—his ability to work for the employer who fired him.¹³⁸

In oral argument before the Supreme Court in *School Board v. Arline*,¹³⁹ the Solicitor General pointed out the problem, which he labeled as a "circular argument which lifts itself by its bootstraps."¹⁴⁰ Writing for the Court, Justice Brennan dismissed the argument in a footnote: "Congress plainly intended the Act to cover persons with a physical or mental impairment (whether actual, past, or perceived) that substantially limited one's ability to work."¹⁴¹

Brennan's retort to the bootstrap morass hardly solves the problem. The dispute is not whether Congress intended the Act to cover impaired individuals who were limited in their ability to

134. *Tudyman*, 608 F. Supp. at 746.

135. *Id.*

136. 794 F.2d 931 (4th Cir. 1986).

137. *Id.* at 933.

138. *Id.* at 934-35.

139. 107 S. Ct. 1123 (1987).

140. *Id.* at 1129 n.10.

141. *Id.*

work. The issue instead is whether an individual who loses a job opportunity because he cannot meet a particular demand of the job is, by definition, impaired and thus handicapped.

*E.E. Black, Ltd. v. Marshall*¹⁴² posed a solution to the problem. "Work" constitutes a major life activity, but work must be carefully defined. If a court construes "work" as one particular job, the statute would be too broad.¹⁴³ If this definition were accepted, the Act could cover a waitress offered a job in nine restaurants but excluded from a tenth because of her allergy to food at the tenth. On the other hand, if work was defined as employability generally, the statute would be too narrow.¹⁴⁴ The Act would unfairly exclude from its protection an attorney who was not hired by a law firm because of an impairment, but who could be hired to be a taxi driver or a nurse.

The compromise explained in *Black* defined work as employment appropriate for an individual. An analysis of whether a person's impairment constitutes a substantial limitation to employment for that individual requires a case-by-case determination. The court suggested a list of factors that should be examined to make a fair judgment.¹⁴⁵ First, a court should consider the number and types of jobs from which the impaired individual is disqualified.¹⁴⁶ Assuming that employers of similar jobs require the same qualifications as the defendant, a court should assess the category of jobs for which a plaintiff does not qualify.

Second, a court should consider the geographical region to which the applicant has reasonable access.¹⁴⁷ A plaintiff's opportunities could be limited despite the availability of a similar job 1000 miles away. If the rejecting employer is the only one in the geographical area offering the position, the requirement is more limiting than if many other employers offer the position without the requirement.

A final factor to consider is the training and job qualifications of the individual.¹⁴⁸ An individual may be qualified both to teach

142. 497 F. Supp. 1088 (D. Haw. 1980).

143. *Id.* at 1099.

144. *Id.*

145. *Id.* at 1100.

146. *Id.*

147. *Id.* at 1101.

148. *Id.*

math and to be a librarian, but may have an impairment which substantially limits his opportunities to teach math. Such a person is not "substantially limited" if a librarian job is available. The person qualified as a chemist, however, is substantially limited even though he might find a job as a truck driver.

A REASONED DEFINITION OF HANDICAPPED INDIVIDUAL

An analysis of whether an individual is handicapped begins as follows:¹⁴⁹ (1)(A) Does the plaintiff have an impairment? (1)(B) Does the impairment substantially limit a major life activity? (2) Does the plaintiff have a record of such an impairment? (3) Is the plaintiff regarded as having such an impairment? If the answer to (1)(A) and (1)(B), or (2), or (3), is yes, then the plaintiff is a handicapped individual under section 504. The court can then proceed to the "otherwise qualified" issue.

The preliminary analysis simply follows the statutory definition. The key to a well-reasoned interpretation is a careful examination of the meaning of "impairment" and "substantially limits a major life activity." A sensitivity about societal attitudes toward the handicapped individual must underlie the analysis.

Physical or Mental Impairment

Deciding whether a plaintiff actually has an impairment, has a record of an impairment, or is perceived as having an impairment requires a clear notion of what "impairment" means. One option is to define impairment as any condition that substantially limits one of a individual's major life activities. If Congress intended to define impairment in this manner, the phrase "which substantially limits one or more of such person's major life activities" would be unnecessary. This definition is therefore unsatisfactory because it is redundant and strips the term "impairment" of any substantive meaning.

149. This analysis is based on the language of 29 U.S.C. § 706(8)(B)(1982). For an analytic approach to interpreting the definition of handicapped individual that emphasizes a distinction between actual and perceived handicaps, see Comment, *What's a Handicap Anyway? Analyzing Handicap Claims Under the Rehabilitation Act of 1973 and Analogous State Statutes*, 22 WILLAMETTE L. REV. 529 (1986).

Another option is to define impairment by comparing the alleged condition with the regulation's list of physical and mental impairments. For example, if the plaintiff has an impairment that is a "physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the body systems,"¹⁵⁰ he would qualify as having a physical impairment. The Supreme Court recently used this analysis in *School Board v. Arline*.¹⁵¹ This definition, however, gives no meaning to the word "impaired." To be classified as having an impairment under the regulations, any "condition" affecting a "body system" would suffice. Mild near-sightedness, chubbiness, or a cold would all fit neatly into such a broad definition. Few people would *not* be impaired. Surely, Congress did not intend the Act to categorize nearly everyone as impaired.

Another option is to define impairment as any job qualification that a person seeking to be or to remain employed does not possess. For example, a short person applies to play professional basketball. Because the condition of being short keeps the person from being hired, the condition is an impairment.

This interpretation is also untenable. To define physical characteristics as impairments because they fail to meet an employer's criteria distorts the common-sense meaning of "impairment." The court in *E.E. Black, Ltd. v. Marshall*¹⁵² adopted this erroneous interpretation by using the example of an employer who required all employees to have curly hair. Applying the Court's definition, the rejected job applicant with straight hair is "impaired."¹⁵³ The Court went on to note that an individual who ran the 100 yard dash in 27 seconds and did not qualify to be a running back for the Dallas Cowboys was also "impaired." This individual would be unprotected by the Act, however, because he was not "otherwise qualified."¹⁵⁴

The better approach is to say that having straight hair or running the 100 yard dash in 27 seconds are not impairments at all.

150. 45 C.F.R. § 84.3(j)(2)(i) (1987).

151. 107 S. Ct. 1123, 1127 (1987). The Court reasoned that because the tuberculosis affected Arline's respiratory system, Arline therefore had a physical impairment.

152. 497 F. Supp. 1088 (D. Haw. 1980).

153. *Id.* at 1100.

154. *Id.*

This approach ironically adopts the definition of impairment set forth in *Black*. An impairment is "any condition which weakens, diminishes, restricts, or otherwise damages an individual's health or physical or mental activity."¹⁵⁵ This definition is a more reasonable interpretation of impairment than the regulation's definition covering "any condition which affects."¹⁵⁶ "Affects" simply means "acts upon."¹⁵⁷ The *Black* definition, however, more precisely uses the verbs "weakens, diminishes, restricts, or damages." Had the court in *Black* properly applied its own definition to its examples, the straight-haired and slow runner applicants would not be impaired under section 504.

Substantial Limitation

A careful definition of "substantially limits one or more of a person's major life activities" involves the consideration of several factors. First, courts should emphasize the characteristics of a particular individual, not the abstract question of whether an impairment limits an activity. The criteria *Black* adopts aids in determining whether the impairment substantially limits activity for that individual.¹⁵⁸

Second, courts should stress the adverb "substantially." Both Congress¹⁵⁹ and the agencies¹⁶⁰ have underscored the importance of

155. *Id.* at 1098.

156. 45 C.F.R. § 84.3(j)(2)(i)(1987).

157. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 35 (1987).

158. 497 F. Supp. 1088, 1100-01 (D. Haw. 1980). *See supra* notes 142-48 and accompanying text.

159. In 1979, a Senate bill was proposed to amend Title VII of the Civil Rights Act of 1964 to prohibit discrimination on the basis of a handicap. The bill would have extended federal protection to handicapped individuals seeking employment or advancement in the private sector. The definition of handicapped individual proposed by the Rehabilitation Act was the same as this Senate bill. Although the bill was not passed, the discussion of the bill is relevant to congressional intent regarding handicapped individuals under the Act. According to the Senate Report,

"impairment," as used in the definition of "handicap," does not extend to individuals with only minor or very temporary impairments or to those who do not have any condition that is stigmatizing or that otherwise more generally limits employment or some other major life activity. Rather the term is intended to apply only to more long-term or permanent, or recurring conditions.

S. 446, S. REP. NO. 316, 96th Cong., 1st Sess. § 3 (1979).

160. 45 C.F.R. pt. 84, app. A at 345 (1987).

emphasis on "substantially." The limit on the plaintiff's ability to perform an activity must be a major limitation. If "substantially" is taken seriously as a limitation on the definition of handicapped, courts cannot justify classifying temporary illnesses, minor allergies, or oversensitivity to cigarette smoke as handicaps in the absence of unusual circumstances.

The definition of handicapped individual must not include all illnesses found in a medical encyclopedia. Dr. David Wechsler, psychologist and inventor of intelligence tests, proposed that the great majority of human differences in physical and mental attributes fall within a normal range.¹⁶¹ According to his theory, out of a thousand individuals, only two will vary greatly from the intermediate group of 998. Wechsler's findings are endorsed by Dr. Earl McBride, a physician who systematically evaluated human functional disability.¹⁶² McBride argued that despite wide ranges in physical and mental attributes,

the mind-body, viewed as a whole . . . has built-in features of safety, compensation, and repair that mitigate the effects of these wide variations. Long experience with the severely disabled has revealed that in a general way the capacities and potentials of the individual human being have been underestimated. Man is incredibly tough.¹⁶³

A handicapped person, then, is an individual who falls outside of a reasonable range of human differences. A court, therefore, should not view a handicap as an illness, although an illness may indeed be handicapping. Rather, the concept of handicap combines both the physical or mental impairment of the individual with the resulting social status of the affected individual. Social status was a clear concern of the Rehabilitation Act, and courts cannot craft a proper interpretation of the definition of handicapped without considering this aspect of a handicap.

161. McBride, *The Classic Concept of Disability*, 221 CLINICAL ORTHOPAEDICS AND RELATED RESEARCH 3, 7 (Aug. 1987).

162. *Id.*

163. *Id.* at 8.

Societal Stigma

Understanding the underlying goal of section 504 is fundamental to a reasoned definition of "handicapped." Despite the lack of explanation within the statute, the 1974 legislative history emphasized the need to integrate disabled persons into society.¹⁶⁴ Section 504 and Title VI¹⁶⁵ of the 1964 Civil Rights Act contain similar language forbidding discrimination.¹⁶⁶ The Civil Rights Act took aim at the history of societal stigma about blacks. Section 504, similarly, focused on precluding societal stigma about handicaps.¹⁶⁷ Historically, disabled people have been subjected to cruel jokes, false myths, and general rejection by society. The "cripple" label is a product of fear, misconception, and ignorance.¹⁶⁸

An important article written in the 1960s stressed social stigma as the element that distinguishes a "disabled" person from the

164. Individuals with handicaps are all too often excluded from schools and educational programs, barred from employment or are underemployed because of archaic attitudes and laws, denied access to transportation, buildings, and housing because of architectural barriers and lack of planning, and are discriminated against by public laws which frequently exclude individuals with handicaps or fail to establish appropriate enforcement mechanisms.

S. REP. NO. 1297, 93d Cong., 2d Sess. (1974), reprinted in 974 U.S. CODE CONG. & ADMIN. NEWS 6373, 6400. Senator Humphrey applauded the efforts of the Department of HEW in promulgating regulations implementing section 504. "Certain kinds of discrimination have become so engrained in our society they almost enjoy respectability. The regulations will mean making an extra effort to share—to share with handicapped Americans the opportunities for an education, transportation, housing, health care, and jobs that other Americans take for granted." 123 CONG. REC. 13,515 (1977).

165. S. REP. NO. 1297, 93d Cong., 2d Sess., reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 6373, 6390.

166. Title VI of the Civil Rights Act of 1964 states: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d (1982).

Section 504 is also modeled from Title XI of the Education Amendments of 1972 which stated, "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . ." 20 U.S.C. § 1681(a) (1982).

167. Congressional concern about irrational societal attitudes is implicit in its definition of "handicapped individual" applicable to section 504. The definition expressly includes people whom society erroneously labels as handicapped. Thus, the social judgment about the individual may be more determinative of whether an individual qualifies as "handicapped" under section 504 than a medical opinion confirming that a handicap indeed exists.

168. McBride, *supra* note 161, at 5.

"handicapped" person.¹⁶⁹ A disability is defined by a medical diagnosis. A handicap, on the other hand, is the status of a disabled person in society. Defining a disability is relatively objective: a doctor examines a patient to find the percentage of restriction resulting from an impairment. On the other hand, a handicap is the product of a societal value system and cannot be defined without determining the extent to which a society accepts or rejects the condition.¹⁷⁰

Deciding whether a person is handicapped involves more than an objective finding. Theoretically, a disability, the mental and physical limitations caused by an impairment, should correspond to the social handicap, the way society interprets the disability. Yet, social stigma often poses a more significant obstacle than the actual impairment.¹⁷¹

Dr. Earl McBride emphasized a similar point.¹⁷² The definition of disability "denotes the position of the individual in society."¹⁷³ Determining who is physically and mentally fit, or "normal," involves value judgments influenced by social prejudice. The term "cripple" illustrates the effect of value judgments and social prejudice. People have historically used the word "cripple" with contempt, believing that the devil possessed handicapped individuals.¹⁷⁴ Unfortunately, the stigma associated with "cripple" still lingers.

Although substitute words with less negative connotations such as "handicapped" or "disabled" are widely used today, the social stigma that attaches to impairments is still a problem. Indeed, overcoming social prejudice may be a greater challenge for the handicapped individual than adjusting to the actual physical or mental restrictions resulting from the handicap. The degree to which the handicapped individual becomes integrated into society is largely a function of social factors.¹⁷⁵

169. tenBroek & Matson, *The Disabled and the Law of Welfare*, 54 CALIF. L. REV. 809, 814 (1966).

170. *See id.*

171. *See id.*

172. McBride, *supra* note 161, at 5.

173. *Id.*

174. *Id.*

175. *Id.* at 5-6.

The Supreme Court recently emphasized congressional intent in protecting the handicapped from social prejudice. In *School Board v. Arline*,¹⁷⁶ the Court pointed out the expanded definition of handicapped individual of the 1974 amendment to the Rehabilitation Act. According to the Court, the protection of persons who have a record of or are regarded as having an impairment demonstrated congressional concern about the effects of stigma. By ensuring that the definition covered not only individuals with actual impairments, but also individuals who were perceived as impaired, "Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment."¹⁷⁷ The Court concluded that the plaintiff, who had tuberculosis, was handicapped because she had an impairment that substantially limited a major life activity. Additionally, the plaintiff's contagious disease was the basis for public fear and social prejudice.¹⁷⁸

Understanding that section 504 attempted to dispel societal stigma associated with handicaps broadens and narrows the definition of "handicapped individual." Preventing prejudice extends the definition to cover persons with contagious diseases, a category which arguably was not originally intended by Congress in enacting the Rehabilitation Act.¹⁷⁹ The goal of preventing prejudice also narrows the definition to exclude people temporarily afflicted with injury or illness, or those suffering from minor afflictions. Such people are simply not the focus of section 504.

CONCLUSION

A reasoned interpretation of the definition of handicapped individual first requires an examination of whether the individual is impaired, has a record of being impaired, or is perceived as impaired. Impairment, best defined as "any condition which weakens, diminishes, or otherwise damages," excludes conditions that may not fit a job description, but are not otherwise outside the usual range of human differences.

176. 107 S. Ct. 1123 (1987).

177. *Id.* at 1129.

178. *See id.*

179. *Id.* at 1132-34 (Rehnquist, J., dissenting).

Second, the impairment must substantially limit one or more major life activities. The focus should be on whether the impairment limits the activity for the particular individual, balancing his or her qualifications, locations, and opportunities. "Substantially" demands emphasis to prevent the definition from becoming trivial.

Finally, courts must examine the stigma attached to the impairment. Section 504 is designed to fight the prejudice that reflects fear and ignorance about handicaps. Oversensitivity to cigarette smoke or the common cold do not arouse the same misapprehensions as AIDS or blindness. Deciding who is handicapped under the Act is not complete until one scrutinizes social attitudes and effects.

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