Congressional Research Service
The Library of Congress

Washington, D.C. 20540

March 22, 1989

TO: House Education and Labor
Attention: Pat Morrissey

FROM: American Law Division

SUBJECT: Analysis of Draft Version of the Americans with Disabilities Act of 1989

This memorandum is furnished in response to your rush request for an analysis of a draft version of the Americans with Disabilities Act of 1989 (hereafter cited as draft bill). You were particularly interested in comparing the draft bill with the Americans with Disabilities Act of 1988, H.R. 4498 and S. 2345, from the 100th Congress. For convenience, these identical bills will be referred to as H.R. 4498.

The Americans with Disabilities Act originated with a proposal from the National Council on the Handicapped[1] to establish a comprehensive nationwide prohibition against discrimination on the basis of handicap. Although federal legislation, section 504 of the Rehabilitation Act of 1973, 29 U.S.C. sec. 794, already exists concerning discrimination against individuals with handicaps, the existing law is limited to programs or activities receiving federal financial assistance, executive agencies, or the U.S. Postal Service. Both the draft bill and H.R. 4498 would provide broader coverage than section 504 since they would cover the private sector as well. However, there are significant differences between the two pieces of legislation. Due to time constraints, this memorandum will be limited to a brief discussion of several of the major distinctions.

OVERVIEW OF THE LEGISLATION

First, it is helpful to look at the forms of the legislation. H.R. 4498 has two central sections, sections 4 and 5 which contain the general prohibitions of discrimination. Section 4 of H.R. 4498 discusses the scope of discrimination prohibited and provides that no person shall be subjected to discrimination on

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[1] The National Council on the Handicapped is an independent federal agency. Its statutory functions include providing recommendations regarding individuals with handicaps to the Congress.

the basis of handicap in employment, the sale or rental of housing, public accommodations covered by title II of the Civil Rights Act of 1964, transportation services, the action, practices and operations of a State or its political subdivision, or broadcasts, communications or telecommunications services. Section 5 of H.R. 4498 discusses the forms of discrimination prohibited and describes certain acts and omissions that constitute discrimination on the basis of handicap. These provisions parallel requirements contained in the regulations under section 504.[2] The draft bill, in contrast, **does not** contain a section comparable to section 4 but **does** contain a section parallel to section 5 of H.R. 4498.

H.R. 4498 contains a specific section on housing, a section discussing the limitations on the duties of accommodation and barrier removal, a section on regulations which contains specific guidance relating to such subjects as transportation and communications, and a section on enforcement. The structure of the draft bill is quite different. It contains specific sections on employment and telecommunications relay services and divides the other requirements into two categories: one relating to public services and one relating to public accommodations and services operated by private entities. The requirements for public accommodations and services operated by private entities are generally less stringent than those imposed on the public sector. Both H.R. 4498 and the draft bill contain similar statements of findings and purposes and contain differing sections describing the relationship of the new legislation to section 504. They both also contain definitions sections which have some significant differences. Having examined the structure of the two pieces of legislation, several of the specific distinctions between the bills will now be analyzed.

DEFINITIONS

One of the major distinctions between the bills is found in the definitions section. H.R. 4498 defines the terms "on the basis of handicap," "physical or mental impairment," "perceived impairment," "record of impairment," and "reasonable accommodation." The draft bill, on the other hand, only contains general definitions of "handicap," and "state."[3] The draft bill's exclusion of the majority of terms defined in H.R. 4498 is probably not of critical importance since those terms are those defined in the regulations under section 504 and the general definition of "handicap" used in the draft bill is like that applicable to section 504. Therefore, it would be likely that the regulatory definitions of the terms used in the general definition of "handicap" under section 504

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[2] See e.g., 28 C.F.R. sec. 41.51.

[3] Other definitions which are applicable only to particular titles of the legislation are found elsewhere in the draft bill. For example, title IV of the draft bill, public accommodations and services operated by private entities contains definitions of "commerce," "mass transportation," and "public accommodation."

would also be used in defining the same language in the draft bill thus rendering their inclusion in statutory language unnecessary.

A more significant distinction regarding the definitions is the fact that the draft bill, in using the definition applicable to section 504, includes the phrase "substantially limits." For the purposes of the draft bill, the term handicap is defined in part as "a physical or mental impairment that **substantially limits** one or more of the major life activities of such individuals...." H.R. 4498, in contrast, defines the term "on the basis of handicap" as meaning "because of a physical or mental impairment, perceived impairment, or record of impairment." The definition in H.R. 4498 is arguably broader and could include minor, common conditions such as left-handedness.

GENERAL PROVISIONS ON DISCRIMINATION

Although the general sections relating to the forms of discrimination prohibited are similar in the two bills, there are some potentially significant distinctions. The draft bill deletes the section that was contained in H.R. 4498 providing that it will be discriminatory to establish or impose or to fail or refuse to remove any architectural, transportation or communication barriers. Arguably this would be covered by the more general statements in the draft bill and the more specific references in the draft bill's subsequent sections dealing with transportation and communications. The draft bill adds a section not contained in H.R. 4498 concerning qualification standards which allows such standards to include requiring that the current use of alcohol or drugs not pose a direct threat to property or the safety of others in the workplace or program and that an individual with a currently contagious disease or infection not pose a direct threat to the health or safety of other individuals in the workplace or program. This section is similar to amendments which have been made to the definitions section applicable to section 504[4] and thus would most likely be included in the interpretation of H.R. 4498 even in the absence of specific language since the general language of H.R. 4498 is similar to that of section 504. However, the draft bill's version is broader in that it includes programs whereas the section 504 definition refers only to employment. The addition of the section adds clarity but probably does not change what would be applicable statutory requirements in its absence.[5]

EMPLOYMENT

Both the draft bill and H.R. 4498 would prohibit employment discrimination but there are significant differences in the way in which this is done. Generally, the draft bill contains less stringent requirements than H.R. 4498. The draft bill specifically exempts bona fide private membership

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[4] 29 U.S.C. sec. 706(8).

[5] See *School Board of Nassau County v. Arline*, 94 L.Ed.2d 307 (1987).

clubs from coverage, and **does not** contain specific provisions found in H.R. 4498 concerning preemployment inquiries, affirmative action, and confidentiality. Some of these specific provisions found in H.R. 4498, such as the provision on preemployment inquiries could arguably be required under the draft bill as well due to the general language prohibiting employment discrimination. However, it is unlikely that a court would read in the affirmative action requirement of H.R. 4498 from the general language of the draft bill.

Both the draft bill and H.R. 4498 limit the nondiscrimination requirements of accommodation but do so in differing ways. The draft bill does not require accommodation if such accommodation would impose an **undue hardship** on the operation of a business while H.R. 4498 would not require accommodation if it would **fundamentally alter the essential nature, or threaten the existence of, the program, activity, business, or facility in question.**[6] The undue hardship language is similar to that used by the Supreme Court in *Southeastern Community College v. Davis*, 442 U.S. 397 (1979), and subsequently placed in regulation. These regulations state that a recipient must make reasonable accommodation for an otherwise qualified handicapped applicant or employee "unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program."[7] The fundamental alterations language is more closely akin to the Supreme Court's discussion of section 504's requirements in *Alexander v. Choate*, 469 U.S. 287 (1985). There the Court found that "while a grantee need not be required to make 'fundamental' or 'substantial' modifications to accommodate the handicapped it may be required to make 'reasonable' ones." It could be argued, however, that the language in H.R. 4498 is more expansive than the requirement articulated by the Court.

It is interesting to compare the possible substantative differences between the language of the draft bill (undue burdens) and the language used by the Court in *Alexander v. Choate* (fundamental or substantial modifications). In a recent third circuit case, *ADAPT v. Burnley,* No. 96-2989 (3d Cir. Feb. 13, 1989), the court discussed the meaning of accommodation in the context of transportation and found that ordering newly purchased buses to be accessible to the mobility-disabled was not a fundamental alteration and did not create an undue financial or administrative burden. The *ADAPT* court did not specifically attempt to distinguish between these two phrases but rather read them together as part of the section 504 nondiscrimination mandate. It could be argued that since the draft bill's language in the general prohibition against discrimination parallels the section 504 regulatory language and the draft bill's language on accommodation also parallels the undue burden language used in section 504 jurisprudence, it would be likely that section 504 interpretation generally would apply. In other words, it is likely that a court

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[6] H.R. 4498, sec. 7(a).

[7] 28 C.F.R. sec. 41.53.

interpreting the draft bill would look for guidance to cases such as *ADAPT* and utilize the concept of fundamental or substantial alterations in conjunction with the concept of undue burden. However, it should be emphasized that the language in H.R. 4498 was arguably more expansive than the interpretations under section 504 so that the change in the draft bill would most likely bring the draft bill into conformity with section 504 but would make it less stringent than H.R. 4498.

TRANSPORTATION

Both H.R. 4498 and the draft bill would mandate transportation accessibility but the requirements of the draft bill would appear to provide less coverage than H.R. 4498. First, the draft bill divides the coverage of transportation accessibility into two categories, public and private, and transportation services run by private entities would appear to have fewer standards applicable to them. There is no such division of requirements in H.R. 4498. The draft bill only requires a good faith effort to locate accessible used vehicles while H.R. 4498 contains no such exception for used vehicles. The time limitations on accessibility requirements also vary. The draft bill requires public transportation to make all structural changes required by the bill within 10 years with regard to intercity, rapid and light rail vehicles, 5 years with regard to commuter rail, and 3 years with regard to key stations, although this time limit for key stations could be extended by the Secretary of Transportation for up to 20 years for extraordinarily expensive structural changes or replacements. H.R. 4498 requires that all vehicles purchased or placed into service later than one year after enactment shall be accessible and that within a reasonable amount of time, not to exceed 7 years, the peak fleet must have 50% of vehicles and rolling stock accessible.

PUBLIC ACCOMMODATIONS

Section four of H.R. 4498 concerns the scope of discrimination, and specifically prohibits discrimination in public accommodations to the same extent that such discrimination is covered by title II of the Civil Rights Act of 1964, 42 U.S.C. sec. 2000a. The draft bill does not contain a section parallel to section 4 of H.R. 4498 but it does prohibit discrimination in public accommodations in its title IV and contains a general provision parallel to that of title II of the Civil Rights Act of 1964. However, the draft bill also contains a section construing the general prohibition on discrimination in public accommodations which limits the general prohibition. For example, the draft bill would prohibit segregation of persons with disabilities because of the absence of auxiliary aids and services "unless the entity can demonstrate that taking such steps would result in undue burden (sic)."[8] In addition, the draft

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[8] Draft bill, section 402(b)(1)(C).

bill would require the removal of architectural and communication barriers "where such removal is readily achievable."[9]

COMMUNICATIONS

Discrimination in communications is prohibited in the draft bill and in H.R. 4498 but they do so in different ways. H.R. 4498 specifically includes broadcasts, communications, or telecommunications in its section 4 on the scope of discrimination prohibited. The draft bill contains no similar section but both bills contain sections on forms of discrimination which could arguably cover communications. In addition, H.R. 4498 provides for regulations to be used by the Federal Communications Commission requiring the prohibition or removal of communication barriers and for making reasonable accommodations. In addition, H.R. 4498 requires these regulations to include requirements for progressively increasing the proportion of programs, advertisements, and announcements that are captioned. The draft bill, in addition to the general section, contains a title V specifically on telecommunications relay services. The draft bill contains no specific section on captioning.

SECTION 504

Both the draft bill and H.R. 4498 draw heavily on section 504 jurisprudence for their general concepts and, in some places, specific language. Therefore, the question of the relationship between these bills and section 504 has been an important issue under both pieces of legislation. H.R. 4498 contains a specific section providing that "[n]othing in this Act shall be construed to affect or change the nondiscrimination provisions contained in title V of the Rehabilitation Act...."[10] This language raises the issue of whether, in a situation where both section 504 and the ADA would apply, the proposed legislation would preclude any change in section 504 coverage, even a change which might broaden the protections against discrimination. The draft bill contains a similar section but is drafted so as to avoid this issue. The draft bill provides that "[n]othing in this Act shall be construed to reduce the scope of coverage or apply a lesser standard than the coverage required or the standards applied under title V of the Rehabilitation Act...."[11] In addition, the draft bill, in several places contains specific references to section 504 which could be interpreted as changing the coverage of the section. For example, the draft bill at section 303(b) concerning discrimination in mass transportation provides that it shall be considered discriminatory for the purposes of the act and **section 504 of the Rehabilitation Act** for an

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[9] Draft bill sec. 402(b)(1)(D)(i).

[10] H.R. 4498, sec. 4(b)(1).

[11] Draft bill, sec. 601(a). It should be noted that both bills contain parallel language relating to other federal, state or local laws.

individual or entity to purchase or lease certain vehicles if they are not readily accessible. Arguably, this provision and others could be interpreted as expanding the existing coverage of section 504 although many of the provisions may be consistent with section 504 as interpreted by courts such as in ADAPT.

We hope this information has been useful to you. If you need further information, please call us.

Nancy Lee Jones
Legislative Attorney

Congressional Research Service
The Library of Congress

Washington, D.C. 20540

March 28, 1989

TO: House Education and Labor
Attention: Pat Morrissey

FROM: American Law Division

SUBJECT: Questions on Draft Americans with Disabilities Act Bill

The enclosed list contains questions, prepared at your request, which could be posed to the drafters of the proposed Americans with Disabilities Act (ADA). We hope this is useful to you.

Nancy Lee Jones
Legislative Attorney

QUESTIONS ON THE DRAFT AMERICANS WITH DISABILITIES BILL

1. The ADA version introduced last Congress contained several general definitions of terms such as "reasonable accommodation," and "physical and mental impairment." These are not included in the general section in the draft bill, although "reasonable accommodation" is defined for the purposes of employment. What difference did you intend by not including these terms in a general definition section?

2. The coverage of employment in the draft bill contains an exception for a "bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of the Internal Revenue Code of 1986." What would be some examples of the types of organizations excluded?

3. In section 205 of the draft bill, the remedies, and procedures of sections 706 and 707 of the Civil Rights Act of 1964 and the remedies and procedures of 42 U.S.C. sec. 1981 and made available to individuals who believe that they are being discriminated against in violation of any provision of the act. What are the differences you intended by including this language rather than the language in the ADA version from last Congress? Section 305 of the draft bill provides that the remedies, procedures and rights set forth in section 505 of the Rehabilitation Act shall be similarly available. What is the relationship between sections 205 and 305 of the draft bill and what was your rationale for inclusion of both provisions?

4. Section 303 of the draft bill contains a general rule providing that it shall be considered discriminatory for the purposes of the act and section 504 to purchase certain vehicles if they are not accessible. To what extent would this language, and similar language in other sections of the bill, change the present interpretation of section 504?

5. What is the relationship in the draft bill regarding mass transportation accessibility and paratransit?

6. Title III of the draft bill covers public services while title IV covers public accommodations and services operated by private entities. What are the differences in applicable discrimination standards in these sections?

7. Section 405 of the draft bill discusses enforcement mechanisms and applies various sections of the Fair Housing Act. What is the scope of this enforcement coverage and can you include some examples of situations which might be covered by the exception contained in section 405.

8. Title V of the draft bill covers telecommunications relay services while the bill from the 100th Congress covered communication more generally. What are the precise distinctions in coverage between the draft bill and H.R. 4498? Would the general provisions relating to discrimination contained in title I of the draft bill essentially cover the more general forms of

communication discrimination that were more specifically delineated in the bill from the 100th Congress?

Congressional Research Service
The Library of Congress

Washington, D.C. 20540

Memorandum

May 15, 1989

TO : Honorable Robert Dole
Attention: Maureen West

FROM : Sylvia Morrison
Specialist in Industry Economics
Economics Division

SUBJECT : Effect on Coverage by the Disabilities Discrimination Legislation of Exempting Facilities with Fewer than Fifty Employees from the Requirements of the Legislation

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This responds to your question regarding the effect on coverage by the disabilities discrimination legislation of exempting facilities with fewer than fifty employees from the requirements of the law.

As you will note in the attached data from County Business Patterns 1986, which is published by the Bureau of the Census of the Department of Commerce, the total number of business establishments in the United States in 1986 was 5,806,973.[1] Of these,

3,258,407 employed 1 to 4 persons
1,133,825 employed 5 to 9 persons
689,395 employed 10 to 19 persons

Thus, 5,081,627 businesses each employed fewer than 20 persons. These businesses constituted 87.5 of U.S. businesses in 1986. The effect then, of exempting businesses employing fewer than 20 persons would be to exempt 87.5 percent of all businesses. The data further indicates that 448,769 businesses employed 20 to 49 persons. Thus the total number of businesses employing fewer than 50 persons is 5,530,396. This number constitutes 95.2 percent of all businesses in the U.S. The effect, then, of excluding from the provisions of the legislation all businesses employing fewer than 50 persons would be to exclude 95.2 percent of all U.S. businesses.

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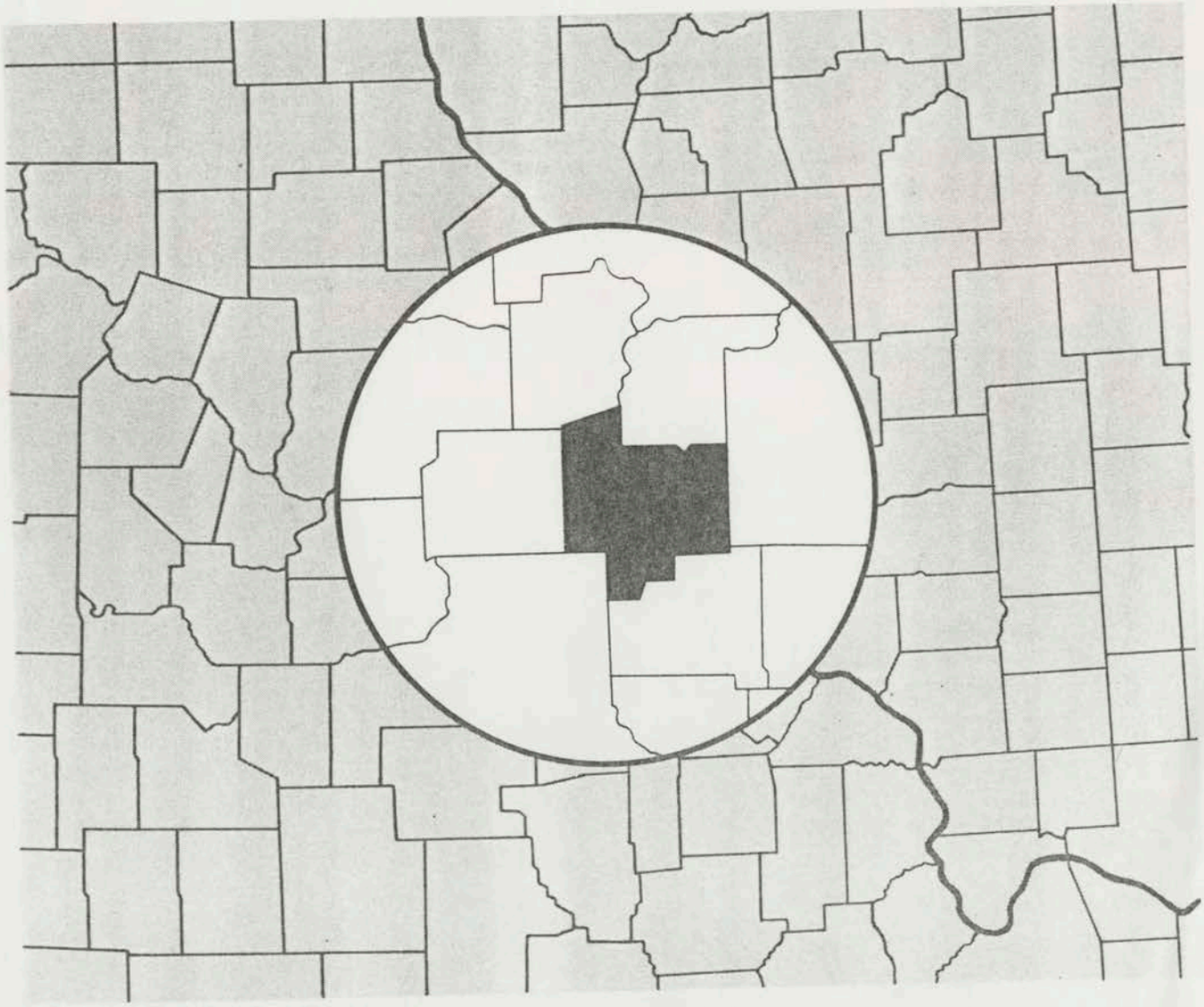
[1] As noted in the attached data, this figure excludes government employees, railroad employees, self-employed persons, and some others.

Please let us know at CRS if we can help you further.

County Business Patterns 1986

UNITED STATES

CBP-86-1



U.S. Department of Commerce
BUREAU OF THE CENSUS

Table 1b. United States—Establishments, Employees, and Payroll for Industries by Employment-Size Class: 1986

[Excludes government employees, railroad employees, self-employed persons, etc. Size class 1 to 4 includes establishments having payroll but no employees during mid-March pay period. (D) denotes figures withheld to avoid disclosing data for individual companies. For meaning of abbreviations and symbols and explanation of terms, see introductory text]

SIC code	Industry	Total	Employment-size class: 1 to 4	5 to 9	10 to 19	20 to 49	50 to 99	100 to 249	250 to 499	500 to 999	1,000 or more
	Number of establishments	5 806 973	3 258 407	1 133 825	689 395	448 769	156 286	84 834	22 164	8 466	4 827
	Number of employees	83 380 465	5 565 875	7 460 051	9 270 065	13 601 675	10 709 097	12 684 166	7 575 807	5 780 228	10 733 501
	Payroll, first quarter ($1,000)	391 731 037	21 181 966	27 608 088	36 131 706	55 490 435	45 538 719	58 070 918	39 072 766	32 961 868	75 674 571
	Payroll, annual ($1,000)	1 608 810 889	112 202 430	113 783 227	148 847 778	228 008 940	185 971 778	234 725 497	156 007 629	131 741 365	297 522 245
	AGRICULTURAL SERVICES, FORESTRY, AND FISHERIES										
	Number of establishments	68 076	45 682	12 763	6 278	2 512	546	217	58	16	4
	Number of employees	412 010	69 575	83 492	82 187	73 691	36 553	32 425	19 373	10 365	4 349
	Payroll, first quarter ($1,000)	1 202 984	167 042	228 633	249 049	225 196	109 907	104 827	64 570	39 564	14 200
	Payroll, annual ($1,000)	5 764 717	1 134 890	1 077 835	1 145 922	1 007 652	476 766	422 734	271 356	165 800	61 759
07	Agricultural services										
	Number of establishments	64 505	43 206	12 278	5 953	2 317	490	191	52	14	4
	Number of employees	384 284	66 291	80 283	77 822	67 699	32 721	(D)	17 382	(D)	4 349
	Payroll, first quarter ($1,000)	1 097 557	155 510	216 826	233 226	205 936	99 212	(D)	54 513	(D)	14 200
	Payroll, annual ($1,000)	5 310 391	1 063 343	1 025 904	1 076 582	927 911	434 189	(D)	231 204	(D)	61 759
071	Soil preparation services										
	Number of establishments	552	319	117	68	34	8	5	1	-	-
	Number of employees	4 774	559	(D)	900	1 107	608	(D)	(D)	-	-
	Payroll, first quarter ($1,000)	16 246	1 751	(D)	2 453	4 186	2 343	(D)	(D)	-	-
	Payroll, annual ($1,000)	72 948	9 234	(D)	11 223	19 816	11 027	(D)	(D)	-	-
072	Crop services										
	Number of establishments	3 360	2 031	581	367	231	94	49	6	1	-
	Number of employees	35 137	3 226	3 839	4 897	6 959	6 555	7 418	(D)	(D)	-
	Payroll, first quarter ($1,000)	111 219	10 508	13 884	16 156	24 059	20 264	21 519	(D)	(D)	-
	Payroll, annual ($1,000)	488 030	73 812	64 421	79 414	102 927	78 171	73 833	(D)	(D)	-
074	Veterinary services										
	Number of establishments	15 788	8 392	4 797	2 167	408	21	3	-	-	-
	Number of employees	89 823	18 072	31 593	27 811	10 602	1 207	538	-	-	-
	Payroll, first quarter ($1,000)	275 654	45 039	95 078	93 649	36 067	3 354	2 469	-	-	-
	Payroll, annual ($1,000)	1 198 094	213 582	409 049	399 085	150 440	15 438	10 501	-	-	-
075	Animal services, except veterinary										
	Number of establishments	6 223	4 463	1 002	524	176	41	14	3	-	-
	Number of employees	31 517	7 605	6 447	6 883	4 992	2 725	1 949	916	-	-
	Payroll, first quarter ($1,000)	86 439	16 136	14 791	19 300	14 754	9 003	7 825	4 627	-	-
	Payroll, annual ($1,000)	365 688	77 913	63 428	77 292	61 702	35 051	32 229	18 069	-	-
076	Farm labor and management services										
	Number of establishments	773	528	83	63	54	25	13	6	-	1
	Number of employees	11 354	769	(D)	846	1 682	1 650	(D)	2 585	-	(D)
	Payroll, first quarter ($1,000)	30 222	4 045	(D)	2 655	4 957	3 982	(D)	5 311	-	(D)
	Payroll, annual ($1,000)	120 669	19 888	(D)	10 375	21 951	14 721	(D)	15 188	-	(D)
0761	Farm labor contractors										
	Number of establishments	81	36	10	11	7	11	2	3	-	1
	Number of employees	4 148	50	69	159	219	721	(D)	(D)	-	(D)
	Payroll, first quarter ($1,000)	10 347	188	215	436	397	2 034	(D)	(D)	-	(D)
	Payroll, annual ($1,000)	38 954	1 925	902	1 676	1 579	7 531	(D)	(D)	-	(D)
0762	Farm management services										
	Number of establishments	498	368	48	36	34	6	5	1	-	-
	Number of employees	3 753	571	(D)	488	1 029	358	(D)	(D)	-	-
	Payroll, first quarter ($1,000)	14 924	3 370	(D)	1 816	3 925	1 234	(D)	(D)	-	-
	Payroll, annual ($1,000)	60 690	13 442	(D)	7 135	17 784	4 922	(D)	(D)	-	-
078	Landscape and horticultural services										
	Number of establishments	34 481	24 913	5 169	2 589	1 370	289	99	36	13	3
	Number of employees	198 780	32 083	33 677	34 251	40 985	19 215	14 800	11 908	(D)	(D)
	Payroll, first quarter ($1,000)	544 269	67 729	79 303	92 918	118 539	57 892	44 281	39 626	(D)	(D)
	Payroll, annual ($1,000)	2 909 923	608 631	429 783	473 313	558 705	270 376	199 827	179 542	(D)	(D)
08	Forestry										
	Number of establishments	1 690	1 050	273	190	116	38	17	4	2	-
	Number of employees	17 174	1 538	(D)	2 549	3 603	2 635	2 710	(D)	(D)	-
	Payroll, first quarter ($1,000)	58 575	4 685	(D)	8 304	8 965	6 532	11 828	(D)	(D)	-
	Payroll, annual ($1,000)	234 768	26 996	(D)	34 503	35 108	23 854	43 313	(D)	(D)	-
09	Fishing, hunting, and trapping										
	Number of establishments	1 811	1 396	204	124	73	10	3	1	-	-
	Number of employees	8 349	1 681	(D)	1 666	2 183	638	(D)	(D)	-	-
	Payroll, first quarter ($1,000)	31 119	6 088	(D)	6 276	8 082	1 387	(D)	(D)	-	-
	Payroll, annual ($1,000)	156 258	42 215	(D)	29 037	37 064	6 140	(D)	(D)	-	-
--	Administrative and auxiliary										
	Number of establishments	70	30	8	11	6	8	6	1	-	-
	Number of employees	2 203	65	(D)	150	206	559	910	(D)	-	-
	Payroll, first quarter ($1,000)	15 728	757	(D)	1 245	2 209	2 776	6 256	(D)	-	-
	Payroll, annual ($1,000)	63 300	2 338	(D)	5 802	7 572	12 580	24 730	(D)	-	-
	MINING										
	Number of establishments	34 973	16 202	6 064	5 257	4 277	1 603	994	375	151	50
	Number of employees	847 143	28 627	40 503	72 354	130 691	109 607	149 988	127 990	102 854	84 529
	Payroll, first quarter ($1,000)	6 651 600	165 414	244 542	448 328	883 200	813 691	1 248 017	1 129 422	955 619	763 362
	Payroll, annual ($1,000)	24 481 218	761 336	897 345	1 664 323	3 176 826	2 895 762	4 466 304	4 208 887	3 601 281	2 809 154

See footnotes at end of table.

Congressional Research Service
The Library of Congress

Washington, D.C. 20540

May 18, 1989

TO:

FROM: American Law Division

SUBJECT: Analysis of "Regarded as Having an Impairment" and "About to be Discriminated Against" Language in Draft Americans with Disabilities Act

I. Introduction

This memorandum is furnished in response to your request for an analysis of two phrases that are used in the draft Americans with Disabilities Act (ADA). This legislation would basically prohibit discrimination against persons with disabilities in the private sector. Present law, as embodied in section 504 of the Rehabilitation Act of 1973, 29 U.S.C. sec. 794, is applicable only to programs or activities that receive federal financial assistance, executive agencies or the U.S. Postal Service.

The term disability is defined in the ADA as meaning with respect to an individual "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." The ADA contains several enforcement sections which provide for certain remedies if an individual believes he or she "is being or about to be subjected to discrimination on the basis of disability." This memorandum will analyze these two provisions and compare them to existing legal interpretations.

II. "About to be Subjected to Discrimination"

No direct parallels were found to the language in the enforcement sections of the ADA allowing remedies to become available for individuals who believe they are "about to be subjected to discrimination." Section 505 of the Rehabilitation Act, 29 U.S.C. sec. 794a, which contains the remedies provisions for section 504 provides for remedies "to any person aggrieved by any act or

failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title." No "about to be discriminated against" language was found in the section 504 regulations or in the statutory requirements of title VII of the Civil Rights Act, 42 U.S.C. sec. 2000e-5. A Lexis computer search of the term in both the Federal and state files yielded no judicial decisions.

The closest statutory parallel is found in the Fair Housing Act, as amended by the Fair Housing Amendments Act of 1988, P.L. 100-430. The original definition of "person aggrieved" under the Fair Housing Act enforcement provisions was "[a]ny person who claims to have been injured by a discriminatory housing practice or who believes that he will be irrevocably injured by a discriminatory housing practice that is about to occur." [1] The Fair Housing Amendments Act of 1988 added a definition of "aggrieved person" to the definitions section which defined such a term as including "any person who -- (1) claims to have been injured by a discriminatory housing practice; or (2) believes that such person will be injured by a discriminatory housing practice that is about to occur."

The House Report[2] discussed this change in the definition.

> *Aggrieved person.* Provides a definition of aggrieved person to be used under this act. In *Gladstone Realtors v. Village of Bellwood,* the Supreme Court affirmed that standing requirements for judicial and administrative review are identical under title VIII. In *Havens Realty Corp. v. Coleman,* the Court held that "testers" have standing to sue under title VIII, because Section 804(d) prohibits the representation "to any person because of race, color, religion, sex or national origin that any dwelling is not available for inspection, sale or rental when such dwelling is in fact so available." The bill adopts as its definition language similar to that contained in Section 810 of existing law, as modified to reaffirm the broad holdings of these cases.

The report correctly states the holding in *Gladstone* but the part of the definition at issue there was the first category -- a person who claims to have been injured by a discriminatory housing practice -- not the second category of persons who believe they will be injured. In addition, the Court in *Gladstone* emphasized that although Congress may expand standing to the full extent permitted by Article III of the Constitution, Congress cannot abrogate

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[1] 42 U.S.C. sec. 3610, P.L. 90-284, sec. 810.

[2] H.Rep. No. 711, 100th Cong. 2d Sess., *reprinted in [1988] U.S. Code Cong. & Ad. News 2173, 2184.* There were no Senate or Conference Reports on P.L. 100-430. The congressional debate also did not center around this provision and there were only a few references to enforcement. For example, see 134 Cong. Rec. S 10556 (Aug. 2, 1988) (statement of Senator Cranston) discussing the strengthening of enforcement provisions.

the essential constitutional requirement that a plaintiff must always have suffered "'a distinct and palpable injury to himself' that is likely to be redressed if the requested relief is granted." [3] Certainly the Court in *Gladstone* and *Havens Realty Corporation* indicated that a "tester" for housing discrimination purposes has standing to sue but the application of the language for other purposes is not as clear and will probably await further judicial action.

In the apparent absence of prior interpretation or legislative history, the question then becomes what is the meaning of this phrase in the ADA? It could be argued that such language is necessary to allow for immediate remedies. For example, if construction of a building were being planned and it was determined not to be accessible for persons with disabilities, it could be argued that the "about to be discriminated against" language would be necessary in order to assure that the building was planned to be accessible. In other words, the language could mean that it was not necessary to wait until the building was complete until remedies were pursued. However, even without this language it could be argued that drafting blueprints or obtaining permits for an inaccessible building are actual acts of discrimination, thus allowing the use of remedies without waiting for completed construction. It could also be argued that the "about to be discriminated against" language could create a serious potential for nuisance suits, especially in areas such as employment. For example, in the area of employment it might be possible to argue that such language would allow suit prior to the instituting of any adverse action against an employee and that such suit could be premised on erroneous interpretations of casual conversations.

This type of language could also raise constitutional questions under Article III of the Constitution. As was noted by the Court in *Gladstone*, Congress may expand standing to sue, but there must be the constitutional minimum of a plaintiff who has suffered a distinct and palpable injury to himself. To the extent that the about to be discriminated against language could be interpreted to allow suit without such a distinct injury, it could face constitutional challenge.

III. "Regarded as Having an Impairment"

The phrase "being regarded as having such an impairment" in the ADA definition of disability is patterned after definitional language applicable to section 504. 29 U.S.C. sec. 706(8)(B) defines the term "individual with handicaps" as meaning "any individual 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.**" (emphasis added). The term "is regarded as having such an impairment" is defined in the lead agency regulations for

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[3] *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979) (citing *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38 (1976)).

section 504 as meaning "(i) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a recipient as constituting such as limitation; (ii) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (iii) has none of the impairments defined in paragraph (b)(1) of this section but is treated by a recipient as having such an impairment." [4]

The "regarded as having such an impairment" language was added to the definition of individual with handicaps in 1974 as part of a revision of the definition to more appropriately reflect the coverage of discriminatory practices. The Senate report on the amendment indicated that it reflected Congress' concern with prohibiting discrimination based not only on simply prejudice but also on stereotypical attitudes and ignorance about individuals with disabilities. This was seen as having a parallel in race discrimination cases where a person is regarded as being a member of a minority group even if he or she is not.[5]

There have been several judicial interpretations of the "regarded as" language. These decisions have generally followed the logic of the regulatory definition of the term. In a recent ninth circuit case, *Thornhill v. Marsh,* 866 F.2d 1182 (9th Cir. 1989), the court reversed and remanded a district court decision which had granted summary judgment for the defendant, applying the second standard in the regulatory definition. The plaintiff had been hired by the Corps of Engineers as a utility man, a job that required frequent lifting of up to 50 pounds of material. However, his employment was conditioned upon passing a physical examination and this examination revealed a congenital spinal deformity. The plaintiff had brought suit alleging that he was "regarded as" handicapped because of the congenital back deformity. The court found that the plaintiff's handicap was not that he could not meet the physical qualifications of the job but rather his handicap was his congenital back deformity which was perceived as imposing a disqualifying limitation. In other words, he was seen as having a physical impairment that did not substantially limit a major life activity but was treated as constituting such a limitation. The court then observed that the plaintiff could then be both handicapped and otherwise qualified for the job.

In *Forrisi v. Bowen,* 794 F.2d 931 (4th Cir. 1986), the court dealt with the issue of the meaning of the substantial limitation qualification in the regulations. More specifically, the court examined whether the "regarded as" language is brought into play any time an employer finds an employee or applicant incapable of satisfying the particular demands of a specific job. The plaintiff in *Forrisi* was hired as a utility systems repairer and operator with a requirement that he be able to climb stairways and ladders. He indicated

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[4] 28 C.F.R. sec. 41.31(b)(4).

[5] S. Rep. No. 1297, 93d Cong., 2d Sess., *reprinted in [1974] U.S. Code Cong. & Ad. News 6373, 6389.*

ered discrimination for an individual or entity to fail to have one car per train that is accessible to individuals who use wheelchairs in accordance with the time limits identified under subparagraph (B).

(B) TIME LIMITS.—

(i) INTERCITY, RAPID, AND LIGHT RAIL.—Not later than 10 years after the date of enactment of this Act, individuals or entities identified under subparagraph (A) shall make all structural changes to or replacement of existing rail vehicles and rolling stock necessary to make all its intercity, rapid and light rail vehicles and rolling stock comply with such subparagraph.

(ii) COMMUTER RAIL.—Not later than 5 years after the date of enactment of this Act, individuals or entities identifies under subparagraph (A) shall make all structural changes to or replacement of existing rail vehicles and rolling stock necessary to make all of its commuter rail vehicles and rolling stock comply with such subparagraph.

precedent for holding that one's sexual orientation or preference falls within the compass of the Rehabilitation Act...." At 1183. The court vacated the district court's judgment on the ground that it appeared to state that relief under the Rehabilitation Act is conditioned on a plaintiff's giving an interviewing officer precise notice of a handicap that is not readily apparent and that this notice requirement was not supported by judicial or regulatory interpretation. Reading *Blackwell* along with the statute and regulatory language, it would appear that homosexuals would most likely not be covered under section 504 simply on the basis of sexual orientation. However, to the extent that an individual is discriminated against because he is **regarded as** being HIV positive, it would be possible to create an argument for coverage.

IV. Conclusion

In summary, no direct parallel was found for the "about to be discriminated against" language in the ADA although similar language was added to the definition of aggrieved person in the Fair Housing Act Amendments of 1988. This language could raise some troubling issues concerning its application in situations such as employment and if interpreted broadly could raise a constitutional issue regarding Article III standing. The phrase "regarded as having such an impairment" is clearly based on the definition applicable to section 504. The intention behind such coverage under section 504 is to reach discrimination that results from stereotypical attitudes and ignorance. The judicial decisions on this term have required that the impairment the individual is regarded as having be a substantial one but have left several issues unresolved.

We hope this has been useful to you. If we may be of further assistance, please contact us.

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87-442 A

CRS Report for Congress

Affirmative Action Revisited: A Review of Recent Supreme Court Actions

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May 18, 1987

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AFFIRMATIVE ACTION REVISITED: A REVIEW OF RECENT SUPREME COURT ACTIONS

In five cases decided over the last two terms, the Supreme Court has considered the legality of affirmative action to promote equal employment opportunity. In Wygant v. Jackson Board of Education, 106 S.Ct. 26 (1986), a sharply divided Court declared unconstitutional a racial preference in the collective bargaining agreement between a local school board and its teachers' union that protected minority teachers from layoffs at the expense of more senior white faculty members. Concluding the 1985-86 term, it decided two other "reverse discrimination" cases, Local 28 Sheet Metal Workers v. EEOC, 106 S.Ct. 3019 (1986), and Firefighters v. City of Cleveland, 106 S.Ct. 3063 (1986), which affirmed the legality of court-ordered minority hiring or union membership "goals" and voluntary racial preferences for promotion under Title VII of the 1964 Civil Rights Act. Then, in complementary decisions this past term, the Justices approved of affirmative action by public employers to increase promotional opportunities for women and minorities, whether undertaken as a voluntary measure or pursuant to court decree. United States v. Paradise, 107 S.Ct. 1053 (1987); Johnson v. Transportation Agency, 107 S.Ct. 1442 (1987).

In Wygant, although holding the specific layoff preference unconstitutional, all nine Justices seemed to agree in principle that a governmental employer is not prohibited by the Equal Protection Clause from all race conscious affirmative action to remedy its own past discrimination. The actual extent of this consensus in principle remains obscure, however, after the Paradise Court split 5 to 4 on the constitutionality of the promotional quota ordered by the district court in that case. However, it appears from the

remaining cases that a firm majority of six Justices agree that Title VII does not, in all circumstances, condemn the use by employers or the courts of racial or sexual preferences, even where they benefit individuals who are not actual victims of past discrimination.

BACKGROUND

At the heart of the affirmative action controversy is a dual theory of remedy in discrimination cases. The first emphasizes compensation for the actual victims of an employer's past discrimination while the second, although not unrelated, focuses more upon the elimination of barriers to equal opportunity for all members of a previously excluded class. The Justice Department has argued in a number of recent cases that victim compensation is the only proper remedial objective and that affirmative action remedies which benefit women and minorities who are not themselves actual victims of an employer's discrimination are illegal. With the Court's rulings this year and last, however, the Department's position appears to have been laid to rest.

Basically, the Supreme Court's affirmative action jurisprudence is marked by two concurrent but not altogether coterminous lines of decision. The first concerns the validity of judicially imposed affirmative action for proven violations of Title VII of the 1964 Civil Rights Act and the Constitution. The other has involved the legality of voluntary affirmative action by public and private employers, and others. The fundamental principle that has emerged from both is that the remediation of past discrimination is a sufficiently "compelling" or "important" governmental interest to justify the use of racial or sex preferences, at least in "narrowly tailored" circumstances. Just how narrowly or widely available, however, has yet to be fully answered.

As for judicial affirmative action remedies, even before the Supreme Court

had acted, all eleven U.S. Circuit Courts of Appeals had, in cases dating back to the very inception of Title VII, approved the remedial use of race or sex quotas, at least where "historic," "egregious," or "longstanding" discrimination was involved. This line of judicial authority was ratified by the Supreme Court in rulings the last two terms. Local 28, Sheetmetal Workers v. EEOC (supra) involved contempt proceedings against a union with an established history of racial and ethnic discrimination for willfully flouting the terms of a judicially imposed affirmative action plan requiring a 29% minority union membership goal. To remedy the union's years of contemptuous evasion of its legal obligations, the district court reinstated the minority membership goal and ordered, in addition, that job referrals be made on the basis of one apprentice for every four journeymen, all of which was affirmed by the Second Circuit. The Supreme Court affirmed, 5 to 4.

Justice Brennan wrote for a plurality of four Justices that Title VII does not preclude race conscious affirmative action as a "last resort" in cases of "persistent or egregious" discrimination, or to dissipate the "lingering effects of pervasive discrimination," but that, in most cases, only "make whole" relief for individual victims is required. Moreover, the plurality felt that by twice adjusting the union's deadline, and its "otherwise flexible application of the membership goal" as a "temporary measure," the district court had enforced it as a benchmark" of the union's compliance "rather than as a strict racial quota." Rounding out the five Justice majority for affirmance was Justice Powell who emphasized the history of "contemptuous racial discrimination" revealed by the record, and the temporary and flexible nature of the prescribed remedy. In separate dissents, Justices White and O'Connor found the referral quota excessive because economic conditions in the

construction industry made compliance impracticable, while then Chief Justice Burger and Rehnquist read Title VII to bar all judicially ordered race conscious relief benefitting nonvictims.

A somewhat parallel situation was presented by United States v. Paradise, this term, involving the constitutionality of temporary promotional quotas for Alabama State troopers. In 1972, as a remedy for systematic exclusion of blacks from the ranks of state troopers for nearly four decades, the district court imposed a hiring quota and required the state to refrain from discrimination in promotions. Due to lack of progress in promotions — no blacks in the upper ranks by 1979 -- the court later approved a series of consent decrees which required the adoption of new nondiscriminatory promotion procedures. In the interim, however, the court ordered a 1 for 1 racial quota for the rank of corporal and above, provided sufficient qualified blacks were available, until 25% of each rank was black. Only one round of promotions for corporal was made before the quota for that and the sergeant rank was suspended. The U.S. Supreme Court granted review of the order under the Equal Protection Clause.

Justice Brennan, whose plurality opinion was again joined by Justices Marshall, Blackmun, and Powell, considered several factors in determining whether the plan violated the equal protection rights of white troopers: the necessity of the relief and the efficacy of alternative remedies, the plan's flexibility and duration, the relationship between the plan's numerical goals and the labor market, and the impact the plan had on the rights of third parties. Significant was the fact that the order did not require the promotion of anyone and could be waived in the absence of qualified minority candidates, as it already had been with respect to lieutenant and captain positions. It

was also tied to the percentage of minorities in the area workforce (25%). Moreover, because it did not bar white advancement, but merely postponed it, the plan did not impose unacceptable burdens on innocent third parties. Accordingly, Justice Brennan concluded that the promotion quota was "narrowly tailored" and justified by the government's "compelling" interest in eradicating the state's "pervasive, systematic, and obstinate exclusion" of blacks and its consistent history of resistance to the court's orders. Justice Stevens, who provided the fifth vote for the Court's judgment, stated in a separate opinion that the district court did not exceed the bounds of "reasonableness" in devising a remedy.

Justice O'Connor, joined in dissent by Justice Scalia and the Chief Justice, found the plan "cannot survive strict scrutiny" because the one-for-one promotion quota is not sufficiently tied to the percentage of blacks eligible for promotion. Finally, Justice White, in a two sentence dissent, said simply that the district court "exceeded its equitable powers."

Somewhat less adherence to strict remediation theory to justify race or sex conscious preferences may be discernible, however, where voluntary affirmative action by public or private employers is involved. In its first affirmative action ruling, Regents of the University of California v. Bakke, 438 U.S. 265 (1978), the Court struck down, 5 to 4, the minority admissions program of a state medical school that reserved 16 of 100 positions for minority applicants. Justice Powell, who provided the crucial fifth vote, rejected the admissions quota as a remedy for mere "societal discrimination" in the absence of formalized judicial or administrative findings of past discrimination by the institution itself. Alternatively, an educational admissions policy could take race into account as "one" but not the "sole" or

determinative factor to promote student diversity and academic freedom. The next case to reach the High Court, United Steelworker v. Weber, 443 U.S. 193 (1979), upheld a voluntary affirmative action plan by a private employer which included a minority quota for a craft training program to remedy "manifest racial imbalance in traditionally segregated job categories." While the Court required no specific finding of past discrimination by the employer, the case was decided against the backdrop of an historically well established record of trade union bias. Then, in Fullilove v. Klutznick, 448 U.S. 448 (1980), where Congress' power to enact minority preferences was at issue, the opinions of the six Justice majority all relied upon one formulation or another of Congress' constitutional authority to remedy past discrimination.

The remediation theory of affirmative action was perhaps most thoroughly explored by the Court in its ruling last term in Wygant v. Jackson Board of Education. The collective bargaining agreement between the school board and the teachers' union in that case provided for a preference for minority teachers with protection from layoff until the percentage of minorities on the faculty mirrored that of the student body in the school system as a whole. Seniority was to govern layoffs except that the number of minorities laid off was not to exceed the percentage employed in the system at the time. Ten white teachers who were laid off while less senior minority teachers were retained filed a reverse discrimination action under the Equal Protection Clause. The Supreme Court, by a 5 to 4 vote, held the minority layoff provisions unconstitutional although no majority was garnered for any particular point of view.

Seven members of the Wygant Court agreed that, if a local government had itself discriminated against minorities in the past, some kinds of voluntary

affirmative action were permissible. The plurality opinion of Justice Powell applied his strict scrutiny test from Bakke: the "limited use of racial classification" must be justified by the "compelling" purpose of remedying "prior discrimination by the governmental unit involved," and "narrowly tailored" to that goal. Neither the board's asserted interest in the presence of minority teachers as critical "role models" or to ameliorate "societal discrimination" was sufficient without "convincing" evidence of the board's own past discrimination. Moreover, while innocent nonminorities may be made to share some of the burden, the remedy must not be too intrusive upon their rights. Thus, because preferential protection from layoffs "impose[d] the entire burden of achieving racial equality on particular individuals," it placed too heavy a burden on innocent whites, and was distinguishable from preferential hiring decisions which "diffuse" the burden more generally. While reserving judgment on the hiring issue, Justice White concurred that the layoff remedy went too far because it displaced more senior white employees in favor of minorities who were not actual discrimination victims. In her separate concurrence, Justice O'Connor aligned herself with the Powell view that societal discrimination will not justify voluntary affirmative action remedies and that the layoff plan here was infirm because overbroad and not "narrowly tailored" to the board's past discrimination.

The Justices sparred over what evidence would suffice to support an informal conclusion that one had discriminated in the past. The plurality opinion suggested "sufficient," "convincing," and "strong" evidence as benchmarks, while Justice O'Connor considered a "firm basis" enough. None of the Justice seemed to require those who would implement voluntary affirmative action to make "formal findings" that they had discriminated in the past.

Justice O'Connor and three of the dissenters (Marshall, J., joined by Brennan and Blackmun, JJ.) noted that such a requirement would chill voluntary efforts to end race discrimination and purge its effects. Only Justice Stevens, in a separate dissent, said he would not have asked whether the plan was justified "as a remedy for sins that were committed in the past," but rather whether, by preserving "an integrated faculty," it served valuable educational ends that "could not be provided by an all white ... faculty."

A possible departure from this apparent emphasis on the remediation of past discrimination as justification for voluntary affirmative action may be found in Johnson v. Transportation Agency, 107 S.Ct. 1442 (1987). The Court there ruled that a county did not violate Title VII when it considered sex among other factors in promoting a woman under a voluntary affirmative action plan. Although the plan was designed to increase women and minorities in jobs where they had traditionally been underrepresented, rather than to remedy past discriminatory practices, the Court applied Weber to uphold the plan as a remedy for "manifest imbalance" in a "traditionally segregated job category."

In 1978, the county agency had adopted a voluntary affirmative action plan that permitted consideration of the sex of a candidate for promotion within traditionally segregated job categories. Women were significantly underrepresented in the county's labor force as a whole and in five of seven job categories, including skilled crafts where all 238 employees were men. The plan's long range goal was proportional representation but, because of the small number of positions and low turnover, actual implementation was based on short term goals which were adjusted annually and took account of qualified minority and female availability. No specific numerical goals or quotas were used. The male respondent had been one of seven candidates for promotion to

road dispatcher who had been passed over in favor of a female county employee with a marginally lower overall qualification rating. The agency head testified that he had based his final selection on the "whole picture," including affirmative action concerns. The district court, however, found that sex was the "determinative factor" and invalidated the plan under Weber for lack of an express termination date. The Ninth Circuit reversed and upheld the plan. The Supreme Court affirmed by a vote of 6 to 3.

In his majority opinion, Justice Brennan decided that Title VII was not coextensive with the Constitution and that, therefore, Weber, not Wygant, was controlling. In recognizing the need for voluntary employer action to "break down old patterns of racial segregation and hierarchy," said Justice Brennan, Weber adopted a "manifest imbalance" standard that was different from the Title VII standard for proof of a "prima facie" case of discrimination. To require the employer to compile evidence that could lead to a reverse discrimination lawsuit would only be a disincentive to voluntary compliance favored by the statute. Accordingly, to justify voluntary affirmative action, the employer may rely on statistics that demonstrate a "disparity" between its minority and female workforce participation when compared to the general county labor force. To rectify the obvious pattern of female underrepresentation presented by this case, Justice Brennan emphasized, the county had established both long and short range goals that took account of the "practicalities," including the availability of jobs and qualified female candidates, rather than having adhered to "blind hiring by the numbers." Therefore, Justice Brennan concluded that because sex was "but one of numerous factors" in the promotion equation, and no qualified candidates were excluded nor unqualified advanced, there was no Title VII violation.

Justice Stevens concurred that the plan was consistent with Weber and Justice O'Connor, in a separate concurrence, provided a sixth vote for the judgment. In her opinion, however, to support a voluntary affirmative action plan, there should be "a statistical disparity sufficient to support a prima facie claim under Title VII by the employee beneficiaries of the affirmative action plan of a pattern or practice claim of discrimination." Equal Protection standards, not Title VII, should govern public employer cases, she said, and she chided the majority approach for giving too little guidance as to the requisite statistical imbalance standard. But because there were no women in skilled craft positions, and sex was only a "plus" factor, either standard was satisfied here.

Justice White, dissenting, would have overruled Weber as a "perversion" of Title VII as would have Justice Scalia, joined by the Chief Justice and Justice White, in a separate dissent. The dissenters criticized the majority for using Title VII "to overcome the effect not of the employer's own discrimination, but of societal attitudes that have limited entry of certain races, or of a particular sex, into certain jobs." Noting the district court finding of no past discrimination by the county agency, they argued in light of Sheetmetal Workers that "there is no sensible basis for construing Title VII to permit employers to engage in race- or sex- conscious employment practices that courts would be forbidden from ordering them to engage in following a judicial finding of discrimination."

CONCLUSION

Predictions are always "risky business" when it comes to court-watching and are further complicated here by the highly fragmented nature of the Court's most recent affirmative action rulings. Nonetheless, both supporters of

affirmative action and its foes may find some comfort in the decisions this term and last. First, whether as a voluntary policy or compelled by court order, it appears that, if certain conditions are met, an employer or labor union may adopt affirmative action remedies that benefit women or minority persons who are not identified as specific victims of past discrimination. A federal court may order affirmative action only where the employer or union has engaged in "persistent" or "egregious" discrimination or where necessary to dissipate the "lingering effects" of pervasive discrimination. In other words, such relief is a remedy of last resort and is to be used only where other available remedies, i.e., injunctions and make-whole relief for identifiable victims, do not promise full and effective relief.

A reduced emphasis on classic remediation theory, or the need to show past discrimination, is apparent where voluntary affirmative action remedies are at issue, at least in the private employment context or where a statutory challenge is involved. Less certain, however, is what must be shown, statistically or otherwise, to sustain the constitutionality of voluntary affirmative action by a public employer, that is, to satisfy Justice Powell's "convincing evidence" or Justice O'Connor's "firm basis" standard in the Wygant case. Note that the Johnson case specifically avoided the issue by not addressing the constitutional question, and its meaning is further obscured by the "inexorable zero," or the fact that no women were employed in the job category involved. Thus, the facts in Johnson would seem to fit readily within any evidentiary standard.

Another verity that seems clearly to emerge is that future cases will be judged not only on the basis of demonstrable need to redress past discrimination but also in terms of adverse impact on identifiable non-

minorities. Accordingly, the duration and flexibility of the remedy have emerged as key factors in evaluating any affirmative action plan. And those remedies, like the minority layoff provision in Wygant, which immediately effect the displacement of white workers are most suspect and the least likely to meet the Court's constitutional and statutory tests. At the other end of the spectrum, hiring and training goals that have a more "diffuse" effect on nonminority applicants are more likely to win judicial acceptance. For example, the basic preferential hiring policy of E.O. 11246, mandating affirmative action by federal contractors, is probably undisturbed by these rulings, but in the event of layoffs such preferred hires presumably could not be immunized against the adverse effects of a seniority policy. The fate of promotional goals or quotas, however, may yet be largely unsettled and may depend on the circumstances of the particular case and whether constitutional or statutory standards are applicable.

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May 18, 1987

CRS Report for Congress

Section 504 of the Rehabilitation Act: Statutory Provisions, Legislative History, and Regulatory Requirements

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January 19, 1989

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SECTION 504 OF THE REHABILITATION ACT: STATUTORY PROVISIONS, LEGISLATIVE HISTORY, AND REGULATORY REQUIREMENTS

SUMMARY

Section 504 of the Rehabilitation Act prohibits discrimination solely on the basis of handicap against otherwise qualified persons with handicaps in federally funded programs, the executive agencies, and the Postal Service. Persons with handicaps not in federally funded or federally conducted programs are not afforded protections under section 504. Under section 504, individuals with handicaps are not to be excluded from participation in or denied the benefits of federally assisted or federally conducted programs solely by reason of handicap.

Section 504 was enacted for federally assisted programs in 1973. In 1974, a definition of persons protected by section 504 was added: eligible individuals are those who have a substantial physical or mental impairment, have a record of such an impairment, or are regarded as having such an impairment. In 1978, section 504 was amended to include federally conducted programs, and the definition of handicapped persons eligible for section 504 protections was amended. The new definition excluded, for purposes of employment, alcoholics or drug abusers whose use of such substances would: 1) prevent the individual from performing the job, or 2) constitute a threat to the property or safety of others.

The Civil Rights Restoration Act, P.L. 100-259, amended section 504 to ensure a broad definition of the scope of these nondiscrimination provisions. These amendments were in response to a Supreme Court decision that had the effect of narrowing the interpretation of the scope of section 504. These amendments also specified that, for purposes of employment, persons with a contagious disease or infection are not protected under section 504 if such disease or infection would: 1) constitute a direct threat to the health or safety of others, or 2) prevent the individual from performing the duties of the job.

Regulations set forth a definition for persons with handicaps covered under section 504 and establish standards for determining discriminatory practices. A major regulatory provision requires executive agencies and recipients of Federal assistance to make reasonable accommodation to the physical and mental limitations of qualified persons with handicaps unless such accommodation would impose an undue hardship on the operation of the program.

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STATUTORY PROVISIONS

SECTION 504 REQUIREMENTS

Section 504 of the Rehabilitation Act of 1973, as amended, provides a broad prohibition of discrimination against individuals with handicaps by recipients of Federal financial assistance and by executive agencies.[1] This is the major Federal law specifically protecting the civil rights of persons with handicaps. The Rehabilitation Act of 1973 prohibited discrimination by recipients of Federal financial assistance, and the 1978 amendments extended this prohibition to agencies of the executive branch of Government and to the United States Postal Service. Section 504, therefore, applies to "any program or activity" assisted by Federal funds or conducted by an executive agency.[2] Federally assisted programs are those supported by Federal grants or loans to States or other political subdivisions or to public or private agencies or other entities receiving Federal financial assistance. Federally conducted programs are those funded and administered directly by executive agencies or purchased through procurement contracts.

The Civil Rights Restoration Act of 1987 was passed in response to a 1983 Supreme Court decision that had the effect of narrowing the applicability of section 504 (and other civil rights statutes) to apply only to the particular "program or activity" receiving Federal financial

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[1]P.L. 98-112 as amended, 29 U.S.C. 794.

[2]Although section 504 does not extend to entities in the private sector that do not receive Federal financial assistance, major legislation was introduced in the 100th Congress that would establish a comprehensive nationwide prohibition against discrimination on the basis of handicap. For information on this initiative, see U.S. Library of Congress. Congressional Research Service. The Americans with Disabilities Act (ADA): Legal Analysis of Proposed Legislation Prohibiting Discrimination on the Basis of Handicap. CRS Report for Congress No. 88-621 A, by Nancy Lee Jones. Washington, September 19, 1988.

assistance, and not to the institution as a whole.[3] In response to the Court decision, the Restoration Act specified that section 504 (and three other civil rights statutes) apply to all the operations of the entity receiving Federal financial assistance, and not only to the particular activity receiving such assistance.

Section 504, entitled "Nondiscrimination Under Federal Grants and Programs," reads as follows:

> Section 504. (a) No otherwise qualified individual with handicaps in the United States, as defined in section 7(8), shall, solely by reason of his or her handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by an Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.
>
> (b) For the purposes of this section, the term "program or activity" means all of the operations of--
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> (1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or
>
> (B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;
>
> (2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or
>
> (B) a local educational agency (as defined in section 1471(12) of the Elementary and Secondary Education Act of 1965), system of vocational education, or other school system;

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[3]Grove City College v. Bell, 465 U.S. 555 (1984).

(3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship--

(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3); any part of which is extended Federal financial assistance.

(c) Small providers are not required by subsection (a) to make significant structural alterations to their existing facilities for the purpose of assuring program accessibility, if alternative means of providing the services are available. The terms used in this subsection shall be construed with reference to the regulations existing on the date of enactment of this subsection.

Section 504 is patterned after the anti-discrimination language of title VI of Civil Rights Act which prohibits discrimination on the basis of race, color, or national origin and title IX of the Education Amendments of 1972 which prohibits discrimination on the basis of sex.

PERSONS WITH HANDICAPS PROTECTED BY SECTION 504

For the purposes of section 504, the term "individual with handicaps" is defined by the Rehabilitation Act to mean any 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.[4] For purposes of employment, however, the term does not include any person who is an alcoholic or drug abuser if such use of alcohol or drugs prevents the individual from performing the duties of the job in question. Persons using such

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[4]From section 7(8) of the Rehabilitation Act, 29 U.S.C. 706(8).

substances are also not included in the definition if such person's employment would constitute a direct threat to the property or safety of others because of current alcohol or drug abuse.

The Civil Rights Restoration Act amended the Rehabilitation Act definition of "individual with handicaps" by excluding from section 504 employment protections for certain persons with contagious diseases or infections. Persons excluded are those individuals who would constitute a direct threat to the health or safety of others or who are not able to perform the duties of the job due to such contagious disease or infection.

P.L. 100-430, the Fair Housing Amendments Act of 1988, amended the Rehabilitation Act by excluding from the definition of "individual with handicaps" any person solely because that person is a transvestite.

LEGISLATIVE HISTORY

1973 ACT: P.L. 93-112

There is very little legislative history surrounding the original enactment of section 504. Joseph Califano, Secretary of the Department of Health, Education and Welfare (HEW), was quoted as saying that "Congress enacted the legislation without legislative hearings and with virtually no floor debate in either House. There is thus little congressional guidance on the host of complex issues raised by section 504's far reaching prohibition against discrimination."[5]

The House report and the House-Senate conference report did not discuss section 504 in any detail; they merely described the section. However, in the Senate report there was some language discussing the history of the legislation and its purposes. It was stated that hearings held as part of the Committee's consideration of the Rehabilitation Act of 1972 highlighted certain areas including:

> . . . the lack of action in areas related to rehabilitation which limit a handicapped individual's ability to function in society, e.g., employment discrimination, lack of housing and transportation services and architectural and transportation barriers . . . .[6]

The congressional debate on the Rehabilitation Act of 1973 did not discuss section 504 in any detail. However, in a statement by Senator Dole, the new goals of the Act were discussed. Senator Dole stated:

> The primary goal of this bill is to assist handicapped individuals in achieving their full potential for participation in our society . . . . I believe this bill will work to the real benefit of America's disabled. This bill contains the State planning requirements, the individualized written programs, strong

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[5]Statement by Joseph A. Califano, Jr., Secretary of HEW, HEW News, Apr. 28, 1977 at page 7. Quoted in Levitan, A. Discrimination Against the Handicapped in Federally-Funded State Services: Subpart F of the Rehabilitation Act Regulations. 12 Clearinghouse Review 339 (Oct. 1978).

[6]U.S. Congress. Senate. Committee on Labor and Public Welfare. Rehabilitation Act of 1972. Senate Report No. 93-318, 93d Cong., lst Sess. Washington, U.S. Govt. Print. Off., 1973.

emphasis on research and training, and antidiscrimination provisions.[7]

1974 AMENDMENTS: P.L. 93-516

Prior to 1974, the definition of the term "handicapped individual" was based on impaired employability. The 1974 amendments to the Rehabilitation Act amended the definition of the term (for the purposes of section 504) to include: 1) a person with a physical or mental impairment which substantially limits one or more major life activities, 2) a person with a record of such an impairment, or 3) a person who is regarded as having such an impairment. The Senate report accompanying the 1974 amendments to the Rehabilitation Act discussed the amended definition and its relevance for section 504:[8]

> Section 504 was enacted to prevent discrimination against all handicapped individuals regardless of their need for or ability to benefit from vocational rehabilitation services, in relation to Federal assistance in employment, education, health services, or any other federally aided programs. Examples of handicapped individuals who may suffer discrimination in the receipt of federally assisted services but who may have been unintentionally excluded from the protection of section 504 by the references to enhanced employability in section 7(b) are as follows: physically or mentally handicapped children who may be denied admission to federally supported school systems on the basis of their handicap, handicapped persons who may be denied admission to federally assisted nursing homes on the basis of their handicap; those persons whose handicap is so severe that employment is not feasible but who may be denied the benefits of a wide range of Federal programs; and those persons whose vocational rehabilitation is complete but who may nevertheless be discriminated against in certain federally assisted activities.

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[7]Dole, Robert. Goals of Act. Remarks in the Senate. Congressional Record, v. 119, July 18, 1973. p. 24589.

[8]Senate Report 93-1297. Rehabilitation Act Amendments of 1974. p. 38.

The 1974 Senate report also explains the nature of discrimination against persons with handicaps in terms of the definition adopted:[9]

> The amended definition eliminates any reference to employment and takes cognizance of the fact that handicapped persons are discriminated against in a number of ways. First, they are discriminated against when they are, in fact, handicapped (this is similar to discrimination because of race and sex). Second, they are discriminated against because they are classified or labeled, correctly or incorrectly, as handicapped (this has no direct parallel in either race or sex discrimination, although racial and ethnic factors may contribute to misclassification as mentally retarded). Third, they are discriminated against if they are regarded as handicapped regardless of whether they are, in fact, handicapped (this has a parallel in race discrimination where a person is regarded as being of a minority group even though, in fact, he or she is not).

The 1974 Senate report also restated the overall purpose of section 504:[10]

> Section 504 was patterned after, and is almost identical to the antidiscrimination language of . . . [title VI of the Civil Rights Act of 1964 (relating to race, color, and national origin) and title IX of the Education Amendments of 1972 (relating to sex)]. The section therefore constitutes the establishment of a broad government policy that programs receiving Federal financial assistance shall be operated without discrimination on the basis of handicap . . . .

1978 AMENDMENTS: P.L. 95-602

The 1978 amendments to the Rehabilitation Act expanded section 504 to apply to any program or activity conducted by any executive agency or by the United States Postal Service. The most detailed

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[9]Ibid.

[10]Ibid., p. 39.

discussion of the amendment to section 504 is found in a statement by Rep. Jeffords discussing the conference report:[11]

> Finally, under section 504 . . . the conferees accepted a provision which I authored which I think brings fairness and equity to the entire picture in eliminating discrimination against the handicapped wherever it exists. In September 1977 the Justice Department issued an opinion at the request of the Department of Health, Education, and Welfare, declaring that the Federal Government was exempt from section 504. Somehow it did not seem right to me that the Federal Government should require States and localities to eliminate discrimination against the handicapped wherever it exists and remain exempt themselves. So I developed a provision which is in this conference report that extends coverage of section 504 to include any function or activity in every department or agency of the Federal Government.

The head of each executive agency was required to promulgate regulations to implement section 504 for federally conducted programs. Although no deadline was provided for completion of regulations, the conference report stated that copies of the proposed regulations were to be submitted to the appropriate authorizing committees of the Congress and were to take effect no earlier than the 30th day after such submission.

The 1978 amendments to the Rehabilitation Act added several sections to title V of the Act that have the potential of strengthening and providing funding for implementation of section 504:

- Persons who feel their rights have been violated by an agency required to comply with section 504 have available to them the rights and procedures of title VI of the Civil Rights Act of 1964. This provision is made under section 505(a)(2).

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[11]Jeffords, James. Remarks in the House. Congressional Record, v. 124, Oct. 14, 1978. p. H13474.

U.S. Congress. House. Committee on Education and Labor. Comprehensive Rehabilitation Services Amendments of 1978. House Report No. 95-1780, 95th Cong., 2d Sess. Washington, U.S. Govt. Print. Off., 1978.

- Persons who obtain a favorable judgment in a court proceeding related to a violation of title V of the Rehabilitation Act are allowed attorneys' fees as part of the costs of litigation. This is provided for under section 505(b).

- Technical assistance for the removal of architectural, transportation, or communication barriers may be provided to persons operating rehabilitation facilities. Such technical assistance may also be provided to public or nonprofit agencies, institutions, or organizations with the concurrence of the Architectural and Transportation Barriers Compliance Board (ATBCB). Section 506(a) makes this provision.

- Financial assistance may be provided to public or nonprofit entities for the purpose of removing architectural, transportation, and communication barriers if a study demonstrating the need for such assistance has been submitted to the ATBCB and if such financial assistance has the concurrence of the ATBCB and the President. Section 506(c) makes this provision.

- Section 507 established an Interagency Coordinating Council to oversee and coordinate the activities of the Federal Government related to implementation and enforcement of the title V provisions and the related regulations. The Council is composed of the following members:

  Secretary of Education
  Secretary of Health and Human Services
  Secretary of Labor
  Assistant Secretary of the Interior for Indian Affairs
  Attorney General
  Chairperson of the Office of Personnel Management
  Chairperson of the Equal Employment Opportunity Commission
  Chairperson of the Architectural and Transportation Barriers Compliance Board

CIVIL RIGHTS RESTORATION ACT OF 1987: P.L. 100-259

Scope of "Program or Activity"

The Civil Rights Restoration Act was enacted on March 22, 1988, when the Senate and House overrode the President Reagan's veto of S. 557, thereby enacting P.L. 100-259. President Reagan had urged the adoption of a substitute measure that would have had less extensive coverage of civil rights provisions. In his veto message the President said:[12]

> Congress . . . has sent me a bill that would vastly and unjustifiably expand the power of the Federal government over the decisions and affairs of private organizations, such as churches and synagogues, farms, businesses, and State and local governments. In the process, it would place at risk such cherished values as religious liberty . . . . Further, this bill would be beyond the scope of pre-Grove City law and expand the scope of coverage of State and local government agencies . . . . The cost and burdens of compliance with S. 557 would be substantial.

P.L. 100-259 amended four civil rights statutes: title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, title VI of the Civil Rights Act of 1964, and section 504 of the Rehabilitation Act.

Congressional response to the 1983 Grove City College decision began in the 98th Congress with legislation that would have deleted the phrase "program or activity" in the four civil rights laws and replaced it with the term "recipient." (S. 2468 and H.R. 5409). Although this proposed amendment was intended to repeal the effects of the Grove City decision by ensuring broad coverage of these statutes, opponents of this approach argued that definitions of the term "recipient" would only lead to ambiguity and possibly greater coverage than had been interpreted prior to the Grove City decision. This legislation was not enacted.

Legislation in the 99th Congress proposed to define the phrase "program or activity" to mean all the operations of any entities, any of part of which received Federal financial assistance. (S. 431 and H.R.

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[12]Weekly Compilation of Presidential Documents, v. 24, no. 11, Mar. 21, 1988. p. 353-354.

700). Efforts to delineate the scope of the civil rights statutes included exempting "ultimate beneficiaries" (an individual receiving a service) and deleting coverage for certain provisions criticized as open-ended. However, these compromises failed to lead to enactment of amendments to repeal the effects of the Grove City decision in the 99th Congress. Efforts to define the issue, however, did lead to language that was introduced in the 100th Congress (S. 577 and H.R. 1214), which ultimately became law.

P.L. 100-259 was enacted to ensure that in all affected civil rights statutes, the phrase "program or activity" means "all the operations of" the following types of entities, any part of which receives Federal financial assistance:

-- State and local governmental units;
-- schools and school systems;
-- post secondary education institutions; and
-- private organizations principally engaged in providing education, health care, housing, social services, or parks and recreation, to which assistance is provided as a whole.

P.L. 100-259 specified that the amendments are not to be construed to extend civil rights coverage to ultimate beneficiaries of Federal financial assistance who were excluded from coverage before the enactment of these amendments. That is, an individual who is the ultimate beneficiary of a service funded with Federal monies is not required to comply with the requirements of the civil rights statutes amended. The Senate bill accompanying P.L. 100-259 states that farmers receiving a crop subsidy are an example of an ultimate beneficiary who would not be required to comply with section 504 requirements.[13]

P.L. 100-259 also provides that the amendments are not to be construed to require any individual, hospital, or any other program or activity receiving Federal financial assistance to perform or pay for an abortion.

The amendments made to section 504 specifically provide that small providers are not required to make significant structural alterations to existing facilities to assure program accessibility, if alternative means of providing the services are available. The Senate report states that pharmacies and grocery stores are examples of small providers that are

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[13]Senate Report 100-64, p. 24.

not required to make significant structural alterations to existing facilities.[14] The terms used are to be construed as those in regulation on the date of enactment of the Restoration Act.[15]

Section 504, Contagious Diseases, and HIV-Infected Persons

Section 504 Provision Regarding Contagious Diseases

The Civil Rights Restoration Act amended the Rehabilitation Act by providing that, for the purposes of employment, section 504 coverage does not extend to persons with contagious diseases or infections if such diseases or infections: 1) constitute a threat to the safety of others, or 2) prevent the person from performing the duties of the job. This amendment placed into law the approach adopted in a 1987 Supreme Court decision.[16]

Supreme Court Decision Regarding Tuberculosis

In 1987 the Supreme Court decided in School Board of Nassau County v. Arline, 107 S.Ct. 1123 (1987), that a person with tuberculosis may be a handicapped individual under section 504, if certain conditions are met. Section 504 protection is available if the person is "otherwise qualified." Such qualification is to be determined according to the degree of risk of transmission of the disease and whether reasonable accommodation by the employer is possible, according to the Court decision. If it is not possible to ameliorate the threat to the safety of others using reasonable accommodation, then the person is not protected by section 504. Section 504 regulations already required that

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[14]Ibid., p. 23.

[15]For further background on the Civil Rights Restoration Act, see U.S. Library of Congress. Congressional Research Service. Civil Rights Legislation: Responses to Grove City College v. Bell. Issue Brief No. IB87123, by Robert F. Lyke, July 21, 1988; and U.S. Library of Congress. Congressional Research Service. The Civil Rights Restoration Act of 1987: Legal Analysis of P.L. 100-259. CRS Report No. 88-171A, by Karen Lewis, et al. Washington, July 12, 1988.

[16]It should be noted that there are numerous Supreme Court and lower court decisions interpreting section 504. However, discussion of these are beyond the scope of this report. For further information, see U.S. Library of Congress. Congressional Research Service. Supreme Court Decisions Interpreting Section 504 of the Rehabilitation Act of 1973. Special Report, by Nancy Lee Jones. Washington, July 22, 1985.

the person be able to perform the duties of the job, with reasonable accommodation.[17]

Section 504 Coverage of HIV-Infected Individuals

In response to a request from the Counsel to the President, the Department of Justice issued a memorandum regarding the application of section 504 to individuals who are infected with the Human Immunodeficiency Virus (HIV) or Acquired Immune Deficiency Syndrome (AIDS).[18] This request specifically included consideration of the question in light of the Arline Supreme Court decision. The Department of Justice determined that section 504 protects symptomatic and asymptomatic HIV-infected individuals in the employment context and in the nonemployment context, if the individual: 1) is able to perform the duties of the job, and 2) does not constitute a direct threat to the health or safety of others. The memorandum acknowledges that section 504 regulations require that employers make reasonable accommodation to the needs of otherwise qualified handicapped persons. If reasonable accommodation cannot remove the threat to the health or safety of other individuals, then an HIV-infected individual would not be protected by section 504, according to the memorandum.

Because the statute and regulations are silent on the applicability of section 504 to HIV-infected individuals, this memorandum represents Administration policy regarding this question.

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[17]For further information, see U.S. Library of Congress. Congressional Research Service. School Board of Nassau County v. Arline: A Person with the Contagious Disease of Tuberculosis May be Covered Under Section 504 of the Rehabilitation Act of 1973. CRS Report for Congress, by Nancy Lee Jones. Mar. 4, 1987; and Legal Implications of the Contagious Disease or Infections Amendment to the Civil Rights Restoration Act, S. 557. Special Report, by Nancy Lee Jones. Mar. 14, 1988.

[18]U.S. Department of Justice. Office of Legal Counsel. Memorandum for Arthur B. Culvahouse, Jr., Counsel to the President. Re: Application of Section 504 of the Rehabilitation Act to HIV-Infected Individuals. Sept. 27, 1988.

SECTION 504 REGULATIONS: HISTORY AND HIGHLIGHTS

Executive agencies affected by section 504 are required to develop and publish regulations for both federally assisted programs and federally conducted programs. To facilitate the development of governmentwide regulations, a model regulation was developed for federally assisted programs and a slightly different prototype regulation was developed for federally conducted programs.

HISTORY OF SECTION 504 RULE-MAKING AFFECTING FEDERALLY ASSISTED PROGRAMS

The first regulation implementing section 504 was published on May 4, 1977, by HEW. This regulation was adapted for use by other executive agencies and published January 13, 1978, as the model regulation for section 504. The model regulation was for federally assisted programs only. (The provision including federally conducted programs was not added to the statute until November of 1978.) Executive Order 11914 gave HEW responsibility for review and approval of other agencies' section 504 regulations.

In May of 1980, HEW was divided into the Department of Education and the Department of Health and Human Services (HHS); HHS assumed responsibility for review and approval of section 504 regulations. On November 4, 1980, Executive Order 12250 placed responsibility for review and approval of all section 504 regulations with the Department of Justice. On August 11, 1981, the original model section 504 regulation was reissued by the Department of Justice (28 CFR Part 41). No substantive changes were made in the model regulation.

The Reagan Administration undertook a review of section 504 regulations to determine whether the regulations placed undue financial or other burdens on recipients of Federal funds. Vice President Bush, who headed the Commission on Regulatory Reform, announced on March 21, 1983, that no changes were needed in the section 504 regulations promulgated for federally assisted programs.

HISTORY OF SECTION 504 RULE-MAKING AFFECTING FEDERALLY CONDUCTED PROGRAMS

The 1978 amendment to section 504 extended nondiscrimination provisions to programs conducted by the executive agencies and by the U.S. Postal Service and required that regulations be promulgated to carry out the expanded provisions. Executive Order 12250 requires the Department of Justice to develop standards and procedures for enforcing this provision. On April 15, 1983, the Department of Justice issued a memorandum to the heads of executive agencies which contained a prototype regulation for the implementation of section 504 as it applied to Federal conducted programs.

SECTION 504 REGULATORY REQUIREMENTS: OVERVIEW

Each executive agency that provides financial assistance to State or local agencies or private organizations, institutions or other entities was required to follow the provisions of the model regulation in issuing its own section 504 regulation. (Additional requirements for 504 regulations determined by the Department of Justice since the promulgation of the model regulation are included in this discussion.) Requirements for federally conducted programs are very similar.[19]

Federal Agency Responsibility

All executive agencies conducting programs or providing Federal financial assistance are required to promulgate a regulation implementing section 504. These regulations are to include, where appropriate, specific provisions adapted to the particular programs and activities receiving funds or other financial assistance from the Federal agency. Federal agencies are required to establish a system for enforcement of their section 504 regulation to include enforcement and hearing procedures used by the agency for title VI of the Civil Rights Act.[20] Agencies receiving Federal funds are to sign assurances, conduct

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[19]For references to specific agency regulations, see U.S. Library of Congress. Congressional Research Service. Regulations Promulgated Pursuant to Section 504 of the Rehabilitation Act of 1973: A Brief History and Present Status. CRS Report for Congress No. 86-53 A, by Nancy Lee Jones and M. Ann Wolfe. Washington, Feb. 28, 1986.

[20]Section 505 of the Rehabilitation Act provides that the remedies, procedures and rights set forth in title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by a recipient of Federal assistance or by a Federal agency under section 504.

self-evaluations, and consult with interested persons, including persons with handicaps, regarding compliance with the provisions of section 504.

Recipients that are receiving assistance from two or more Federal agencies are to coordinate compliance activities, and one Federal agency is to be the primary agency for section 504 compliance purposes.

Federal agencies are to consult with the Architectural and Transportation Barriers Compliance Board in developing and enforcing requirements for accessibility of buildings.[21] Federal agencies are to coordinate with the Department of Labor in enforcing requirements concerning employment discrimination by recipients that are also Federal contractors subject to section 503 of the Rehabilitation Act.[22]

Standards for Determining Eligible Persons

Persons eligible to receive protections under section 504 are those otherwise qualified individuals with handicaps who have a physical or mental impairment which substantially limits one or more of such person's major life activities, have a record of such an impairment, or are regarded as having such an impairment.

The model regulation defines "physical or mental impairment" to include any physiological disorder, cosmetic disfigurement or anatomical loss affecting one of the major body systems. The term also includes any mental or psychological disorder such as mental retardation, organic

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[21]Section 502 of the Rehabilitation Act provides authority for the Architectural and Transportation Barriers Compliance Board to enforce requirements regarding accessibility to federally funded buildings as required by the Architectural Barriers Act of 1968. The Board is composed of representatives of Federal agencies and members of the public. For further information, see U.S. Library of Congress. Congressional Research Service. Accessibility for the Handicapped in Federally Funded Buildings: The Law and Its Implementation. CRS Report for Congress No. 85-613 EPW, by Mary F. Smith. Mar. 11, 1985.

[22]Section 503 of the Rehabilitation Act requires affirmative action in hiring of persons with handicaps by Federal contractors with contracts in excess of $2,500. For further information, see U.S. Library of Congress. Congressional Research Service. Affirmative Action in the Employment of Persons with Handicaps Under Federal Contracts: Section 503 of the Rehabilitation Act. CRS Report for Congress No. 88-701 EPW, by Mary F. Smith. November 2, 1988.

brain syndrome, emotional or mental illness, and specific learning disabilities. Examples of diseases and conditions are presented.

The model regulation defines "major life activities" to include functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.

A person who has a "record" of having an impairment is defined as one who has a history of, or has been misclassified as having, a substantially limiting mental or physical impairment.

A person who is "regarded" as having an impairment is defined as one who either does not have an impairment or does not have a substantially limiting impairment but is discriminated against as if he had a substantially limiting impairment. (Examples of these might be a refusal of employment to an able-bodied disfigured person, or a person with a slight physical impairment who has the ability to perform the job.)

A "qualified individual with handicaps" with respect to employment, means a person with handicaps who, with reasonable accommodation, can perform the essential functions of the job. With respect to services, a qualified person with handicaps is one who meets the essential eligibility requirements of the service program.

Guidelines for Determining Discriminatory Practices

General Provisions

The model regulation restates the portion of the statute that prohibits discrimination on the basis of handicap in any program or activity that receives Federal funds. The model regulation includes in the prohibition those programs or activities that receive "or benefit from" Federal financial assistance. The model regulation states that a recipient, in providing any aid, benefit or service, may not deny a qualified person with handicaps the opportunity to participate and must afford such a person an opportunity that is equal to that afforded others. In determining the location of a program, a recipient may not select a site which would have the effect of excluding handicapped persons. The exclusion of a specific class of handicapped persons from a program limited by Federal statute or executive order to a different class of handicapped person is not prohibited. For example, it is not discriminatory to exclude blind persons from a program specifically designed to serve deaf persons. The model regulation requires

recipients to ensure that communication regarding the program is available to applicants, employees and beneficiaries with impaired vision and hearing.

Employment Provisions

The model regulation requires that no qualified person with handicaps shall, on the basis of handicap, be subjected to discrimination in employment under any program or activity that receives or benefits from Federal financial assistance. Agencies are prohibited from limiting, segregating or classifying applicants or employees in any way that would adversely affect their opportunities or status because of handicap. The prohibition against discrimination in employment applies to recruitment, hiring, compensation, job assignment, benefits, training and other terms and benefits of employment.

Recipients are required to make reasonable accommodation to the known physical and mental limitations of qualified handicapped applicants or employees unless it can be shown that the accommodation would impose an undue hardship on the operation of the program. Reasonable accommodation may include, but is not limited to, making facilities accessible to and usable by persons with handicaps, job restructuring or modified work schedules, acquisition or modification of equipment, modification of employment examinations, and the provision of readers and interpreters.

Qualified person with handicaps means, with respect to employment, a person who: 1) with or without reasonable accommodation, can perform the essential functions of the job without endangering the health or safety of the individual or others, and 2) meets experience and/or education requirements. Tests or employment criteria that discriminate against persons with handicaps are not to be used, and recipients must ensure that any tests used are adapted for persons who have impaired sensory, manual or speaking skills. Preemployment inquiries and preemployment medical examinations to determine the fact or degree of handicap are prohibited except for inquiries to ascertain an applicant's ability to perform job-related functions. Recipients may invite applicants to indicate handicap status if the employer is attempting to correct past discrimination against handicapped persons.

Program Accessibility

Regulations require that no qualified individual with handicaps be subject to discrimination or denied program benefits because a recipient's facilities are inaccessible or unusable by handicapped persons. Recipients are to operate programs so that the program, when viewed in its entirety, is accessible to handicapped persons. This does not necessarily require a recipient to make each facility or every part of a facility accessible to handicapped persons. Recipients are not required to take any action that would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens.

New facilities are to be designed and constructed to be readily accessible to handicapped persons. Alterations to existing facilities, to the maximum extent feasible, are to be designed and constructed to be accessible to handicapped persons. Buildings newly constructed or altered using Federal funds are to comply with the accessibility requirements and standards of the Architectural Barriers of 1968.

CRS Report for Congress

Disabled Persons: State Laws Concerning Accessibility and Discrimination

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ABSTRACT

This report surveys and discusses the statutes in the fifty states and the District of Columbia which concern accessibility of buildings, transportation and public accommodations for disabled persons along with the right of disabled persons to be accompanied by a guide dog within all of these facilities. In addition, laws prohibiting discrimination of disabled persons in the areas of employment, public accommodation and transportation were examined.

Disabled Persons: State Laws Concerning Accessibility and Discrimination

SUMMARY

This report surveys the laws in the fifty states and the District of Columbia concerning accessibility standards of buildings, public accommodations and transportation for disabled persons. Laws were also examined concerning discrimination of handicapped persons in the areas of employment, public accommodation and transportation. Administrative and judicial remedies were also researched and discussed.

It was determined that thirty-five states require that both public and private buildings be accessible to handicapped persons. Eighteen states use the American National Standards Institute, Inc. figures A117.1 (ANSI) as their guide when constructing accessible buildings. Seventeen states follow their own standard. Fourteen states require that public buildings be accessible and nine use ANSI as their building guide. Thirty-five states require that private buildings which are used to offer public accommodations must be built under an accessible standard. The requirements regarding transportation accessibility are the most diverse with no provisions found within the statutes of twenty-eight states regarding that subject.

Forty-five states and the District of Columbia prohibit employment discrimination of disabled persons in both the private and public sector. Twenty-three of these states and the District of Columbia have organized these employment discrimination laws as part of a larger body of civil rights law which prohibits discrimination in public accommodation, transportation and other areas as well as employment and which includes handicapped persons as one of a class of persons protected along with other classes designated by race, religion, sex, national origin etc. Four states prohibit employment discrimination only in the public sector. Delaware does not prohibit employment discrimination of disabled persons.

All of the states prohibit discrimination of disabled persons in public accommodation and transportation; many of these laws are part of the oldest type of public accommodation law affecting handicapped persons known as "white cane laws." Laws pertaining to guide dogs are an important element of the white cane laws. All of the states except Alaska provide that guide dogs must be allowed to accompany their disabled masters into common carriers, public buildings and those private buildings which are used for public accommodations.

All of the states have enacted laws in more than one of the categories set out in this survey. Seventeen states have enacted laws requiring that public and private buildings be accessible to disabled persons as well as laws prohibiting discrimination against handicapped persons in employment, public accommodation and transportation. Within these seventeen states the anti-discrimination laws are organized into one body of law which includes handicapped persons as one of a class of persons protected along with other classes designated by race, religion, sex, national origin, age etc. This body of law also includes administrative and judicial remedies.

Disabled Persons: State Laws Concerning Accessibility and Discrimination

The laws of the fifty states and the District of Columbia were examined concerning the accessibility of buildings, transportation and public accommodations for disabled persons along with the right of disabled persons to be accompanied by guide dogs within all of these facilities. In addition, laws prohibiting discrimination of disabled persons in the areas of employment, public accommodation and transportation were researched as well as the type of remedies made available when violation of these laws is alleged, i.e. the administrative and judicial remedies are set out as well as the statutory citations which specifically include language which allows attorney's fees to be awarded.

There are thirty-five (35) states[1] which require that both public and private buildings within the state be accessible to disabled persons. Within the meaning of this report, public buildings are those buildings which are built with public funds; private buildings are those buildings which are built with private funds and which are used to offer goods and services to the general public. State statutes generally specify a date when the accessible requirement is effective, especially for private buildings. Buildings built prior to that date are generally not affected unless renovations to that building are initiated; sometimes limits are placed on the type of renovations required, taking into account the financial expense of certain accessible features, e.g. see Maine 5 §4593-4594-C. Eighteen (18) states within the thirty-five use the American National Standards Institute, Inc., figures A117.1 (ANSI) as their guide when constructing accessible buildings (see footnote 1). Seventeen (17) states follow their own standard.

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[1] Arizona,* California, Colorado,* Connecticut,* Delaware, Florida,* Georgia,* Idaho,* Illinois, Indiana, Iowa, Kansas,* Kentucky, Louisiana,* Maine,* Maryland, Massachusetts, Michigan, Minnesota, Nebraska,* New Jersey, New Mexico,* New York, North Carolina,* Ohio, Oregon,* Pennsylvania, Rhode Island,* South Carolina,* Tennessee, Texas,* Vermont,* Washington, West Virginia,* Wisconsin. [An asterisk indicates use of American National Standards Institute, Inc., figures A117.1, (ANSI) for accessibility guidelines.]

Fourteen (14) states[2] require that public buildings be accessible. Of these fourteen states, nine (9) use ANSI as their building guide. It should be noted that the State of Virginia requires that public buildings *and* places of employment be accessible to disabled persons. The State of North Dakota requires that publicly funded buildings be accessible but that only the toilet rooms within private buildings be accessible to disabled persons. The State of Arkansas requires that elevators within public buildings be equipped with braille tags. Otherwise, Arkansas does not require that buildings, public or private, meet any accessible standards. The District of Columbia repealed its building accessibility requirements; however, certain federal laws govern the accessibility of transportation facilities there (see the state chart).

The thirty-five states previously listed as requiring accessibility of buildings built with public as well as private funds are necessarily the same states as those which require that public accommodations be accessible. As mentioned previously, it is only privately funded buildings which also offer public accommodations such as hotels, restaurants, sports arenas, retail stores etc. which are included in the accessible standard requirement. Private homes and clubs, structures intended for agricultural purposes, sometimes small apartment buildings, etc., are exempt from those standards either because they are specifically listed in an exemption statute or, more frequently, because they are not included in the definition of "public accommodation." Conversely, the states which require that only those buildings built with public funds be accessible necessarily do not require that public accommodations be located within accessible buildings.

There are twenty-two (22) states[3] and the District of Columbia which discuss transportation accessibility for handicapped persons within their statutes. Of these twenty-two states, five (5) states, i.e., Colorado, Connecticut, Georgia, Illinois and Ohio encourage rather than require jurisdictions to apply accessible standards to various types of public vehicles through the use of grants or funds. Alaska requires only that its vessels be accessible, including their extensive ferry system. States such as California, Maine, Maryland, Minnesota, New Jersey, North Carolina, Oregon, Texas and Washington have either fully developed or are in the process of developing accessibility standards within their various transportation statutes. Several states, not included in this survey, make general reference to observing federal requirements in the planning and design of various transportation systems so

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[2] Alabama,* Alaska, Hawaii,* Mississippi,* Missouri, Montana,* Nevada,* New Hampshire,* North Dakota,* Oklahoma, South Dakota,* Utah, Virginia, Wyoming.* [An asterisk indicates use of American National Standards Institute, Inc., figures A117.1, (ANSI) for accessibility guidelines.]

[3] Alaska, California, Colorado, Connecticut, District of Columbia, Georgia, Illinois, Iowa, Louisiana, Maine, Maryland, Minnesota, Nebraska, New Jersey, New York, North Carolina, Ohio, Oklahoma, Oregon, Texas, Virginia, Washington, Wisconsin.

that federal funding can be obtained. These general references do not specify that an accessible standard for elderly and handicapped persons is one of these federal requirements, but see 49 U.S.C. §1612 of the Urban Mass Transportation Act where separate grants and loans are set aside for this purpose. Oklahoma is the only state which expressly forbids application for federal grants or loans to meet the special needs of handicapped persons in transportation (Okla. 69 §4002 subd. 7).

Forty-five (45) states and the District of Columbia prohibit employment discrimination of disabled persons in both the private and the public sector. Twenty-three (23)[4] of these states and the District of Columbia have organized these employment discrimination laws as part of a larger body of law such as human rights or civil rights law which also prohibit discrimination in public accommodation, transportation and other areas as well as employment and which include handicapped persons as one of a class of persons protected along with other classes designated by race, religion, sex, national origin, age etc. This type of civil rights law includes administrative as well as judicial remedies.

Nevada and Rhode Island prohibit employment and public accommodation discrimination in the context of a civil rights statute but do not treat these provisions as one body of law. North Dakota statutes resemble Nevada and Rhode Island in some respects but differ in offering only judicial remedies.

Eleven (11) states within the forty-five which prohibit employment discrimination treat this discrimination separately as opposed to including public accommodation, but do treat handicapped persons as one protected group among several, i.e., they protect persons from employment discrimination on the basis of sex, national origin, religion, race, etc., as well as handicap. These states are Arizona, California, Florida, Hawaii, Massachusetts, Nebraska, Texas, Utah, Vermont, Wisconsin and Wyoming. Six (6) states, Kentucky, Louisiana, Michigan, South Carolina, Tennessee and Virginia prohibit employment discrimination of handicapped persons in a statute which is separate from all other groups. Kentucky, Michigan, South Carolina and Tennessee offer administrative as well as judicial procedures while Louisiana and Virginia offer only a judicial remedy for alleged violations. Two states, Georgia and North Carolina have each a statute which treats employment discrimination of disabled persons as one protected group among several groups and an additional statute which prohibits employment discrimination of handicapped persons only. There is a mix of administrative and judicial procedures in these states between the various statutes.

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[4] Alaska, Colorado, Connecticut, District of Columbia, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Minnesota, Missouri, Montana, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Washington, West Virginia.

The employers affected by the anti-discrimination in employment statutes in the forty-three states and the District of Columbia differ widely. For example, Maine (5 §4553), Minnesota (§363.01), South Dakota (§20-13-1), Vermont (21 §495d) and Wisconsin (§111.32) define employer as any person who employs one or more persons. In Maryland (Art. 49B §15), Nevada (§613.310), North Carolina (§143-422.2), South Carolina (§1-13-30), Oklahoma (25 §1301), Texas (Civ. Stat. Art. 5221k §2.01), and Utah (§34-35-2) the definition of employer is any person who employs 15 or more persons. California (Govt. §12926), defines employer as anyone who employs 5 or more persons. And Nebraska (§48-1102) defines employer as one who employs 25 or more persons.

Four (4) states prohibit employment discrimination only in the public sector. These states are Alabama, Arkansas, Idaho and Mississippi. Delaware does not have a statute prohibiting employment discrimination of handicapped persons.

All of the states and the District of Columbia prohibit discrimination of disabled persons in public accommodation and transportation. As previously mentioned twenty-three states have incorporated these statutes within their larger civil rights type statutes. The oldest type of public accommodation law affecting disabled persons is known as a "White Cane Law." These laws, many dating from the 1800's, often include transportation in their definition of public accommodation along with the usual list of establishments such as hotels, restaurants and retail stores. Another important component of the white cane law is a provision that guide dogs must be allowed to accompany their disabled masters into these buildings and carriers and cannot be charged an extra fee for the presence of the guide dog; a provision is usually included that the disabled person is liable for any damage which may occur. Alaska is the only jurisdiction which has no statute specifically requiring that guide dogs be allowed into places of public accommodation. Mississippi and South Dakota specify that blind and deaf persons are allowed to have guide dogs whereas the remainder of the jurisdictions use the phrase "handicapped" or "disabled persons." White cane laws usually carry a criminal sanction and action must be initiated by the State Attorney General or some other designated state official. There are two states, Tennessee and Wisconsin, with white cane laws written in such a way as to strongly suggest that only those handicapped persons who are accompanied by a guide dog cannot be discriminated against in the use of the public accommodation. North Dakota, Oklahoma, and Oregon have similar statutes but they also have public accommodation statues which are a part of their larger anti-discrimination law and therefore certainly include all disabled persons. Many states have both white cane laws to prohibit public accommodation and transportation discrimination as well as incorporating this provision in their larger civil rights type laws.

Forty-three (43) states and the District of Columbia have set up administrative procedures to remedy alleged violations of employment discrimination. Louisiana and Virginia offer only judicial remedies. Twenty-

six (26) states and the District of Columbia have established administrative procedures to remedy alleged violations of public accommodation. And twenty-five (25) states and the District of Columbia have included discrimination in transportation within the administrative procedure law. Generally, the commissions which are set up to address this issue are instructed, in the statutes, to informally investigate the complaint filed and if it is determined that the allegations are supported by substantial evidence, an effort must be made immediately and confidentially to eliminate the discrimination complained of by conference, conciliation and persuasion. If these efforts fail, a hearing must be held and an order issued stating the findings as well as an order of "appropriate" relief.

All of the forty-five states and the District of Columbia which prohibit employment discrimination of handicapped persons also provide a statute allowing judicial review. All fifty (50) states and the District of Columbia set out judicial procedures for alleged violations of the prohibition of discrimination of handicapped persons in public accommodation and transportation. States differ concerning when this appeal may be made within the framework of the administrative and judicial procedures.

Thirty-one (31) states and the District of Columbia allow "attorney's fees" for employment discrimination to either private or prevailing parties if such a decision is deemed appropriate. Twenty-two (22) states and the District of Columbia provide for attorney's fees, when appropriate, as part of the remedy in public accommodation and transportation discrimination actions. Nevada provides for attorney's fees only in public accommodation; discrimination in transportation is treated in a separate statute and does not mention attorney's fees.

In conclusion, as demonstrated by the earlier discussion, all of the states have enacted laws in more than one of the categories set out in this survey. However, there are only seventeen (17) states which have enacted laws requiring that public and private buildings be accessible to disabled persons as well as laws prohibiting discrimination against handicapped persons in employment, public accommodation and transportation.[5] Within these seventeen states the anti-discrimination laws are organized into one body of law which include handicapped persons as one of a class of persons protected along with other classes designated by race, religion, sex, national origin, age etc. This body of law also includes administrative and judicial remedies. These states are Colorado, Connecticut, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Minnesota, New Jersey, New Mexico, New York, Ohio, Oregon,

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[5] These provisions are similar to the accessibility and discrimination provisions found in the Americans for Disability Act (ADA) introduced in the 100th and 101st Congress (S. 993 & HR 2273). However, the ADA provisions include only disabled persons and do not treat disabled persons as one of a class of persons protected along with other classes designated by race, religion, sex, national origin, age., etc.

Pennsylvania, Washington, West Virginia. It is also interesting to note that the requirements within the fifty states and the District of Columbia regarding transportation accessibility are the most diverse with no provisions found within the statutes of twenty-eight (28) states regarding that subject. Oklahoma specifies that application for federal grants or loans to meet the special needs of handicapped persons in transportation is not allowed.

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State	*Accessibility*	*Prohibits Discrimination* Employment	Pub. Accom.	Transp.	*Remedy* Administrative	Judicial	*Provides for Attorney's Fee*
Alabama Ala. Code (1988 Supp.)	B = built w/pub. funds §21-4-4; ANSI & own standard §21-4-6, §21-4-3; T = NPWF PA = NPWF GD §21-7-4	State employment §21-7-8	§21-7-3	§21-7-3	NPWF	PA & T = misdemeanor §21-7-6	NPWF
Alaska Alaska Stat. (1988 Supp.)	B = built w/pub. funds §35.10.015; own standard but conform to ANSI §35.10.015 T = Vessels, including ferries, operated by State §35.10.015 PA = NPWF GD = NPWF	§18.80.220	§18.80.230 & §18.80 .300(14)	§18.80.230	E, PA & T = §18.80.100	E, PA & T = §18.80.135	E, PA & T = §18.80.130(e)
Arizona Ariz. Rev. Stat. Ann. (1988 Supp.)	B = Pub & private §34-402, §34-403; ANSI §34-404 T = NPWF PA = §34-403 GD = §24-411 subd. B	§41-1463	§24-411 subd. A	§24-411 sub. A	E = §41-1481 subd. A	E = §41-1481 subd. D; PA & T = petty offense §24-411 subd. E	E = §41-1481 subd. J

NPWF = No Provisions Were Found
ANSI = American National Standards Institute, Inc., figures A117.1
B = Buildings
E = Employment
T = Transportation
PA = Public Accommodation
GD = Guide Dog

State	*Accessibility*	*Prohibits Discrimination* Employment	Pub. Accom.	Transp.	*Remedy* Administrative	Judicial	*Provides for Attorney's Fee*
Arkansas Ark. Stat. Ann. (1987 Supp.)	B = built w/pub. funds, only requires braille tags in elevators §20-24-118 T = NPWF PA = NPWF GD = §20-14-304	State employment §20-14-301(b)	§20-14-301, §20-14-303(a)	§20-14-301, §20-14-303(a)(2)	NPWF	PA & T = misdemeanor §20-14-302	NPWF
California Cal. Govt. Code (1989 Supp.)	B = Pub. & private Govt. §4450 & Health & S §19955, own standard, Govt. §4452 T = Govt. §4500; Tax & R §24380 & §24383 PA = Health & S §19955 & Civil §54.1 GD = Civil §54.2	Govt. §12940	Civil §54.1(a)	Civil §54.1(a)	E = Govt. §12960	E = Govt. §12965(b); B & PA = Health & S §19958.5, Govt. §4458 and Civil §54.3; T = Civil §54.3	E = Govt. §12965(b); T, PA & GD = Civil §54.3
Colorado Colo. Rev. Stat. (1986 Supp.)	B = Pub. & private §9-5-102. ANSI & own §9-5-104, §9-5-112 T = Encouraged w/grants §43-1-601 PA = §9-5-102 GD = Blind persons & common carriers §40-9-109 & generally §24-34-801(e)	§24-34-402;	§24-34-601 & §24-34-801(c), (d)	§24-34-601 & §24-34-801(d)	E, PA & T = §24-34-306(1)	E, PA & T = §24-34-306(11)	NPWF

State	Accessibility	Prohibits Discrimination: Employment	Pub. Accom.	Transp.	Remedy: Administrative	Judicial	Provides for Attorney's Fee
Connecticut Conn. Gen. Stat. (1989 Supp.)	B = Pub. & private §29-269; ANSI §29-269 T = encouraged w/grants §7-273n; PA = §29-269 GD = §22-346a & §46a-64(a)	§46a-60	§46a-64(a), exemptions §46a-64(b) & §22-346a	§22-346a	E & PA = §46a-82	E = §46a-90; T, PA & GD Class C misdemeanor §22-346a(c) PA fined and/or imprisoned §46a-64	NPWF
Delaware Del. Code Ann. (1988 Supp.)	B = Pub. 29 §6917, private 9 §2903 own standard 29 §6917 except when fed. funds involved 29 §6914. T = NPWF PA = 9 §2903 GD = 16 §9502(c)	NPWF	16 §9502(a), (b)	16 §9502(b)	NPWF	E = NPWF PA & T = misdemeanor 16 §9504 & 16 §9506	NPWF
District of Columbia D.C. Code Ann. (1988 Supp.)	B = Bldgs. constructed under Nat. Capital Transp. Act & the Transit Regulation Compact 42 USC §4151 T = Fed. Funded Rapid Rail §1-2453 PA = NPWF GD = §6-1702	§1-2512	§1-2519 & §6-1702	§1-2519 see §1-2502(24)	E, T, PA = §1-2544	E, T, PA = §1-2554	E, T, PA = §1-2553(E) & §1-2556(b)
Florida Fla. Stat. Ann. (1989 Supp.)	B = Pub. & Private §553.46, §553.47; §336.045 & 337.408; ANSI & own §553.48 T = NPWF PA = §553.47 & §553.46 GD = §413.08(b)	§760.10	§413.08 (1)(a)	§413.08 (1)(a)	E = §760.10(10)	E = §760.10(12); T, PA & GD = §413.08(2) misdemeanor	E = §760.10(13)

State	*Accessibility*	*Prohibits Discrimination*			*Remedy*		*Provides for Attorney's Fee*
		Employment	Pub. Accom.	Transp.	Administrative	Judicial	
Georgia Ga. Code. Ann. (1988 Supp.)	B = Pub. & private §30-3-3; ANSI & exemptions §30-3-3. T = Encouraged §32-9-3 PA = §30-3-3 GD = §30-4-1	§34-6A-4, §45-19-29	§30-4-1	§30-4-1	E = §45-19-36(b)	E = §45-19-39(a), §34-6A-6; B, T & PA = misdemeanor §30-4-3, §30-3-6	E = §45-19-39(c), §34-6A-6
Hawaii Hawaii Rev. Stats. (1987 Supp.)	B = built w/pub. funds §103-50; ANSI §103-50 T = NPWF PA = NPWF GD = §347-13(b)	§378-2	§347-20, §347-13(a)	§347-13	E = §378-4	E = §378-5(e)(2); T = fined and/or imprisoned §347-14	E = §378-5(j)
Idaho Idaho Code (1988 Supp.)	B = Pub. & private §39-3201; ANSI §39-3203 T = NPWF PA = §39-3201 GD = §56-704	State employment §56-707	§56-702 & §56-703	§56-703	NPWF	E = NPWF T & PA misdemeanor §56-706	NPWF
Illinois Ill. Ann. Stat. (Smith Hurd 1989 Supp.)	B = Pub. & private 111½ §3711 et seq. own standards 111½ §3714 T = Encouraged w/grants 127 §49.19a PA = 111½ §3711(r)(2) GD = 23 §3363, 38 §65-1	68 §1-102	68 §5-102, 23 §3363	68 §5-102, 23 §3363	E, T, PA = 68 §7-102	E, T, PA = 68 §7-104, 68 §8-11 B = 111½ §3716 T & PA = 23 §3363 misdemeanor	E, T & PA = 68 §8-108(G)

State	*Accessibility*	*Prohibits Discrimination* Employment	Pub. Accom.	Transp.	*Remedy* Administrative	Judicial	*Provides for Attorney's Fee*
Indiana Ind. Code Ann. (1988 Supp.)	B = Pub. & private §22-12-1-4 & §22-13-4-1 own standard T = NPWF PA = §22-12-1-4 & §22-13-4-1 GD = §16-7-5-2	§22-9-1-2	§22-9-1-2 & §22-9-1-3(m)	§22-9-1-2 & §22-9-1-3(m)	E, T, PA = 22-9-1-11	E, T, PA = §22-9-1-6(k)(2)	NPWF
Iowa Iowa Code Ann. (1989 Supp.)	B = Pub. & private §104A.1 et seq., own standards §104A.2 T = §601J.4 PA = §104A.1 et seq. GD = §601D.5	§601A.6	§601D.4, §601A.7 & §601A.2(10)	§601D.4 §601A.7	E, PA & T = §601A.15	E, PA & T = §601A.16(2); GD = misdemeanor §601D.7	E, PA & T = §601A.16(5)
Kansas Kan. Stats Ann. (1988 Supp.)	B = Pub. & private §58-1301a, ANSI §58-1301 & own §58-1317 T = NPWF PA = §58-1301a & §58-1316 GD = §39-1102	§44-1009	§39-1101(b) & §44-1001	§39-1101(a) & §44-1001	E, PA & T = §44-1005	E, PA & T = §44-1011; T & GD = misdemeanor §39-1103	NPWF
Kentucky Ky. Rev. Stats. Ann. (1988 Supp.)	B = Pub. & private §198B.260, own standards §198B.260 T = NPWF PA = §198B.260 & exceptions GD = §258.500	§207.150	§258.500	§258.500	E = §207.200	E = §207.230 T, PA & GD = §258.991 fine or prison	E = §207.230

State	*Accessibility*	*Prohibits Discrimination*			*Remedy*		*Provides for Attorney's Fee*
		Employment	Pub. Accom.	Transp.	Administrative	Judicial	
Louisiana La. Civ. Code Ann (1989 Supp.)	B = Pub. & private 40:1731 et seq., ANSI 40:1733 T = 46:1952 subd. E, PA = 40:1731 GD = 46:1952 subd. C	46:2254	46:1952 subd. B	46:1952 subd. B	NPWF	E = 46:2256 T & PA = §1952 subd. D misdemeanor	E = 46:2256
Maine Me. Rev. Stats. Ann. (1988 Supp.)	B = Pub. bldgs. 25 §2701, & private 5 §4593 ANSI 25 §2701 subd. 5 T = 5 §4593 through 4594-C, ANSI 5 §4594 subd. 2 PA = 5 §4593 through 4594-C GD = 17 §1312 subd. 3	5 §4572	5 §4592, 5 §4553 subd. 8 & 17 §1312	5 §4592, 5 §4553 subd. 8 & 17 §1312	E, PA & T = 5 §4611	E, PA & T = 5 §4621	E, PA, & T = 5 §4614 & 5 §4622
Maryland Md. Ann. Code (1989 Supp.)	B = Pub. & private, Art. 83B §6-102, own standard art. 83B §6-102(2), Art. 41 §11-402 & SF 2-504, conform to ANSI SF 2-509 T = Art. 49B §5(d)(2)(ii) subd. 2 max. expense $2,500 per vehicle PA = Art. 49B §5(d)(2) & Art. 83B §6-102 GD = Art. 30 §33(d)(2)	Art. 49B §16	Art. 49B §5(c) & (d); blind & hearing impaired Art. 30 §33(d)(1)	Art. 49B §5(d)(1)(iii); blind & hearing impaired Art. 30 §33(d)(1)	E, PA & T = Art. 49B §9; also PA = Art. 83B §6-102(3)(ii)	E, PA & T = Art. 49B §10(d) & 12; also PA = Art. 83B §6-102(4)	NPWF

State	*Accessibility*	*Prohibits Discrimination*			*Remedy*		*Provides for Attorney's Fee*
		Employment	Pub. Accom.	Transp.	Administrative	Judicial	
Massachusetts Mass. Gen. Laws Ann. (1989 Supp.)	B = Pub. & private 22 §13A, own standard 22 §13A T = NPWF PA = 22 §13A GD = 272 §98A	151B §4 subd. 16	272 §92A	272 §92A(2)	E = 151B §5 B = 22 §13A	E = 151B §6 & 151B §9 T & PA fined and/or imprisoned 272 §98; B = 22 §13A	E = 151B §9
Michigan Mich. Comp. Laws Ann. (1988 Supp.)	B = Pub. & private §125.1352, own standard §125.1354 T = NPWF PA = §125.1352 GD = §750.502c	§37.1201	§37.1302	§37.1302	E, PA & T = §37.1605, §37.2602	E, PA & T = §37.1606, §37.2606	E, PA & T = §37.1606(3), §37.2605, §37.2801, §37.2802
Minnesota Minn. Stat. Ann. (1989 Supp.)	B = Pub. & private §16B.61 subd. 5 & §471.465; own standard §16B.61 subd. 1 & §471.467 T = §363.03 subd. 4(2), §174.255 (para transit) §473.169 subd. 1 (light rail) §473.384 subd. 8 PA = §471.465 GD = §363.03 subd. 10	§363.03 subd. 1(2)	§363.03 subd. 3	§363.03 subd. 3 and 4	E, T, PA = §363.06	E, T, PA = §363.072 & 363.14 subd. 1	E, T, PA = §363.071 & §363.14 subd. 3

State	*Accessibility*	*Prohibits Discrimination* Employment	Pub. Accom.	Transp.	*Remedy* Administrative	Judicial	*Provides for Attorney's Fee*
Mississippi Miss. Code Ann. (1988 Supp.)	B = built w/pub. funds §43-6-101; own standards §43-6-101 survey state owned bldgs. to comply Fed. standards §31-11-3(b) T = NPWF PA = NPWF GD = blind & hearing disabled §43-6-7	state employment §25-9-149 & §43-6-15	§43-6-5	§43-6-5	NPWF	T, PA & GD = misdemeanor §43-6-11	NPWF
Missouri Mo. Ann. Stat. (1989 Supp.)	B = built w/pub. funds §8.610; own standard §8.620 T = NPWF PA = NPWF GD = §209.150	§213.055	§213.065 & §209.150	§213.065 & §209.150	E, T, PA = §213.075	E, T, PA = §213.085, §213.111; T, PA & GD = §209.160 misdemeanor	E, T, PA = §213.111 subd. 2
Montana Mont. Code Ann. (1987)	B = built w/pub. funds §50-60-201(4), ANSI §50-60-201(4) T = NPWF PA = NPWF GD = §49-4-214	§49-2-303 & §49-4-101	§49-2-304 & §49-4-211	§49-2-304 & §49-4-211	E, T, PA = §49-2-501	E, T, PA = §49-2-509 & E = §49-4-102	E, T, PA = §49-2-505(4), §49-2-509(6) E = §49-4-102
Nebraska Neb. Rev. Stat. (1988 Supp.)	B = Pub. & private §72-1101, ANSI & own standard & 72-1101 et seq. T = §13-1201 et seq. PA = §72-1101 et seq. GD = §20-127(3)	§48-1104	§20-127(2)	§20-127(2)	E = §48-1118	E = §48-1120(1) T & PA = §20-129 misdemeanor	E = §48-1120(2)

State	*Accessibility*	*Prohibits Discrimination*			*Remedy*		*Provides for Attorney's Fee*
		Employment	Pub. Accom.	Transp.	Administrative	Judicial	
Nevada Nev. Rev. Stat. (1987 Supp.)	B = built w/pub. funds §338.180, ANSI §338.180 T = NPWF PA = NPWF GD = §651.075 & §704.145	§613.330	§651.070	§704.143	E = §613.405; PA = §651.110; T = §704.635	E = §613.420; T = §704.145; PA = §651.080 misdemeanor	E = NPWF PA = §651.090
New Hampshire N.H. Rev. Stat. Ann. (1988 Supp.)	B = built w/pub. funds, ANSI & own §275-C:14 T = NPWF PA = NPWF GD = §167-D:3	§354-A:8 subd. I	§167-D:1 subd. V & §354-A:8 subd. IV	§167-D:1 subd. V & §354-A:8 subd. IV	E, T & PA = 354-A:9	E, T, & PA = §354-A:10; T, PA, GD = §167-D:9	NPWF
New Jersey N.J. Stat. Ann. (1988 Supp.)	B = Pub. & private §52:32-4, own standards §52:32-5 T = 27:25-25 et seq. PA = §52:32-4 GD = §48:3-33 transportation; §10:5-29 generally	§10:5-29.1 & §10:5-4.1	§10:1-2 & §10:5-4.1	§10:1-2 & §10:1-5	E, T, PA & GD = §10:5-13	E, T, PA & GD = §10:5-38	E, T, PA & GD = §10:5-27.1
New Mexico N.M. Stat. Ann. (1988 Supp.)	B = Pub. & private §60-13-44 subd. D, ANSI §60-13-44 subd. D (see §60-13-58 applicable law though repealed) see also §28-7-3 subd. D T = NPWF PA = §60-13-44 subd. D GD = §28-7-3 subd. C	§28-1-7 subd. A	§28-1-7 subd. F & §28-7-3 subd. A & B	§28-1-7 subd. F & 28-7-3 subd. A & B	E, T, PA = §28-1-10	E, T, PA = §28-1-13 subd. A; T, PA & GD = §28-7-5 misdemeanor	E, T, PA = §28-1-13 subd. D, §28-1-11 subd. E

State	*Accessibility*	*Prohibits Discrimination*			*Remedy*		*Provides for Attorney's Fee*
		Employment	Pub. Accom.	Transp.	Administrative	Judicial	
New York N.Y. Executive Law Consol. (1989 Supp.)	B = Pub. & private Pub. Bldgs. §51, own standard Pub. Bldg. §51 T = New York City-Trans. §15-b, ANSI §15-b subd. 7 also see Pub. Bldgs. §51(1), (2), (3) & (4) PA = Pub. Bldgs. §51 GD = Exec. §296 subd. 14 & Civil Rights §47	Exec. §296 subd. 1(a), Civil Rights §47-a & Civil Rights §40-c	Exec. §296 subd. 2(a)	Exec. §296 subd. 2(a) & Exec. §292 subd. 9	E, T, PA & GD = Exec. §297	E, T, PA & GD = Exec. 297 subd. 9 & Exec. 298	NPWF
North Carolina N.C. Gen. Stat. (1988 Supp.)	B = Pub. & private §143-138(c) & §168-2, ANSI §143-138(c) T = §168A-8 PA = §168A-3(10) subd. b & §168A-4 GD = §168-4.2	§143-422.2 §168A-5(a)(1). See defin. reasonable accomodation §168A-3(10) & §168A-4	§168A-6 & §168-3	§168A-8 & §168-3	E = §143-422.3	E, T & PA = §168A-11; GD = §168-4.5 misdemeanor	E, T, & PA = §168A-11(d)

State	*Accessibility*	*Prohibits Discrimination*			*Remedy*		*Provides for Attorney's Fee*
		Employment	Pub. Accom.	Transp.	Administrative	Judicial	
North Dakota N.D. Cent. Code (1987 Supp.)	B = built w/pub. funds §48-02-19, ANSI §48-02-19; T = NPWF PA = Accessible toilet rooms §23-13-13 GD = §25-13-02	§14-02. 4-03	§14-02. 4-14, §25-13-02 w/guide dog	§14-02. 4-14, §25-13-02 w/guide dog	NPWF	E, PA & T = §14-02.4-19 T & PA = §25-13-04 misdemeanor	E, PA & T = §14-02.4-20
Ohio Ohio Rev. Ann. (1988 Supp.)	B = Pub. & private §3781.11 own standards §3781.111 T = §5501.08 created fund entitled "Elderly & Handicapped Transit Vehicle & Equipment Fund" PA = §3781.11 GD = §955.43	§4112.02(A)	§4112.02(G) & §955.43	§4112.02(G) & see §4112.01(9) & §955.43	E, T, PA = §4112.05	E, T, PA = §4112.051 & §4112.06	E, T, PA = §4112.05(G) & §4112.051
Oklahoma Okla. Stat. Ann. (1989 Supp.)	B = built w/pub. funds 61 §11(changed from ANSI to Building Officials & Code Administrators International Inc. in 1983, 61 §11. T = does not allow application for fed. grants or loans to meet special needs of handicapped persons 69 §4002 subd. 7. PA = NPWF GD = 7 §19.1	25 §1302	25 §1402 & 7 §19.1 w/guide dog	25 §1402 7 §19.1 w/guide dog	E, PA & T = 25 §1502	E, PA & T = 25 §1506; GD = 7 §19.1 misdemeanor	E, PA, & T = 25 §1506(b)

State	*Accessibility*	*Prohibits Discrimination*			*Remedy*		*Provides for Attorney's Fee*
		Employment	Pub. Accom.	Transp.	Administrative	Judicial	
Oregon Or. Rev. Stat. (1987)	B = Pub. & private §447.220, own standards guided by ANSI §447.230(3) T = §267.240 ANSI §267.240; §391.830 PA = §447.220 GD = §346.620	§659.425(1)	§659.425(4) & §346.620 w/guide dog	§659.425(4) defined §30.675; §346.620 w/guide dog	E, T, PA = §659.435, §659.040 & §659.045	E, T, PA = §659.095; GD = §346.991 misdemeanor	E, T & PA = §659.121
Pennsylvania Pa. Cons. Stat. Ann. (1988 Supp.)	B = Pub. & private 71 §1455.1 own standard 71 §1455.2 T = NPWF PA = 71 §1455.1 GD = 43 §955(i)(1)	43 §955(a)	43 §955(i)(1)	43 §955(i)(1) defined 43 §954(l)	E, T, PA & GD = 43 §959	E, T, PA & GD = 43 §960 & 43 §962	NPWF
Rhode Island R.I. Gen. Laws (1988 Supp.)	B = Pub. & private §23-27.3-109.1.4 & §37-8-15 own standard reasonably consistent with national model standards §23-27.3-100.1.5 T = NPWF PA = §23-27.3-109.1.4 GD = §11-24-2.1(C)	§28-5-7; §42-87-2	§11-24-2	§11-24-2 defined §11-24-3	E = §28-5-17 T & PA = §11-24-4	E, T & PA = §28-5-24.1 & §28-5-28; §42-87-4	E, T & PA = §28-5-24

State	*Accessibility*	*Prohibits Discrimination* Employment	Pub. Accom.	Transp.	*Remedy* Administrative	Judicial	*Provides for Attorney's Fee*
South Carolina S.C. Code Ann. (1988 Supp.)	B = Pub. & private §10-5-220, ANSI §10-5-250 T = NPWF PA = §10-5-220 GD = §43-33-2(c) & §43-33-70(d)	§43-33-530	§43-33-530 & §43-33-20	§43-33-530 & §43-33-20	E = §43-33-550 & §1-13-90	E = §1-13-90(d)(6); T, PA & GD = §43-33-40 misdemeanor	E, PA & T = §43-33-540
South Dakota S.D. Codified Laws Ann. (1987 Supp.)	B = built w/pub. funds §5-14-12, ANSI §5-14-13 T = NPWF PA = NPWF GD = §20-13-23.2 (blind), §20-13-23.5 (deaf)	§20-13-10 & blind §20-13-10.1	§20-13-23	§20-13-23 defined §20-13-1(12)	E, T, PA & GD = §20-13-29	E, T, PA & GD = §20-13-47	NPWF
Tennessee Tenn. Code Ann. (1988 Supp.)	B = Pub. & private §68-18-204, own standard §68-18-204 T = NPWF PA = §68-18-204 GD = §62-7-112	§8-50-103	§62-7-112 w/guide dog	§62-7-112 w/guide dog	E = §8-50-103(b)(1), §4-21-302	E = §4-21-307, §4-21-311; PA, T & GD = §62-7-112 misdemeanor	E = §4-21-306(a)(8) & §4-21-311
Texas Tex. Code Ann. (1989 Supp.)	B = Pub. & private Civil Stat. Art. 601b §7.02, ANSI Civil Stat. Art. 601b §7.05(c) T = Civil Stat. Art. 1118x §12B(d) PA = Civil Stat. Art. 601b §7.02 GD = Human R. §121.003(c)	Civil Stat. Art. 5221K §5.01, Human R. §121.003(f)	Human R. §121.003(a)	Human R. §121.003(b)	E = Civil Stat. Art. 5221K §6.01	E = Civil Stat. Art. 5221K §7.01; E, T, PA & GD = Human R. §121.004 misdemeanor	E = Civil Stat. Art. 5221K §7.01(e)

State	*Accessibility*	*Prohibits Discrimination* Employment	Pub. Accom.	Transp.	*Remedy* Administrative	Judicial	*Provides for Attorney's Fee*
Utah Utah Code Ann. (1989 Supp.)	B = built w/pub. funds, privately funded bldgs. encouraged §26-29-1, own standards §26-29-3. T = NPWF PA = encouraged, not required §26-29-1(4) GD = §26-30-2	§34-35-6	§26-30-1(3)	§26-30-1(2)	E = §34-35-7.1	E = §34-35-8; T, PA & GD = §26-30-4 Class C misdemeanor	NPWF
Vermont Vt. Stat. Ann. (1987 Supp.)	B = Pub. & private, 18 §1322(a), ANSI 18 §1322(a) T = NPWF PA = 18 §1322(a) GD = 9 §4502(b)	21 §495	9 §4502(a)	9 §4502(a)	E = 21 §495b(a);	E = 21 §495b(b) T, PA & GD = 9 §4506	E = 21 §495b(b) T, PA & GD = 9 §4506
Virginia Va. Code (1988 Supp.)	B = built w/pub. funds §2.1-514, own standard §2.1-516; employers must meet reasonable accommodation standard including bldg. accessibility §51.5-41 T = §51.5-44 subd. C (no retrofitting required §51.5-44 subd. D) PA = NPWF GD = §51.5-44 subd. E	§51.5-41 (defines "reasonable accomodation")	§51.5-44	§51.5-44	NPWF	E, PA & T = §51.5-46	E, PA & T = §51.5-46

State	*Accessibility*	*Prohibits Discrimination* Employment	Pub. Accom.	Transp.	*Remedy* Administrative	Judicial	*Provides for Attorney's Fee*
Washington Wash. Rev. Code Ann. (1989 Supp.)	B = Pub. & private §70.92.100, own standards §70.92.140 & §70.92.1505 T = §47.04.170 PA = §70.92.100 GD = §70.84.030	§49.60 .030(a) & §49.60.180	§49.60 .030(b), §70.84 .010(3)	§49.60 .030(b) defined §49.60.040, §70.84 .010(3)	E, T, PA = §49.60.230	E, T, PA = §49.60.250(6), §49.60.260(5) & §49.60.270; T, PA, GD = §70.84.070	E, PA & T = §49.60.030(2)
West Virginia W. Va. Code (1988 Supp.)	B = Pub. & private §18-10F-2, ANSI §18-10F-3 T = NPWF PA = §18-10F-2 GD = §5-15-4(c)	§5-11-9(a)	§5-11-9(f)(1) & §5-15-4	§5-11-9(f)(1) & §5-15-4	E, T & PA = §5-11-10	E, T & PA = §5-11-11 & §5-11-13(b); GD = §5-15-8 misdemeanor	E, T & PA = §5-11-13(c)
Wisconsin Wis. Stat. Ann. (1988 Supp.)	B = Pub. & private §101.13, own standards w/consideration of ANSI §101.13(5)(b) T = §85.20 (Urban Mass Transit), §85.21 (counties) & §85.22 (private nonprofit corp.) encourages w/grants PA = §101.13 & defined §101.01(2)(h) GD = §174.056 generally	§111.322(1)	§174.056 w/guide dog	§174.056 w/guide dog	E = §111.39	E = §111.395 PA, T & GD = §174.056(2) fined	NPWF
Wyoming Wyo. Stat. (1985 Supp.)	B = built w/pub. funds §16-6-501, ANSI §16-6-501 T = NPWF PA = NPWF GD = §42-1-126(b) & §42-1-129(a)	§27-9-105	§42-1-126(a)	§42-1-126(a)	E = §27-9-106	E = §27-9-107, §27-9-108; T, PA & GD = §42-1-128 misdemeanor	NPWF

CRS Report for Congress

The Americans With Disabilities Act (ADA): An Overview of Selected Major Legal Issues

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THE AMERICANS WITH DISABILITIES ACT (ADA): AN OVERVIEW OF SELECTED MAJOR LEGAL ISSUES

SUMMARY

The Americans with Disabilities Act would provide broad based nondiscrimination protection for persons with disabilities in the private sector. It uses many of the key concepts from existing law concerning the civil rights of persons with disabilities, section 504 of the Rehabilitation Act of 1973, and would cover employment, public services, public accommodations, transportation, and telecommunications. The protection from discrimination would apply unless a particular standard or practice is "both necessary and substantially related to the ability of an individual to perform or participate" in a program or job and the essential components of the job or program cannot be met by reasonable accommodation or with the provision of auxiliary aids or services. Reasonable accommodation generally would not be required if it would place an undue burden on an entity.

Several legal issues have been posed by this legislation. There have been questions raised concerning the coverage of drug addicts, alcoholics and persons with contagious diseases or infections, and questions concerning the remedies provided for by the bill, especially the provisions which allow suit by persons who believe that they are "about to be subjected to discrimination." In addition, there have been issues raised concerning the scope of public accommodations coverage in the legislation, the coverage of transportation, church-state issues, and the meaning of certain references to section 504 in the ADA.

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I. Introduction

The Americans with Disabilities Act of 1989 (ADA), S. 933 and H.R. 2273, 101st Cong., lst Sess., was introduced on May 9, 1989. The legislation would provide broad based nondiscrimination protection for persons with disabilities in the private sector and would cover employment, public services, public accommodations, transportation, and telecommunications. This protection would apply unless a particular standard or practice is "both necessary and substantially related to the ability of an individual to perform or participate" in a program or job and the essential components of the job or program cannot be met by reasonable accommodation or with the provision of auxiliary aids or services.

As stated in section 2 of the ADA, its purpose is fourfold: (1) to provide a clear and comprehensive national mandate for the elimination of discrimination against persons with disabilities, (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities, (3) to assure that the federal government plays a central role in enforcing the standards established in the Act, and (4) to invoke the sweep of congressional authority to address discrimination against persons with disabilities. The ADA originated with a proposal from the National Council on Disabilities[1] and similar legislation was introduced in the 100th Congress.[2] Hearings were held in the fall of 1988 and three days of hearings were held in May and June of 1989.[3]

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[1] The National Council on Disabilities is an independent federal agency. Its statutory functions include providing recommendations to the Congress regarding individuals with disabilities. 29 U.S.C. sec. 781.

[2] S. 2345 and H.R. 4498, 100th Cong. For an analysis of these bills see "The Americans with Disabilities Act (ADA): Legal Analysis of Proposed Legislation Prohibiting Discrimination on the Basis of Handicap," CRS Rep. 88-621A (Sept. 19, 1988).

[3] Senate Subcommittee on the Handicapped Hearings, May 10, 1989; Senate Labor and Human Resources Hearings, May 9, June 26, 1989. Senate mark-up scheduled August 2, 1989. House Subcommittee on Select Education Hearings, July 18, 1989.

There is an existing federal statute prohibiting discrimination against individuals with disabilities, section 504 of the Rehabilitation Act of 1973, 29 U.S.C. sec. 794.[4] Section 504 prohibits discrimination against an otherwise qualified individual with handicaps solely by reason of handicap in any program or activity that receives federal financial assistance or in the executive agencies or the U.S. Postal Service. Many of the concepts used in the ADA originated in section 504 jurisprudence although section 504 differs from the proposed legislation in several ways which will be discussed subsequently. The most significant difference is that section 504's prohibition of discrimination is generally tied to the receipt of federal financial assistance. The ADA would cover the private sector and contains a specific section stating that nothing in the act shall be construed to reduce the scope of coverage or apply a lesser standard than the coverage required or the standards applied under the nondiscrimination provisions of section 504.

This report will first provide a brief overview of the current proposed legislation and will compare the bills in the 101st Congress with the legislation from the 100th Congress. Finally, selected controversial legal issues will be analyzed.

II. Overview of S. 933 and H.R. 2273, 101st Cong.

Section 1 is the short title and table of contents for the bill. Section 2 sets out congressional findings and purposes while section 3 provides definitions of "auxiliary aids and services," "disability," "reasonable accommodation," and "state." The term disability is defined as meaning with respect to an individual "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such indivdiual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." Reasonable accommodation is defined as including "(A) making existing facilities used by employees readily accessible to and useable by individuals with disabilities; and (B) job restructuring, part-time or modified work schedules, reassignment, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations and training materials, adoption or modification of procedures or protocols, the provision of qualified readers or interpreters, and other similar accommodations."

Title I sets forth the general prohibitions against discrimination, many of which are drawn from the section 504 regulations.[5] It also provides that it shall be a defense to a charge of discrimination that an application of certain qualification standards is necessary and substantially related to the ability of an individual to perform or participate in the essential components

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[4] Other sections in the Rehabilitation Act concern affirmative action for handicapped employees in the federal government, 29 U.S.C. sec. 791, and affirmative action for employees of federal contractors, 29 U.S.C. sec. 793.

[5] 28 C.F.R. secs. 41.51 et seq.

of the job or program. The term "qualification standards" may include requiring that the current use of alcohol or drugs by an alcoholic or drug abuser not pose a direct threat to property or the safety of others in the work place or program and requiring that an individual with a currently contagious disease or infection not pose a direct threat to the health or safety of other individuals in the work place or program.

Title II provides that an employer, employment agency, labor organization, or joint labor-management committee may not discriminate against a qualified individual with a disability with regard to any term, condition or privilege of employment. The term employer is defined as a person engaged in an industry affecting commerce who has 15 or more employees. The remedies of title VII of the Civil Rights Act of 1964, 42 U.S. C. secs. 2000e-5, 2000e-8, and 2000e-9, are incorporated by reference as are the remedies of section 1981, 42 U.S.C. sec. 1981, with respect to any individual who believes that he or she is being or is about to be subjected to discrimination on the basis of disability in violation of the Act.

Title III concerns public services and provides that no qualified individual with a disability may be discriminated against by a State or agency or political subdivision of a State. This title also contains several detailed provisions relating to public transportation. The remedies of section 505 of the Rehabilitation Act of 1973, 29 U.S.C. sec. 794a, are incorporated by reference.

Title IV concerns public accommodations and services operated by private entities. It provides that no individual shall be discriminated against in the full and equal enjoyment of the goods, services, facilities, privileges, advantages and accommodations of any place of public accommodation on the basis of disability. Places of public accommodation are seen as including among others, auditoriums, convention centers, theaters, restaurants, professional offices of health care providers, sales establishments, parks, private schools, and recreation facilities. Specific provisions are included regarding discrimination in public transportation services provided by private entities. The remedies of the Fair Housing Act, 42 U.S.C. secs. 3602(i), 3613, and 3614(a) and (d), are incorporated by reference.

Title V sets forth the nondiscrimination provisions relating to telecommunications relay services and specifies that telephone services offered to the general public must include interstate and intrastate telecommunication relay services so that such services provide individuals who use nonvoice terminal devices equal opportunities for communications. The remedies of the Fair Housing Act, 42 U.S.C. secs. 3602(i), 3613, and 3614(a) and (d), and the remedies of the Communications Act of 1934, 47 U.S.C. secs. 206, 207, 208, 209, and 401 et seq., are incorporated by reference.

Title VI contains miscellaneous provisions including a section discussing the relationship between the ADA and section 504 and the relationship between various titles in the ADA, a section prohibiting retaliation, a section abrogating state immunity under the Eleventh Amendment, a section requiring that the Architectural and Transportation Barriers Compliance Board

(ATBCB) issue certain guidelines, and a section allowing attorneys' fees in administrative or judicial actions.

III. Comparison of Major Differences Between the ADA in the 100th and 101st Congresses

Substantial changes were made in the ADA prior to its reintroduction in the 101st Congress. The 100th Congress version (hereafter referred to as the "old ADA") had a different structure and varies from the 101st Congress version (hereafter referred to as the ADA or S. 933) in several substantive ways. Five of the most significant of these distinctions will be discussed here.

The old ADA had broad definitions of "on the basis of handicap" and "physical or mental impairment." Although much of this language was based on regulations promulgated pursuant to section 504, the definition of "disability" in S. 933 is closer to the definition applicable to section 504. The present version of the ADA defines disability as meaning in part a physical or mental impairment that "**substantially limits**" one or more of an individual's major life activities. The absence of the substantially limits language in the predecessor legislation could have given rise to coverage of minor impairments such as left-handedness which have not been found to be covered under section 504.[6]

Another area of difference between the two versions of the ADA is in the area of reasonable accommodations. Generally, the Supreme Court has found that section 504 does not require a "fundamental alteration in the nature of a program."[7] The Court has viewed section 504 requirements as striking "a balance between the statutory rights of the handicapped to be integrated into society and the legitimate interests of federal grantees in preserving the integrity of their programs: while a grantee need not be required to make 'fundamental' or 'substantial' modifications to accommodate the handicapped, it may be required to make 'reasonable' ones."[8] The old ADA contained somewhat similar language, referred to as the "bankruptcy clause", which stated that the failure or refusal to remove barriers and make reasonable accommodations shall not be an unlawful act of discrimination if such action would fundamentally alter the essential nature, or **threaten the existence of**, the program or business.[9] This language arguably provided a stricter standard than that under section 504. The present version of the ADA uses a standard like that of section 504 and provides that discrimination is not

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[6] *de la Torres v. Bolger,* 610 F. Supp. 593 (D. Tex. 1985).

[7] *Southeastern Community College v. Davis,* 442 U.S. 397, 410 (1979).

[8] *Alexander v. Choate,* 469 U.S. 287 (1985).

[9] H.R. 4498, 100th Cong., 2d Sess., sec. 7. (Emphasis added).

present if an entity can demonstrate that the accommodation would impose an undue hardship.

The coverage of public accommodations differs between the two versions of the ADA. The 100th Congress version prohibited discrimination in any public accommodation covered by title II of the Civil Rights Act of 1964, 42 U.S.C. sec. 2000a. S. 933, on the other hand, is more comprehensive and has a title which discusses public accommodations and includes various places, such as the professional offices of health care providers and shopping centers, which are not covered by title II of the Civil Rights Act.

The 100th Congress version of the ADA would have required some retrofitting of existing transportation vehicles to render them accessible to and usable by persons with physical and mental impairments. S. 933 does not require retrofitting but does contain more detailed requirements relating to transportation services. These requirements differ depending on whether the entity providing them is public or private.

Another major distinction between the two versions of the ADA is in their treatment of remedies. The old ADA had one remedies section which covered all different aspects of discrimination on the basis of disability. The new version contains specific remedies sections for titles II, III, IV and V. These sections parallel the remedies which would be provided under similar civil rights statutes. For example, title II on employment references the remedies and procedures set forth in title VII of the Civil Rights Act of 1964. This type of reference has the advantage of being more certain since it incorporates an already existing body of law; however, it has been criticized as expanding remedies to possibly allow punitive damages or damages for pain and suffering.[10]

IV. Major Legal Issues Concerning the ADA

A. Introduction

Although the ADA has enjoyed broad based support and the concept of the legislation was endorsed by President Bush during the election campaign,[11] several of the specifics of the legislation have proven to be controversial. Some of these major legal issues will be analyzed here.[12]

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[10] For a detailed discussion of the remedies sections of S. 933 see "Remedies and Standing to Sue Under S. 933, the 'Americans with Disabilities Act of 1989'", CRS Rep. No. 89-336A (May 26, 1989).

[11] 19 ARC Government Report 3 (May 18, 1989).

[12] Since the ADA is a civil rights bill, most of the issues have been legal ones. The major exception to this has been the question of cost. The cost factor of reasonable accommodations was discussed at Senate hearings on May

B. Drug Addicts, Alcoholics and Persons with Contagious Diseases

As described above, the ADA allows a defense to a charge of discrimination if certain qualification standards are necessary to perform the job or participate in the program. Such qualification standards may include providing that the current use of alcohol or drugs by an alcoholic or drug abuser not pose a direct threat to property or the safety of others in the work place or program and providing that an individual with a currently contagious disease or infection not pose a direct threat to the health or safety of other individuals in the work place or program. In other words, if the use of alcohol or drugs or the presence of a contagious disease or infection would pose a direct threat, an individual could be denied employment or participation in a program without a violation of the act. If there was no such threat posed and the individual was able to meet the general qualification standards, such an individual would be covered by the nondiscrimination provisions of the legislation.

The definitional section applicable to section 504 contains similar provisions relating to drug addicts, alcoholics and persons with contagious diseases or infections. The provision on contagious diseases or infections would cover persons with AIDS or who are positive for antibodies to HIV.[13] Similarly, the ADA is intended to cover such individuals.[14] However, the greatest controversy around this provision of the ADA has centered around the coverage of drug addicts and alcoholics. It has been argued that this

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9, 10 and 16, 1989 and has been addressed by the National Council on Disability. See Memorandum to the National Council on the Handicapped, from Robert L. Burgdorf, Jr., entitled "Cost Data Regarding the Americans with Disabilities Act" (July 28, 1988). The costs of the legislation are difficult to determine since the type of accommodations required would vary greatly from individual to individual. Also, some accommodations may not be required if they would result in an "undue burden" and exactly what is an "undue burden" would be determined on a case-by-case basis. In addition, it has been argued that the legislation would actually be a revenue generator since it would bring more individuals into the work force and would create more consumer spending by providing accessible shopping areas, restaurants, and places of entertainment. A more detailed discussion of cost is beyond the scope of this report.

[13] Even prior to the amendment of the Rehabilitation Act discussing contagious diseases and infections (contained in the Civil Rights Restoration Act, P.L. 100-259), the Supreme Court had interpreted section 504 to cover persons with contagious diseases and most commentators and subsequent judicial decisions have applied the Court's reasoning to HIV infected persons. See *School Board of Nassau County v. Arline*, 107 S.Ct. 1123 (1987).

[14] See 135 Cong. Rec. S 4985 (May 9, 1989) (Comments of Senator Harkin).

coverage is in conflict with the drug-free work place statute, P.L. 100-690, 102 Stat. 4304, since it may protect drug addicts or alcoholics from discrimination in certain circumstances. However, it could be argued that the ADA is consistent with the drug-free work place law since the ADA does not grant protection for the use of drugs on the job and since it requires that individuals must be able to perform a particular job. The more difficult issue is the extent to which the ADA's prohibition of discrimination would cover discriminatory acts against persons who use drugs in a non work place environment. If such use did not pose a direct threat and the individual performed or took advantage of the essential components of the job or program, a strong argument could be made that discrimination against such individuals would be prohibited by the legislation.

C. Remedies and Damages

The ADA contains differing remedies provisions for various substantive titles in the legislation and to some extent provides for differences in the scope of coverage. These sections draw upon the remedies and procedures found in other civil rights statutes, for example, the title II employment remedies section references the remedies and procedures of title VII of the Civil Rights Act of 1964. Several issues have arisen concerning these sections: (1) what exactly do these references encompass, (2) how does this differ, if it does, from present remedies coverage of persons with disabilities under section 504, (3) are punitive damages or damages for pain and suffering covered, and (4) what are the ramifications of the language in these provisions allowing suit when an individual feels that they are "about to be discriminated against?" This last issue will be addressed in a separate section.

Title II of the ADA bans discrimination in employment against otherwise qualified persons with disabilities and incorporates by reference the remedies and procedures set forth in sections 706, 709, and 710 of the Civil Rights Act of 1964, 42 U.S.C. secs. 2000e-5, 2000e-8, 2000e-9, and the remedies and procedures available under section 1981, 42 U.S.C. sec. 1981. Title VII provides for administrative enforcement by the Equal Employment Opportunity Commission (EEOC). The EEOC is to attempt voluntary conciliation but where this fails, the Commission is authorized to bring a civil action against certain employers. However, there is also a private right of action where the EEOC has either dismissed a charge or has not reached a conciliation agreement or filed a suit within 180 days. Under section 1981 there would be a private right of action; however, recently the Supreme Court has limited coverage of 1981 to situations involving hiring decisions or promotion decisions where such decisions would constitute a new and distinct relationship between the employer and employee.[15] Thus, generally section 1981 would not be applicable to discrimination on the job. One question presented by this case is whether the reference in the ADA to inclusion of section 1981 remedies would mean that these remedies would be similarly limited in application to certain situations as they were by the Supreme Court

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[15] *Patterson v. McLean Credit Union,* No. 87-107 (June 15, 1989).

in *Patterson*. In other words, would *Patterson* essentially have no effect on ADA interpretation since the ADA refers only to the remedies of section 1981 or would the limitations of application in *Patterson* also be applicable in the ADA? It would appear that reading of the plain language of the bill would indicate that the remedies of section 1981 are to be applicable in situations where there is discrimination as defined in the ADA. Report language may assist in resolving this issue.

The specific remedies under title VII would include injunctive relief and affirmative action including reinstatement or hiring, with or without back pay.[16] Back pay liability is limited to two years under title VII; however, there is no time limit under section 1981. Also, compensatory and punitive damages may be awarded under section 1981 although these are not generally available under title VII.[17] Section 1981 would allow jury trials while title VII does not provide for jury trials and whether jury trial are appropriate under the ADA has generated considerable discussion. Attorneys' fees are available under both title VII and section 1981.

Title III of the ADA prohibits discrimination in public services and applies the remedies, procedures and rights set forth in section 505 of the Rehabilitation Act of 1973, 29 U.S.C. sec. 794, to such acts of discrimination. Section 505 sets forth the enforcement procedures for section 504 of the Rehabilitation Act and provides that the remedies for section 504 are those available under title VI of the Civil Rights Act. Generally, the Rehabilitation Act has been interpreted to allow a private right of action and to allow money damages and equitable actions for back pay.[18] However, the exact extent of these remedies is uncertain. It would appear likely that intentional discrimination is required[19] but there is no settled line of cases regarding damages for pain and suffering and punitive damages.[20]

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[16] 42 U.S.C. sec. 2000e-5(g).

[17] *Johnson v. Railway Express Agency,* 421 U.S. 454 (1975).

[18] *Consolidated Rail Corporation v. Darrone,* 465 U.S. 624 (1984).

[19] *Carter v. Orleans Parish Public Schools,* 725 F.2d 261 (5th Cir. 1984); *Marvin H. v. Austin Independent School District,* 714 F.2d 1348 (5th Cir. 1983).

[20] See *Recanzone v.Washoe County School District,* 696 F. Supp. 1372 (D. Nev. 1988)(allowing damages for pain and suffering); *Shuttleworth v. Broward County,* 649 F.Supp. 35 (S.D.Fla. 1986)(damages for mental suffering or humiliation would not be allowed under section 504); *Gelman v. Department of Education,* 544 F. Supp 651 (D.Col. 1982)(punitive damages not available); *Fitzgerald v. Green Valley Area Education Agency*, 589 F. Supp. 1130 (S.D. Iowa 1984) (punitive damages presumably available but were not justified in the particular factual situation raised).

Public accommodations and services operated by private entities are covered by title IV of the ADA. The enforcement section of this title is based on the Fair Housing Act and references the sections authorizing private civil action by aggrieved persons and judicial actions by the Attorney General. The bill does not reference the Fair Housing Act sections relating to administrative complaints, investigations and adjudication procedures.

Title VI of the bill requires common carriers of telephone services to provide telecommunication relay services. The sections of the Fair Housing Act used for public accommodation in title IV of the ADA are referenced here and in addition, administrative enforcement is provided by reference to provisions of the Communications Act of 1934, 47 U.S.C. secs. 206, 207, 208, and 209. The referenced Federal Communications Commission (FCC) provisions authorize the filing of complaints and investigations by the FCC, provide that the FCC may hold hearings, make determinations as to liability and damages and make an order directing payment. In addition, the FCC would have cease and desist authority and could impose fines of $10,000.

The remedies available under the ADA do differ in scope of coverage from those available for section 504 violations. For example, the administrative scheme applicable under title VII differs from those available under section 504. Also, the referencing of the Fair Housing Act would authorize judicial actions by the Attorney General which are not specifically authorized for section 504. The reference to the Federal Communications Act of 1934 would also provide for broad cease and desist authority and fines which have no parallel under sections 504 or 505. One of the major differences is one of scope -- the availability of judicial remedies if an individual feels that he or she is "about to be subjected to discrimination."

The extent of the availability of punitive damages or damages for pain and suffering under the ADA is not certain. There is no settled line of cases on these issues regarding section 504. Punitive damages may be awarded under section 1981 but it is possible that the application of section 1981 may be limited by the Supreme Court's decision in *Patterson* as discussed above.

D. Remedies for Persons "About to be Subjected to Discrimination"

The various remedies sections in the ADA would apply if an individual believes he or she "is being or **about to be** subjected to discrimination on the basis of disability." (emphasis added). The "about to be subjected to discrimination" language is not contained in the remedies provisions applicable to section 504[21] or under title VII of the Civil Rights Act of 1964. The closest

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[21] 29 U.S.C. sec. 794a, which contains the remedies provisions for section 504, provides for remedies "to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title."

statutory parallel is found in the Fair Housing Act, as amended by the Fair Housing Amendments Act of 1988, P.L. 100-430.[22]

The original definition of "person aggrieved" under the Fair Housing Act enforcement provisions was "[a]ny person who claims to have been injured by a discriminatory housing practice or who believes that he will be irrevocably injured by a discriminatory housing practice that is about to occur."[23] The Fair Housing Amendments Act of 1988 added a definition of "aggrieved person" to the definitions section which defined such a term as including "any person who -- (1) claims to have been injured by a discriminatory housing practice; or (2) believes that such person will be injured by a discriminatory housing practice that is about to occur."

The House Report[24] discussed this change in the definition.

> *Aggrieved person.* Provides a definition of aggrieved person to be used under this act. In *Gladstone Realtors v. Village of Bellwood,* the Supreme Court affirmed that standing requirements for judicial and administrative review are identical under title VIII. In *Havens Realty Corp. v. Coleman,* the Court held that "testers" have standing to sue under title VIII, because Section 804(d) prohibits the representation "to any person because of race, color, religion, sex or national origin that any dwelling is not available for inspection, sale or rental when such dwelling is in fact so available." The bill adopts as its definition language similar to that contained in Section 810 of existing law, as modified to reaffirm the broad holdings of these cases.

The report correctly states the holding in *Gladstone* but the part of the definition at issue there was the first category -- a person who claims to have been injured by a discriminatory housing practice -- not the second category of persons who believe they will be injured. In addition, the Court in

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[22] Title II of the Civil Rights Act of 1964, 42 U.S.C. sec. 2000a-3, allows a civil action "[w]henever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice prohibited by section 203 [42 U.S.C. sec. 2000a-2]." The ADA, it should be emphasized, contains no requirement for "reasonable grounds" and in addition, title II provides only injunctive relief. Title II does not provide for a damage remedy.

[23] 42 U.S.C. sec. 3610, P.L. 90-284, sec. 810.

[24] H.Rep. No 711, 100th Cong. 2d Sess., *reprinted in [1988] U.S. Code Cong. & Ad. News* 2173, 2184. There were no Senate or Conference Reports on P.L. 100-430. The congressional debate also did not center around this provision and there were only a few references to enforcement. For example, see 134 Cong. Rec. S 10556 (daily edition Aug. 2, 1988) (statement of Senator Cranston) discussing the strengthening of enforcement provisions.

Gladstone emphasized that although Congress may expand standing to the full extent permitted by Article III of the Constitution, Congress cannot abrogate the essential constitutional requirement that a plaintiff must always have suffered "'a distinct and palpable injury to himself' that is likely to be redressed if the requested relief if granted."[25] Certainly the Court in *Gladstone* and *Havens Realty Corporation* indicated that a "tester" for housing discrimination purposes has standing to sue but the application of the language to other purposes is not as clear and will probably await further judicial action.

In the apparent absence of prior interpretation or legislative history, the question then becomes what is the meaning of this phrase in the ADA? It could be argued that such language is necessary to allow for immediate remedies. For example, if construction of a building were being planned and it was determined not to be accessible for persons with disabilities, it could be argued that the "about to be discriminated against" language would be necessary in order to assure that the building was planned to be accessible. In other words, the language could mean that it was not necessary to wait until the building was complete until remedies were pursued. However, even without this language it could be argued that drafting blueprints or obtaining permits for an inaccessible building are actual acts of discrimination, thus allowing the use of remedies without waiting for completed construction. It could also be argued that the "about to be discriminated against" language could create a serious potential for nuisance suits, especially in areas such as employment. For example, in the area of employment it might be possible to argue that such language would allow suit prior to the instituting of any adverse action against an employee and that such suits could be premised on erroneous interpretations of casual conversations.

This type of language could also raise constitutional questions under Article III of the Constitution. As was noted by the Court in *Gladstone,* Congress may expand standing to sue, but there must be the constitutional minimum of a plaintiff who has suffered a distinct and palpable injury to himself. To the extent that the about to be discriminated against language could be interpreted to allow suit without such a distinct injury, it could face constitutional challenge.

E. Public Accommodations in the ADA and Public Accommodations in Title II of the Civil Rights Act

Title IV of the ADA would prohibit discrimination in any place of public accommodation. Title II of the Civil Rights Act of 1964 also covers public accommodations and the major issues concerning this section of the ADA concern what the coverage is under the ADA and title II and whether there should be such a distinction.

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[25] *Gladstone, Realtors v. Village of Bellwood,* 441 U.S. 91, 100 (1979)[citing *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38 (1976)].

Public accommodation is defined in the ADA as privately operated establishments that are used by the general public as customers, clients or visitors, or that are potential places of employment and whose operations affect commerce. Specific examples of covered entities are also listed including auditoriums, convention centers, stadiums, theaters, shopping centers, professional offices of health care providers, parks, and private schools but the list is illustrative, not exhaustive. Title II is more limited in coverage than the ADA. It prohibits discrimination in any place of public accommodation and defines public accommodation by exhaustively listing covered entities -- hotels, restaurants, places of entertainment and other establishments connected with the covered entities in certain ways. Unlike the ADA, this list defines the coverage and does not leave open the possibility of coverage of other entities. In addition, the illustrative list in the ADA is more comprehensive than title II and would cover entities like the professional offices of health care providers and private schools which are not covered under title II. Section 402 of the ADA does provide some limitations on its coverage of public accommodations. For example, a failure to remove architectural and communication barriers is not discriminatory where such removal is not "readily achievable." In addition, a failure to ensure individuals with disabilities are not excluded or denied services is discrimination unless the entity can demonstrate that taking such steps would result in an "undue burden."

It could be argued that the more extensive coverage under the ADA is necessary to cover places of crucial importance to persons with disabilities such as professional offices of health care providers and that limitations are provided by the concepts of "readily achievable" and "undue burden." However, it could also be argued that the ADA coverage goes beyond these specific needs and that if the intention of the legislation is to parallel existing civil rights legislation, this distinction does not fulfill this intention.

F. Church-State Implications of the ADA

The ADA does not specifically mention religious or religiously affiliated institutions; however, arguments have been made that several of its provisions have implications for such institutions. For example, William Bentley Ball testified before the Senate Subcommittee on the Handicapped that the ADA would violate the constitutional rights of churches and religious schools under the First Amendment. He argued that the bill would impose substantial economic costs on churches and religious schools, and that the bill would require these entities to hire admitted drug and alcohol users and individuals who are HIV positive in violation of religious principles. This, Mr. Ball argued, would be in violation of both the free exercise and the establishment of religion clauses of the First Amendment.

These arguments raise several issues: first, does the scope of the ADA cover religious or religiously affiliated institutions; second, assuming that it does would this coverage pose a constitutional violation? Although the issue is not without ambiguity, it would appear that the ADA would apply to these

institutions and its application to such entities most likely would not be unconstitutional.

The extent to which the ADA covers religious or religiously affiliated institutions is not entirely clear but certain observations may be made. The public accommodations provisions of the ADA specifically list private schools as covered entities and do not provide any exclusion for private religious schools. Thus, such institutions would appear to be covered by the ADA. Whether churches or other religious institutions are to be covered is more uncertain since they are not specifically listed but the broad general prohibition of discrimination in accommodations discussed previously would appear to allow coverage of such entities. However, the general provisions of the ADA do provide for flexibility in coverage by allowances for "undue hardship" and for qualification standards. Therefore, these exceptions could be used to argue that, for example, a church would not have to hire an alcoholic if this would violate its religious precepts. Legislative history on this issue would be helpful in providing clarity.

If the ADA's provisions are somewhat ambiguous on this coverage, the constitutional boundaries of government regulation of pervasively religious entities are even more unclear. With regard to the establishment clause, the Supreme Court has generally employed the tripartite or *Lemon* test:

> First, the statute must have a secular legislative purposes; second, its principal or primary effect must be one that neither advances nor inhibits religion...; finally, the statute must not foster "an excessive government entanglement with religion." *Lemon v. Kurtzman,* 403 U.S. 602, 612-13 (1971).

The free exercise clause has also been construed to protect religious practices from undue governmental interference and the Court has often required that to be constitutional a government action burdening religious exercise be shown to serve a compelling public interest and to be the least restrictive means available of achieving that interest.[26] Although there are certainly constitutional protections from governmental interference under both the establishment clause and the free exercise clause, such protections are not absolute. The Court has specifically upheld the imposition of a racial nondiscrimination requirement on the tax exemption afforded a religious school because of the government's compelling interest in eradicating racial discrimination.[27] Similarly, the lower courts have generally upheld the imposition of nondiscrimination requirements on religious entities except with

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[26] *Sherbert v. Verner,* 374 U.S. 398 (1963). But the Court's most recent free exercise decision held strict scrutiny inappropriate in the absence of actual coercion of religious practices. See *Lyng v. Northwest Indian Cemetery Protective Association,* 56 U.S.L.W. 4292 (1988).

[27] *Bob Jones University v. United States,* 461 U.S. 574 (1983).

respect to employment decisions regarding clergy.[28] These cases would suggest that to the extent the ADA is found to cover religious institutions, it would pass constitutional muster so long as the qualifications provisions or the undue burden language were seen as limiting interference with certain hiring decisions.

G. Transportation

Transportation issues regarding persons with disabilities have always been problematic and the subject of numerous judicial decisions. This area has posed some of the most difficult issues regarding balancing the rights of individuals with disabilities and the interests of federal grantees in preserving the integrity of their programs.[29] Recently, the third circuit court of appeals in *ADAPT v. Burnley,* Nos. 88-1139, 88-1177, and 88-1178 (Feb. 13, 1989), examined the transportation requirements of section 504 and held that they required that newly purchased buses be accessible to the mobility-disabled. In addition, the court struck down Department of Transportation regulations allowing the option of paratransit in place of accessibility and relieving certain statutory duties if transit authorities spend more than 3% of their budget on services to the handicapped. However, this decision was vacated on April 19, 1989.

The ADA contains detailed sections relating to transportation and requires that new vehicles be accessible and allows paratransit but only as a supplement to existing systems, not as an alternative. Thus, it parallels section 504 as such section was interpreted by the third circuit. One of the issues which has arisen is the extent to which the *ADAPT* decision should be written into a statute when it is not certain if the decision will be appealed to the Supreme Court.[30]

One of the other major issues regarding transportation was the question of whether existing vehicles should be required to be retrofitted. The 100th Congress version of the ADA would have required retrofitting but this requirement was dropped when the ADA was revised and reintroduced in the 101st Congress.

H. Relationship of the ADA with Section 504

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[28] See e.g., *McClure v. Salvation Army,* 460 F.2d 553 (5th Cir.), *cert. denied,* 409 U.S. 896 (1972).

[29] The Supreme Court in *Alexander v. Choate,* 469 U.S. 287 (1985), found that section 504 involves "a balance between the legitimate interests of federal grantees in preserving the integrity of their programs: while a grantee need not be required to make 'fundamental' or 'substantial' modifications to accommodate the handicapped, it may be required to make 'reasonable' ones."

[30] Another major issue which comes up most often in the transportation context is that of cost. See footnote 12 *supra.*

The ADA contains a specific section, section 601, which provides that "[n]othing in this Act shall be construed to reduce the scope of coverage or apply a lesser standard than the coverage required or the standards applied under title V of the Rehabilitation Act of 1973...or the regulations issued by Federal agencies pursuant to such title." Section 504 is also referenced several times in sections relating to transportation and such references generally provide that it shall be considered to be discrimination for the purposes of the ADA and section 504 to perform certain acts, such as the purchase of inaccessible buses.[31] The issue these latter references raise is whether such references are really amendments to section 504. This is not entirely clear-cut. It could be argued that these are in effect amendments to section 504 since they define how section 504 is to be interpreted with regard to transportation. However, it could also be argued that this is essentially a restatement of existing section 504 interpretation and that it is necessary to clarify coverage for providers of transportation who receive federal funds.

V. Summary

The Americans with Disabilities Act would provide broad based nondiscrimination protection for persons with disabilities in the private sector. It uses many of the key concepts from existing law concerning the civil rights of persons with disabilities, section 504 of the Rehabilitation Act of 1973, and would cover employment, public services, public accommodations, transportation, and telecommunications. The protection from discrimination would apply unless a particular standard or practice is "both necessary and substantially related to the ability of an individual to perform or participate" in a program or job and the essential components of the job or program cannot be met by reasonable accommodation or with the provision of auxiliary aids or services. Reasonable accommodation generally would not be required if it would place an undue burden on an entity.

Several legal issues have been posed by this legislation. There have been questions raised concerning the coverage of drug addicts, alcoholics and persons with contagious diseases or infections, and questions concerning the remedies provided for by the bill, especially the provisions which allow suit by persons who believe that they are "about to be subjected to discrimination." In addition, there have been issues raised concerning the scope of public accommodations coverage in the legislation, the coverage of transportation, church-state issues, and the meaning of certain references to section 504 in the ADA.

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[31] See e.g., S. 933, 101st Cong., sec. 303(b), 303(c), and 303(d).

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CRS Report for Congress

The Americans With Disabilities Act (ADA): An Overview of Selected Major Legal Issues

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THE AMERICANS WITH DISABILITIES ACT (ADA): AN OVERVIEW OF SELECTED MAJOR LEGAL ISSUES

SUMMARY

The Americans with Disabilities Act would provide broad based nondiscrimination protection for persons with disabilities in the private sector. It uses many of the key concepts from existing law concerning the civil rights of persons with disabilities, section 504 of the Rehabilitation Act of 1973, and would cover employment, public services, public accommodations, transportation, and telecommunications. The protection from discrimination would apply unless a particular standard or practice is "both necessary and substantially related to the ability of an individual to perform or participate" in a program or job and the essential components of the job or program cannot be met by reasonable accommodation or with the provision of auxiliary aids or services. Reasonable accommodation generally would not be required if it would place an undue burden on an entity.

Several legal issues have been posed by this legislation. There have been questions raised concerning the coverage of drug addicts, alcoholics and persons with contagious diseases or infections, and questions concerning the remedies provided for by the bill, especially the provisions which allow suit by persons who believe that they are "about to be subjected to discrimination." In addition, there have been issues raised concerning the scope of public accommodations coverage in the legislation, the coverage of transportation, church-state issues, and the meaning of certain references to section 504 in the ADA.

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THE AMERICANS WITH DISABILITIES ACT (ADA): AN OVERVIEW OF SELECTED MAJOR LEGAL ISSUES

I. Introduction

The Americans with Disabilities Act of 1989 (ADA), S. 933 and H.R. 2273, 101st Cong., lst Sess., was introduced on May 9, 1989. The legislation would provide broad based nondiscrimination protection for persons with disabilities in the private sector and would cover employment, public services, public accommodations, transportation, and telecommunications. This protection would apply unless a particular standard or practice is "both necessary and substantially related to the ability of an individual to perform or participate" in a program or job and the essential components of the job or program cannot be met by reasonable accommodation or with the provision of auxiliary aids or services.

As stated in section 2 of the ADA, its purpose is fourfold: (1) to provide a clear and comprehensive national mandate for the elimination of discrimination against persons with disabilities, (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities, (3) to assure that the federal government plays a central role in enforcing the standards established in the Act, and (4) to invoke the sweep of congressional authority to address discrimination against persons with disabilities. The ADA originated with a proposal from the National Council on Disabilities[1] and similar legislation was introduced in the 100th Congress.[2] Hearings were held in the fall of 1988 and three days of hearings were held in May and June of 1989.[3]

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[1] The National Council on Disabilities is an independent federal agency. Its statutory functions include providing recommendations to the Congress regarding individuals with disabilities. 29 U.S.C. sec. 781.

[2] S. 2345 and H.R. 4498, 100th Cong. For an analysis of these bills see "The Americans with Disabilities Act (ADA): Legal Analysis of Proposed Legislation Prohibiting Discrimination on the Basis of Handicap," CRS Rep. 88-621A (Sept. 19, 1988).

[3] Senate Subcommittee on the Handicapped Hearings, May 10, 1989; Senate Labor and Human Resources Hearings, May 9, June 26, 1989. Senate mark-up scheduled August 2, 1989. House Subcommittee on Select Education Hearings, July 18, 1989.

There is an existing federal statute prohibiting discrimination against individuals with disabilities, section 504 of the Rehabilitation Act of 1973, 29 U.S.C. sec. 794.[4] Section 504 prohibits discrimination against an otherwise qualified individual with handicaps solely by reason of handicap in any program or activity that receives federal financial assistance or in the executive agencies or the U.S. Postal Service. Many of the concepts used in the ADA originated in section 504 jurisprudence although section 504 differs from the proposed legislation in several ways which will be discussed subsequently. The most significant difference is that section 504's prohibition of discrimination is generally tied to the receipt of federal financial assistance. The ADA would cover the private sector and contains a specific section stating that nothing in the act shall be construed to reduce the scope of coverage or apply a lesser standard than the coverage required or the standards applied under the nondiscrimination provisions of section 504.

This report will first provide a brief overview of the current proposed legislation and will compare the bills in the 101st Congress with the legislation from the 100th Congress. Finally, selected controversial legal issues will be analyzed.

II. Overview of S. 933 and H.R. 2273, 101st Cong.

Section 1 is the short title and table of contents for the bill. Section 2 sets out congressional findings and purposes while section 3 provides definitions of "auxiliary aids and services," "disability," "reasonable accommodation," and "state." The term disability is defined as meaning with respect to an individual "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such indivdiual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." Reasonable accommodation is defined as including "(A) making existing facilities used by employees readily accessible to and useable by individuals with disabilities; and (B) job restructuring, part-time or modified work schedules, reassignment, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations and training materials, adoption or modification of procedures or protocols, the provision of qualified readers or interpreters, and other similar accommodations."

Title I sets forth the general prohibitions against discrimination, many of which are drawn from the section 504 regulations.[5] It also provides that it shall be a defense to a charge of discrimination that an application of certain qualification standards is necessary and substantially related to the ability of an individual to perform or participate in the essential components

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[4] Other sections in the Rehabilitation Act concern affirmative action for handicapped employees in the federal government, 29 U.S.C. sec. 791, and affirmative action for employees of federal contractors, 29 U.S.C. sec. 793.

[5] 28 C.F.R. secs. 41.51 et seq.

of the job or program. The term "qualification standards" may include requiring that the current use of alcohol or drugs by an alcoholic or drug abuser not pose a direct threat to property or the safety of others in the work place or program and requiring that an individual with a currently contagious disease or infection not pose a direct threat to the health or safety of other individuals in the work place or program.

Title II provides that an employer, employment agency, labor organization, or joint labor-management committee may not discriminate against a qualified individual with a disability with regard to any term, condition or privilege of employment. The term employer is defined as a person engaged in an industry affecting commerce who has 15 or more employees. The remedies of title VII of the Civil Rights Act of 1964, 42 U.S. C. secs. 2000e-5, 2000e-8, and 2000e-9, are incorporated by reference as are the remedies of section 1981, 42 U.S.C. sec. 1981, with respect to any individual who believes that he or she is being or is about to be subjected to discrimination on the basis of disability in violation of the Act.

Title III concerns public services and provides that no qualified individual with a disability may be discriminated against by a State or agency or political subdivision of a State. This title also contains several detailed provisions relating to public transportation. The remedies of section 505 of the Rehabilitation Act of 1973, 29 U.S.C. sec. 794a, are incorporated by reference.

Title IV concerns public accommodations and services operated by private entities. It provides that no individual shall be discriminated against in the full and equal enjoyment of the goods, services, facilities, privileges, advantages and accommodations of any place of public accommodation on the basis of disability. Places of public accommodation are seen as including among others, auditoriums, convention centers, theaters, restaurants, professional offices of health care providers, sales establishments, parks, private schools, and recreation facilities. Specific provisions are included regarding discrimination in public transportation services provided by private entities. The remedies of the Fair Housing Act, 42 U.S.C. secs. 3602(i), 3613, and 3614(a) and (d), are incorporated by reference.

Title V sets forth the nondiscrimination provisions relating to telecommunications relay services and specifies that telephone services offered to the general public must include interstate and intrastate telecommunication relay services so that such services provide individuals who use nonvoice terminal devices equal opportunities for communications. The remedies of the Fair Housing Act, 42 U.S.C. secs. 3602(i), 3613, and 3614(a) and (d), and the remedies of the Communications Act of 1934, 47 U.S.C. secs. 206, 207, 208, 209, and 401 et seq., are incorporated by reference.

Title VI contains miscellaneous provisions including a section discussing the relationship between the ADA and section 504 and the relationship between various titles in the ADA, a section prohibiting retaliation, a section abrogating state immunity under the Eleventh Amendment, a section requiring that the Architectural and Transportation Barriers Compliance Board

(ATBCB) issue certain guidelines, and a section allowing attorneys' fees in administrative or judicial actions.

III. Comparison of Major Differences Between the ADA in the 100th and 101st Congresses

Substantial changes were made in the ADA prior to its reintroduction in the 101st Congress. The 100th Congress version (hereafter referred to as the "old ADA") had a different structure and varies from the 101st Congress version (hereafter referred to as the ADA or S. 933) in several substantive ways. Five of the most significant of these distinctions will be discussed here.

The old ADA had broad definitions of "on the basis of handicap" and "physical or mental impairment." Although much of this language was based on regulations promulgated pursuant to section 504, the definition of "disability" in S. 933 is closer to the definition applicable to section 504. The present version of the ADA defines disability as meaning in part a physical or mental impairment that "**substantially limits**" one or more of an individual's major life activities. The absence of the substantially limits language in the predecessor legislation could have given rise to coverage of minor impairments such as left-handedness which have not been found to be covered under section 504.[6]

Another area of difference between the two versions of the ADA is in the area of reasonable accommodations. Generally, the Supreme Court has found that section 504 does not require a "fundamental alteration in the nature of a program."[7] The Court has viewed section 504 requirements as striking "a balance between the statutory rights of the handicapped to be integrated into society and the legitimate interests of federal grantees in preserving the integrity of their programs: while a grantee need not be required to make 'fundamental' or 'substantial' modifications to accommodate the handicapped, it may be required to make 'reasonable' ones."[8] The old ADA contained somewhat similar language, referred to as the "bankruptcy clause", which stated that the failure or refusal to remove barriers and make reasonable accommodations shall not be an unlawful act of discrimination if such action would fundamentally alter the essential nature, or **threaten the existence of**, the program or business.[9] This language arguably provided a stricter standard than that under section 504. The present version of the ADA uses a standard like that of section 504 and provides that discrimination is not

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[6] *de la Torres v. Bolger,* 610 F. Supp. 593 (D. Tex. 1985).

[7] *Southeastern Community College v. Davis,* 442 U.S. 397, 410 (1979).

[8] *Alexander v. Choate,* 469 U.S. 287 (1985).

[9] H.R. 4498, 100th Cong., 2d Sess., sec. 7. (Emphasis added).

present if an entity can demonstrate that the accommodation would impose an undue hardship.

The coverage of public accommodations differs between the two versions of the ADA. The 100th Congress version prohibited discrimination in any public accommodation covered by title II of the Civil Rights Act of 1964, 42 U.S.C. sec. 2000a. S. 933, on the other hand, is more comprehensive and has a title which discusses public accommodations and includes various places, such as the professional offices of health care providers and shopping centers, which are not covered by title II of the Civil Rights Act.

The 100th Congress version of the ADA would have required some retrofitting of existing transportation vehicles to render them accessible to and usable by persons with physical and mental impairments. S. 933 does not require retrofitting but does contain more detailed requirements relating to transportation services. These requirements differ depending on whether the entity providing them is public or private.

Another major distinction between the two versions of the ADA is in their treatment of remedies. The old ADA had one remedies section which covered all different aspects of discrimination on the basis of disability. The new version contains specific remedies sections for titles II, III, IV and V. These sections parallel the remedies which would be provided under similar civil rights statutes. For example, title II on employment references the remedies and procedures set forth in title VII of the Civil Rights Act of 1964. This type of reference has the advantage of being more certain since it incorporates an already existing body of law; however, it has been criticized as expanding remedies to possibly allow punitive damages or damages for pain and suffering.[10]

IV. Major Legal Issues Concerning the ADA

A. Introduction

Although the ADA has enjoyed broad based support and the concept of the legislation was endorsed by President Bush during the election campaign,[11] several of the specifics of the legislation have proven to be controversial. Some of these major legal issues will be analyzed here.[12]

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[10] For a detailed discussion of the remedies sections of S. 933 see "Remedies and Standing to Sue Under S. 933, the 'Americans with Disabilities Act of 1989'", CRS Rep. No. 89-336A (May 26, 1989).

[11] 19 ARC Government Report 3 (May 18, 1989).

[12] Since the ADA is a civil rights bill, most of the issues have been legal ones. The major exception to this has been the question of cost. The cost factor of reasonable accommodations was discussed at Senate hearings on May

B. Drug Addicts, Alcoholics and Persons with Contagious Diseases

As described above, the ADA allows a defense to a charge of discrimination if certain qualification standards are necessary to perform the job or participate in the program. Such qualification standards may include providing that the current use of alcohol or drugs by an alcoholic or drug abuser not pose a direct threat to property or the safety of others in the work place or program and providing that an individual with a currently contagious disease or infection not pose a direct threat to the health or safety of other individuals in the work place or program. In other words, if the use of alcohol or drugs or the presence of a contagious disease or infection would pose a direct threat, an individual could be denied employment or participation in a program without a violation of the act. If there was no such threat posed and the individual was able to meet the general qualification standards, such an individual would be covered by the nondiscrimination provisions of the legislation.

The definitional section applicable to section 504 contains similar provisions relating to drug addicts, alcoholics and persons with contagious diseases or infections. The provision on contagious diseases or infections would cover persons with AIDS or who are positive for antibodies to HIV.[13] Similarly, the ADA is intended to cover such individuals.[14] However, the greatest controversy around this provision of the ADA has centered around the coverage of drug addicts and alcoholics. It has been argued that this

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9, 10 and 16, 1989 and has been addressed by the National Council on Disability. See Memorandum to the National Council on the Handicapped, from Robert L. Burgdorf, Jr., entitled "Cost Data Regarding the Americans with Disabilities Act" (July 28, 1988). The costs of the legislation are difficult to determine since the type of accommodations required would vary greatly from individual to individual. Also, some accommodations may not be required if they would result in an "undue burden" and exactly what is an "undue burden" would be determined on a case-by-case basis. In addition, it has been argued that the legislation would actually be a revenue generator since it would bring more individuals into the work force and would create more consumer spending by providing accessible shopping areas, restaurants, and places of entertainment. A more detailed discussion of cost is beyond the scope of this report.

[13] Even prior to the amendment of the Rehabilitation Act discussing contagious diseases and infections (contained in the Civil Rights Restoration Act, P.L. 100-259), the Supreme Court had interpreted section 504 to cover persons with contagious diseases and most commentators and subsequent judicial decisions have applied the Court's reasoning to HIV infected persons. See *School Board of Nassau County v. Arline*, 107 S.Ct. 1123 (1987).

[14] See 135 Cong. Rec. S 4985 (May 9, 1989) (Comments of Senator Harkin).

coverage is in conflict with the drug-free work place statute, P.L. 100-690, 102 Stat. 4304, since it may protect drug addicts or alcoholics from discrimination in certain circumstances. However, it could be argued that the ADA is consistent with the drug-free work place law since the ADA does not grant protection for the use of drugs on the job and since it requires that individuals must be able to perform a particular job. The more difficult issue is the extent to which the ADA's prohibition of discrimination would cover discriminatory acts against persons who use drugs in a non work place environment. If such use did not pose a direct threat and the individual performed or took advantage of the essential components of the job or program, a strong argument could be made that discrimination against such individuals would be prohibited by the legislation.

C. Remedies and Damages

The ADA contains differing remedies provisions for various substantive titles in the legislation and to some extent provides for differences in the scope of coverage. These sections draw upon the remedies and procedures found in other civil rights statutes, for example, the title II employment remedies section references the remedies and procedures of title VII of the Civil Rights Act of 1964. Several issues have arisen concerning these sections: (1) what exactly do these references encompass, (2) how does this differ, if it does, from present remedies coverage of persons with disabilities under section 504, (3) are punitive damages or damages for pain and suffering covered, and (4) what are the ramifications of the language in these provisions allowing suit when an individual feels that they are "about to be discriminated against?" This last issue will be addressed in a separate section.

Title II of the ADA bans discrimination in employment against otherwise qualified persons with disabilities and incorporates by reference the remedies and procedures set forth in sections 706, 709, and 710 of the Civil Rights Act of 1964, 42 U.S.C. secs. 2000e-5, 2000e-8, 2000e-9, and the remedies and procedures available under section 1981, 42 U.S.C. sec. 1981. Title VII provides for administrative enforcement by the Equal Employment Opportunity Commission (EEOC). The EEOC is to attempt voluntary conciliation but where this fails, the Commission is authorized to bring a civil action against certain employers. However, there is also a private right of action where the EEOC has either dismissed a charge or has not reached a conciliation agreement or filed a suit within 180 days. Under section 1981 there would be a private right of action; however, recently the Supreme Court has limited coverage of 1981 to situations involving hiring decisions or promotion decisions where such decisions would constitute a new and distinct relationship between the employer and employee.[15] Thus, generally section 1981 would not be applicable to discrimination on the job. One question presented by this case is whether the reference in the ADA to inclusion of section 1981 remedies would mean that these remedies would be similarly limited in application to certain situations as they were by the Supreme Court

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[15] *Patterson v. McLean Credit Union*, No. 87-107 (June 15, 1989).

in *Patterson*. In other words, would *Patterson* essentially have no effect on ADA interpretation since the ADA refers only to the remedies of section 1981 or would the limitations of application in *Patterson* also be applicable in the ADA? It would appear that reading of the plain language of the bill would indicate that the remedies of section 1981 are to be applicable in situations where there is discrimination as defined in the ADA. Report language may assist in resolving this issue.

The specific remedies under title VII would include injunctive relief and affirmative action including reinstatement or hiring, with or without back pay.[16] Back pay liability is limited to two years under title VII; however, there is no time limit under section 1981. Also, compensatory and punitive damages may be awarded under section 1981 although these are not generally available under title VII.[17] Section 1981 would allow jury trials while title VII does not provide for jury trials and whether jury trial are appropriate under the ADA has generated considerable discussion. Attorneys' fees are available under both title VII and section 1981.

Title III of the ADA prohibits discrimination in public services and applies the remedies, procedures and rights set forth in section 505 of the Rehabilitation Act of 1973, 29 U.S.C. sec. 794, to such acts of discrimination. Section 505 sets forth the enforcement procedures for section 504 of the Rehabilitation Act and provides that the remedies for section 504 are those available under title VI of the Civil Rights Act. Generally, the Rehabilitation Act has been interpreted to allow a private right of action and to allow money damages and equitable actions for back pay.[18] However, the exact extent of these remedies is uncertain. It would appear likely that intentional discrimination is required[19] but there is no settled line of cases regarding damages for pain and suffering and punitive damages.[20]

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[16] 42 U.S.C. sec. 2000e-5(g).

[17] *Johnson v. Railway Express Agency,* 421 U.S. 454 (1975).

[18] *Consolidated Rail Corporation v. Darrone,* 465 U.S. 624 (1984).

[19] *Carter v. Orleans Parish Public Schools,* 725 F.2d 261 (5th Cir. 1984); *Marvin H. v. Austin Independent School District,* 714 F.2d 1348 (5th Cir. 1983).

[20] See *Recanzone v.Washoe County School District,* 696 F. Supp. 1372 (D. Nev. 1988)(allowing damages for pain and suffering); *Shuttleworth v. Broward County,* 649 F.Supp. 35 (S.D.Fla. 1986)(damages for mental suffering or humiliation would not be allowed under section 504); *Gelman v. Department of Education,* 544 F. Supp 651 (D.Col. 1982)(punitive damages not available); *Fitzgerald v. Green Valley Area Education Agency,* 589 F. Supp. 1130 (S.D. Iowa 1984) (punitive damages presumably available but were not justified in the particular factual situation raised).

Public accommodations and services operated by private entities are covered by title IV of the ADA. The enforcement section of this title is based on the Fair Housing Act and references the sections authorizing private civil action by aggrieved persons and judicial actions by the Attorney General. The bill does not reference the Fair Housing Act sections relating to administrative complaints, investigations and adjudication procedures.

Title VI of the bill requires common carriers of telephone services to provide telecommunication relay services. The sections of the Fair Housing Act used for public accommodation in title IV of the ADA are referenced here and in addition, administrative enforcement is provided by reference to provisions of the Communications Act of 1934, 47 U.S.C. secs. 206, 207, 208, and 209. The referenced Federal Communications Commission (FCC) provisions authorize the filing of complaints and investigations by the FCC, provide that the FCC may hold hearings, make determinations as to liability and damages and make an order directing payment. In addition, the FCC would have cease and desist authority and could impose fines of $10,000.

The remedies available under the ADA do differ in scope of coverage from those available for section 504 violations. For example, the administrative scheme applicable under title VII differs from those available under section 504. Also, the referencing of the Fair Housing Act would authorize judicial actions by the Attorney General which are not specifically authorized for section 504. The reference to the Federal Communications Act of 1934 would also provide for broad cease and desist authority and fines which have no parallel under sections 504 or 505. One of the major differences is one of scope -- the availability of judicial remedies if an individual feels that he or she is "about to be subjected to discrimination."

The extent of the availability of punitive damages or damages for pain and suffering under the ADA is not certain. There is no settled line of cases on these issues regarding section 504. Punitive damages may be awarded under section 1981 but it is possible that the application of section 1981 may be limited by the Supreme Court's decision in *Patterson* as discussed above.

D. Remedies for Persons "About to be Subjected to Discrimination"

The various remedies sections in the ADA would apply if an individual believes he or she "is being or **about to be** subjected to discrimination on the basis of disability." (emphasis added). The "about to be subjected to discrimination" language is not contained in the remedies provisions applicable to section 504[21] or under title VII of the Civil Rights Act of 1964. The closest

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[21] 29 U.S.C. sec. 794a, which contains the remedies provisions for section 504, provides for remedies "to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title."

statutory parallel is found in the Fair Housing Act, as amended by the Fair Housing Amendments Act of 1988, P.L. 100-430.[22]

The original definition of "person aggrieved" under the Fair Housing Act enforcement provisions was "[a]ny person who claims to have been injured by a discriminatory housing practice or who believes that he will be irrevocably injured by a discriminatory housing practice that is about to occur."[23] The Fair Housing Amendments Act of 1988 added a definition of "aggrieved person" to the definitions section which defined such a term as including "any person who -- (1) claims to have been injured by a discriminatory housing practice; or (2) believes that such person will be injured by a discriminatory housing practice that is about to occur."

The House Report[24] discussed this change in the definition.

> *Aggrieved person.* Provides a definition of aggrieved person to be used under this act. In *Gladstone Realtors v. Village of Bellwood,* the Supreme Court affirmed that standing requirements for judicial and administrative review are identical under title VIII. In *Havens Realty Corp. v. Coleman,* the Court held that "testers" have standing to sue under title VIII, because Section 804(d) prohibits the representation "to any person because of race, color, religion, sex or national origin that any dwelling is not available for inspection, sale or rental when such dwelling is in fact so available." The bill adopts as its definition language similar to that contained in Section 810 of existing law, as modified to reaffirm the broad holdings of these cases.

The report correctly states the holding in *Gladstone* but the part of the definition at issue there was the first category -- a person who claims to have been injured by a discriminatory housing practice -- not the second category of persons who believe they will be injured. In addition, the Court in

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[22] Title II of the Civil Rights Act of 1964, 42 U.S.C. sec. 2000a-3, allows a civil action "[w]henever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice prohibited by section 203 [42 U.S.C. sec. 2000a-2]." The ADA, it should be emphasized, contains no requirement for "reasonable grounds" and in addition, title II provides only injunctive relief. Title II does not provide for a damage remedy.

[23] 42 U.S.C. sec. 3610, P.L. 90-284, sec. 810.

[24] H.Rep. No 711, 100th Cong. 2d Sess., *reprinted in [1988] U.S. Code Cong. & Ad. News* 2173, 2184. There were no Senate or Conference Reports on P.L. 100-430. The congressional debate also did not center around this provision and there were only a few references to enforcement. For example, see 134 Cong. Rec. S 10556 (daily edition Aug. 2, 1988) (statement of Senator Cranston) discussing the strengthening of enforcement provisions.

Gladstone emphasized that although Congress may expand standing to the full extent permitted by Article III of the Constitution, Congress cannot abrogate the essential constitutional requirement that a plaintiff must always have suffered "'a distinct and palpable injury to himself' that is likely to be redressed if the requested relief if granted."[25] Certainly the Court in *Gladstone* and *Havens Realty Corporation* indicated that a "tester" for housing discrimination purposes has standing to sue but the application of the language to other purposes is not as clear and will probably await further judicial action.

In the apparent absence of prior interpretation or legislative history, the question then becomes what is the meaning of this phrase in the ADA? It could be argued that such language is necessary to allow for immediate remedies. For example, if construction of a building were being planned and it was determined not to be accessible for persons with disabilities, it could be argued that the "about to be discriminated against" language would be necessary in order to assure that the building was planned to be accessible. In other words, the language could mean that it was not necessary to wait until the building was complete until remedies were pursued. However, even without this language it could be argued that drafting blueprints or obtaining permits for an inaccessible building are actual acts of discrimination, thus allowing the use of remedies without waiting for completed construction. It could also be argued that the "about to be discriminated against" language could create a serious potential for nuisance suits, especially in areas such as employment. For example, in the area of employment it might be possible to argue that such language would allow suit prior to the instituting of any adverse action against an employee and that such suits could be premised on erroneous interpretations of casual conversations.

This type of language could also raise constitutional questions under Article III of the Constitution. As was noted by the Court in *Gladstone,* Congress may expand standing to sue, but there must be the constitutional minimum of a plaintiff who has suffered a distinct and palpable injury to himself. To the extent that the about to be discriminated against language could be interpreted to allow suit without such a distinct injury, it could face constitutional challenge.

E. Public Accommodations in the ADA and Public Accommodations in Title II of the Civil Rights Act

Title IV of the ADA would prohibit discrimination in any place of public accommodation. Title II of the Civil Rights Act of 1964 also covers public accommodations and the major issues concerning this section of the ADA concern what the coverage is under the ADA and title II and whether there should be such a distinction.

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[25] *Gladstone, Realtors v. Village of Bellwood,* 441 U.S. 91, 100 (1979)[citing *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38 (1976)].

Public accommodation is defined in the ADA as privately operated establishments that are used by the general public as customers, clients or visitors, or that are potential places of employment and whose operations affect commerce. Specific examples of covered entities are also listed including auditoriums, convention centers, stadiums, theaters, shopping centers, professional offices of health care providers, parks, and private schools but the list is illustrative, not exhaustive. Title II is more limited in coverage than the ADA. It prohibits discrimination in any place of public accommodation and defines public accommodation by exhaustively listing covered entities -- hotels, restaurants, places of entertainment and other establishments connected with the covered entities in certain ways. Unlike the ADA, this list defines the coverage and does not leave open the possibility of coverage of other entities. In addition, the illustrative list in the ADA is more comprehensive than title II and would cover entities like the professional offices of health care providers and private schools which are not covered under title II. Section 402 of the ADA does provide some limitations on its coverage of public accommodations. For example, a failure to remove architectural and communication barriers is not discriminatory where such removal is not "readily achievable." In addition, a failure to ensure individuals with disabilities are not excluded or denied services is discrimination unless the entity can demonstrate that taking such steps would result in an "undue burden."

It could be argued that the more extensive coverage under the ADA is necessary to cover places of crucial importance to persons with disabilities such as professional offices of health care providers and that limitations are provided by the concepts of "readily achievable" and "undue burden." However, it could also be argued that the ADA coverage goes beyond these specific needs and that if the intention of the legislation is to parallel existing civil rights legislation, this distinction does not fulfill this intention.

F. Church-State Implications of the ADA

The ADA does not specifically mention religious or religiously affiliated institutions; however, arguments have been made that several of its provisions have implications for such institutions. For example, William Bentley Ball testified before the Senate Subcommittee on the Handicapped that the ADA would violate the constitutional rights of churches and religious schools under the First Amendment. He argued that the bill would impose substantial economic costs on churches and religious schools, and that the bill would require these entities to hire admitted drug and alcohol users and individuals who are HIV positive in violation of religious principles. This, Mr. Ball argued, would be in violation of both the free exercise and the establishment of religion clauses of the First Amendment.

These arguments raise several issues: first, does the scope of the ADA cover religious or religiously affiliated institutions; second, assuming that it does would this coverage pose a constitutional violation? Although the issue is not without ambiguity, it would appear that the ADA would apply to these

institutions and its application to such entities most likely would not be unconstitutional.

The extent to which the ADA covers religious or religiously affiliated institutions is not entirely clear but certain observations may be made. The public accommodations provisions of the ADA specifically list private schools as covered entities and do not provide any exclusion for private religious schools. Thus, such institutions would appear to be covered by the ADA. Whether churches or other religious institutions are to be covered is more uncertain since they are not specifically listed but the broad general prohibition of discrimination in accommodations discussed previously would appear to allow coverage of such entities. However, the general provisions of the ADA do provide for flexibility in coverage by allowances for "undue hardship" and for qualification standards. Therefore, these exceptions could be used to argue that, for example, a church would not have to hire an alcoholic if this would violate its religious precepts. Legislative history on this issue would be helpful in providing clarity.

If the ADA's provisions are somewhat ambiguous on this coverage, the constitutional boundaries of government regulation of pervasively religious entities are even more unclear. With regard to the establishment clause, the Supreme Court has generally employed the tripartite or *Lemon* test:

> First, the statute must have a secular legislative purposes; second, its principal or primary effect must be one that neither advances nor inhibits religion...; finally, the statute must not foster "an excessive government entanglement with religion." *Lemon v. Kurtzman,* 403 U.S. 602, 612-13 (1971).

The free exercise clause has also been construed to protect religious practices from undue governmental interference and the Court has often required that to be constitutional a government action burdening religious exercise be shown to serve a compelling public interest and to be the least restrictive means available of achieving that interest.[26] Although there are certainly constitutional protections from governmental interference under both the establishment clause and the free exercise clause, such protections are not absolute. The Court has specifically upheld the imposition of a racial nondiscrimination requirement on the tax exemption afforded a religious school because of the government's compelling interest in eradicating racial discrimination.[27] Similarly, the lower courts have generally upheld the imposition of nondiscrimination requirements on religious entities except with

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[26] *Sherbert v. Verner,* 374 U.S. 398 (1963). But the Court's most recent free exercise decision held strict scrutiny inappropriate in the absence of actual coercion of religious practices. See *Lyng v. Northwest Indian Cemetery Protective Association,* 56 U.S.L.W. 4292 (1988).

[27] *Bob Jones University v. United States,* 461 U.S. 574 (1983).

respect to employment decisions regarding clergy.[28] These cases would suggest that to the extent the ADA is found to cover religious institutions, it would pass constitutional muster so long as the qualifications provisions or the undue burden language were seen as limiting interference with certain hiring decisions.

G. Transportation

Transportation issues regarding persons with disabilities have always been problematic and the subject of numerous judicial decisions. This area has posed some of the most difficult issues regarding balancing the rights of individuals with disabilities and the interests of federal grantees in preserving the integrity of their programs.[29] Recently, the third circuit court of appeals in *ADAPT v. Burnley,* Nos. 88-1139, 88-1177, and 88-1178 (Feb. 13, 1989), examined the transportation requirements of section 504 and held that they required that newly purchased buses be accessible to the mobility-disabled. In addition, the court struck down Department of Transportation regulations allowing the option of paratransit in place of accessibility and relieving certain statutory duties if transit authorities spend more than 3% of their budget on services to the handicapped. However, this decision was vacated on April 19, 1989.

The ADA contains detailed sections relating to transportation and requires that new vehicles be accessible and allows paratransit but only as a supplement to existing systems, not as an alternative. Thus, it parallels section 504 as such section was interpreted by the third circuit. One of the issues which has arisen is the extent to which the *ADAPT* decision should be written into a statute when it is not certain if the decision will be appealed to the Supreme Court.[30]

One of the other major issues regarding transportation was the question of whether existing vehicles should be required to be retrofitted. The 100th Congress version of the ADA would have required retrofitting but this requirement was dropped when the ADA was revised and reintroduced in the 101st Congress.

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[28] See e.g., *McClure v. Salvation Army,* 460 F.2d 553 (5th Cir.), *cert. denied,* 409 U.S. 896 (1972).

[29] The Supreme Court in *Alexander v. Choate,* 469 U.S. 287 (1985), found that section 504 involves "a balance between the legitimate interests of federal grantees in preserving the integrity of their programs: while a grantee need not be required to make 'fundamental' or 'substantial' modifications to accommodate the handicapped, it may be required to make 'reasonable' ones."

[30] Another major issue which comes up most often in the transportation context is that of cost. See footnote 12 *supra.*

H. Relationship of the ADA with Section 504

The ADA contains a specific section, section 601, which provides that "[n]othing in this Act shall be construed to reduce the scope of coverage or apply a lesser standard than the coverage required or the standards applied under title V of the Rehabilitation Act of 1973...or the regulations issued by Federal agencies pursuant to such title." Section 504 is also referenced several times in sections relating to transportation and such references generally provide that it shall be considered to be discrimination for the purposes of the ADA and section 504 to perform certain acts, such as the purchase of inaccessible buses.[31] The issue these latter references raise is whether such references are really amendments to section 504. This is not entirely clear-cut. It could be argued that these are in effect amendments to section 504 since they define how section 504 is to be interpreted with regard to transportation. However, it could also be argued that this is essentially a restatement of existing section 504 interpretation and that it is necessary to clarify coverage for providers of transportation who receive federal funds.

V. Summary

The Americans with Disabilities Act would provide broad based nondiscrimination protection for persons with disabilities in the private sector. It uses many of the key concepts from existing law concerning the civil rights of persons with disabilities, section 504 of the Rehabilitation Act of 1973, and would cover employment, public services, public accommodations, transportation, and telecommunications. The protection from discrimination would apply unless a particular standard or practice is "both necessary and substantially related to the ability of an individual to perform or participate" in a program or job and the essential components of the job or program cannot be met by reasonable accommodation or with the provision of auxiliary aids or services. Reasonable accommodation generally would not be required if it would place an undue burden on an entity.

Several legal issues have been posed by this legislation. There have been questions raised concerning the coverage of drug addicts, alcoholics and persons with contagious diseases or infections, and questions concerning the remedies provided for by the bill, especially the provisions which allow suit by persons who believe that they are "about to be subjected to discrimination." In addition, there have been issues raised concerning the scope of public accommodations coverage in the legislation, the coverage of transportation, church-state issues, and the meaning of certain references to section 504 in the ADA.

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[31] See e.g., S. 933, 101st Cong., sec. 303(b), 303(c), and 303(d).

CRS Report for Congress

Federal Civil Rights Decisions of the U.S. Supreme Court During the 1988-89 Term

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July 28, 1989

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Federal Civil Rights Decisions of the U.S. Supreme Court During the 1988-89 Term

Summary

The United States Supreme Court recently concluded its 1988-89 Term with a fusillade of rulings which could reshape the future course of federal civil rights enforcement, particularly in the employment discrimination area. Although these decisions concerned, for the most part, matters of statutory scope and procedure, and may thus be remediable by Act of Congress, constitutional issues pertinent to racial preferences and governmental affirmative action in the form of minority business set-asides were also considered.

First, the Court followed a ruling last term with two additional edicts concerning allocation between the parties of the burden of proving discrimination in so-called "mixed motive" and "disparate impact" cases under Title VII of the 1964 Civil Rights Act. Second, in the affirmative action area, the Court struck down as a violation of the Equal Protection Clause a local ordinance that set-aside 30% of publicly financed construction contracts for minority owned businesses and ruled that white firefighters could collaterally attack affirmative action consent decrees that had been adopted by a local government to settle charges of racial discrimination against it. In perhaps one of the most closely watched cases of the term, the Court unanimously refused to overrule *Runyon v. McCrary* but ruled that the 1866 Civil Rights Act, earlier held to bar racial discrimination in private employment, applied only to "initial formation" and "enforcement" of an employment contract and did not reach racial harrassment on the job. In another §1981 case, the Court ruled that a municipality could not be held liable for the discriminatory acts of its supervisory employees under a *respondeat superior* theory. Finally, in three possibly less noticed but nonetheless significant decisions, the Court restricted the availability of attorney's fees awards against intervenors in civil rights actions, placed further limits of the "continuing violation" theory of Title VII liability as applied to seniority systems, and held that neither states nor state officials acting in their official capacities could be sued under another early federal civil rights statute, 42 U.S.C. 1983.

These latest High Court rulings triggered almost immediate calls for a congressional legislative response to would restore what civil rights groups believed to be previously well established judicial doctrines affecting civil rights enforcement.

Federal Civil Rights Decisions of the U.S. Supreme Court During the 1988-89 Term

Introduction

The United States Supreme Court recently concluded its 1988-89 Term with a fusillade of rulings which could reshape the future course of federal civil rights enforcement, particularly in the employment discrimination area. Without explicitly overruling any prior judicial precedents, a five-Justice majority formed by the Chief Justice, the three most recent appointees to the High Court, and Justice White was able to effect doctrinal containment of the law in a number of areas by working within the interstices of established legal principles. While these decisions concerned, for the most part, matters of statutory scope and procedure, and may thus be remediable by Act of Congress, constitutional issues pertinent to racial preferences and governmental affirmative action in the form of minority business set-asides were also considered. Each of the decisions, however, primarily expounded upon principles which were themselves creatures of an earlier judicial interpretation by the Court rather than express statutory declaration.

Basically, the Court's decisions this term pertained to three major topics of civil rights concern and sundry related issues. First, the Court followed a ruling last term[1] with two additional edicts concerning allocation between the parties of the burden of proving discrimination in so-called "mixed motive"[2] and "disparate impact"[3] cases under Title VII of the 1964 Civil Rights Act.[4] Second, in the affirmative action area, the Court struck down as a violation of the Equal Protection Clause a local ordinance that set-aside 30% of publicly financed construction contracts for minority owned businesses[5] and ruled that white firefighters could collaterally attack affirmative action consent decrees that had been adopted by a local government to settle charges of racial discrimination against it.[6] In perhaps one of the most closely watched cases

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1 *Watson v. Fort Worth Bank & Trust*, 108 S.Ct. 2777 (1988).

2 *Price Waterhouse v. Hopkins*, 109 S.Ct. 1775 (1989).

3 *Wards Cove Packing Co., Inc. v. Atonio*, 109 S.Ct 2115 (1989).

4 42 U.S.C. 2000e *et seq.*

5 *City of Richmond v. J. A. Croson Co.*, 109 S.Ct. 706 (1989).

6 *Martin v. Wilks*, 109 S.Ct. 2180 (1989).

of the term, the Court unanimously refused to overrule *Runyon v. McCrary*[7] but ruled that the 1866 Civil Rights Act,[8] earlier held to bar racial discrimination in private employment, applied only to "initial formation" and "enforcement" of an employment contract and did not reach racial harrassment on the job.[9] In another §1981 case, the Court ruled that a municipality could not be held liable for the discriminatory acts of its supervisory employees under a *respondeat superior* theory.[10] Finally, in three possibly less noticed but nonetheless significant decisions, the Court restricted the availability of attorney's fees awards against intervenors in civil rights actions,[11] placed further limits of the "continuing violation" theory of Title VII liability as applied to seniority systems,[12] and held that neither states nor state officials acting in their official capacities could be sued under another early federal civil rights statute, 42 U.S.C. 1983.[13] The implications of these latest High Court rulings are more fully explored in the remainder of this report.

Title VII Burden of Proof

The Court has over the years evolved a range of analytical models for distributing between plaintiffs and defendants the burden of proof and rebuttal in Title VII employment discrimination actions. To a large extent, Title VII theories of liability depend on legal "inferences" and "presumptions," common to the law of evidence generally, as applied to the facts presented by the parties and tailored to specific Title VII substantive rules developed by the Court. Thus, "while the most obvious evil Congress had in mind when it enacted Title VII" was "disparate treatment" or intentional workplace discrimination, in the Court's view,[14] the statute was also designed to eliminate the "adverse impact" or effects of practices and procedures that are

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7 427 U.S. 160 (1976).

8 42 U.S.C. §1981.

9 *Patterson v. McLean Credit Union*, 109 S.Ct. 2362 (1989).

10 *Jett v. Dallas Independent School Dist.*, 57 U.S.L.W. 4858 (S.Ct. 6-22-89).

11 *Independent Federation of Flight Attendants v. Zipes*, 57 U.S.L.W. 4872 (S.Ct. 6-22-89).

12 *Lorance v. AT&T Technologies, Inc.*, 109 S.Ct. 2261 (1989).

13 *Will v. Michigan Department of Police*, 109 S.Ct. 2304 (1989).

14 *International Bhd of Teamsters v. United States*, 431 U.S. 324, 335 n. 15 (1977).

"fair in form, but discriminatory in operation."[15] To implement this dual congressional purpose, different methods of proof were developed by the Court for "disparate treatment" (or intentional) and "adverse impact" (or unintentional) discrimination cases.

Under prevailing disparate treatment analysis, *McDonald Douglas Corp. v. Green*[16] established a tripartite order and allocation of proof for establishing whether or not an illicit discriminatory motive exists. That is, once the plaintiff establishes by direct or indirect evidence a *prima facie* case of differential treatment by an employer because of protected class status, the defendant has the burden of rebutting the inference of intentional discrimination. In a series of three post-*McDonald Douglas Corp.* cases, however, the Court made clear that the burden of proof remains at all times with the plaintiff, and that the employer's sole obligation at the second stage is simply "to articulate a legitimate, nondiscriminatory reason" for the employer's action.[17] In the third and final stage, the plaintiff must establish that the defendant's proffered reason for its actions is in fact a pretext.

Until recently, however, a distinctly different mode of analysis appeared to govern disparate impact cases. In *Griggs v. Duke Power Co.*[18] the Court held that the "touchstone" of Title VII's prohibition on employment practices that are "fair in form, but discriminatory in operation" is "business necessity." Thus, "[i]f an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."[19] Under *Griggs*, once the plaintiff has shown that a challenged employment policy or practice "operate[s] to disqualify Negroes [or other protected groups] at a substantially higher rate" than nonminorities, the burden shifts to the

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[15] *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

[16] 411 U.S. 792 (1973).

[17] *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981)(employer need only come forward and articulate its reason so as to create a triable issue of fact and need not prove by a preponderance of evidence that such reason constituted its true motivation nor that the selected candidate had superior qualifications); *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24 (1978)(employer need only articulate a legitimate, nondiscriminatory reason and need not prove the absence of discriminatory motive); *Furnco Constr. Corp v. Waters*, 438 U.S. 567, 577 (1978)("[T]he burden which shifts to the employer is merely that of proving that he based his employment decision on a legitimate consideration, and not an illegitimate once such as race.").

[18] 401 U.S. 424 (1971).

[19] *Id.*, at 431.

defendant to demonstrate "business necessity," in other words, that the offending practice is "necessary to safe and efficient job performance."[20] "Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question," said *Griggs*.[21]

The *Griggs* model of proof thus involved two basic steps. Plaintiff carries the initial burden of proving, most often in practice by the use of statistical evidence, the disproportionate or adverse impact of a given policy or practice on protected class members as compared to other employee or applicant groups. Earlier cases then suggested that the burden was on the defendant to rebut plaintiff's *prima facie* case with proof of an affirmative defense of "business necessity" for the challenged practice.[22] Motivation was not an explicit element of impact analysis. Moreover, the defendant employer's burden, rather than merely "articulating" a possible business purpose, as in the disparate treatment context, appeared to be a weightier one of persuading the court of a "manifest relationship" between the challenged practice and business purposes. The plaintiff could then reshift the burden back to the defendant by showing the availability of "lesser discriminatory alternatives" responsive to employer needs.[23]

The Court's most recent rulings, however, seem to blur traditional distinctions between the disparate treatment and adverse impact approaches, possibly reducing the defendant's burden for proving business necessity in the latter context. Last term, for example, in *Watson v. Fort Worth Bank & Trust*,[24] the Court resolved that disparate impact analysis is applicable in challenges to subjective or discretionary hiring and promotion standards. However, led by Justice O'Connor, a plurality of Justices seemed to retreat from the burden-shifting implications of *Griggs* by declaring that, as in disparate treatment cases, "the ultimate burden of proving that discrimination against a protected class has been caused by a specific employment practice

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[20] *Id.*

[21] 401 U.S. at 432. See, also, *Dothard v. Rawlinson*, 433 U.S. 321, 332 (1977) and *Connecticut v. Teal*, 457 U.S. 440, 446 (1982).

[22] *E.g.*, *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977)(employer has to "prov[e] that the challenged requirements are job related"); *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975)(employer has "burden of proving that its tests are 'job related'"); *Griggs*, 401 U.S. at 432 (employer has "burden of showing that that any given requirement must have a manifest relationship to employment").

[23] *E.g.*, *EEOC v. Rath Packing Co.* 787 F.2d 318 (8th Cir. 1986); *Contreras v. Los Angeles*, 656 F.2d 1267 (9th Cir. 1981).

[24] 108 S. Ct. 2777 (1988).

remains with the plaintiff at all times."[25] Therefore, according to the plurality, because "[courts] are generally less competent than employers to restructure business practices,"[26] the defendant need only produce some evidence that its practices "are based on legitimate business reasons" to rebut the plaintiff's statistical showing of disparate impact.

With the ascendancy of Justice Kennedy to the High Court, the plurality view in *Watson* appears to have become the majority rule this term in *Wards Cove Packing Co. v. Atonio*.[27] By a 5 to 4 vote, the Court there held that while employers bear the burden of producing evidence of a "legitimate business justification" for any practice that has a racially disparate impact, the "burden of persuasion" remains with the plaintiff who must ultimately disprove any asserted employer justification.

Wards Cove involved salmon processing facilities in Alaska which operated during the summer months employing only seasonal labor. Most unskilled cannery jobs were held by minorities while the skilled, higher paying non-cannery positions in the plants were held predominantly by white workers, and the two groups were provided separate dormitory and mess facilities. Asserting both disparate treatment and disparate impact Title VII claims, a class of nonwhite cannery workers alleged that various employer policies--notably, nepotism, rehiring preferences, subjective hiring standards, separate hiring channels, and a practice of not promoting from within--resulted in a racially stratified workforce that denied them equal employment opportunity. After a trial and various appeals, the Ninth Circuit ultimately rejected the disparate treatment claims but held that the facts supported a *prima facie* case of disparate impact in hiring which could only be justified by the employer's showing of business necessity.

Justice White, writing for the five Justice majority, reversed. First, he ruled that the Circuit Court had "misapprehend[ed]" Title VII precedent by finding a disparate impact based upon an internal comparison between the racial composition of the company's cannery and noncannery workforces. Rather, the proper comparison in a disparate impact case is "between the racial composition of the qualified persons in the labor market and the persons holding at issue jobs." In this case, Justice White said, the cannery workforce "in no way" reflected the pool of qualified job applicants or the qualified population in the workforce. Therefore, "[a]s long as there are no barriers or practices deterring qualified nonwhites from applying for noncannery positions," an employer is not accountable for a "racially imbalanced" workforce attributable to factors it did not cause. Otherwise, Justice White opined, employers might be tempted to adopt hiring quotas to

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[25] *Id.*, at 2790.

[26] *Id.* at 2791.

[27] *Supra* n. 3.

achieve a racially balanced workforce, a result rejected by the Congress that enacted Title VII.

Although not essential to its holding, the Court proceeded to examine two other important issues: causation and the business necessity defense. First, the majority followed the *Watson* plurality by requiring employees asserting disparate impact claims to prove "specific causation" as part of their *prima facie* case. That is, statistical evidence of racial imbalance "at the bottom line," allegedly caused by the aggregate operation of multiple employer practices, as in *Wards Cove*, would not satisfy the plaintiffs' burden. Rather, the focus of disparate impact analysis is on "the impact of *particular* hiring practices on employment opportunities for minorities." Title VII plaintiffs, therefore, must prove "that the disparity they complain of is the result of one or more of the employment practices they are attacking" and "specifically show that each challenged practice has a significantly disparate impact on employment opportunities for whites and nonwhites." The four dissenters in *Wards Cove* were particularly critical of this "apparent redefinition of the employees' burden in a disparate impact case" and would have instead permitted Title VII plaintiffs to build a *prima facie* case on proof of the cumulative effect of "numerous questionable employment practices."

Finally, in a discussion of the employer's burden, the majority opinion seems to recast the business necessity doctrine in *Griggs* from an affirmative defense for which the employer carries the burden of persuasion to a "business justification" subject only to "reasoned review" and for which the latter need meet a "burden of production." Revealing may be the statement from the majority opinion that "there is no requirement that the challenged practice be 'essential' or 'indispensable' to the employer's business" since similar terminology had been used in the past to describe the business necessity defense. The result, as in the disparate treatment-intentional discrimination context, is that the "ultimate burden" remains "at all times" with the plaintiff employee. The majority further melds disparate treatment, for which the plaintiff must prove discriminatory intent, and disparate impact theory, traditionally thought not to require such proof, in the final stage of its analysis. Thus, the plaintiff may attack the employer's asserted business justification by showing that it is a "pretext" for discrimination. That is, the plaintiff must show that other "equally effective," less discriminatory alternatives are available to achieve the employer's legitimate objectives. This focus on the pretextual nature of an asserted employer justification is an explicit component of proof in disparate treatment cases where it connotes discriminatory intent.

Burden of proof rules under Title VII also played a pivotal role in the Court's consideration of *Price Waterhouse v. Hopkins*.[28] The plaintiff there was a female senior manager being considered for partnership by a major national accounting firm. Pursuant to the firm's established peer review

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[28] *Supra* n. 2.

system, evaluations of the plaintiff were solicited from all the firm's partners. Some cited the plaintiff for "outstanding performance" and productivity while others were critical of her "aggressiveness," her "macho" and "abrasive" manner, and a general lack of "interpersonal skills." After her candidacy was held over for reconsideration and two partners withdrew their support, the plaintiff resigned and filed a Title VII sex discrimination charge. The district court found the firm liable for giving credence and effect to partners' comments that resulted from sex stereotyping. In affirming, the Court of Appeals ruled that a candidate's interpersonal skills could lawfully be considered in the firm's partnership decisions, but where that factor was coupled with other illegitimate motives, the firm must prove "by clear and convincing evidence" that the decision would have been the same even in the absence of discrimination.

The Court's decision in *Price Waterhouse* resolved a conflict among the federal circuit courts as to the appropriate standards of proof in so-called "mixed motive" cases, that is, where an alleged intentional act of discrimination may be partially the product of both lawful and unlawful employer motivation.[29] A plurality of four Justices led by Justice Brennan opted for a rule of causation which states that once the plaintiff shows that impermissible factors play a role or were "a" motivating factor, the employer must prove by a "preponderance of the evidence" that it would have made the same decision absent that factor. In effect, the "burden of persuasion" rests on the employer to establish as an "affirmative defense" the precise causal roles played by legitimate and illegitmate considerations by demonstrating that same employment decision was dictated by legitimate factors alone. The plurality also suggests that "in most cases" employers "should" rely on "some objective evidence" rather than "the employer's own testimony" to meet this burden but the plurality rejected the "clear and convincing evidence" standard applied by the appeals court. Justice White partially concurred with the plurality's formulation of the "same decision" rule but would permit employers broader evidentiary latitude. "In my view, there is no special requirement that the employer carry its burden by objective evidence" so that "where the employer credibly testifies that the action would have been taken for legitimate reasons alone, this should be ample proof."

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[29] *E.g.*, *Fields v. Clark University*, 817 F.2d 931 (1st Cir. 1987)(where plaintiff shows discrimination was "a" motivating factor, burden shifts to employer to prove by "preponderance" of evidence that it was not determinative); *Knighton v. Laurens County School District 56*, 721 F.2d 976 (4th Cir. 1983)("direct evidence" of discrimination shifts burden to employer to prove "by clear and convincing evidence" that plaintiff was not victim of discrimination); *Walsdorf v. Board of Commissioners*, 857 F.2d 1047 (5th Cir. 1988)(proof that discriminatory motive was a "significant" factor established Title VII violation *per se*); *McQuillen v. Wisconsin Education Ass'n Council*, 830 F.2d 659 (7th Cir. 1987)(employee must show that discrimination the "determining" factor, not just a factor, in the challenged employment decision).

Justice O'Connor rounded out the majority for the same rule but disagreed with aspects of the plurality's causation standard and allocation of the burden of proof in mixed motive cases. Rather than merely requiring the plaintiff in such cases to demonstrate that discrimination was "a" motivating factor, Justice O'Connor would require that the illicit motivation be a "substantial" factor before requiring the employer to assume the same decision burden. Secondly, she would limit the burden-shifting principle of the plurality decision to cases where there is "direct evidence" of illegitimate motive that does not rely on statistics or other indirect inference. "What is required is what Ann Hopkins showed here: direct evidence that the decisionmakers placed substantial negative reliance on an illegitimate criterion in reaching their decision."

Finally, Justice Kennedy argued in dissent that traditional disparate treatment analysis under *McDonnell Douglas* and *Burdine*, *supra*, should be applied to mixed motive cases. *Burdine*, he notes, stated that a plaintiff can prove pretext not only by showing that an employer's proffered explanation is unworthy of credence but also by persuading the court that the employment decision more likely than not was motivated by a discriminatory reason. Otherwise, he predicts, every Title VII plaintiff will now take advantage of the new burden-shifting rule and require courts to generate a jurisprudence of the meaning of "substantial factor."

In a perhaps less prominent decision, *Lorance v. AT & T Technologies*,[30] the Court reviewed the plaintiff's burden for proving discrimination in the operation of employee seniority systems and the theory of Title VII liability based on "continuing violations." The precise issue there presented was whether the 180- or 300-day limitation period for filing Title VII charges runs from the date of adoption of an allegedly discriminatory seniority system or the date on which the individual is adversely affected by the system. Female AT & T employees there filed a charge with the EEOC in 1983 complaining that they had been demoted during a company reduction-in-force as the result of a change in seniority rules negotiated between labor unions and the employer and approved union's membership in 1979. The plaintiffs alleged that although neutral on its face, the change from plantwide to departmental seniority was adopted for the purpose of discriminating on the basis of sex, that the violations were continuing in nature, and that each action taken under the system was an act of discrimination actionable under Title VII.

In affirming dismissal of the suit as untimely, a 5 to 3 majority of the Court ruled that the Title VII limitation period commences when a discriminatory seniority system is imposed, not at some indefinite future time when the "concrete effects" of the system become obvious. The decision was

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[30] *Supra* n. 12.

primarily based on a provision in Title VII[31] and a line of prior rulings which largely insulate seniority systems from challenge on a disparate impact theory unless discriminatory impact is proven.[32] Because of these special Title VII protections for seniority, Justice Scalia was unpersuaded that the continuing effects of the adoption of the system could serve as a predicate of successive charges of discrimination.

> In the context of the present case, a female [employee] could defeat the settled (and worked-for) expectations of her co-workers whenever she is demoted or not promoted under the new system, be that in 1983, 1993, 2003, or beyond. Indeed, a given plaintiff could in theory sue successively for not being promoted, for being demoted, for being laid off, and for not being awarded a sufficiently favorable pension, so long as these acts--even if nondiscriminatory in themselves--could be attributed to the 1979 change in seniority. Our past cases, to which we adhere today, have declined to follow an approach that has such disruptive implications.

By way of caveat, however, Justice Scalia cautioned that "a facially discriminatory seniority system (one that treats similarly situated employees differently) can be challenged at any time, and that even a facially neutral system, if it is adopted with unlawful discriminatory motive," can be challenged within the time limits prescribed by Title VII. Justices Marshall, Brennan, and Blackmun argued in dissent that the distinction between facially neutral and facially discriminatory seniority systems is a "specious" one and predicted that *Lorance* "will come as a surprise to Congress, whose goals in enacting Title VII surely never included conferring absolute immunity on discriminatorily adopted seniority systems that survive their first 300 days."

Even this brief excursion through the esoteric jurisprudence of Title VII burden of proof theory may leave the reader with a sense of dynamic and continuing development in this legal area. Indeed, the Court's decisions over the last two terms signal a fundamental rethinking of certain judge-made principles that the legal community had considered largely settled. Of these, the *Hopkins* case be the least dramatic because as noted federal appellate courts were widely divided on causation and proof in mixed motive cases and the Court's action this term may introduce some greater uniformity and predictability to the area. Similarly, *Lorance* may not have been unexpected

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[31] §703(h) of Title VII exempts from the Act's discrimination prohibitions any effects of a "bona fide" seniority system that "are not the result of an intention to discriminate because of race, color, religion, sex, or national origin. . ." 42 U.S.C. 2000e-2(h).

[32] *E.g., Teamsters v. United States*, 431 U.S. 324 (1977); *American Tobacco Co. v. Patterson*, 456 U.S. 63 (1982).

since it was inspired and, as noted by Justice Stevens' concurrence, virtually compelled by prior precedent and may have marginal impact beyond seniority. *Wards Cove*, however, may have broad and immediate ramifications for Title VII enforcement because of the prominence of the disparate impact approach to class action and other major civil rights litigation. Disparate impact analysis has permitted class-based challenges to objective employment policies that exclude minorities to proceed on the basis of statistical evidence of discriminatory effects in situations where the "inquiry into the elusive factual question of intentional discrimination"[33] required in individual disparate treatment cases would be impracticable. However, after *Wards Cove*, with its emphasis on specific causation, its rejection of the burden-shifting principles of *Griggs* and its progeny, and its dilution of the business necessity doctrine, there may now be few if any operational advantages for Title VII plaintiffs under the disparate impact approach. Indeed, as noted, the decisions this term may have effected a *de facto* merger of the two approaches so that now some showing of discriminatory intent may be required in all Title VII cases.

Affirmative Action

As noted, the affirmative action cases decided by the Court this term implicated both substantive constitutional and procedural concerns. In the former category was *City of Richmond v. J.A. Croson*[34] which struck down as an equal protection violation a municipal ordinance which reserved 30% of city financed construction contracts for minority owned business. In the realm of federal procedure, a 5 to 4 majority in *Martin v. Wilks*[35] ruled that white firefighters who knowingly failed to intervene in a minority Title VII action that was settled by consent decree could later challenge as "reverse discrimination" employment actions taken pursuant to the decree. While decided in the context of a Title VII case, *Martin* was not a Title VII statutory interpretation but was decided pursuant to the Federal Rules of Civil Procedure. It therefore may apply as well outside the discrimination field to a wide range of federal civil litigation.

Characteristic of its earlier skirmishing over affirmative action, only an imperfect judicial consensus was reached in *Croson* on certain controlling principles. However, for the first time, a six-member majority led by Justice O'Connor agreed that the Constitution requires all governmental classifications by race, whether invidiously discriminatory or motivated by a "benign" remedial purpose, be subjected to "strict judicial scrutiny." Measured against this standard, the Richmond set-aside program was flawed both by absence from the legislative record of "specific" and "identified" instances of

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[33] *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. at 255, n. 8.

[34] *Supra* n. 5.

[35] *Supra* n. 6.

past discrimination in city contracting and the city's failure to "narrowly tailor" the remedy to any "compelling" objective other than "outright racial balancing." *Croson* thus added an important piece to the fragmented matrix of decisions that make up the Court's affirmative action jurisprudence.[36]

Justice O'Connor's opinion emphasized a number of factors which conspired to defeat the Richmond MBE set-aside program. First, there was no specific evidence of past discrimination, "public or private," as it relates to the exclusion of qualified MBEs willing to perform city contracts, and the 30% benchmark reflected a "completely unrealistic" assumption that MBE participation in a particular trade will mirror minority representation in the community. Second, the Richmond ordinance was flawed by "gross overinclusiveness" in that it applied ~~not only to blacks~~ but also to various other groups, Eskimos and Aleuts for example, as to whom "there is *absolutely no evidence* of past discrimination." (Court's emphasis). Third, the Richmond City Council failed to "consider any alternatives to a race-based quota" to eliminate barriers to minority participation in public contracts. Finally, the focus on MBE availability without regard to whether a minority firm had actually suffered from past discrimination rendered the plan's "waiver" provision deficient.

The majority ruling in *Croson* marks a further extension to the field of public contracts of certain fundamental constitutional limitations on state sponsored affirmative action foreshadowed by several of the Court's earlier decisions. The heavy emphasis in Justice O'Connor's opinion on the need for a remedial justification for race-conscious measures, in terms of demonstrable "specific" and "identified" past discrimination, and the associated constitutional imperative that the remedy chosen be "narrowly tailored" to accomplishing that goal clearly finds its genesis in prior caselaw.[37] Similarly, while the "strict scrutiny" standard in this context had previously commanded no more than a plurality of the Justices, its ascendancy to a majority position in *Croson* was not altogether unpredictable. What may be less predictable, and yet possibly the most far-reaching aspect of this latest ruling, is the nature and quantum of proof the Court may now require of states and localities as legal justification for race-conscious affirmative action.

Congressional power to adopt affirmative action measures may be largely unaffected by *Croson*, however. Justice O'Connor plainly suggests that Congress has far more authority than the states and localities to enact MBE set-asides and other race conscious remedies pursuant to its enforcement power under §5 of the Fourteenth Amendment as interpreted by *Fullilove v. Klutznick*. In that earlier case, the Supreme Court upheld a congressionally

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[36] For background, see CRS Report 87-442 A, Dale, *Affirmative Action Revisited: A Review of Recent Supreme Court Actions*, May 18, 1987.

[37] *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978); *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986).

enacted 10% set-aside of federal public works funds for MBEs based on generalized evidence before the Congress of "a nationwide history of past discrimination" against minorities in the construction industry. This may make possible several federal legislative responses to *Croson*.[38]

Martin v. Wilks a Title VII suit between black firefighters and the City of Birmingham, Ala., was settled by two consent decrees that set forth long term and interim annual goals for hiring blacks as firefighters and also provided promotional goals for blacks within the department. An earlier union motion to intervene in the cases had been rejected as was an action to preliminarily enjoin the decrees filed by seven white firefighters. After various appeals, another group of white firefighters who claimed that they had been denied promotions in favor of less qualified blacks filed a separate suit. The city admitted that it had made race conscious personnel decisions but argued that its actions were unassailable because made pursuant to the consent decrees. Ruling against the city, the Eleventh Circuit declared that the consent decree was entitled to no more weight than a voluntary affirmative action plan which "must yield to the policy against requiring third parties to submit to bargains in which their interests were either ignored or sacrificed."[39]

The Supreme Court majority relied on the premise that "a person cannot be deprived of his legal rights in a proceeding to which he is not a party" to reject the doctrine of "impermissible collateral attack." Under that doctrine, as adopted by the majority of federal circuits, actions taken pursuant to a consent decree are deemed largely immune from attack by parties who failed to intervene in the underlying lawsuit. Chief Justice Rehnquist's opinion is an interpretation of mandatory joinder and permissive intervention under Federal Civil Procedure Rules 19 and 24, respectively. The issue was whether affected nonparties like the white firefighters had an obligation under Rule 24 to seek intervention at an earlier stage or whether the onus was on parties to the lawsuit to join them under Rule 19 as necessary parties. The majority concluded, "Joinder as a party, rather than knowledge of a lawsuit and an opportunity to intervene, is the method by which potential parties are subjected to jurisdiction of the court and bound by a judgment or decree." Since the parties to a lawsuit know best who is likely to be affected by it, they have the burden under Rule 19 of joining all persons who they wish to be bound by the judgment. Knowledge of the lawsuit does not give rise to a

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[38] See, CRS Report 89-124A, Dale, *Minority Business Set-Asides and the Constitution: A Legal Analysis of the U.S. Supreme Court in* ***City of Richmond v. J.A. Croson Co.***, February 24, 1989; CRS Report 89-202A, Dale, *United States Supreme Court Actions Regarding Minority Business Set-Asides After* ***City of Richmond v. J.A. Croson Co.***, March 21, 1989.

[39] *In re Birmingham Discrimination Employment Litigation*, 833 F.2d 1492 (11th Cir. 1987).

duty under Rule 24 to intervene, Rehnquist said, and a non-party is thus not precluded from challenging actions taken under a consent decree.

Justice Stevens, in dissent, argued that although their interests may have been affected, the white firefighters were deprived of no "legal rights" by the consent decrees and so were not "bound" by them in any legal sense. Moreover, to permit collateral attack in this situation "would destroy the integrity of litigated judgments, would lead to vexatious litigation, and would subvert the interest in comity between courts." Thus, unless a decree is "collusive, fraudulent, transparently invalid, or entered without jurisdiction," he felt it "unconscionable" to hold the city to additional liability for adherence to it.

Martin settled an issue over which the Justices had been evenly divided before Justice Kennedy joined the Court[40] and on which a majority of federal circuit courts had ruled to the contrary.[41] The majority of the Court now makes clear that third party unions or individual plaintiffs can bring an action challenging the effects of an affirmative action consent decree. Nonetheless, numerous questions remain as to the nature of the injury that must be alleged and time limits within which the reverse discrimination action must be brought. However, the potential costs of defending post-decree litigation will probably lead employers to consent only to decrees that mirror what a court would issue. And the only "safe harbor" in the wake of other recent affirmative action decisions of the Court may be relief that is limited to persons who can make some sort of showing that they had personally been discriminated against.

Reconstruction Era Civil Rights Statutes: §1981 and §1983

In a widely awaited decision, the Court in *Patterson v. McLean Credit Union*[42] imposed new limits on the scope of §1981's guarantee of equal rights to "make and enforce" contracts[43] as applied to employment. A series of High

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[40] See *Marino v. Ortiz*, 484 U.S. 301 (1988).

[41] Except for the Eleventh Circuit, the other federal appeals courts protected Title VII consent decrees from collateral attack. *Dennison v. City of Los Angeles Dept. of Water and Power*, 658 F.2d 694 (9th Cir. 1981); *Thaggard v. City of Jackson*, 687 F.2d 66 (5th Cir. 1982); *Striff v. Mason*, 47 FEP Cases 79 (6th Cir. 1988).

[42] *Supra* n. 9.

[43] The full text of the statute reads as follows:

> All persons within the jurisdiction of the United States shall have the *same right* in every State and Territory *to make and enforce*

Court rulings over a two decade period had led to a revival of the long dormant 1866 Civil Rights Act as a remedy for private racial discrimination in a broad range of areas. This trend culminated in the 1976 ruling in *Runyon v. McCrary*[44] which ruled that §1981 prohibited the racially based refusal of a private school to "contract" for admission of black students. Even before *Runyon*, however, the Court had ruled that §1981 afforded a federal remedy for racial discrimination in private employment, and while by no means limited thereto, employment has remained a principal focus of §1981 litigation. Specifically, §1981 had been used to challenge racial and ethnic discrimination in virtually all aspects of the employment relationship, including hiring,[45] job assignments,[46] termination,[47] and other terms, conditions, and privileges of employment. Thus, in terms of substantive coverage, §1981 had evolved into a remedy for race discrimination in private employment largely coextensive with Title VII of the 1964 Civil Rights Act.

Patterson, a racial harassment in employment case, was first heard by the Court during its 1987-88 Term but by a 5 to 4 vote was ordered held over for reargument last Term. Provoking controversy far beyond the narrow issues presented by the case, the order directed the parties to brief and argue the more fundamental question of whether the 1976 *Runyon* decision should be reconsidered. However, when it finally decided *Patterson*, the Court unanimously declined to overrule the earlier case. Instead, by a 5 to 4 margin, it held the statute did not apply to racial harassment related to the conditions of employment or any other conduct which does not interfere with the "formation" or "right to enforce" a contract.

Patterson was an action by a black woman who alleged that her employer had harassed and berated her, refused to promote her to an intermediate

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contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws for the security of persons and property *as is enjoyed by white citizens*, and shall be subject to like punishment, pains penalties, taxes, licenses, and exactions of every kind, and to no other. (emphasis added).

[44] 427 U.S. 160 (1976).

[45] *E.g., Barnett v. W.T. Grant Co.*, 518 F.2d 543 (4th Cir. 1975)("word of mouth" hiring policy violates §1981 because it may have tendency to perpetuate all-white workforce).

[46] *E.g., Williams v. DeKalb County*, 577 F.2d 248 (5th Cir. 1978)("irregularities" in job posting procedures that disadvantaged black applicants for promotion violated §1981 unless adequately explained).

[47] *E.g., Goff v, Continental Oil Co.*, 678 F.2d 593 (5th Cir. 1982)(retaliatory firing of employee for filing a racial discrimination claim with Equal Employment Opportunity Commission is actionable under §1981).

accounting clerk position, and then discharged her, all because of her race in violation of §1981. A federal district court ruled her harassment claim to be beyond the coverage of the statute and the Fourth Circuit affirmed that racial harassment standing alone does not abridge the right to "make" and "enforce" contracts. The appeals court also agreed that to prevail on her promotion claim, the plaintiff was required to show that she was better qualified than the person promoted in order to demonstrate that her employer's justification was a pretext.

Speaking for the entire Court, Justice Kennedy ruled that while "[s]ome Members of this Court believe that *Runyon* was decided incorrectly," none of the traditional exceptions to *stare decisis* or the principle of judicial adherence to precedent justified its reversal. That is, the *Runyon* holding had not been "undermined by subsequent changes or developments of the law," was not "unworkable or confusing" or a "positive detriment to coherence and consistency in the law," and was "entirely consistent with out society's deep commitment to eradication of [racial] discrimination."

Nonetheless, a majority of five Justices held that the scope of §1981 was limited "by its plain terms" to the right to "make" and "enforce" contracts and could not be construed "as a general proscription of racial discrimination in all aspects of contract relations." Thus, while the statute extends to discrimination in the "formation" of a contract, it does not reach "postformation" employer conduct affecting employment terms, conditions, or benefits which are governed by the more comprehensive provisions of Title VII. Similarly, the right to "enforce" contracts was limited strictly to impairment of an employee's "right of access to legal process" for resolution of contract disputes whether by public or private action. Thus, "harassment" claims as in *Patterson* are not covered by §1981 nor, Justice Kennedy's opinion suggests, would discriminatory discharge or conduct amounting to a "breach" of contract under state law since that "would federalize all state-law claims for breach of contract where racial animus is alleged." However, the majority does leave a window for §1981 claims of race discrimination in promotion but only "where the promotion rises to the level of an opportunity for a new and distinct relation between the employee and employer."

The case was thus remanded for consideration of whether the claimed denial of promotion in *Patterson* had entailed "the opportunity for a new contract with the employer." If so, §1981 would apply to the refusal to promote and Justice Kennedy states that the Title VII disparate treatment approach to proof of intentional discrimination must govern the lower courts' further deliberations. This meant, however, that plaintiff was not limited to proving that she was more qualified than the white candidate who got the job but that she could rely on other evidence of employer intent to discriminate or "pretext." And the employer's past treatment of her, including alleged racial harassment, could be relevant here, not as the basis for a separate claim, but as evidence of discrimination "at the rime of the formation of the contract [or promotion]."

In dissent, Justice Brennan, joined by Justices Marshall, Blackmun, and in part by Stevens, argued that §1981 covers racial harassment or other postformation conduct that is so "severe or pervasive as to effectively belie that the contract was entered into in a racially neutral manner" and was concerned the majority's "cramped" construction would restrict the statute's availability in non-employment contexts. Justice Stevens argued that an at-will employee's contract is continually remade, so that harassment fits the statutory language.

Accordingly, after *Patterson*, §1981 coverage of employment will probably be largely limited to refusals to hire because of race and, in some situations, racial discrimination in promotions where a "new" contractual relation with the employer would result. Discriminatory discharges, layoffs, transfers, for example, or disparate treatment in the terms, conditions, or benefits of employment would not seem within the purview of the statute.[48] Instead, civil rights plaintiffs would probably have to pursue their claims under the broader coverage of Title VII. Indeed, the possibility of conflict with the "detailed" and more comprehensive coverage and procedures of the 1964 Act was one factor which persuaded the *Patterson* majority to confine the scope of §1981. "We should be reluctant. . .to read an earlier statute broadly where the result is to circumvent the detailed remedial scheme constructed in a later statute." Note, however, that §1981 may have certain remedial and procedural advantages over Title VII for civil rights plaintiffs that may be lost because of the ruling. Some of these were succinctly outlined by Justice Brennan's dissenting opinion:

> Perhaps most important, §1981 is not limited in scope to employment discrimination by businesses with 15 or more employees, [citation omitted], and hence may reach the nearly 15% of the workforce not covered by Title VII. [citation omitted]. A §1981 backpay award may also extend beyond the two-year limit of Title VII. [citation omitted]. Moreover, a §1981 plaintiff is not limited to recovering backpay: she may also obtain damages, including punitive damages in an appropriate case. Other differences between the two statutes include the right to a jury trial under

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[48] For example, since *Patterson*, a federal district court in Texas has ruled that a black salesman who alleged that he was evaluated under harsher standards than whites, denied equal opportunities for promotion, and ultimately laid off during a reduction in force because of his race could not proceed against his former employer under §1981 since none of his claims "concern[ed] discrimination in the making or enforcement of his contract. . .as those terms were defined in *Patterson*." While the trial judge found that a failure-to-promote charge may be pursued under §1981, he ruled against the plaintiff here too because the desired promotion to area supervisor would not have created a "new and distinct relationship" with the employer. *Greggs v. Hillman Distributing Co.*, 141 DLR A-2 (July 25, 1989)

> §1981, but not Title VII; a different statute of limitations in §1981 cases, [citation omitted], and the availability under Title VII, but not §1981, of administrative machinery designed to provide assistance in investigation and conciliation, [citation omitted].

Of course, because §1981 is not limited to racial discrimination in employment, but applies to contractual relations in other civil rights contexts, for example, education and commercial dealing of various sorts, *Patterson* may have similar repercussions elsewhere as well.

Two other rulings last Term limited liability of state and local governmental entities for the acts of their officials under §1981 and another Reconstruction-era federal civil rights statute, 42 U.S.C. §1983, which provides a remedy to any person deprived of federal protected rights under color of state law. A decade ago, in *Monell v. Department of Social Services*,[49] the Supreme Court held that municipalities are "persons" subject to liability under §1983. The Court also ruled, however, that municipal liability is not governed by the rule of *respondeat superior*; that is, a municipality is not automatically liable under §1983 for every deprivation of federal constitutional rights inflicted by one of its employees. Under *Monell*, a municipality is liable only when constitutional injury results from a decision made by a government's "lawmakers or by those whose edicts or acts may fairly be said to represent official policy." Since *Monell*, the Court has grappled to settle on a definition to meet *Monell's* standard. In the previous term, Justice O'Connor affirmed *Monell* and writing for a plurality of four Justices in *City of St. Louis v. Praprotnick*[50] stated that an isolated action may result in municipal liability if the actor is explicitly designated by state law as the "final policymaking authority" in the area of the city's business into which the act falls.

The issue presented in *Jett v. Dallas Independent School Dist.*[51] was whether §1981 provides an independent cause of action for damages against local governmental entities that is broader than §1983 so that a municipality may be held liable for its employees' violations of the former statute under a theory of *respondeat superior*. A white football coach in that case had been awarded damages in a §1981 jury trial against the Dallas school district because of alleged racial discrimination by a school principal and superintendent who had removed and replaced him with a less experienced black coach. The Fifth Circuit had ruled the school district not liable because neither supervisory official in the case was shown to have followed a district "custom or policy" in removing the plaintiff and that to recognize §1981 vicarious liability "would contravene the congressional intent behind §1983."

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[49] 436 U.S. 658 (1978).

[50] 108 S.Ct. 915 (1988).

[51] *Supra* n. 10.

The Supreme Court affirmed 5 to 4 that when a claim is against a governmental employer, the exclusive remedy is the cause of action created by §1983 and that *Monell* precludes *respondeat superior* or vicarious liability of a master for the wrongful acts of its subordinate. Thus, the coach on remand of the case had to show that violation of his "right to make contracts" protected by §1981 was caused by municipal custom or policy within the meaning of *Monell* and subsequent cases. The majority then issued guidance to the courts below in determining where policymaking authority lies for purposes of §1983.

> Reviewing the relevant legal materials, including state and local positive law, as well as "'custom or usage' having the force of law," [citation omitted], the trial judge must identify those officials or governmental bodies who speak with final policymaking authority for the local governmental actor concerning the action alleged to have cause the particular constitutional or statutory violation at issue. Once these officials who have the power to make official policy on a particular issue have been identified, it is for the jury to determine whether *their* decisions have caused the deprivation of rights at issue by policies which affirmatively command that it occur, [citation omitted], or by acquiescence in a longstanding practice or custom which constitutes the 'standard operating procedure' of the local governmental entity.[52]

Absent proof that alleged discrimination is inflicted by governmental custom or usage, a §1983 claimant is limited to seeking personal damages against the state or local official who actually caused the deprivation at issue.

Will v. Michigan Department of State Police[53] decided a companion issue that *states* and state officials acting in their official capacities were not "persons" who may be sued for civil rights violations under §1983. Prior to *Monell*, municipalities were held not to be "persons" for §1983 purposes[54] and it was later settled that states likewise were not subject to damage actions under the statute.[55] But *Monell* overruled *Monroe*, holding that a municipality could be sued under §1983 and resurrecting the issue as regards

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[52] Emphasis in original.

[53] *Supra* n. 13.

[54] *Monroe v. Pape*, 365 U.S. 167 (1961).

[55] *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

the states. Confusion was compounded by *Quern v. Jordan*[56] where, in deciding that §1983 did not override the states' Eleventh Amendment immunity, the Court implied in *dicta* that a state is not a person. Against this historical backdrop, Justice White for a five Justice majority in *Will* "reaffirm[ed] today what he had concluded prior to *Monell* and what some have considered implicit in *Quern*: that a State is not a person within the meaning of §1983."

Justice White reasoned that the word "person" is not commonly understood to include sovereigns, and the language of §1983 failed to make "clear and manifest" a congressional intent to preempt the states' historic powers, as any legislation must that is to affect the traditional federal-state balance. Moreover, states officials could not be held liable for damages in their official capacities under §1983 because "a suit against a state official in his or her official capacity is not a suit against the official but rather is a suits against the official's office." As such, it was not different than a suit against the state itself. The majority opinion makes plain, however, the such officials could be sued in their official capacities for injunctive relief since these traditionally "are not treated as actions against the State." Also, *Will* does not preclude holding state officials individually liable for damages in §1983 actions but only forecloses reaching into the "deep pockets" of the state for monetary recovery.

Title VII Attorney's Fees

Independent Federation of Flight Attendants v. Zipes[57] ruled that attorney's fees cannot be awarded under Title VII against losing intervenors who have not been found to have violated the Act, unless the intervenors' action is frivolous, unreasonable, or without foundation. The dispute originated in a 1970 class action challenging as sex discrimination an airline's policy of dismissing flight attendants who became mothers. The settlement agreement, which credited class members with both company and union seniority, was unsuccessfully challenged by the union, which had intervened on behalf of employees who were not members of the plaintiff class. The district court awarded plaintiffs attorney's fees against the union.

The Supreme Court, by Justice Scalia, reasoned that a fee award would further neither the general policy that wrongdoers make whole those whom they have injured nor Title VII's aim of deterring employers from engaging in discriminatory practices. As a general rule, he argued, the law has recognized a connection between liability for violation of federal law and liability for attorney's fees under federal fee-shifting statutes. "[F]ee liability runs with merits liability." There is also a generally recognized distinction in law

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[56] 440 U.S. 332 (1979).

[57] *Supra* n. 11.

between wrongdoers and the blameless as pertains to a district court's discretion to fashion Title VII remedies. Justice Blackmun concurred in the judgment but refused to join the Court's opinion insofar as it might require the plaintiff to bear the cost of intervention related attorney's fees. Instead, he would require the losing defendant to defray these costs. In dissent, Justice Marshall, joined by Justice Brennan, objected that the majority ruling will tempt defendants to "rely on intervenors to raise many of their defenses, thereby minimizing the fee exposure of defendants and forcing prevailing plaintiffs to litigate many, if not most, of their claims against parties from whom they have no chance of recovering fees."

Congressional Response

These latest High Court rulings triggered almost immediate calls for a congressional legislative response that would restore what civil rights groups believed to be previously well established judicial doctrines affecting civil rights enforcement.[58] Apparently the first proposal to materialize was H.R. 2598, a bill introduced by Mr. Campbell on June 12, 1989 to deal with that aspect of *Wards Cove* concerning the appropriate statistical definition for a *prima facie* case of disparate impact in Title VII cases. The Court there, remember, rejected plaintiffs' internal comparison between the racial composition of the company's cannery and noncannery workforces. Instead it opted for a rule, generally in accord with the standard that had been applied in earlier cases, that the proper comparison in a disparate impact case is "between the racial composition of the qualified persons in the labor market and the persons holding at issue jobs." The House bill, however, seems to employ a formulation closer to that urged by the plaintiffs and the dissenters in *Wards Cove* that would gauge a *prima facie* violation of Title VII in terms of

> proof that the representation of the group receiving protections under this title of which plaintiff is a member is significantly less represented in the position or among those receiving the benefit in question than among the qualified applicants, or likely qualified applicants, or eligible persons, or likely eligible persons, for the benefit.

In other words, for example, the bill may be intended to equate the cannery workers in *Wards Cove* with "likely qualified applicants" or "likely eligible persons" for noncannery positions so that the significant underrepresentation of minorities in the latter positions would then become relevant to proof of a Title VII disparate impact claim. In addition, the House bill seems to

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[58] See *Congress May Seek to Reverse Narrow Civil Rights Ruling*, **Cong. Quarterly Weekly Report**, p. 1404 (June 10, 1989); *Groups Look To Capitol Hill For Help on Civil Rights*, **Cong. Quarterly Weekly Report**, p. 1479 (June 17, 1989).

redefine the defendant employer's burden of justification for a selection procedure with a disparate impact on minorities in terms of *proof* that it is "essential to the performance of the defendant's legitimate function." This appears a more severe burden, and closer to the traditional business necessity doctrine, than that borne by the employer in *Wards Cove*.

On June 23, 1989, Senator Metzenbaum for himself and several colleagues introduced S. 1261, the "Fair Employment Reinstatement Act," a bill likewise intended by its sponsors to reinstate certain of the evidentiary requirements in disparate impact cases that existed prior to the *Wards Cove* decision under *Griggs* and its progeny.[59] Basically, the bill would amend § 703 of Title VII[60] to impose on employers the "burdens of production *and* persuasion" as to "business necessity" for any employment practice that has a disparate impact and makes plain that a plaintiff may challenge a group of employment practices without showing that each separate practice has a disparate impact. In addition, the bill makes clear that when demonstrating that a challenged practice is "required by business necessity," the employer must show that the practice is "essential to effective job performance."[61] Unlike the earlier House measure, however, S. 1261 does not appear to deal directly with the statistical proof standards as articulated by *Wards Cove*.

On another front, Senator Simon has introduced S. 1235 to override the limits on state or local authority to enact minority business set-asides under *Croson*. The bill makes congressional "findings" that there has been a "long and continual" history of discrimination in private employment and subcontracting that has been "exacerbated" by state and local governmental contract awards. Thus, pursuant to Congress' enforcement power under the Fourteenth Amendment, the bill would amend Title VII to authorize the "States" and their "political subdivisions" to "enact reasonable provisions setting aside a percentage of funds for spending on contracts to be awarded to firms that have ownership, control or employment practices which further the goal of remedying [past discrimination]."[62] In explaining his bill, Senator Simon stated:

> Of course, any set-asides must be reasonable, limited in scope and duration, to insure that no abuses are taking place, and only those plans which meet these requirements are authorized by my bill. Moreover, my bill does not require state or local governments to enact set-aside

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[59] 135 Cong. Rec. S 7512-13 (daily ed. 6-23-89)(Remarks of Senator Metzenbaum).

[60] 42 U.S.C. 2000e-2.

[61] 135 Cong. Rec. S. 7513 (daily ed. 6-23-89)(emphasis added).

[62] 135 Cong. Rec. S. 7308 (daily ed. 6-22-89).

programs; it merely authorizes them to do so if they choose.[63]

Similarly, legislative options may be available to the Congress should it seek to redress various of the Court's other rulings this Term. For example, the result in *Martin v. Wilks*, permitting collateral attacks upon affirmative action consent decrees by nonparties, could be changed by appropriate legislative amendment to Title VII or maybe even the federal rules. One possibility may be suggested by current EEOC guidelines which insulate from Title VII challenge voluntary employer affirmative action plans that meet certain specified criteria.[64] Thus, Title VII could be amended to provide employers and labor organizations with an affirmative "good faith" defense for actions taken in reliance upon the terms of a judicially approved consent decree designed to correct the effects of prior discriminatory practices in conformity with standards like those set forth in the EEOC guidelines. Such an approach would continue to permit nonparty challenges where it could be shown that the decree is "collusive, fraudulent, transparently invalid, or entered without jurisdiction," as urged by the *Martin* dissent.

The Court's limiting interpretations of the Reconstruction era civil rights laws, §§ 1981 and 1983, may also be remedied by legislative amendment to the underlying statutes. Thus, to overcome limitations upon the scope of §1981 coverage implicit in *Patterson*, a proviso to that law might state the same right to "make" contracts of employment shall include the hiring, dismissal, and promotion of employees and equality with respect to all employment terms, conditions, and benefits. The decision in *Will* as to §1983 liability of the states and localities could be reversed by a general provision abrogating the states' Eleventh Amendment immunity to §1983 suits specifically defining "person" to include states and state officials acting in their official capacity. In answer to *Jett*, either §1981 or §1983 could be amended to make local governmental entities liable for damages caused by acts of their officials or employees in the ordinary scope of their duties.

In sum, while the Court's rulings last term may have significant implications for federal civil rights enforcement, much of that impact may be altered by congressional action. Of course, the determination of what legislative response may be appropriate, or if any action is necessary at all, is a policy judgment for the Congress to make and not a legal issue.

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[63] Id. at S. 7307.

[64] 29 C.F.R. 1608.

Accordingly, the foregoing is only intended to illustrate available legislative options but clearly takes no position as to the necessity or advisablity of future congressional action.

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July 28, 1989

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CRS Report for Congress

Affirmative Action: The Debate, The Supreme Court, and Employment; Selected References

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AFFIRMATIVE ACTION: THE DEBATE, THE SUPREME COURT, AND EMPLOYMENT; SELECTED REFERENCES

SUMMARY

This bibliography focuses on several of the key issues important to an understanding of affirmative action. The first section identifies materials that debate the pros and cons of affirmative action and discuss its constitutionality. A key issue in this debate centers around reverse discrimination, a term used to describe what is perceived as the negative impact on those affected by steps taken to promote affirmative action. The second unit contains materials on Supreme Court cases on affirmative action. The third part addresses employment issues. This portion is divided into subsections on general materials, the Federal Government, State and municipal government, and private employers.

The bibliography is comprised of materials from newspapers, magazines, reports, hearings, and scholarly journals. Books from the Library of Congress' general collection and CRS products are also included. References from 1987 to August 1989 were selected from the PPLT (Public Policy Literature) data base and from the Library of Congress Computerized Catalog.

For references to earlier works, see two bibliographies authored by Charles P. Dove titled, Affirmative Action: Bibliography-in-Brief: 1983-1986, January 1986 (L0581); and 1985-1987, February 1987 (87-180 L).

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AFFIRMATIVE ACTION: THE DEBATE, THE SUPREME COURT, AND EMPLOYMENT; SELECTED REFERENCES

I. THE AFFIRMATIVE ACTION DEBATE

Affirmative action and the Constitution. In Constitutional controversies. Edited by Robert A. Goldwin, William A. Schambra and Art Kaufman. Washington, American Enterprise Institute for Public Policy Research, 1987. p. 97-127. LRS87-14064

In a discussion held on May 21, 1985, participants discuss several topics pertinent to the controversies surrounding affirmative action. Among the issues discussed are if there is a need for "race-conscious remedies to increase minority group opportunities in employment" and whether such remedies are unconstitutional. Among the five discussants are William Bradford Reynolds, former assistant attorney general in charge of the Civil Rights Division and Benjamin L. Hooks, executive director of the National Association for the Advancement of Colored People.

Affirmative action: cure or contradiction? Center magazine, v. 20, Nov.-Dec.1987: 20-23, 25, 27-28. LRS87-11544

Presents comments of Professor G. Binion, University of California, Santa Barbara; V. Carson, NAACP; J. Duff, attorney in Los Angeles; Professor E. Erler, San Bernardino State University; Lecturer S. Kennedy, University of California, Santa Barbara; S. Kincaid, director for rental housing at Santa Barbara's Franklin Neighborhood Center; D. McDonald, former acting director at the Center for the Study of Democratic Institutions; Chairman C. Thomas of the U.S. EEOC; and Visiting Scholar A. Wortham, Hoover Institution.

Affirmative action: symposium. Iowa law review, v. 72, Jan. 1987: 255-285. LRS87-14138

Contents.--Continued uncertainty as to the constitutionality of remedial racial classifications: identifying the pieces of the puzzle, by Jesse H. Choper.--Missing pieces: a commentary on Choper, by Rex E. Lee.--Affirmative action and the Constitution: three theories, by Paul Brest.

Binion, Gayle.
Affirmative action reconsidered: justifications, objections, myths and misconceptions. Women & politics, v. 7, spring 1987: 43-62.
LRS87-13129

"The current attack on affirmative action in the United States is based on a series of misconceptions about the nature and operation of affirmative action programs. Critics claim that gender or race consciousness is inherently 'reverse discrimination.' This and other objections to affirmative action are explored and critiqued."

Equal opportunity. Edited by Norman E. Bowie. Boulder, Westview Press, 1988. 200 p. HF5549.5.A34E7 1988

This book examines the meaning of equal opportunity. Part One analyzes whether the goal of equal opportunity is an impossible one. Part Two looks at whether equal opportunity is a useful goal. Part Three examines the concept in the democratic process.

Freiwald, Aaron.
William Bradford Reynolds. American lawyer, v. 11, Mar. 1989: 147-151. LRS89-2893

Profiles William Bradford Reynolds and discusses his controversial tenure as Assistant Attorney General for Civil Rights.

Glazer, Nathan.
The affirmative action stalemate. Public interest, no. 90, winter 1988: 99-114. LRS88-476

"Within the initial boundaries, affirmative action, particularly as it affects blacks and women, has been institutionalized and has become an accepted part of the American economic scene. It will be very hard to uproot. There is now a serious question whether one should try."

Affirmative discrimination: ethnic inequality and public policy. Cambridge, Mass., Harvard University Press, 1987. 248 p.
JC599.U5G53 1987

This monograph is a reissue of a 1975 publication, "based on the William W. Cook Lectures on American Institutions, which [Glazer] delivered at the University of Michigan in April 1974, under the title 'The American Ethnic Pattern: A New Phase.'" Glazer challenges practices that take into account sex and race and argues that to correct the affirmative action practices that have resulted since the mid-sixties, "it is now our task to work with the intellectual, judicial, and political institutions of the country to reestablish the simple and clear understanding that rights attach to the individual, not the group, and that public policy must be exercised without distinction of race, color, or national origin."

Kramer, Larry.
Consent decrees and the rights of third parties. Michigan law review, v. 87, Nov. 1988: 321-364. LRS88-14561

Article describes "the dynamic of the consent decree process: why parties want consent decrees and why courts agree to enforce them . . . . Considers whether there is any reason to prevent third parties from bringing an independent action attacking a consent decree." Considers whether the collateral attack bar (which channels third party attacks to the court that entered the consent decree) is constitutional. Concludes that "third parties should not be able to force adjudication of the claim settled by the consent decree, and there is no reason to require a fairness hearing before entering the decree." Uses examples from affirmative action cases.

Kubasek, Nancy. Giapetro, Andrea M.
Moving forward on reverse discrimination. Business and society review, no. 60, winter 1987: 57-61. LRS87-2724

Discusses several of the arguments against affirmative action that use the concept of reverse discrimination to support their positions. Argues that affirmative action is not reverse discrimination and portends that "perhaps with the use of affirmative action, it may one day no longer be true that blacks are unequal to whites and therefore do not need such programs to compete in the economic game." Concludes that until such time, affirmative action is necessary.

Landers, Robert K.
Is affirmative action still the answer? Washington, Congressional Quarterly, 1989. p. 197-212. (Editorial research reports, 1989, v. 1, no. 14) LRS89-6069

"Affirmative action survived the Reagan administration's assault and is now an established fact, both in government and in big business. But with the success of the black middle class and the troubles of the largely black underclass, is affirmative action still relevant to the needs of today's black Americans?"

Merriman, W. Richard, Jr.
America's second racial dilemma: what's fair and what's constitutional in the search for racial justice? Bloomington, Poynter Center, Indiana University, c1987. 16 p. (Bicentennial of the Constitution lecture series) LRS87-13108

Lecture given at Indiana University, Nov. 19, 1986, and at Purdue University, West Lafayette, Nov. 20, 1986, by the Director of the Jefferson Foundation, Washington.

Spencer, Janet Maleson.
When preferential hiring becomes reverse discrimination. Employee relations law journal, v. 14, spring 1989: 513-529. LRS89-4184

"The question here is not whether the principle of affirmative action is correct, about which one may argue at length, but with the more practical question of when, and under what circumstances, and in what form, a specific affirmative action plan will be deemed to be valid and hence constitute a defense to a claim of reverse discrimination."

Williams, Juan.
In his mind, but not his heart. Washington post, Jan. 10, 1988: 10-17. LRS88-336

"For many people in this country, civil rights is the most emotional issue of their lives. For Assistant Attorney General William Bradford Reynolds, it's an interesting intellectual puzzle . . . . He will have a place in the history books as the first assistant attorney general for civil rights to try to get the federal government, local governments and even the courts to halt a wide range of established civil rights reforms, from affirmative action to busing."

II. SUPREME COURT CASES

Affirmative action cases from the 1988-89 term of the Supreme Court: collection of articles compiled by CRS, covering the period June 10, 1989-July 2, 1989. 24 p. LRS89-6607

Discusses the Court's decisions that have implications for affirmative action. Cases discussed include City of Richmond v. J. A. Croson Co., Wards Cove Packing Co. v. Atonio, Martin v. Wilks, and Patterson v. McLean Credit Union. Articles are drawn from the New York Times, Congressional Quarterly Weekly Report, Los Angeles Times, Washington Post, Newsweek, and Time.

Belton, Robert.
Reflections on affirmative action after Paradise and Johnson. In Symposium on civil rights and civil liberties in the workplace. Harvard civil rights-civil liberties law review, v. 23, winter 1988: 115-137. LRS88-2253

This Article reviews the Supreme Court decisions regarding the United States v. Paradise case, which "involved the legality of a court-ordered affirmative action plan" and the Johnson v. Transportation Agency, Santa Clara County, Calif., case involving a voluntary affirmative action plan."

Benjamin, Joyce Holmes.
The Supreme Court decision and the future of race-conscious remedies. Government finance review, v. 5, Apr. 1989: 21-24. LRS89-2653

Analyzes "the U.S. Supreme Court's January 1989 decision striking down the City of Richmond, Virginia's, minority contractor set-aside program." Examines whether the decision will "jeopardize similar plans adopted by other state and local governments?"

Blum, Karen M.
Section 1981 revisited: looking beyond Runyon and Patterson. Howard law journal, v. 32, no. 1, 1989: 1-38. LRS89-4151

Discusses Runyon v. McCrary and Patterson v. McLean Credit Union and concludes that "it would be politically, socially and morally disastrous for the Supreme Court of the United States to move backward on the issue of race. The backlash of the civil rights movement has infected many segments of our society. In many instances where the struggle for racial equality has made limited progress, that progress has been perceived as a threat and has been met with fear, hate and racism."

Coyle, Marcia.
How far will the Court go? National law journal, v. 11, June 26, 1989: 1, 46. LRS89-5873
"Civil rights groups try to assess the damage [done to affirmative action] . . . in the wake of recent major job bias rulings by the U.S. Supreme Court." (Wards Cove Packing Co. v. Atonio, Martin v. Wilks)

Croall, David T.
Affirmative action in the late 1980s. Labor law journal, v. 39, Aug. 1988: 519-524. LRS88-7344
Analyzes some Supreme Court decisions and other judicial developments relating to affirmative action objectives. Also examines related areas of legislative activity.

Dale, Charles V.
Affirmative action revisited: a review of recent Supreme Court actions. May 18, 1987. Washington, Congressional Research Service, 1987. 12 p. 87-442 A
In five cases decided in the 1985-86 and 1986-87 terms, the Supreme Court has considered the legality of affirmative action to promote equal employment opportunity.

Federal civil rights decisions of the U.S. Supreme Court during the 1988-89 Term. July 28, 1989. Washington, Congressional Research Service, 1989. 23 p. 89-439 A
The United States Supreme Court recently concluded its 1988-89 term with a fusillade of rulings which could reshape the future course of Federal civil rights enforcement, particularly in the employment discrimination area. These latest High Court rulings triggered almost immediate calls for a congressional legislative response that would restore what civil rights groups believed to be previously well established judicial doctrines affecting civil rights enforcement.

Minority business set-asides and the Constitution: a legal analysis of the U.S. Supreme Court ruling in City of Richmond v. J. A. Croson Co. Feb. 24, 1989. Washington, Congressional Research Service, 1989. 14 p. 89-124 A
The U.S. Supreme court ruling in City of Richmond v. J. A. Croson, holding unconstitutional a local ordinance which reserved 30% of city-financed construction contracts for minority-owned businesses, may engender various possible responses by the Congress which are examined in this report.

United States Supreme Court actions regarding minority business set-asides after City of Richmond v. J. A. Croson Co., Mar. 21, 1989. Washington, Congressional Research Service, 1989. 5 p. 89-202 A

Since its ruling earlier this term in City of Richmond v. J. A. Croson, the U.S. Supreme Court has taken action in two other cases involving minority business set-asides. In Milliken v. Michigan Road Builders Assn. the Court upheld a lower court's ruling voiding a Michigan state law mandating that "not less than 7 per cent of its expenditures for construction, goods and services go to minority-owned businesses and not less than 5 per cent to women-owned" businesses. The Court vacated a ruling in H. K. Porter Co., Inc. v. Dade Co., Florida where the lower court had "upheld a 5 percent minority owned business set-aside" program.

Daly, Mary C.

Some runs, some hits, some errors--keeping score in the affirmative action ballpark from Weber to Johnson. Boston College law review, v. 30, Dec. 1988: 1-97. LRS88-14429

"Article examines the use of race/gender-conscious criteria, particularly by public sector employers, the most influential group of employers in the national economy . . . . Both the supporters and opponents of these controversial programs have looked to the United States Supreme Court to settle definitively the issue of their statutory and constitutional validity. But after nine major decisions in the last ten years, the Court is still sounding an uncertain trumpet."

Eastland, Terry.

Racial preference in court (again). Commentary, v. 87, Jan. 1989: 32-38. LRS89-4145

Argues that Supreme Court through cases like City of Richmond v. J. A. Croson Company has an opportunity to reverse an eleven year trend of setting policy instead of interpreting law.

Fasman, Zachary.

Affirmative action receives green light from divided court. Legal times, v. 9, May 25, 1987: 12-14. LRS87-4048

"In United States v. Paradise and Johnson v. Santa Clara County Transportation Agency, this term's 'reverse discrimination' decisions, the Supreme Court reaffirmed the propriety of voluntary affirmative action plans and the constitutionality of court-ordered numerical relief in employment discrimination cases."

Ho, Geoffrey T. C.
Affirmative action programs in employment. In Equal protection. Annual survey of American law, v. 1986, May 1987: 441-468. LRS87-6306

"The Supreme Court's recent decision in [Firefighters Local Union No. 1784 v. Stotts] suggests that affirmative action programs may no longer be an appropriate means of remedying discrimination in the work place. The circuit courts, however, consistently refused to follow Stotts thereby protecting affirmative action plans in Title VII cases. Until the Supreme Court expressly addresses the issues raised in Stotts and later decisions, this division of opinion likely will continue."

Levick, Marsha.
Affirmative action. In Supreme Court review. National law journal, v. 9, Aug. 17, 1987: S4-S5. LRS87-11474

An analysis of the Supreme Court affirmative action cases includes discussions of the Johnson v. Transportation Agency, Santa Clara County, and U.S. v. Paradise decisions. "Reading Johnson and Paradise together . . . [indicates that] certainly, the threat of a successful 'reverse discrimination' lawsuit, which undoubtedly stayed the hand of many employers in the past, now has been virtually extinguished."

Liggett, Malcolm H.
Recent Supreme Court affirmative action decisions and a reexamination of the Weber case. Labor law journal, v. 38, July 1987: 415-421. LRS87-6983

Supreme Court rulings in Wygant v. Jackson Board of Education, Local No. 93 International Association of Firefighters v. Cleveland and Local 28 of the Sheet Metal Workers Union v. EEOC indicate that "nonminorities may suffer at the expense of race-conscious remedies where the remedies allocate future openings on a race-conscious basis; but affirmative action remedies will not be allowed to re-allocate jobs currently held."

McDowell, Douglas S.
Affirmative action after the Johnson decision: practical guidance for planning and compliance. Washington, National Foundation for the Study of Employment Policy, 1987. 166 p. KF3464.M343 1987

"Discusses the Supreme Court's major affirmative action cases . . . . The monograph's last chapter sets out a number of guidelines that can be extracted from the Court's decisions to date. It identifies trends that demonstrate clear areas of vulnerability, as well as many policies that would appear to be allowed under the law as it exists at this time. Gray areas are discussed and methods for crafting affirmative action plans are examined."

Mitchell, Charles E.
Race-conscious remedies: pursuing equal employment opportunity or equal employment results? Labor law journal, v. 38, Dec. 1987: 781-785. LRS87-12073

This article concludes that the focus of recent equal opportunity legal cases has switched from one of equality of opportunity (where the law is completely color-blind) to one of equality of results (where the relative achievement of various racial and sex groups is considered paramount).

Nalbandian, John.
The U.S. Supreme Court's "consensus" on affirmative action. Public administration review, v. 49, Jan.-Feb. 1989: 38-45. LRS89-709

"Following a review of the Court's two-part analytical approach to affirmative action, this article analyzes the Court's deliberations with respect to the competing values of individual rights, social equity, and efficiency. The future of affirmative action is examined in terms of the influence of the Court's configuration, its respect for precedent, and the way in which the value of social equity has penetrated public personnel policy and practices."

Rasnic, Carol D.
The Supreme Court and affirmative action: an evolving standard or compounded confusion? Employee relations law journal, v. 14, autumn 1988: 175-190. LRS88-9850

"Since the 1977 Bakke decision, the Supreme Court has addressed the legality of affirmative action programs eight times. Plaintiffs have included both minority group members (and one female) requesting court-ordered preferential treatment to alleviate past discrimination and nonminorities alleging illegal discrimination because of the implementation of an affirmative action program . . . . The following article summarizes these eight decisions and compares the various affirmative action programs involved in an effort to ascertain a developing standard and to offer employers guidance on how to apply the Court's various directives to their own situation."

Rosenfeld, Michel.
Decoding Richmond: affirmative action and the elusive meaning of constitutional equality. Michigan law review, v. 87, June 1989: 1729-1794. LRS89-6250

Article examines the Supreme Court's reasoning in its 1989 decision of City of Richmond v. J. A. Croson Co., striking down a minority business set-aside program on municipal procurement contracts, concluding "that the constitutional issues posed by affirmative action cannot be coherently or systematically resolved except in terms of the constitutionalization of some conception of substantive equality." Under the author's conception, "the Plan in Croson would pass constitutional muster as a means to remedy the present effects of past discrimination."

Schenkel-Savitt, Susan. Seltzer, Steven P.
Recruitment as a successful means of affirmative action. Employee relations law journal, v. 13, winter 1987-88: 465-479. LRS87-11632

Article asserts that because the Justice Dept. has left open only one avenue to increased hiring of minorities, intensive recruitment campaigns, public employers may be wise to follow that path to avoid suits. Specifically this article "discusses major Court decisions of the 1980s, then analyzes the successful campaign of Yonkers, New York, to recruit female and minority policy officers and firefighters through such strategies as establishment of recruitment centers in the minority neighborhood, use of female and minority personnel as role models and detailed training for qualification tests."

Schwartz, Herman.
The 1986 and 1987 affirmative action cases: it's all over but the shouting. Michigan law review, v. 86, Dec. 1987: 524-576. LRS87-13133

Article examines the record of the Supreme Court on affirmative action cases during 1986 and 1987. Author concludes that although affirmative action programs have survived, "we are worse off in some areas such as minority employment than we were twenty years ago. Moreover, although many women have successfully moved into the work force, there are still many barriers to their advancement; there is even less upward mobility for minorities."

Selig, Joel L.
Affirmative action in employment: the legacy of a Supreme Court majority. Indiana law journal, v. 63, no. 2, 1987-1988: 301-368. LRS87-13141

"Article reviews the current status of affirmative action in employment in the wake of the Supreme Court's 1986 and 1987 decisions. It explores the contours of the majority views that emerged on various issues, identifying those points that have been definitively decided and those that remain open to further development. The Article concludes that the Brennan-Powell majority position is a legacy that should be preserved."

Shane, Penny.
Affirmative action. In Equal protection. Annual survey of American law, v. 1987, June 1988: 31-66. LRS88-8491

Analyzes Supreme Court cases involving voluntary affirmative action plans through a review of the Wygant and Cleveland decisions and court ordered affirmative action plans by discussions of the Sheet Metal Workers and Paradise decisions.

Stewart, David O.
Set-asides set aside. American Bar Association journal, v. 75, Apr. 1989: 46, 48, 50, 52. LRS89-2642

Discusses the Supreme Court opinion (and the dissent) regarding minority set-aside programs for construction contracts awarded by the city of Richmond.

United States Commission on Civil Rights.
Toward an understanding of Johnson. Washington, The Commission, 1987. 66 p. (Clearinghouse publication 94) LRS87-14360

Analyzes the Supreme Court's decision in Johnson v. Transportation Agency, Santa Clara County, California, in which the Court "approved Santa Clara County's decision to promote Diane Joyce, a qualified female applicant, to the position of road dispatcher over Paul Johnson, a better qualified male applicant."

Waren, William T.
Minority set-aside programs: what future after Richmond vs. Croson? State legislatures, v. 15, July 1989: 32-36. LRS89-5563

Reviews the contents and implications for minority contractor set-aside programs of the Supreme Court decision in Richmond v. Croson. The Court held that race conscious measures in minority business programs must be justified by a detailed record of past discrimination and that plans must be tailored specifically for remedying such discrimination.

Woodside, Steven M. Marx, Jan Howell.
Walking the tightrope between Title VII and equal protection: public sector voluntary affirmative action after Johnson and Wygant. In Symposium: State and local issues before the Supreme Court and Federal courts. Urban lawyer, v. 20, spring 1988: 367-388. LRS88-5759

Concludes that Johnson v. Transportation Agency, Santa Clara County, California, a case brought by a man challenging a voluntary affirmation plan that led to the promotion of a woman who had scored slightly lower than he on a qualifying interview, "demonstrates the Supreme Court's continuing support of a voluntary affirmative action plan."

III. EMPLOYMENT

A. GENERAL MATERIALS

Black employment opportunities: macro and micro perspectives. Journal of social issues, v. 43, no. 1, 1987: whole issue (156 p.) LRS87-8203

Partial contents.--How minorities continue to be excluded from equal employment opportunities: research on labor market and institutional barriers, by Jomills Henry Braddock II and James M. McPartland.--Shaping the organizational context for Black American inclusion, by Thomas F. Pettigrew and Joanne Martin.--Rethinking affirmative action, by Irwin Katz and Harold Proshansky.

Chused, Richard H.
The hiring and retention of minorities and women on American law school faculties. University of Pennsylvania law review, v. 137, Dec. 1988: 537-569. LRS88-13895

Article reports on a study which concludes that "commitments must be made by all American law schools to recruit, hire, and tenure black, Hispanic, Asian and other minority persons aggressively. Change has been occurring at a snail's pace . . . . Commitments must be made by all American law schools to recruit, hire, and tenure women aggressively. The failure of a sizeable segment of law schools, including many of the highest stature, to hire substantial numbers of women is appalling."

EEO update: program materials, analysis & application. Washington, Georgetown University Law Center, Continuing Legal Education Division, 1987-1988. 2 v. KF3464.G46

Topics covered in the 1987 volume include analyses of Title VII, statistics in EEO cases, defense considerations, and other issues. The 1988 volume focuses on the use of statistics in employment discrimination cases, the government as employer, quotas and affirmative action, and several other topics.

Hanna, Charlotte.
The organizational context for affirmative action for women faculty. Journal of higher education, v. 59, July-Aug. 1988: 390-411. LRS88-11902

"Faculty affirmative action occurs within a context of decentralized decision making and hinges on judgments that faculty make about one another. Administrative leadership, faculty liaisons, federal pressure, and institutional culture influence those decentralized judgments. The nature and extent of those factors are outlined, as are their implications for university administrators."

Hudson Institute.
Opportunity 2000: creative affirmative action strategies for a changing workforce. Washington, U.S. Dept. of Labor, 1988. 181 p. LRS88-9741

Contents.--Eight major trends that will revolutionize tomorrow's workforce.--Work and families.--Minorities and the economically disadvantaged.--Disabled workers.--Older workers.--Veterans in the civilian workforce.--A human resources approach to affirmative action.

Stewart, Joseph, Jr. Meier, Kenneth J. England, Robert E.
In quest of role models: change in Black teacher representation in urban school districts, 1968-1986. Journal of Negro education, v. 58, spring 1989: 140-152. LRS89-3488

"The present research addresses the issue of change, looking at the scope and determinants of change in Black faculty representation in a sampling of urban public school systems from 1968 through 1986. Our goal was to understand better the factors associated with change in the representation of Black faculty. Our findings shed light on ways that affirmative action plans targeted at Black teachers might be enhanced."

U.S. Congress. House. Committee on Education and Labor.
Subcommittee on Employment Opportunities.
Affirmative action in the work force. Joint hearing before the Subcommittee on Employment Opportunities of the Committee on Education and Labor and the Subcommittee on Civil and Constitutional Rights of the Committee of the Judiciary, 100th Congress, 1st session. Oct. 8, 1987. Washington, G.P.O., 1988. 104 p. LRS88-365

"Serial no. 100-49; Committee on the Judiciary serial no. 20"

Hearing focuses on current and future aspects of "affirmative action and equal employment opportunity law enforcement." Witnesses were advised to "focus on the report of the Study Group on Affirmative Action. The report makes clear that affirmative action has been an effective tool in achieving equal employment opportunity for minorities and women. The weakness of affirmative action has been in its application to hiring at the exclusion of other employment decisions, such as training and promotions."

Wharton Center for Applied Research. Study Group on Affirmative Action.
A report . . . to the Committee on Education and Labor, U.S. House of Representatives, 100th Congress, 1st session. Washington, G.P.O., 1987. 307 p. LRS87-6213

At head of title: Committee print.

"Serial no. 100-L"

The Study Group was convened under a Committee contract with the Wharton School, University of Pennsylvania. "The report contains a thoughtful analysis of current EEO and affirmative action policies and practices and addresses the continued validity of and necessity for such actions . . . . It analyzes proposed alternatives to affirmative action as a means to remedy the effects of past discrimination."

B. FEDERAL GOVERNMENT

DiPrete, Thomas A.
The professionalization of administration and equal employment opportunity in the U.S. Federal Government. American journal of sociology, v. 93, July 1987: 119-140. LRS87-7421

"A statistical analysis of personnel outcomes for the 15 largest agencies of the federal government during 1962-77 shows that lower-level employees frequently moved into entry-level administrative positions. This suggests that upward-mobility programs begun during these years successfully countered professionalization trends and allowed the proportion of entry-level administrative positions filled internally to increase." Finds women and minorities have benefitted most; discusses implications for further career advancement.

Downing, Paul M.
Elimination of the Professional and Administrative Career Examination (PACE) and proposed alternative selection procedures. Revised Apr. 22, 1989. Washington, Congressional Research Service, 1989. 47 p. 89-315 GOV

In response to allegations by civil rights groups that it denied equal opportunity, the Federal Government in 1981 agreed to terminate use of the Professional and Administrative Career Examination (PACE), a mental ability test used to fill positions in 118 entry-level professional and administrative occupations. This report presents arguments for and against the examination, and describes the agreement to abolish it. The report then discusses the replacement of PACE with noncompetitive hiring, and OPM's recent development of new selection procedures for hiring into the competitive service.

Gilson, Robert J.
The Federal manager's guide to EEO. Huntsville, Ala., Federal Personnel Management Institute, c1989. 122 p.

This book was written to help supervisors "succeed as managers by learning how to use the EEO program more effectively." Chapters are devoted to several facets of equal employment opportunity including affirmative action, recruitment and employee development.

Lewis, Gregory B.
Progress toward racial and sexual equality in the Federal civil service? Public administration review, v. 48, May-June 1988: 700-707. LRS88-5338

"Paper addresses two questions. First, has the Federal civil service made progress toward racial and sexual equality in the past decade? Second, has progress slowed during the Reagan Administration?"

Novak, Viveca.
The last plantation. Common Cause magazine, v. 13, Sept.-Oct. 1987: 28-31. LRS87-6840

"The U.S. Department of Agriculture (USDA) has been beset by complaints of racial discrimination at many of its field offices . . . . Critics point to a track record of ignoring affirmative action plans, and a pattern of discrimination that ultimately hurts black farmers who use government farm programs. Interviews with a number of minority USDA workers nationwide revealed a systemic problem in the department despite periodic, sweeping declarations of good intentions from USDA chiefs."

U.S. Congress. House. Committee on Education and Labor.
Subcommittee on Employment Opportunities.
Employment practices of the Federal Bureau of Investigation. Hearing, 100th Congress, 2nd session. Washington, G.P.O., 1988. 57 p. LRS88-9446

"Serial no. 100-82"
Hearing held May 20, 1988, Los Angeles, CA.
Hearing was held to receive "testimony on allegations that the premier law enforcement agency in this land, and the premier agency that is used to investigate acts of civil rights violation, is a perpetrator of employment discrimination policies." Groups represented at the hearing include the Mexican American Legal Defense and Education Fund, U.S. Equal Employment Opportunity Commission, National Association of Black Law Enforcement Executives, and others.

Hearing on H.R. 3330, the Federal Equal Employment Act. Hearing, 100th Congress, 2nd session. Feb. 9, 1988. Washington, G.P.O., 1988. 127 p. LRS88-6467

"Serial no. 100-62"
"Hearing . . . to consider H.R. 3330, the Federal Equal Employment Opportunity Reporting Act, to require Federal agencies to file affirmative action reports and plans with EEOC regarding Federal employment, and to grant EEOC authority to compel filing of such reports. Supplementary material (p. 127) includes correspondence."
Witnesses include Clarence Thomas, Chairman of the EEOC; Richard T. Seymour of the Lawyer's Committee for Civil Rights Under Law; and G. Mario Moreno of the Mexican American Legal Defense and Educational Fund.

U.S. Congress. House. Committee on Foreign Affairs. Subcommittee on International Operations.
Equal employment opportunity in the Department of State, Agency for International Development, and the United States Information Agency. Hearing, 99th Congress, 2nd session. Sept. 17, 1986. Washington, G.P.O., 1987. 130 p. LRS87-609

Congressman George W. Crockett writes in a prepared statement that he is "appalled by the lack of progress of these agencies in implementing their Congressional mandate to develop a Foreign Service that is truly representative of the American people." Participants discuss and analyze the representation of minorities in these three agencies. Witnesses include Congressmen Crockett and Robert Garcia; George S. Vest, Director of the Foreign Service and Director of Personnel, Department of State; and Woodward Kingman of the U. S. Information Agency.

Equal employment opportunity in the foreign affairs agencies. Hearings before the Subcommittees on International Operations and on Western Hemisphere Affairs of the Committee on Foreign Affairs, House of Representatives, 100th Congress, 1st session. July 29 and 30, 1987. Washington, G.P.O., 1988. 157 p. LRS88-1286

Hearing discusses the Department of State's compliance with the Foreign Service Authorization Act of 1980 which provided "that the members of the Foreign Service should be representative of the American people." In opening the hearing the chairman affirms that he believes "the State Department's statistics clearly demonstrate that there has been little, if any, improvement during the past year in obtaining the goal that the Foreign Service be representative of this Nation's ethnic and cultural diversity." Witnesses include members of the Department of State, the Joint Center for Political Studies, and organizations comprised of Department of State employees.

U.S. Congress. House. Committee on Post Office and Civil Service. Subcommittee on Civil Service.
Hispanic employment in the Federal Government. Hearing, 100th Congress, 2nd session. June 14, 1988. Washington, G.P.O., 1988. 99 p. LRS88-9448

"Serial no. 100-64"

"Based on data from the U.S. Office of Personnel Management, we already know that recruitment efforts by Federal agencies have resulted in a solid base of federally employed Hispanics. But Hispanics seem to be concentrated in just two areas: within DEA at Justice, for example, or in EEOC offices which serve large Hispanic communities. Further, the numbers of Hispanics in Government aren't growing. We need to find out why."

U.S. Congress. House. Committee on the Judiciary. Subcommittee on Civil and Constitutional Rights.
FBI affirmative action and equal employment opportunity efforts. Hearing, 100th Congress, 2nd session. Washington, G.P.O., 1989. 544 p. LRS89-2082

"Serial no. 118"

Hearings held Mar. 31 and June 8, 1988.

Subcommittee's interest "was triggered by the filing of a class action lawsuit joined by 90 percent of the FBI's Hispanic agents, who allege a pattern of racial discrimination in terms of assignments and promotion." Rather than "delve into the specific facts", the subcommittee focuses "on [the] broader questions . . . pos[ed] concerning the recruitment, hiring and promotion of minorities."

U.S. General Accounting Office.
Minority representation: efforts of the Alcohol, Drug Abuse, and Mental Health Administration; report to the Honorable Daniel K. Inouye, U.S. Senate. May 13, 1988. Washington, G.A.O., 1988. 29 p. LRS88-7217

"GAO/HRD-88-49, B-231054"

Finds "that ADAMHA was not in total compliance with EEOC affirmative action requirements and with some elements of the ADAMHA merit promotion plan."

U.S. Commission on Civil Rights: concerns about Commission operations; report to congressional requesters. May 26, 1988. Washington, G.A.O., 1988. 76 p. LRS88-7309

"GAO/GGD-88-71, B-227768"

"Thirteen areas of concern were raised about the U.S. Commission on Civil Rights. These areas include employment trends; hiring and use of consultant, temporary, and Schedule C employees; referrals from state employment service offices; Affirmative Action; awards and promotions; Commissioners' and Special Assistants' billings; financial disclosure reports; Commission travel; appropriations; lobbying; Commission automobile; state advisory committees; and contracting."

C. STATE/MUNICIPAL GOVERNMENT

Gottfried, Frances.
The merit system and municipal civil service: a fostering of social inequality. New York, Greenwood Press, 1988. 181 p.
JS358.G597 1988

Chapter 3 (p. 53-91) concludes that "major barriers to the implementation of affirmative action in municipal civil service systems continue to exist. Racist and sexist attitudes by those officials responsible for maintaining the system, union pressure to maintain seniority systems, belief that affirmative action is synonymous with reverse discrimination, and insistance [sic] by personnel administrators in maintaining strong merit principles regardless of their impact on social equity, all contribute to the difficulty of implementing affirmative action in municipal civil service systems. Despite these considerable barriers, some progress is being made."

Moss, Philip I.
Employment gains by minorities, women in large city government, 1976-83. Monthly labor review, v. 111, Nov. 1988: 18-24.
LRS88-12376

"Minorities and white women made significant gains in upper-level city government employment over the 1976-83 period; however, their salaries continued to lag those of white men."

Slack, James D.
Affirmative action and merit in public administration. American review of public administration, v. 18, Dec. 1988: 377-387.
LRS88-13941

"Study tests the hypotheses that graduates of master of public administration (MPA) programs are more supportive of affirmative action than are recipients of other graduate degrees . . . . Results show that type of graduate education has no bearing on levels of support for affirmative action among city managers throughout the United States. City managers' belief in the principle of merit, however, has a negative impact on city managers' attitudes toward affirmative action."

Thomas, Ralph C.
Holding a model public hearing under Richmond v. Croson. MBE: minority business entrepreneur, v. 6, May-June 1989: 11-12, 14-15.
LRS89-6944

Executive director of the National Association of Minority Contractors provides guidelines for witnesses at public hearings held by State and local governments desiring to establish or retain minority business utilization programs. The guidelines discuss the type of evidence to legally justify such a program under the requirements established by the Supreme Court's 1989 Richmond decision.

D. PRIVATE SECTOR

The 50 best places for Blacks to work. Black enterprise, v. 19, Feb. 1989: 73-78, 80-84, 86-88, 90-91. LRS89-188

Reviews fifty companies with effective affirmative action programs and emphasis on training and development programs.

Law, Sylvia A.

"Girls can't be plumbers"--affirmative action for women in construction: beyond goals and quotas. Harvard civil rights-civil liberties law review, v. 24, winter 1989: 45-77. LRS89-4185

"This Article considers the gulf between the norm of sexual equality and the reality of sex-based discrimination and explores which strategies for closing the gulf have the greatest prospect for success."

Moore, John W.

The action's affirmative. National journal, v. 21, Aug. 5, 1989: 1972-1977. LRS89-6068

"In a series of decisions, the Supreme Court has reopened a national debate over affirmative action. But the business community says the rulings are not likely to change its commitment to affirmative action."

Smith, Mary.

Affirmative action in the employment of persons with handicaps under Federal contracts: section 503 of the Rehabilitation Act. Nov. 2, 1988. Washington, Congressional Research Service, 1988. 6 p. 88-701 EPW

Employers doing business with the Federal Government under a contract for more than $2,500 are required to take affirmative action to employ and advance in employment qualified individuals with handicaps. This report summarizes the provisions of this program and sets forth current program data.

U.S. Congress. House. Committee on Education and Labor.

A report on the investigation of the civil rights enforcement activities of the Office of Federal Contract Compliance Programs, U.S. Department of Labor. Washington, G.P.O., 1987. 2 v. (162, 763 p.) LRS87-12914

"Serial no. 100-R"

At head of title: Committee print.

Concludes from a review of policy, organizational, and administrative issues "that this agency is in substantial disarray; that it has suffered political and ideological turmoil at the National Office and, as a result, the field offices are in a state of confusion as to the official policies and practices of the agency. Effective enforcement has come to a virtual standstill." Includes a case study of a controversial compliance review of the Los Alamos National Laboratory.

U.S. Congress. House. Committee on Education and Labor.
Subcommittee on Employment Opportunities.
Oversight hearing on Office of Federal Contract Compliance Programs. Hearings, 100th Congress, 1st session. June 3-4, 1987. Washington, G.P.O., 1987. 124 p. LRS87-10603

"Serial no. 100-38"

The Office of Federal Contract Compliance Programs (OFCCP) is mandated to monitor "the contract compliance of companies doing business with the Federal Government, comprising some $200 billion in business." Executive Order 11246 requires the OFCCP to enforce "nondiscrimination in, and affirmative action measures for, integrating contractor workforces." Preliminary studies of the OFCCP indicated "serious organizational and compliance procedure" problems requiring reform. "In light of those concerns", the hearing was held "to receive testimony from former OFCCP officials and the civil rights community." The second day of the hearing focused on how the Government, with its resources, could work to improve contractor compliance measures.

U.S. Congress. House. Committee on Energy and Commerce.
Subcommittee on Telecommunications and Finance.
Labor issues in the telecommunications industry. Hearings, 100th Congress, 2nd session on H.R. 292 and H.R. 1090. Washington, G.P.O., 1989. 488 p. LRS89-1762

Hearings held May 17 and June 16, 1988.

"Serial no. 100-205"

Hearings focus on employment of ethnic minorities in the broadcast, cable, and telephone industries.

CRS Report for Congress

The Americans With Disabilities Act: An Overview of Major Provisions

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July 31, 1990

Congressional Research Service • The Library of Congress

THE AMERICANS WITH DISABILITIES ACT: AN OVERVIEW OF MAJOR PROVISIONS

SUMMARY

The Americans With Disabilities Act (ADA), enacted on July 26, 1990, would provide broad non-discrimination protection for individuals with disabilities in employment, public services, public accommodations, and services operated by private entities, transportation, and telecommunications.

THE AMERICANS WITH DISABILITIES ACT (ADA): AN OVERVIEW OF MAJOR PROVISIONS

BACKGROUND OF THE LEGISLATION

The Americans with Disabilities Act, ADA, P.L. 101-336, has often been described as the most sweeping nondiscrimination legislation since the Civil Rights Act of 1964. It would provide broad based nondiscrimination protection for individuals with disabilities in employment, public services, public accommodations and services operated by private entities, transportation, and telecommunications. On July 13, 1990, the final conference report was approved by the Senate.[1] House approval had come on July 12[2] and President Bush signed the legislation on July 26.[3]

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[1] 136 Cong. Rec. S 9695 (daily ed. July 13, 1990).

[2] 136 Cong. Rec. H 4629 (daily ed. July 12, 1990).

[3] The legislative course of the ADA can only be described as tortuous. Although legislative attempts to implement various concepts in the ADA have been longstanding, the ADA originated in a proposal from the National Council on Disabilities. The National Council is an independent federal agency whose statutory functions include providing recommendations to the Congress regarding individuals with disabilities. 29 U.S.C. sec. 781. The National Council proposal followed two reports by the National Council, *Toward Independence* (1986), and *On the Threshold of Independence* (1988). Legislation of this type was also recommended in the 1988 report of the Presidential Commission on the Human Immunodeficiency Virus Epidemic. Legislation was introduced in the 100th Congress, S. 2345 and H.R. 4498, and a hearing was held but further action was not taken. A substantially revised version of the ADA, S. 933 and H.R. 2273, was introduced in both the House and Senate on May 9, 1989. S. 933 passed the Senate with substantial amendments on September 7, 1989. In the House, the legislation was referred to four committees, House Education and Labor, Energy and Commerce, Transportation and Public Works, and Judiciary. After numerous hearings, and markups, the ADA passed the House on May 22, 1990. Conferees were appointed and a conference report was agreed to by the conferees but the Senate on July 11, 1990 voted to recommit the legislation to conference. A compromise was agreed to. On July 12, the House voted to pass the ADA and on July 13 the Senate followed suit.

An existing federal statutory provision, section 504 of the Rehabilitation Act of 1973, 29 U.S.C. sec. 794, prohibits discrimination against an otherwise qualified individual with handicaps, solely on the basis of handicap, in any program or activity that receives federal financial assistance, the executive agencies or the U.S. Postal Service. Many of the concepts used in the ADA originated in section 504 jurisprudence although section 504 differs from the ADA in several ways. The most significant difference is that section 504's prohibition against discrimination is generally tied to the receipt of federal funds while the ADA would cover entities not receiving such funds. The ADA contains a specific provision stating that except as otherwise provided in the act, nothing in the act shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. 790 et seq.) or the regulations issued by Federal agencies pursuant to such title.[4]

OVERVIEW OF THE ADA

Short Title and Definitions

Section 1 contains the short title and the table of contents of the act. Section 2 contains statements concerning congressional findings and purpose while section 3 contains definitions of auxiliary aids and services, disability, and state. The term disability is defined as meaning with respect to an individual "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." This definition is drawn from the definitional section applicable to section 504 of the Rehabilitation Act.[5] Although AIDS and HIV infection are not specifically mentioned in the Act, the prior interpretation of section 504 and the legislative history of the ADA indicate that such coverage is intended.[6]

Title I -- Employment

Title I provided that no covered entity shall discriminate against a qualified individual with a disability because of the disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment. The term employer is defined as a person engaged in an industry affecting commerce who has 15 or more employees; however, for the two years following the effective date of the title, an employer means a person engaged in an industry affecting commerce who has 25 or more

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[4] ADA, sec. 501.

[5] 29 U.S.C. sec. 706(8).

[6] See e.g., S. Rep. No. 116, 101st Cong., lst Sess. (1989).

employees. The term qualified individual with a disability is defined as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such person holds or desires."[7]

Title I incorporates many of the concepts set forth in the regulations promulgated pursuant to section 504, including the requirement to provide reasonable accommodation unless such accommodation would pose an undue hardship on the operation of the business.[8] There is a section which specifically lists some defenses to a charge of discrimination including (1) that the alleged application of qualification standards has been shown to be job related and consistent with business necessity and such performance cannot be accomplished by reasonable accommodation, (2) the term qualification standards can include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace, and (3) religious entities may give a preference in employment to individuals of a particular religion to perform work connected with carrying on the entities' activities. In addition, religious entities may require that all applicants and employees conform to the religious tenets of the organization. The Secretary of Health and Human Services is required to list infectious and communicable diseases transmitted through the handling of food and if the risk cannot be eliminated by reasonable accommodation, a covered entity may refuse to assign or continue to assign an individual with such a disease to a job involving food handling.[9]

Another controversial issue which arose regarding employment concerned the application of the ADA to drug addicts and alcoholics. The act provides that, with regard to employment, an employee or applicant who is currently engaging in the illegal use of drugs is not considered to be a qualified individual with a disability. Also, title I provides that a covered entity may prohibit the illegal use of drugs and the use of alcohol at the workplace.

The remedies and procedures set forth in sections 705, 706, 707, 709, and 710 of the Civil Rights Act of 1964,[10] are incorporated by reference. This would provide for certain administrative enforcement as well as allowing for individual suits. Presently, these remedies would include injunctive relief and

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[7] ADA, sec. 101(8).

[8] See 45 C.F.R. Part 84.

[9] This provision reflects the compromise reached concerning the "Chapman" or food handlers amendment added to the ADA during House debate. For a discussion of the original amendment see "The Americans with Disabilities Act: Major Distinctions Between the Senate and House Versions as Passed," CRS General Distribution Memorandum (June 5, 1990).

[10] 42 U.S.C. secs. 2000e-4, 2000e-5, 2000e-6, 2000e-8.

back pay but not compensatory and punitive damages.[11] The Equal Employment Opportunities Commission is to promulgate regulations no later than one year after the date of enactment. The agencies with enforcement authority for employment discrimination in the ADA and under the Rehabilitation Act of 1973 are to develop, within 18 months, coordination procedures to avoid a duplication of effort or varying enforcement standards. Title I will become effective 24 months after enactment.

Title II -- Public Services

Title II provides that no qualified individual with a disability shall be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity or subjected to discrimination by any such entity. Public entity is defined as state and local governments, any department or other instrumentality of a state or local government, and the National Railroad Passenger Corporation. This title also provides specific requirements for public transportation by intercity and commuter rail and for public transportation other than by aircraft or certain rail operations. All new vehicles purchased or leased by a public entity which operates a fixed route system are to be accessible and good faith efforts must be demonstrated with regard to the purchase or lease of accessible used vehicles. Retrofitting of existing buses is not required. Paratransit services would be required in most circumstances other than those involving commuter bus service. Generally, within five years, rail systems are to have at least one car per train that is accessible to individuals with disabilities.

The enforcement remedies of section 505 of the Rehabilitation Act of 1973, 29 U.S.C. sec. 794a, are incorporated by reference. These remedies would be similar to those of title VI of the Civil Rights Act of 1964 and would include damages and injunctive relief. The Attorney General is to promulgate regulations relating to subpart A of the title (Prohibition Against Discrimination and other Generally Applicable Provisions) although such regulations are not to include matters within the scope of the authority of the Secretary of Transportation. Subpart B provides that the Secretary of Transportation shall issue regulations. Generally, the effective date for title II is eighteen months, but the date varies for some sections such as that relating to Public entities operating fixed route systems.

Title III -- Public Accommodations and Services Operated by Private Entities

Title III provides that no individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a

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[11] If the Civil Rights Act of 1990, S. 2104, is enacted, the remedies referred to may change.

place of public accommodation. Entities to be covered by the term public accommodation are listed and include, among others, hotels, restaurants, theaters, auditoriums, laundromats, museums, parks, zoos, private schools, day care centers, professional offices of health care providers, and gymnasiums. Religious institutions or entities controlled by religious institutions are not included on the list. There are some limitations on the nondiscrimination requirement and a failure to remove architectural barriers is not a violation unless such a removal is "readily achievable." "Readily achievable" is defined as meaning "easily accomplishable and able to be carried out without much difficulty or expense." The nondiscrimination mandate also does not require that an entity permit an individual to participate in or benefit from the services of a public accommodation where such an individual poses a direct threat to the health or safety of others.

Title III also contains provisions relating to the prohibition of discrimination in public transportation services provided by private entities. Purchases of over-the-road buses are to be made in accordance with regulations issued by the Secretary of Transportation. In issuing these regulations, the Secretary must take into account the recommendations of a study on the subject to be done by the Office of Technology Assessment.

The remedies and procedures of title II of the Civil Rights Act shall be the powers, remedies, and procedures title III of the ADA provides to any person who is being subjected to discrimination or any person who has reasonable grounds for believing that he or she is about to be subjected to discrimination with respect to the construction of new or the alteration of existing facilities in an inaccessible manner. Title II of the Civil Rights Act has generally been interpreted to include injunctive relief, not damages. In addition, state and local governments can apply to the Attorney General to certify that state or local building codes meet or exceed the minimum accessibility requirements of the ADA. The Attorney General may bring pattern or practice suits with a maximum civil penalty of $50,000 for the first violation and $100,000 for a violation in a subsequent case. The monetary damages sought by the Attorney General do not include punitive damages. Courts may also consider an entity's "good faith" efforts in considering the amount of the civil penalty. Factors to be considered in determining good faith include whether an entity could have reasonably anticipated the need for an appropriate type of auxiliary aid to accommodate the unique needs of a particular individual with a disability. Generally, the effective date of title III is 18 months after enactment although there are certain exceptions to this.

Title IV -- Telecommunications

Title IV amends title II of the Communications Act of 1934[12] by adding a section providing that the Federal Communications Commission shall ensure

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[12] 47 U.S.C. 201 et seq.

that interstate and intrastate telecommunications relay services are available, to the extent possible and in the most efficient manner, to hearing-impaired and speech-impaired individuals. Any television public service announcement that is produced or funded in whole or part by any agency or instrumentality of the federal government shall include closed captioning of the verbal content of the announcement. The FCC is given enforcement authority with certain exceptions and the services shall be provided not later than 3 years after the date of enactment.

Title V -- Miscellaneous Provisions

Title V contains an amalgam of provisions, several of which generated considerable controversy during ADA debate. Section 501 concerns the relationship of the ADA to other statutes and bodies of law. Subpart (a) states that "except as otherwise provided in this act, nothing in this Act shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act ... or the regulations issued by Federal agencies pursuant to such title." Subpart (b) provides that nothing in the Act shall be construed to invalidate or limit the remedies, rights and procedures of any federal, state or local law that provides greater or equal protection. Nothing in the act is to be construed to preclude the prohibition of or restrictions on smoking. Subpart (c) limits the application of the act with respect to the coverage of insurance; however, this subsection is not to be used as a subterfuge to evade the purposes of titles I and III. Finally, subsection (d) provides that the act does not require an individual with a disability to accept an accommodation which that individual chooses not to accept.

Section 502 abrogates the eleventh amendment state immunity from suit. Section 503 prohibits retaliation and coercion against an individual who has opposed an act or practice made unlawful by the ADA. Section 504 requires the Architectural and Transportation Barriers Compliance Board to issue guidelines regarding accessibility. These guidelines are to include procedures and requirements for alterations of historic buildings or facilities. Section 505 provides for attorneys' fees in "any action or administrative proceeding" under the act. Section 506 provides for technical assistance to assist entities covered by the act in understanding their responsibilities. Section 507 provides for a study by the National Council on Disability regarding wilderness designations and wilderness land management practices and "reaffirms" that nothing in the wilderness act is to be construed as prohibiting the use of a wheelchair in a wilderness area by an individual whose disability requires the use of a wheelchair. Section 513 provides that "where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution ... is encouraged...." Section 514 provides for severability of any provision of the act that is found to be unconstitutional.

The coverage of Congress was a major controversy during the House-Senate conference on the ADA. The Senate passed version had provided that the ADA's requirements shall apply in their entirety to the Senate, the House and all the instrumentalities of the Congress. This language incorporated the

provisions in various titles providing for administrative enforcement of the ADA, thus raising constitutional issues regarding separation of powers and speech and debate clause immunity. The House took a different approach and applied the rights and protections of the ADA to the Congress but provided for the chief official of each instrumentality of Congress to establish remedies and procedures for these rights. After considerable debate, existing Senate and House procedures concerning discrimination were codified and the concept of a private right of action was dropped.

Two other controversial areas were also covered in title V -- sex and drugs. Section 510 provides that the term "individual with a disability" in the ADA does not include an individual who is currently engaging in the illegal use of drugs when the covered entity acts on the basis of such use. An individual who has been rehabilitated would be covered. However, the conference report language clarifies that the provision does not permit individuals to invoke coverage simply by showing they are participating in a drug rehabilitation program; they must refrain from using drugs. The conference report also indicates that the limitation in coverage is not intended to be narrowly construed to only persons who use drugs "on the day of, or within a matter of weeks before, the action in question." The definitional section of the Rehabilitation Act which would be applicable to section 504 is also amended to create uniformity with this definition and to add some provisions relating to alcohol use.

Section 508 provides that an individual shall not be considered to have a disability solely because that individual is a transvestite. Section 511 similarly provides that homosexuality and bisexuality are not disabilities under the act and that the term disability does not include transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders, compulsive gambling, kleptomania, or pyromania, or psychoactive substance use disorders resulting from current illegal use of drugs.

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CRS Report for Congress

The Americans with Disabilities Act, S. 933, As Passed by the Senate: An Overview

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Congressional Research Service • The Library of Congress

THE AMERICANS WITH DISABILITIES ACT, S. 933, AS PASSED BY THE SENATE: AN OVERVIEW

SUMMARY

The Americans With Disabilities Act (ADA), S. 933 and H.R. 2273, 101st Cong., lst Sess., would provide broad based nondiscrimination protection for persons with disabilities in the private sector and would cover employment, public services, public accommodations and services operated by private entities, transportation, and telecommunications.

THE AMERICANS WITH DISABILITIES ACT, S. 933, AS PASSED BY THE SENATE: AN OVERVIEW

BACKGROUND OF THE LEGISLATION

The Americans With Disabilities Act (ADA), S. 933 and H.R. 2273, 101st Cong., lst Sess., would provide broad based nondiscrimination protection for persons with disabilities in the private sector and would cover employment, public services, public accommodations and services operated by private entities, transportation, and telecommunications. S. 933 and H.R. 2273 were introduced on May 9, 1989 and passed the Senate with substantial amendments on September 7, 1989. The ADA[1] originated in a proposal from the National Council on Disabilities[2] and similar legislation was introduced in the 100th Congress.[3]

An existing federal statutory provision, section 504 of the Rehabilitation Act of 1973, 29 U.S.C. sec. 794, prohibits discrimination against an otherwise qualified individual with handicaps solely on the basis of handicap in any program or activity that receives federal financial assistance, the executive agencies or the U.S. Postal Service. Many of the concepts used in the ADA originated in section 504 jurisprudence although section 504 differs from the proposed legislation in several ways. The most significant difference is that section 504's prohibition against discrimination is generally tied to the receipt of federal funds while the ADA would cover entities not receiving such funds. The ADA contains a specific section stating that nothing in the act shall be construed to reduce the scope of coverage required or the standards applied under the nondiscrimination provisions of section 504.

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[1] References to the ADA in this report refer only to the version as passed by the Senate.

[2] The National Council on Disabilities is an independent federal agency whose statutory functions include providing recommendations to the Congress regarding individuals with disabilities. 29 U.S.C. sec. 781. The legislation resulted following two reports by the National Council, *Toward Independence* (1986), and *On the Threshold of Independence* (1988). Legislation of this type was also recommended in the 1988 report of the Presidential Commission on the Human Immunodeficiency Virus Epidemic.

[3] S. 2345 and H.R. 4498, 100th Cong.

OVERVIEW OF THE LEGISLATION

Short Title and Definitions

Section 1 is the short title and table of contents for the bill. Section 2 sets out congressional findings and purposes while section 3 provides for definitions of auxiliary aids and services, disability, and state. The term disability is defined as meaning with respect to an individual "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual, (B) a record of such an impairment; or (C) being regarded as having such an impairment." This definition is drawn from the definitional section applicable to section 504 of the Rehabilitation Act.[4]

Title I -- Employment

Title I provides that no covered entity shall discriminate against a qualified individual with a disability because of the disability in regard to job application procedures, the hiring or discharge of employees, employee compensation, advancement, job training, and other terms, conditions and privileges of employment. The term employer is defined as a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year. However, for the first two years following the title's effective date, only employers with 25 or more employees are covered. Title I incorporates many of the regulatory concepts set forth in the regulations promulgated pursuant to section 504, including the requirement to provide reasonable accommodation unless such accommodation would pose an undue hardship on the operation of the business.[5] Reasonable accommodation and undue hardship are also defined and an exception to the definition of qualified individual with a disability regarding illegal drugs and alcohol was added for title I.

The remedies and procedures set forth in section 706, 707, 709 and 710 of the Civil Rights Act of 1964 are incorporated by reference. These remedies would include injunctive relief and back pay but not compensatory and punitive damages.[6] Title I would become effective 24 months after enactment.

Title II -- Public Services

Title II provides that no qualified individual with a disability shall, by reason of such disability, be excluded from the participation in, be denied the

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[4] 29 U.S.C. sec. 706(8).

[5] See 45 C.F.R. Part 84.

[6] For a more detailed discussion of remedies under the ADA see Dale, "Remedies and Standing to Sue Under S. 933, the "Americans With Disabilities Act of 1989," CRS 89-336A (May 26, 1989).

benefits of, or be subjected to discrimination by a department, agency, special purpose district, or other instrumentality of a State or local government. Specific requirements are set forth regarding public transportation and all new fixed route buses are to be made accessible unless it can be demonstrated that no lifts are available. Paratransit is also required as a supplement to fixed route public transportation except where it would impose "an undue financial burden."

The enforcement remedies of section 505 of the Rehabilitation Act, 29 U.S.C. sec. 794a, are incorporated by reference. These remedies would be similar to those of title VI of the Civil Rights Act of 1964 and would include damages and injunctive relief. The effective date for title II is the date of enactment regarding new fixed route vehicles but 18 months after enactment for other purposes.

Title III -- Public Accommodations and Services Operated by Private Entities

Title III provides that no individual shall be discriminated against in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, on the basis of disability. Entities to be covered by the definition of public accommodation are listed and would include, among others, hotels, restaurants, theaters, grocery stores, shopping centers, and the professional offices of health care providers. However, such entities would not have to be made accessible unless the changes are "readily achievable," a term which is defined in the act using criteria similar to those in section 504 regulations.[7] In addition, the title contains specific provisions relating to the prohibition of discrimination in public transportation services provided by private entities.

The remedies of section 204 of the Civil Rights Act of 1964, 42 U.S.C. sec. 2000a-3(a), (which have been generally interpreted not to include damages) are incorporated by reference. The effective date of title II is 18 months after enactment.

Title IV -- Telecommunications Relay Services

Title IV would amend the Communications Act of 1934 to provide that the Federal Communications Commission (FCC) shall ensure that interstate and intrastate telecommunications relay services are available, to the extent possible and in the most efficient manner, to hearing-impaired and speech-impaired individuals. The FCC is given enforcement authority for these provisions and such services shall be provided not later than 3 years after the date of enactment.

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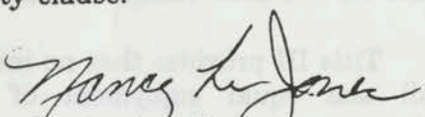
[7] See 45 C.F.R. sec. 84.12.

Title V -- Miscellaneous Provisions

Title V contains various miscellaneous provisions including a section describing the ADA's construction with regard to other federal laws; a provision indicating that the ADA shall not be construed to prohibit or restrict general insurance practices; a prohibition against retaliation and coercion, a provision indicating that Congress intends that the states not be immune from suit under the ADA; a section providing that the Architectural and Transportation Barriers Compliance Board (ATBCB) shall issue minimum guidelines; a section providing for attorneys' fees; a section providing for technical assistance; a section providing for a study on federal wilderness areas; two sections limiting the definition of disability so it is not interpreted to include transvestites, homosexuality and certain other conditions; a section providing for congressional coverage; a section discussing the use of illegal drugs, an amendment to the definition of handicapped person in the Rehabilitation Act; and, finally, a severability clause.



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CRS Report for Congress

Americans With Disabilities Act of 1989: Analysis of the Remedies and Enforcement Provisions of S.933, as Passed by the Senate

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February 22, 1990

Congressional Research Service • The Library of Congress

SUMMARY

S. 933, the "Americans with Disabilities Act of 1989," would broaden current federal sanctions against handicap discrimination which, as found mainly in the Rehabilitation Act of 1973, are restricted in coverage to the agencies of the federal government, federal contractors, and recipients of federal aid. The bill would augment this protection with a panoply of new safeguards applicable to public and private employers, bus, rail, and related transportation services and facilities, most places of public accommodation, and telecommunication relay services. For the most part, the relief provided by the bill to enforce these new protections draws expressly upon the remedies and procedures found in other civil rights laws. This report analyzes the various remedy provisions in S. 933, as passed the Senate on September 7, 1989, in relation to current provisions of existing federal civil rights legislation.

Americans with Disabilities Act of 1989: Analysis of the Remedies and Enforcement Provisions of S. 933, as Passed by the Senate

S. 933, the "Americans with Disabilities Act of 1989," would broaden current federal sanctions against handicap discrimination which, as found mainly in the Rehabilitation Act of 1973, are restricted in coverage to the agencies of the federal government, federal contractors, and recipients of federal aid. The bill would augment this protection with a panoply of new safeguards applicable to public and private employers, bus, rail, and related transportation services and facilities, most places of public accommodation, and telecommunication relay services. For the most part, the relief provided by the bill to enforce these new protections draws expressly upon the remedies and procedures found in other civil rights laws. This report analyzes the various remedy provisions in S. 933, as passed the Senate on September 7, 1989, in relation to current provisions of existing federal civil rights legislation.

Employment

Title I of the bill bans discrimination against qualified disabled individuals with respect to hiring, discharge, compensation or any term, condition, or privilege of employment by employers with over 15 employees, labor unions, employment agencies, and joint labor-management committees. It requires "reasonable accommodation" to the known physical or mental limitations of the disabled employee or applicant unless this would impose an "undue hardship" on business operations. The enforcement provisions contained in §107 of the bill draw directly upon remedies and procedures mandated by equal employment opportunity provisions of Title VII of the 1964 Civil Rights Act as "set forth in sections 706, 707, 709, and 710 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5, 2000e-6, 2000e-8, and 2000e-9). . ."

Briefly, the procedural mechanism outlined by §706 of Title VII, as incorporated by the bill, is as follows. The Equal Employment Opportunity Commission is responsible for administrative enforcement of Title VII with respect to private and state and local government employment. It is empowered to investigate and conciliate formal charges of employment discrimination, which must be filed by an aggrieved individual or on the Commission's own initiative within 180 days of the alleged unlawful employment practice. Title VII imposes specific time limits for processing charges which may be extended for up to 60 days to accommodate deferrals to state or local fair employment practices agencies with jurisdiction to hear the charges. Based on its investigation, the EEOC must make a

determination whether there is "reasonable cause" to believe the charge, a finding that is essential to initiation of conciliation efforts required by the statute. Where its attempts at voluntary conciliation fail, the Commission is authorized to bring a civil action against the uncooperative employer, employment agency, or labor organization. In addition, under §707 of Title VII, the Commission has similar authority to act where it "has reasonable cause to believe that any person or group of persons is engaged in a *pattern or practice* of resistance to full enjoyment of any of the rights" protected by the Act. In the case of discrimination by governmental employers, however, the matter must be referred to the Attorney General for judicial enforcement action.[1]

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[1] Beyond the scope of this report, but clearly implicated by §509 of the Senate passed bill, are the constitutional ramifications of including Congress and its "instrumentalities" within the coverage of the Act. The main issue here relates to enforcement of the employment sections of the ADA which, as noted, involve two stages: an administrative process by complaint to the EEOC, and a judicial process by private right of action in federal court. Both stages implicate the speech and debate clause assurance that Members of Congress "shall not be questioned in any other place" for things done or said in the legislative process. Article I, §6, cl. 1. Speech and debate issues may also be presented by the required elimination of architectural and other barriers to access to persons with disabilities and the conferral of a private right of action to individuals to enforce the mandate. Additionally, a general separation of powers issue would be raised by authorization of an executive branch agency to police the employment relations of the legislative branch. While relevant caselaw continues to develop, and is currently too unsettled to permit a definitive resolution of these issues, the U.S. Supreme Court appears to be moving in the direction of a "functional" approach to questions of official immunity.

> Under that approach, we examine the nature of the function with which a particular official or class of officials has been lawfully entrusted and we seek to evaluate the effect that exposure to particular forms of liability would likely have on the appropriate exercise of those functions. Officials who seek exemption from personal liability have the burden of showing that such an exemption is justified by overriding considerations of public policy. . .

Thus, concluded the Court in *Forrester v. White*, 108 S.Ct. 538 (1988), it is "the nature of the function performed, not the identity of the actor who performed it, that inform[s] our immunity analysis. While *Forrester* held that a state judge did not have judicial immunity from a damages action brought by a probation officer whom he had fired, and is thus most directly apposite to the liability of state and local officials, the Court has elsewhere observed that "we generally have equated the legislative immunity to which state legislators are entitled under §1983 to that accorded Congressmen under the

A Commission finding of reasonable cause is not, however, a prerequisite to a private civil action under Title VII. Where the Commission dismisses a charge or has not, within 180 days of the filing of the charge, reached a conciliation agreement or initiated court action, it must notify the charging party who then has 90 days to file a suit. These provisions were designed to permit private parties to pursue independently their Title VII remedies in federal court where there is Commission inaction, dismissal, or unsatisfactory conciliation agreement.

The federal courts possess broad remedial authority under Title VII. They may not only enjoin the unlawful employment practices but may "order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay. . ., or any other relief as the court deems appropriate."[2] Title VII backpay is limited to the two years prior to filing the complaint. The Senate passed measure, however, eliminates any reference to 42 U.S.C. §1981 for purposes of ADA enforcement. As originally introduced, S. 933 specifically incorporated §1981 relief which includes compensatory and punitive damages, not generally recognized under Title VII.[3] Attorneys' fees may be awarded the prevailing party under both Title VII and the ADA.

Title VII also permits the courts to issue "temporary or preliminary relief" which may include injunctions against anticipated violations of the statute in at least some circumstances.[4] As a general rule, however, preliminary relief may be granted in the employment context only where the plaintiff can show likelihood of success on the merits and irreparable injury caused by the threatened conduct. For example, in *Sampson v. Murray*,[5] a non-Title VII

Constitution." See, *e.g.*, *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 502-503 (1975). If, therefore, *Forrester v. White* bears on the question of congressional immunity for employment decisions, it strongly suggests that for such decision Members of Congress may not have immunity.

[2] 42 U.S.C. 2000e-5(g).

[3] *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975).

[4] When a timely charge is filed and if, "on the basis of a preliminary investigation", it appears "that prompt judicial action is necessary to carry out the purposes of [the Act]," the EEOC is authorized by §706(f)(2) to seek preliminary injunctive relief pending final disposition of the charge. The charging party's right to seek immediate injunctive relief is not specified but, as a general matter, the courts may have inherent equitable discretion to grant injunctive relief to private claimants. *Sheehan v. Purolator Courier Corp.*, 676 F.2d 877 (7th Cir. 1982).

[5] 415 U.S. 61 (1974).

case, the U.S. Supreme Court held that a probationary federal employee about to be terminated in violation of procedural regulations issued by the Civil Service Commission could obtain preliminary relief pending an appeal to the CSC only on a showing of extraordinary "irreparable harm." Neither the threatened loss of income alleged by the employee, nor her allegations of humiliation and damage to reputation constituted such harm, said the Court, because each of these elements of injury could be fully remedied if the plaintiff prevailed on the merits. The courts are divided as to whether EEOC proceedings under §706(f)(2) must show irreparable harm,[6] but such a standard has been held satisfied by an alleged threatened retaliation because of the chilling effect of such conduct on the exercise of Title VII rights by other employees.[7]

The inspection, recordkeeping, and reporting requirements imposed generally upon employers by §709 of Title VII would also pertain to administration of the disabled discrimination provisions of the bill. Similarly, general Commission powers related to subpoenas, witnesses and the production of evidence in Title VII proceedings would apply to its administration of the bill as well.[8]

An issue has recently been raised concerning the effect of certain amendments to Title VII proposed by H.R. 4000/S. 2104, the proposed "Civil Rights Act of 1990" (hereafter "1990 Act"), on enforcement of the ADA if both measures become law. A provision of the 1990 Act would amend §706(g) of Title VII,[9] defining the remedial powers of the court, to include compensatory and punitive damages and the opportunity for a jury trial.[10] The statutory predicate of that amendment, §706(g), is one of those provisions incorporated for enforcement of the employment title of the ADA. Adoption of Title VII damage awards and jury trials by the 1990 Act could therefore result in same remedies being available in judicial actions under the ADA. The applicability of these proposed changes in Title VII practice to ADA enforcement, however, would probably turn on a determination of Congress' intent as revealed in the legislative history of the ADA law and, possibly, the sequence of legislative enactment. For example, if the 1990 Act becomes law prior to the ADA, and

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[6] *EEOC v. Anchor Hocking Corp.*, 666 F.2d 1037 (6th Cir. 1981)(yes); *EEOC v. Pacific Press Publ. Ass'n*, 535 F.2d 1182 (9th Cir. 1976)(no, if the EEOC acts pending resolution of the charge. If the charge has been processed, EEOC must establish traditional "irreparable harm.").

[7] *Holt v. Continental Group, Inc.*, 708 F.2d 515 (2d Cir. 1983).

[8] 42 U.S.C. 2000e-9, 29 U.S.C. 161.

[9] 42 U.S.C. 2000e-5(g).

[10] See §8 of S. 2014, 136 *Cong. Rec.* S 1020 (daily ed. 2-7-90).

the congressional reports or debate on the later law suggest an intent to incorporate the broader remedies, or is otherwise silent on the matter, this could support an inference that Congress intended the new remedies to apply. Conversely, if the ADA were enacted first in time, and the legislative history indicates Congress' intent to incorporate the Title VII procedures then in effect, this could preclude award of damages and jury trials in ADA cases. In any event, the dilemma would seem readily resolvable either by statutory directive in the ADA law itself, or accompanying congressional documents, making clear the desired legislative outcome.

Although related to ADA liability rather than remedies, which are the focus of this report, one other issue may be noted at this point. That concerns the proposed statutory incorporation of the "business necessity" defense by the ADA in relation to a parallel standard proposed by the 1990 Act to govern Title VII "disparate impact" claims in response to the Supreme Court decision last term in *Wards Cove Packing v. Atonio*.[11] The Court there appeared to recast certain evidentiary principles emanating from the earlier *Griggs v. Duke Power Co.*,[12] which had required employers to demonstrate a "business necessity" for employment practices that disqualified minorities or other protected groups at a "substantially higher rate" than nonminorities. Under *Wards Cove*, by contrast, the business necessity doctrine was transformed from an affirmative defense for which the employer carried the burden of persuasion to a "business justification" subject only to "reasoned review" and for which the employer need only meet a "burden of production." The result was that "there is no requirement that the challenged practice be 'essential' or 'indispensable' to the employer's business," as was the prevailing judicial view prior to *Wards Cove*, and that the "ultimate burden" for proving disparate impact discrimination remained "at all times" with the plaintiff employee.

The 1990 Act seeks to reallocate this burden of proof by proposing that where the Title VII plaintiff "demonstrates that an employment practice results in a disparate impact," the employer must "demonstrate" that the "specific employment practice" or "group" of practices "is *required by* business necessity."[13] Certain provisions in the Senate passed ADA are also pertinent to the issue. For purposes of the definition of "discrimination" in §102(b)(7), S. 933 as passed would allow "employment tests or other selection criteria that screen out or tend to screen out" the disabled only if "shown to be job-related for the position in question" and "*consistent with* business necessity."[14] Similarly, §103 would allow as a general "defense" to any ADA charge of

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[11] 109 S.Ct. 2115 (1989).

[12] 401 U.S. 424 (1971).

[13] 136 *Cong. Rec.* S 1019 (daily ed. 2-7-90)(*emphasis added*).

[14] Emphasis added.

discrimination, whether related to employment or other covered activity, a showing that "an alleged application of qualification standards, tests, or selection criteria" is "job related and *consistent with* business necessity" and is not amendable to "reasonable accommodation."[15]

As a general proposition, the proposed language of the Senate passed ADA appears to largely coincide with the approach taken by the 1990 Act to the business necessity defense. There are, however, some differences in wording which, depending upon the courts' interpretation, could lead to diverse legal results. Note, for example, that while the 1990 Act demands a demonstration that an offending employment practice is "required by" business necessity, the Senate passed ADA is satisfied merely by showing that such practices are "consistent with" that standard. In addition, the former bill makes clear that the the employer's burden is one of both "production and persuasion" while the Senate passed ADA is silent on the issue and thus might be construed to impose a lesser burden on defending employers. Of course, the ADA also incorporates a "reasonable accommodation" standard specific to that law which is not found in the proposed 1990 Act. Finally, it should be observed that even if enacted, these differences would presumably result in no direct legal conflict or inconsistency since the separate bills deal with different forms of discrimination and are not substantively interdependent in operation. However, these potential differences may be a matter of policy concern to the Congress.

Public Services

Title II of the Senate passed bill generally prohibits discrimination against the disabled in administration of state and local governmental affairs and mandates accessibility standards for the disabled to public transportation facilities--including bus and rail systems--other than air carriers. Section 205 incorporates for enforcement of Title III the "remedies, procedures, and rights set forth in §505 of the Rehabilitation Act of 1973 (29 U.S.C. 794a). . ." As amended in 1978, §505 in turn provides for a bifurcated enforcement scheme depending upon whether the alleged discriminators are federal agencies or federally assisted entities. Thus, disabled persons are granted the same remedies against federal agencies violating the Rehabilitation Act as are available under Title VII of the 1964 Civil Rights Act.[16] Those remedies and procedures are outlined in the previous section of this report.

Section 505 also grants disabled individuals the same remedies against state and local governments or private parties who are recipients or providers of federal financial assistance as are available under Title VI of the 1964 Civil

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[15] Emphasis added.

[16] 29 U.S.C. §794a(a)(1).

Rights Act.[17] Generally, Title VI provides both administrative and judicial remedies for persons who suffer discrimination in any "program or activity" that is financially aided by the federal government. Federal grantmaking agencies are authorized to investigate and hold formal hearings based on individual complaints or their own compliance reviews and to terminate federal financial assistance to any institution found to operate in a discriminatory manner. While the Supreme Court has thus far avoided the issue, lower federal courts have generally found that a private cause of action is available to enforce Rehabilitation Act claims.[18] Moreover, monetary damages as well as injunctive relief have been awarded by analogy to Title VI which was interpreted by the Court in *Guardians Associations v. Civil Service Commission* to authorize a damage remedy in intentional discrimination cases.

However, a basic question could be raised as to whether §205 of the bill is intended to incorporate the entire §505 remedial framework, even though the Title VII references there relate to remedies available against federal agencies not apparently subject to Title II of the bill, or only those that pertain to federally assisted entities of a kind covered by Title II, namely the remedies and procedures under Title VI of the 1964 Civil Rights Act. While the latter appears the more logical conclusion, an argument could be made for either interpretation based on the present wording of §205.

Public Accommodations and Services Operated by Private Entities

Title III of the bill as passed states rules concerning nondiscrimination and accessibility by the disabled to privately operated places of "public accommodation," defined by §301 to include any of several specifically delineated types of service establishments, "if the operations of such entities affect commerce." The enforcement section of this title is modeled generally on Title II of the 1964 Civil Rights Act, 43 U.S.C. § 2000a-3(a), which provides for injunctive relief against racial discrimination in places of public accommodations, and the "remedies and procedures" of which are expressly incorporated by reference in §308(a) of the Senate bill. The ADA would add to this preexisting arsenal of injunctive relief, however, specific authority to require "auxiliary" aids or services, modification of policies or methods, and the alteration of facilities "to make such facilities accessible and usable by individuals with disabilities to the extent required by this title." Similar to its 1964 Act counterpart, the Attorney General would be granted jurisdiction to investigate and commence civil actions in "pattern or practice" cases or where the alleged denial of protected rights "raises an issue of general public importance." The ADA goes further, however, in mandating "periodic reviews

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[17] 42 U.S.C. 2000d et seq.

[18] E.g., *Doe v. Marshall*, 622 F.2d 118 (5th Cir. 1980), *cert. denied*, 451 U.S. 993 (1981); *Adashunas v. Negley*, 626 F.2d 600 (7th Cir. 1980); *Miener v. Missouri*, 673 F.2d 969 (8th Cir.), *cert. denied*, 459 U.S. 916 (1982).

of compliance" by covered entities. While the scope of this compliance review authority is not otherwise spelled out by the bill, it appears to have no direct parallel in the law or administrative practice under Title II of the 1964 Act.

In any civil action brought to enforce the public accommodations provisions of the Senate bill, the court may grant all "appropriate" equitable remedies--including required auxiliary aids, services, or modifications to make facilities "readily accessible"--and monetary damages, as well as civil penalties not to exceed $50,000 for a first violation or $100,000 for any subsequent violation. The latter provisions for a damage remedy and civil penalties are without statutory or judicial corollary under the 1964 Civil Rights Act, although monetary damages may be available in appropriate cases alleging racial discrimination in admission to private commercial establishments under §1981 of the 1866 Civil Rights Act.

Section 308(a) of the ADA also parallels the 1964 Act in explicitly providing for prospective relief in situations where an alleged denial of equal access to public accommodation is "about to" occur.[19] The bill as passed, however, was amended to substitute an apparently objective standard to govern such cases. This is in contrast to the original measure which would have predicated legal standing to sue on a complaining party's largely subjective "belie[f]" that a violation was "about to" occur.

Telecommunications Relay Services

Finally, Title IV of the bill amends the Communications Act of 1934 to require that the Federal Communications Commission insure by regulation "that interstate and intrastate telecommunications relay services are available, to the extent possible and in the most efficient manner, to hearing-impaired and speech-impaired individuals in the United States." Section 401(b)(2) states, generally, that the "same remedies, procedures, rights, and obligations" that govern interstate common carriers by rail or wire under the Communications Act shall apply to enforcement of the ADA with respect to both interstate and intrastate carriers.

Basically, the Communications Act authorizes the filing of complaints and investigation by the FCC of any alleged violation of the federal

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[19] *Compare* §308(a)(1) of S. 933, as passed, providing that relief "shall be available to any individual who is being or is *about to be* subjected to discrimination," with §204(a) of the 1964 Act, 42 U.S.C. 2000a-3(a), which authorizes private civil action where "there are reasonable grounds to believe that any person is *about to engage in*" forbidden discrimination. (*emphasis added*). Similarly, §802(i)(2) of the 1988 Fair Housing Amendments employs a similar standard in defining "aggrieved person" to include anyone who "believes that such person will be injured by a discriminatory housing practice that is about to occur." 42 U.S.C. §3602(i)(2).

communications law by a regulated carrier and provides that such "carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation."[20] The Commission is empowered to hold hearings, to make all determinations as to liability and damages, and to "make an order directing the carrier to pay the complainant the sum to which he is entitled."[21] Finally, any carrier that "knowingly fails or neglects to comply" with the law or Commission orders or regulations thereunder would be subject to forfeitures to the government of $10,000 for each offense. All proceedings before the Commission would be conducted pursuant to procedural requirements set forth in the communications law which, among other things, provides for judicial appeals and enforcement of FCC orders.[22]

In addition, however, the bill mandates FCC certification of state programs meeting federal requirements for intrastate telecommunications relay services and provides for FCC referral of complaints regarding such services to those states which have programs in effect. The state then has 180 days to take final action before the Commission may exercise jurisdiction over the complaint. Similarly, the FCC must issue a final order on any ADA complaint within 180 days pursuant to the general procedures described above.

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Legislative Attorney
February 22, 1990

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[20] 47 U.S.C. §206.

[21] 47 U.S.C. §209.

[22] 47 U.S.C. 401 et. seq.

CRS Report for Congress

Remedies and Standing to Sue Under S. 933, the "Americans with Disabilities Act of 1989"

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May 26, 1989

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Summary

S. 933, the "Americans with Disabilities Act of 1989," would broaden current federal sanctions against handicap discrimination which, as found mainly in the Rehabilitation Act of 1973, are restricted in coverage to the agencies of the federal government, federal contractors, and recipients of federal aid. The bill would augment this protection with a panoply of new safeguards applicable to public and private employers, bus, rail, and related transportation services and facilities, most places of public accommodation, and telecommunication relay services. For the most part, the relief provided by the bill to enforce these new protections draw expressly upon the remedies and procedures found in other civil rights laws. In addition, the bill seems to borrow from last year's Fair Housing Amendments a relatively novel, and far broader, concept of legal standing to complain of prospective violations than traditionally embodied in other statutory contexts.

Remedies and Standing to Sue Under S. 933, the "Americans with Disabilities Act of 1989."

S. 933, the "Americans with Disabilities Act of 1989," would broaden current federal sanctions against handicap discrimination which, as found mainly in the Rehabilitation Act of 1973, are restricted in coverage to the agencies of the federal government, federal contractors, and recipients of federal aid. The bill would augment this protection with a panoply of new safeguards applicable to public and private employers, bus, rail, and related transportation services and facilities, most places of public accommodation, and telecommunication relay services. For the most part, the relief provided by the bill to enforce these new protections draw expressly upon the remedies and procedures found in other civil rights laws. In addition, the bill seems to borrow from last year's Fair Housing Amendments a relatively novel, and far broader, concept of legal standing to complain of prospective violations than traditionally embodied in other statutory contexts. This report analyzes the various remedy provisions in S. 933 as they relate to current provisions of existing federal civil rights legislation.

Employment

Title II of the bill bans discrimination against qualified disabled individuals with respect to hiring, discharge, compensation or any term, condition, or privilege of employment by employers with over 15 employees, labor unions, employment agencies, and joint labor-management committees. It requires "reasonable accommodation" to the known physical or mental limitations of the disabled employee or applicant unless this would impose an "undue hardship" on business operations. The enforcement provisions contained in §205 of the bill draw directly upon remedies and procedures mandated by equal employment opportunity provisions of Title VII of the 1964 Civil Rights Act as "set forth in sections 706, 709, and 710 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5, 2000e-8, and 2000e-9" as well "section 1981 of the Revised Statutes (42 U.S.C. 1981). . ."

Briefly, the procedural mechanism outlined by §706 of Title VII, as incorporated by the bill, is as follows. The Equal Employment Opportunity Commission is responsible for administrative enforcement of Title VII with respect to private and state and local government employment. It is empowered to investigate and conciliate formal charges of employment discrimination, which must be filed by an aggrieved individual or on the Commission's own initiative within 180 days of the alleged unlawful employment practice. Title VII imposes specific time limits for processing charges which may be extended for up to 60 days to accommodate deferrals

to state or local fair employment practices agencies with jurisdiction to hear the charges. Based on its investigation, the EEOC must make a determination whether there is "reasonable cause" to believe the charge, a finding that is essential to initiation of conciliation efforts required by the statute. Where its attempts at voluntary conciliation fail, the Commission is authorized to bring a civil action against the uncooperative employer, employment agency, or labor organization except where the respondent is a government, governmental agency, or political subdivision. In the case of governmental employers, the matter must be referred to the Attorney General for judicial enforcement action.

A Commission finding of reasonable cause is not, however, a prerequisite to a private civil action under Title VII. Where the Commission dismisses a charge or has not, within 180 days of the filing of the charge, reached a conciliation agreement or initiated court action, it must notify the charging party who then has 90 days to file a suit. These provisions were designed to permit private parties to pursue independently their Title VII remedies in federal court where there is Commission inaction, dismissal, or unsatisfactory conciliation agreement. Under the bill, moreover, handicap discrimination claimants would have a private right of action independent of Title VII by virtue of the incorporated reference to §1981. Thus, as in race discrimination cases currently, handicap discrimination claims could be filed directly in federal court under §1981 without first exhausting Title VII administrative remedies.

The federal courts possess broad remedial authority under Title VII. They may not only enjoin the unlawful employment practices but may "order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay. . ., or any other relief as the court deems appropriate."[1] Liability for Title VII backpay is limited to the two years prior to filing the complaint. No such limitation pertains to §1981 relief, however. The U.S. Supreme Court has held that compensatory and punitive damages, not generally recognized under Title VII, may be awarded in §1981 actions.[2] Thus, damages for emotional distress may be revered under §1981 but not Title VII. Attorneys' fees may be awarded the prevailing party under both Title VII and §1981. Note further, however, that the basic applicability of §1981 as a remedy for discrimination in private employment is an issue currently being reexamined by the Supreme Court in a case whose outcome could have ramifications in the present context.[3]

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[1] 42 U.S.C. 2000e-5(g).

[2] *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975).

[3] *Patterson v. McLean Credit Union*, No. 87-107.

The inspection, recordkeeping, and reporting requirements imposed generally upon employers by §709 of Title VII would also pertain to administration of the handicap discrimination provisions of the bill. Similarly, general Commission powers related to subpoenas, witnesses and the production of evidence in Title VII proceedings would apply to its administration of the bill as well.[4]

The enforcement provisions of the bill's §205 are substantially broader than their Title VII counterpart in one noteworthy respect. That is, the procedure and remedies described above would apparently be available not only to individual victims of alleged prior or current ongoing acts of discrimination but also to anyone "who believes that he or she is. . .about to be subjected to discrimination on the basis of disability" in violation of the proposed act or regulations thereunder. In this regard, the bill seems to allow for prospective relief from feared or threatened future harm to the full extent otherwise available to persons who are victims of perfected acts of employment bias. This contrasts with Title VII which currently authorizes charges by or on behalf of persons "aggrieved" by practices that have already occurred, and for Commissioner charges alleging that an employer or other covered entity "has engaged in an unlawful employment practice. . ."[5]

Title VII does permit the courts to issue "temporary or preliminary relief" which may include injunctions against anticipated violations of the statute in at least some circumstances.[6] As a general rule, however, preliminary relief may be granted in the employment context only where the plaintiff can show likelihood of success on the merits and irreparable injury caused by the threatened conduct. For example, in *Sampson v. Murray*,[7] a non-Title VII case, the U.S. Supreme Court held that a probationary federal employee about to be terminated in violation of procedural regulations issued by the Civil Service Commission could obtain preliminary relief pending an appeal to the CSC only on a showing of extraordinary "irreparable harm." Neither the threatened loss of income alleged by the employee, nor her allegations of humiliation and damage to reputation constituted such harm, said the Court,

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[4] 42 U.S.C. 2000e-9, 29 U.S.C. 161.

[5] See 42 U.S.C. 2000e-5.

[6] When a timely charge is filed and if, "on the basis of a preliminary investigation", it appears "that prompt judicial action is necessary to carry out the purposes of [the Act]," the EEOC is authorized by §706(f)(2) to seek preliminary injunctive relief pending final disposition of the charge. The charging party's right to seek immediate injunctive relief is not specified but, as a general matter, the courts may have inherent equitable discretion to grant injunctive relief to private claimants. *Sheehan v. Purolator Courier Corp.*, 676 F.2d 877 (7th Cir. 1982).

[7] 415 U.S. 61 (1974).

because each of these elements of injury could be fully remedied if the plaintiff prevailed on the merits. The courts are divided as to whether EEOC proceedings under §706(f)(2) must show irreparable harm,[8] but such a standard has been held satisfied by an alleged threatened retaliation because of the chilling effect of such conduct on the exercise of Title VII rights by other employees.[9]

The bill thus appears to adopt a broader definition of actionable discrimination than present Title VII law. Under §205, an administrative or judicial claim for relief could be predicated upon an allegation either that the disabled person had been discriminated against by the employer or potential employer or that the party "believes that he or she is . . .about to be subjected to discrimination" because of a disability. Moreover, the bill seems to adopt a wholly subjective standard of "belief" since there is no explicit requirement that the belief be "reasonable" or otherwise justified by objective consideration of the surrounding facts or circumstances. The determinative factor may then be not whether the alleged facts reasonably support an inference that discrimination is about to occur but whether the charging party harbored such a belief, whether reasonable or not. Of the federal civil rights laws, only the recently enacted Fair Housing Amendments Act of 1988 employs a similar standard.[10] The legislative history of the 1988 Act, however, fails to elucidate Congress' intention and there is a dearth of judicial opinion on its meaning to date.

Public Services

Title III of the bill generally prohibits discrimination against the disabled in administration of state and local governmental affairs and mandates accessibility standards for the disabled to public transportation facilities--including bus and rail systems--other than air carriers. Section 305 incorporates for enforcement of Title III the "remedies, procedures, and rights set forth in §505 of the Rehabilitation Act of 1973 (29 U.S.C. 794a)" which are again made available to discriminatees or those who "believe" they are "about to be subjected to discrimination. . ." As amended in 1978, §505 in turn provides for a bifurcated enforcement scheme depending upon whether the alleged discriminators are federal agencies or federally assisted entities. Thus,

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[8] *EEOC v. Anchor Hocking Corp.*, 666 F.2d 1037 (6th Cir. 1981)(yes); *EEOC v. Pacific Press Publ. Ass'n*, 535 F.2d 1182 (9th Cir. 1976)(no, if the EEOC acts pending resolution of the charge. If the charge has been processed, EEOC must establish traditional "irreparable harm.").

[9] *Holt v. Continental Group, Inc.*, 708 F.2d 515 (2d Cir. 1983).

[10] Under §802(i)(2) of the Amendments, an "aggrieved person" includes anyone who "believes that such person will be injured by a discriminatory housing practice that is about to occur." 42 U.S.C. 3602(i)(2).

disabled persons are granted the same remedies against federal agencies violating the Rehabilitation Act as are available under Title VII of the 1964 Civil Rights Act.[11] Those remedies and procedures are outlined in the previous section of this report.

Section 505 also grants disabled individuals the same remedies against state and local governments or private parties who are recipients or providers of federal financial assistance as are available under Title VI of the 1964 Civil Rights Act.[12] Generally, Title VI provides both administrative and judicial remedies for persons who suffer discrimination in any "program or activity" that is financially aided by the federal government. Federal grantmaking agencies are authorized to investigate and hold formal hearings based on individual complaints or their own compliance reviews and to terminate federal financial assistance to any institution found to operate in a discriminatory manner. While the Supreme Court has thus far avoided the issue, lower federal courts have generally found that a private cause of action is available to enforce Rehabilitation Act claims.[13] Moreover, monetary damages as well as injunctive relief have been awarded by analogy to Title VI which was interpreted by the Court in *Guardians Associations v. Civil Service Commission* to authorize a damage remedy in intentional discrimination cases.

However, a basic question could be raised as to whether §305 of the bill is intended to incorporate the entire §505 remedial framework, even though the Title VII references there relate to remedies available against federal agencies not apparently subject to Title III of the bill, or only those that pertain to federally assisted entities of a kind covered by Title III, namely the remedies and procedures under Title VI of the 1964 Civil Rights Act. Absent clarification in the bill itself or its legislative history, an argument could be made for either interpretation based on the present wording of §305.

Public Accommodations and Services Operated by Private Entities

Title IV of the bill specifies rules concerning nondiscrimination and accessibility by the disabled to privately operated places of "public accommodation," broadly defined by §401 to include most private establishments providing services or employment to the public, and "public transportation services provided by a privately operated entity." The enforcement section of the title is based on the federal Fair Housing Act and provides in §405 that "[s]ections 802(i), 813, and 814(a) and (d) of the Fair

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[11] 29 U.S.C. §794a(a)(1).

[12] 42 U.S.C. 2000d et seq.

[13] E.g., *Doe v. Marshall*, 622 F.2d 118 (5th Cir. 1980), *cert. denied*, 451 U.S. 993 (1981); *Adashunas v. Negley*, 626 F.2d 600 (7th Cir. 1980); *Miener v. Missouri*, 673 F.2d 969 (8th Cir.), *cert. denied*, 459 U.S. 916 (1982).

Housing Act (42 U.S.C. 3602(i), 3613, and 3614(a) and (d)) shall be available with respect to any aggrieved individual" as discussed below.

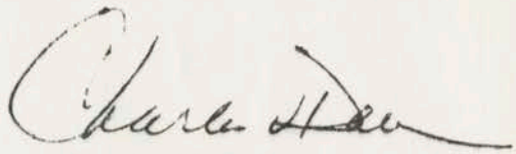
The provisions referenced in §405 are basically those authorizing private civil actions by aggrieved persons, and judicial actions by the Attorney General in "pattern or practice cases," alleging fair housing violations. Thus, as incorporated into Title IV of the bill, any person claiming to be, or who "believes" that he or she is "about to" be, discriminated against due to disability would have two years to file a federal district court action for "appropriate relief." If the court determined that a violation had occurred, or was about to occur, it could award the plaintiff actual and punitive damages, a temporary or permanent injunction, and "such affirmative action as may be appropriate." Similarly, in cases brought by the Attorney General alleging a "pattern or practice of resistance" to protected rights, the court would be empowered to grant the same full range of injunctive relief and monetary damages. But in addition, civil penalties of up to $50,000 for a first violation and $100,000 for any subsequent violations would also be authorized. The court would have authority to appoint an attorney and waive fees and costs of the action for a financially needy plaintiff. The prevailing party in both public and private actions could be awarded attorney's fees and costs at the court's discretion.

While Title IV of the bill relies upon the judicial remedy provisions of the Fair Housing Act, §405 excludes reference to the administrative complaint, investigation, and adjudication procedures in that law as amended by the Fair Housing Amendments Act of 1988. Thus, the housing law's expedited procedure for a federal agency investigation and "reasonable cause" determination followed by a hearing before an administrative law judge would not be available under Title IV.

Telecommunications Relay Services

Finally, Title V of the bill states a general rule that it shall be unlawful discrimination for any common carrier of telephone services to the general public to fail to provide "telecommunication relay services" providing "individuals who use nonvoice terminal devices because of disabilities with opportunities for communication that are equal to those provided to their customers who are able to use voice telephone services. . ." Section 504 adopts the same Fair Housing Act provisions for enforcement by civil actions as employed for judicial enforcement of the Title IV public accommodations provisions discussed above. In addition, however, §504(b) provides for administrative enforcement of Title V by the Federal Communications Commission which is to employ the "remedies, procedures, and rights set forth in sections 206, 207, 208, and 209 of the Communications Act of 1934 (47 U.S.C. 206, 207, 208, and 209) and in title IV of the Communications Act of 1934 (47 U.S.C. 401 et seq.)."

The cited provisions of law generally authorize the filing of complaints and investigation by the FCC of any alleged violation of the federal communications law by a regulated carrier and provide that such "carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation."[14] The Commission is empowered to hold hearings, to make all determinations as to liability and damages, and to "make an order directing the carrier to pay the complainant the sum to which he is entitled."[15] In addition, §504(b)(3) of the bill would arm the Commission with "cease and desist" and general authority to "take other actions as it finds appropriate and necessary" against violators of disabled rights. Finally, any carrier that "knowingly fails or neglects to comply" with the law or Commission orders or regulations thereunder would be subject to forfeitures to the government of $10,000 for each offense.
All proceedings before the Commission would be conducted pursuant to procedural requirements set forth in the communications law which, among other things, provides for judicial appeals and enforcement of FCC orders.[16]



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May 26, 1989

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[14] 47 U.S.C. §206.

[15] 47 U.S.C. §209.

[16] 47 U.S.C. 401 et. seq.

HANDICAPPED
Requirements Handbook

Supplement No. 126 **May 1989**

Highlights

Current Developments

House committee eliminates handicap set-aside from vocational education bill

The House Education and Labor Committee approved legislation last month that would eliminate mandated spending on "special populations," such as disabled students, in federal vocational education programs.

The bill, which would reauthorize the Carl D. Perkins Vocational Education Act, would replace set-asides with a formula for distributing federal money to secondary and postsecondary schools. High schools would receive 20 percent of their grants based on a count of handicapped students enrolled. Likewise, community colleges would receive 20 percent of their grants based on the number of students in vocational rehabilitation.The bill (H.R.7) would also require states to provide "special assurances" that disabled, poor and limited English-speaking students are served.

Currently, states must target funds for special populations to ensure that they're being served by vocational education programs. But educators have complained that by the time the grant reaches the local level, it's been whittled down to a meaningless sum.

The proposed change sparked controversy among members of the Education and Labor Committee. Some members praised the move as benefiting the disabled, while others, who are concerned that handicapped students would actually lose out, greeted it with skepticism.

H.R. 7 co-sponsor and ranking member Bill Goodling, R-Pa., said "The handicapped have not been well-served under set-asides. This guarantees that money will go in their direction."

"This is a substantial and progressive move forward for the handicapped," said Rep. William Ford, D-Mich.

Not all members shared this enthusiasm, however. "The handicapped have not reached a point where they're as well protected" to not have these guarantees, said Rep. Major Owens, D-N.Y. Owens had planned to introduce an amendment restoring a 5 percent set-aside for the handicapped that is similar to the ones retained in the bill to ensure sex-equity

and assist displaced homemakers. But he relented when it appeared that it would not pass.

"This (sex-equity) set-aside is a very well-crafted approach which would have been very suitable for people with disabilities," Owens said. "I'm disappointed that this committee could not reach a consensus" on the issue.

But the bill's other co-sponsor, Education and Labor Committee Chairman Augustus Hawkins, D-Calif., stemmed the debate when he declared, "If I thought that this bill did less for the handicapped than the previous situation, I'd have my name stricken from it."

Besides dropping the set asides, H.R. 7 would also change the term "vocational education" to "applied technology education." The bill would also increase federal funding for the Perkins program from $900 million in fiscal 1989 to $1.4 billion in fiscal 1990.

Other provisions would eliminate most matching requirements, set funding to coordinate high school and community college curricula, and create tie-ins between vocational education and the Job Training Partnership Act.

The bill now goes to the full House.

Bush fills OSERS, RSA posts

President Bush has nominated Robert Davila, a vice president at Gallaudet University, to head the Office of Special Education and Rehabilitative Services (OSERS) at the Department of Education. Davila, who is hearing-impaired, has been an administrator at Gallaudet since 1978 and was a teacher at the New York School for the Deaf. He replaces Madeleine Will.

The White House also selected Nell Carney to be commissioner of the Rehabilitation Services Administration (RSA). Carney, a former teacher and counselor, has served as assistant director of the Virginia Department of the Visually Impaired.

Agencies criticized for disabled veterans hiring record

The Disabled Veterans Affirmative Action Program (DVAAP) "has fallen through the cracks" at federal agencies, according to the General Accounting Office's director of federal human resource management issues.

Testifying before the House Veterans Affairs Subcommittee on Education, Training and Employment last month, Bernard Ungar said, "The commitment to the concept is there, but top management lacks the commitment to implement it."

Under DVAAP, federal agencies must have an affirmative action plan to hire and promote disabled veterans, particularly those who are more than 30 percent disabled. But in a report released in February, GAO said the program has considerable shortcomings.

Between 1982 and 1987, employment opportunities decreased for disabled veterans at five federal agencies [the Departments of Labor and Health and Human Services, the Office of Personnel Management (OPM), the Office of Management and Budget (OMB), and the National Aeronautics and Space Administration]. Moreover, many of the veterans

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remained in low-paying positions. "All the agencies could do a better job at promoting veterans," Ungar said.

Ungar added that the agencies lack standards, goals and timetables for the program, and agency reports are increasingly less informative. The majority of DVAAP coordinators at these agencies reported that they spend less than 10 percent of their time working on the program.

OPM and the Labor Department had better program performance records than the other agencies, GAO noted. But Ungar said none of the agencies is aggressive in this area. He suggested that OPM "apply pressure on the other agencies to do a better job."

Officials from four of the five agencies studied testified that the agencies are taking steps to improve their program performance, including recruitment, personnel training and promotion. Subcommittee Chairman Timothy Penny, D-Minn., criticized OBM for not appearing at the hearing. Noting OMB's poor DVAAP performance, he suggested its absence indicated an "apparent lack of commitment" to the program.

Representatives of veterans groups voiced their support of the program, and called on Congress to enact stricter controls over agencies' hiring practices, such as making it illegal for an agency to ignore the law.

NCD to hold hearings on disabled students education

The National Council on Disability (NCD) will hold public hearings May 15 and 17, and June 7 and 8 in Washington, D.C., to discuss several handicapped education issues. As part of the council's national study, "The Education of Students with Disabilities: Where Do We Stand," the sessions will touch on topics such as parental involvement, transition to the work place and education reform. To submit information or participate in the hearings, contact NCD, 800 Independence Ave. S.W., Suite 814, Washington, D.C. 20591; (202) 267-7652.

Kansas sponsors disability issues seminars

The Kansas Advisory Committee on Employment of the Handicapped (KACEH) is offering seminars this summer on three disability issues: in-home care; accessibility and employment (including requirements of Sections 501 and 504 of the Rehabilitation Act); and the legislative process. For more information, contact KACEH, 1430 S.W. Topeka Blvd., Topeka, Kan. 66612-1877; (913) 296-1722.

In the Courts

Court rules hospital may fire nurse for not reporting HIV test result

A hospital did not violate Section 504 of the Rehabilitation Act when it discharged a nurse who refused to disclose the result of his human immunodeficiency virus (HIV) test, the U.S. District Court for the Eastern District of Louisiana has ruled.

The nurse, Leckelt, was tested for HIV infection at the request of the hospital. The hospital repeatedly asked Leckelt to provide the test result. Under hospital policy, employees are required to report cases of communicable disease to the employee health service; this policy is spelled out in the employee manual. When Leckelt refused to provide the test result, the hospital first suspended and then discharged him, citing his failure to follow hospital policy.

Leckelt claimed that he was fired because the hospital suspected he was HIV positive. He sued, arguing that the discharge violated section 504. Under section 504, people who are perceived to be impaired are considered to be individuals with handicaps. (And under the Civil Rights Restoration Act, contagious diseases are considered handicapping conditions.)

The District Court rejected Leckelt's claim. "No evidence was produced that anyone involved in the decision had concluded that he was seropositive," the court said. "The fact

that the hospital repeatedly insisted that the nurse produce his test results flies in the face of a conclusion that it perceived him as being HIV positive."

Further, the hospital was justified in its actions, the court said. Besides the HIV result, Leckelt had not reported that he was a hepatitis B carrier and that he had had syphilis. These facts, as well as the nurse's failure to submit the HIV test result as required, established a legitimate reason for the discharge. "When an employer has a lawful motive for discharging an employee, the employer's coincidental consideration of the employee's handicap does not prevent the employer from acting on its lawful motive," the court said.

If Leckelt had been HIV positive, the hospital would have modified his work duties to protect both him and the patients, the court stated. The hospital fired the nurse not "out of fear and ignorance," the court said, but because he had violated the hospital's infection policy.

The court also rejected Leckelt's section 504 claim on the basis that he was not otherwise qualified. "Hospitals must establish policies and procedures for controlling the risk of transmitting infectious or communicable diseases," the court said. Leckelt's refusal to comply with the policy rendered him not otherwise qualified to perform his job.

This case is *Leckelt v. Board of Commissioners of Hospital District No. 1*, Appendix IV:467.

State must exhaust administrative remedies before suing federal government, court rules

A plaintiff must exhaust administrative remedies before it can sue a federal agency over jurisdiction, the 11th U.S. Circuit Court of Appeals has ruled.

The issue in this case is whether the U.S. Department of Education's Office of Civil Rights (OCR) has the jurisdiction to investigate complaints brought under Section 504 of the Rehabilitation Act regarding educational opportunities for disabled students.

Under the Education of the Handicapped Act (EHA), parents may challenge a state's denial of educational benefits to handicapped children. OCR has the authority to review state and local schools to ensure compliance with section 504. OCR can initiate these reviews periodically or when it receives a complaint, usually from a parent. If the state or local school district refuses to cooperate with the investigation, ED may cut off federal funding.

In response to several section 504 complaints, OCR reviewed the special education programs operated by DeKalb and Chatham counties (Ga.) and the Georgia Department of Education. When county and state officials refused to cooperate, OCR started the process to terminate federal funding for the three handicapped programs.

This prompted the Georgia State Board of Education to sue, charging that OCR was acting beyond its jurisdiction under section 504. OCR moved to dismiss on the grounds that the educators must exhaust administrative remedies before filing suit.

A U.S. District Court ruled in favor of OCR, and the appellate court upheld that decision. Requiring plaintiffs to exhaust administrative appeals, the appeals court said, assures that "courts review ripe controversies, presenting concrete injuries." Until OCR decides to cut off federal funding, the court said, the issues will not be ripe.

The court noted that a plaintiff may pursue a lawsuit without exhausting administrative remedies only if: (1) exhausting administrative remedies clearly results in irreparable injury; (2) the agency's jurisdiction is plainly lacking; and (3) the agency's special expertise is of no help on the question of its jurisdiction.

The Georgia officials failed on all three conditions, the court ruled. First, they did not show that going through administrative channels would cause irreparable harm. Should OCR cut off funding, the Georgia officials could then file suit and ask that any action be stayed until the case is decided, the court noted.

OCR's supervision of the Georgia and county special education programs is "not plainly outside of the agency's jurisdiction," the court found. The EHA provides the appropriate means for a parent to sue a school. However, a federal agency brought the action in this case, the court noted. "Law may allow

— and Congress may have intended — two overlapping, complementary schemes of enforcement: one exercised by private litigants through the provision of the EHA, the other provided by OCR supervisory investigations as authorized under the regulations to section 504," the court said.

Finally, the court concluded that "the Department of Education's expertise in this area will greatly aid judicial review of the issues presented in this case." Without OCR's interpretation of its regulations, the court would have to speculate on the agency's interpretation, and then judge its propriety.

This case is *Rogers v. Bennett*, Appendix IV:468.

Perspective

Attitudinal barriers and the Americans With Disabilities Act

by Charles D. Goldman

Occasionally, we need to examine various attitudes that can engender barriers to people with disabilities. Last year in this space (Supplement No. 116), we examined issues of attitudinal barriers in the context of the enactment of the Civil Rights Restoration Act and the installation of the first deaf president at Gallaudet University. Today we are on the verge of another national debate on disability rights, with the 101st Congress expected to consider a major disability rights bill, the Americans With Disabilities Act.

One of the biggest issues in the bill is how much access there must be to transportation, including whether every new bus must have a lift. (In February, a U.S. appeals court ruled that all new public buses bought with federal funds must be equipped with lifts; see Supplement No. 124.) Other major issues in the bill relate to nondiscrimination in places open to the public, i.e. places of public accommodation, and non-discrimination in private sector employment. In each of these areas are examples of society's biases, the attitudinal barriers toward people with disabilities.

Transportation barriers reflect society's biases

Transportation issues have long been an indication of society's attitude toward disadvantaged people. For years, minorities were relegated to separate buses or to separate sections (the rear) on buses. When minority individuals began to insist on sitting in the front of the bus, they helped set in motion the chain of events that culminated in passage of the Civil Rights Act of 1964.

Today, the issue of how to provide public transportation to disabled individuals remains heated. How many accessible buses must be placed in service? Does service for disabled passengers have to be part of the mainline public transit system, or is a paratransit system acceptable? (Paratransit systems are viewed as secondary to the main service.)

One municipality, San Antonio, which had opted for a paratransit system rather than making its mainline transit accessible, recently found itself losing the Annual Meeting of the President's Committee on Employment of People with Disabilities due to the lack of accessible mainline bus transit.

But bus service is not the only form of transportation service in which attitudinal barriers persist.

The debate over the regulations to implement the Air Carrier Access Act is replete with examples of attitudinal barriers. Most glaring is the note of the Air Transport Association of America that the proposed regulatory requirement for assisting disabled travelers "smacks of involuntary servitude, which was abolished by the 13th Amendment." To people with disabilities the issue was not slavery but getting reasonable and necessary aid.

Another attitudinal barrier in air traffic may come to the fore when a person with a disability seeks to travel alone ("unaccompanied" in airline jargon). In one case, a student's family wound up suing an airline after it refused to let her fly home alone for Thanksgiving holidays, despite the fact that she had made similar unaccompanied trips on several occasions. To the airline the stated issue was safety. To the individual the airline was discriminating against her and displaying a patronizing attitude.

A more mundane example of the bias against people with disabilities in the transit field is revealed when a person with a disability attempts to hail a taxicab. Even though local codes generally prohibit it, taxicab drivers regularly bypass a person with crutches or in a wheelchair, or a person who is blind (even one holding a "TAXI" sign aloft).

Barriers to public accommodations still exist

The attitudinal barriers to people with disabilities are also manifested in the structural environment that is open to the public. These places, including such facilities as restaurants, hotels, parks, theatres, are known in law as places of public accommodation and had a special role in civil rights history. The Americans With Disabilities Act would be a federal mandate that such facilities not exclude and not discriminate against people with disabilities.

Today, relatively few restaurants or hotels are accessible. Examples of barriers caused by misguided attitudes abound. A disabled person calls a restaurant and is told it is accessible, even though there are steps in the front and the only ramp for patrons in wheelchairs is in the rear. A softball league sought to bar a manager from the field in his wheelchair — even though the manager had successfully managed from the field in his wheelchair for years.

Attitudinal barriers can also manifest themselves in certain public works projects. A municipality may decide to make a series of curb cuts (curb ramps) along a major downtown street. The curb cut may lead the disabled person across the thoroughfare, only to find that the other side of the street is totally inaccessible. (To make things worse, the lack of access to the other side may not be visible until the mobility impaired person is halfway or more across the street.) The attitudinal barrier is in not using common sense to realize that access means making both sides of the street accessible.

Attitudinal barriers in the workplace are common

Common sense is also necessary in employment of people with disabilities who may well be otherwise qualified to do the tasks for which they are hired. The Americans With Disabilities Act would extend the mandate of the non-discrimination to private employers. It would cover, for example, a shoe salesman who performed at a level comparable to that of most of the other salespersons, but who was terminated the day after his seizures on the job. The employer claimed it was because of customer preference that he was fired.

The Americans With Disabilities Act will lead to major debates in Congress over how people with disabilities are faring. There will be anecdotal recitations of discriminatory horror stories by very qualified people with disabilities. We must learn to address not only the factual situations, but the unstated and equally, if not more, important attitudes which such anecdotes illustrate.

Charles D. Goldman, Esq., is a Washington, D.C., attorney who specializes in disabilities issues and who writes regularly for the Handicapped Requirements Handbook. *His book,* Disability Rights Guide, Practical Solutions to Problems Affecting People with Disabilities, *won the 1988 Book Award from the President's Committee on Employment of the Handicapped.*

Agency Briefs

ED amends regulations for deaf-blind children program

The U.S. Department of Education has amended the regulations governing its Services for Deaf-Blind Children and Youth program (34 CFR Part 307). The changes, which incorporate the 1986 amendments to the Education of the Handicapped Act, describe the way the secretary makes awards to state and multi-state projects under the program. (April 17 *Federal Register,* Pages 15308-15313.)

ED proposes rule for technology-related assistance program

ED has proposed regulations to implement the Technology-Related Assistance for Individuals with Disabilities Act of 1988, which provides funding for states to develop technology assistance programs for disabled people. The proposed regulations discuss the purpose of the program, types of activities it would support, application requirements and criteria, and grant requirements. (April 12 *Federal Register*, Pages 14778-14785.)

OCR publishes pamphlet on handicapped rights

The Office of Civil Rights (OCR) at the U.S. Department of Education has published a pamphlet describing the rights and responsibilities under Section 504 of the Rehabilitation Act. To order "The Rights of Individuals with Handicaps Under Federal Law," contact the appropriate OCR regional office. (A list of OCR regional offices appears in the *Handbook* at Appendix II:A:1.)

Funding Opportunities

Department of Education

Deaf-blind children program...ED will award $6 million in several grants for state and multi-state service projects under its Services for Deaf-Blind Children and Youth program. The agency will also award a $600,000 grant to provide technical assistance for transitional services. For more information, contact Joseph Clair, ED, Division of Educational Services, 400 Maryland Ave. S.W., Room 4622, Washington, D.C. 20202; (202) 732-4503. Applications are due June 2. (April 17 *Federal Register*, Page 15314.)

Pediatric rehabilitation center...The National Institute on Disability and Rehabilitation Research has adopted as a final funding priority the establishment of a pediatric Rehabilitation Research Training Center. The center will investigate alternatives to hospitalization, examine the impact of disability on minority children, and study the social and emotional development of disabled children. (April 12 *Federal Register*, Pages 14774-14775.)

Research in education...The Office of Special Education and Rehabilitative Services (OSERS) will award six research grants under its Education of the Handicapped program. OSERS has $550,000 to fund two projects covering science and math curricula and $1 million to fund four projects in teacher planning and adaptation for students with handicaps. Applications are due June 9.

OSERS also set final research priorities for:

- small grants;
- social studies or language arts curricula;
- interventions to support junior high school-aged students with handicaps who are at risk for dropping out of school;
- the delivery of services to students with handicaps from non-English-speaking backgrounds; and
- initial career awards for people entering the research field.

For more information, contact Linda Glidewell, Office of Special Education Programs, 400 Maryland Ave. S.W., Room 3522, Washington, D.C. 20202; (202) 732-1099. (April 4 *Federal Register*, Pages 13608-13629.)

Department of Health and Human Services

Developmental disabilities program...The Office of Human Development Services has funding for universities to establish affiliated or satellite programs for people with development disabilities. Up to four grants will be awarded; only universities in states without such services may apply. For more information, contact Judy Moore, Administration on Developmental Disabilities, Room 5319, 330 Independence Ave. S.W., Washington, D.C. 20201; (202) 245-7719. (March 30 *Federal Register*, Pages 13119-13121.)

Developmental disabilities allotments...The Administration on Developmental Disabilities has announced the fiscal 1990 federal allotment for states with developmental disabilities basic support and protection and

advocacy formula grant programs. The funding levels are based on fiscal 1989 levels and must be approved by Congress. (March 31 *Federal Register*, Page 13239.)

Respite care for disabled children...Funding is available from the the Administration for Children, Youth and Families (ACYF) for states to provide disabled children with temporary, non-medical (respite) care. Respite care relieves families from the pressures of caring for a disabled child, which helps to prevent family stress. The application deadline is June 6. For more information, contact Phyllis Nophlin at ACYF, (202) 245-0624. (April 7 *Federal Register*, Pages 14154-14167.)

AIDS

Minority HIV education...The Office of Minority Health (OMH) at the Public Health Service has funding for community organizations and institutions to develop human immunodeficiency virus (HIV) educational programs for minorities. The grants are intended to curb "high risk" behavior among blacks and Hispanics, especially intravenous (IV) drug use and IV needle sharing, which has become the primary means of HIV transmission in these groups. For more information, contact OMH Grant Office, 8201 Greensboro Drive, Suite 600, McLean, Va. 22102; (703) 821-2487. Applications are due June 26. (April 19 *Federal Register*, Pages 15908-15911.)

Questions & Answers

Question: **A group of senior citizens asked our local housing authority to provide more access for people with disabilities to a particular building. The building is quite old and has steps in the lobby area in front of the elevator. We installed a lift meeting all local code requirements. Now, the seniors seem to be somewhat upset because we did not put in a ramp. Are we in compliance with section 504?**

Answer: Yes. The lift provides sufficient interior access around the problem area in the lobby. Structural changes are not always required to comply with the Rehabilitation Act.

Question: **What type of depression makes an employee a qualified handicapped individual for purposes of the Rehabilitation Act? Everyone gets "depressed" some time or another.**

Answer: As a qualifying handicapping condition, the depression must substantially impair a major life activity, such as employment. Such serious cases of depression usually cause aberrational behavior, such as nonresponsiveness to directions, inability to follow well established office procedures, or inability to communicate or think clearly.

Question: **When an employee claims to be so depressed as to be a qualified handicapped individual, can we in management require documentation of the condition?**

Answer: Yes, employees can be required to provide evidence of their handicapping conditions, including depression. Depression and other mental impairments have categorized DSM (Diagnostic Statistical Manual) codes. The DSM code noted will correspond to a particular condition.

Question: **We operate a private security firm. A long-time employee who had been carrying a weapon as part of his normal duties had a seizure. This was the first time ever. We reassigned him to an unarmed post. He did not object. Was that reasonable accommodation? If he continues to have seizures can we terminate him? A security guard who has seizures does not help our image with clients.**

Answer: Yours is a classic example of reasonable accommodation by modifying an employee's duties, here by changing the employee's position so he does not have to carry a gun. Whether or not you can terminate him if he continues to have seizures depends on the circumstances and whether there are other

reasonable accommodations that would permit the individual to do the job. The question is not what the patrons or clients think. The question relates to what the individual's abilities are in terms of the essential functions of the job. Underlying all anti-discrimination laws are premises that ability is what counts and that what "they" (be they clients, patrons, etc.) think is not determinative. "They" excluded many other persons until laws prohibited that activity.

Question: **Can airlines be sued under the Air Carrier Access Act for excluding individuals with handicapping conditions?**

Answer: Yes. In *Tallarico v. Trans World Airlines,* 693 F.Supp. 785 (1988), the family of a disabled child sued under the act, and the decision clearly established the right to go to court. The child had been barred by the airline from traveling alone ("unattended" in airline parlance). The case is on appeal on a complicated issue of the amount of damages that may be awarded. The airline is appealing on the right to sue.

***Question*: The Uniform Federal Accessibility Standard (UFAS) was issued under the federal Architectural Barriers Act. As a recipient of federal aid, if our institution complies with UFAS, are we essentially in compliance with Section 504 of the Rehabilitation Act?**

Answer: Yes, if your organization complied with UFAS, you will in all likelihood be in compliance with section 504 for structural accessibility concerns. On March 8, 1989, a number of federal agencies proposed to amend their section 504 regulations for federally assisted programs or activities to establish that, with respect to new construction and alternation, compliance with UFAS counts as compliance with section 504. This is consistent with the recommendations made by the Department of Justice, the lead federal civil rights agency.

Question: **May students who are learning disabled be considered for our school's Honor Roll program?**

Answer: Yes. In fact, the honor roll is a program of the school in which the students may participate. To totally exclude students with learning disabilities would be discriminatory.

Question: **One of our faculty members, a lecturer, has brought our office information about a handicapping condition of which we had never heard, trigeminal neuralgia. What is it? Is he eligible for disability retirement from our university?**

Answer: It is a neurological condition that can manifest itself in extreme pain, causing, for example, speech to be delayed or totally impaired. It is quite possible that the faculty member could be eligible for disability retirement, depending on the definition of disability in your institution's employment agreement with the individual (or with the union, if there is a collective bargaining agreement covering this employee) and the medical conditions documented. The delayed or impaired speech can severely impair communication to the point that teaching is totally impeded, both in regard to lecturing and to dialogues with students.

At presstime: A revised Americans with Disabilities Act was introduced in Congress on May 9. Three hearings covering employment, transportation and other accessibility issues were held. Co-sponsors Sen. Tom Harkin, D-Iowa, and Rep. Tony Coelho, D-Calif., said they hope to have a final vote in Congress before the August recess. A full story will appear in the June supplement.

Conference Calendar

• *May 22-24:* "Advocacy and Action into the '90s," Coalition of Citizens with Disabilities in Illinois, Springfield, Ill. Contact Springfield Center for Independent Living (217) 523-2587.

• *May 28-June 2:* Annual Meeting, American Association on Mental Retardation, Chicago. Contact Steven Stidinger (202) 387-1968.

• *June 1-6:* Annual Meeting, American Diabetes Association, Detroit. Contact ADA (703) 549-1500.

• *June 10:* Statewide Self-Advocacy Conference, New Jersey Self-Advocacy Project, Piscataway, N.J. Contact (201) 469-6333.

• *June 30-July 2:* "Rehabilitation Policy: Thriving or Surviving?," National Association of Rehabilitation Facilities, Washington, D.C. Contact NARF (703) 648-9300.

• *July 1-8:* 28th Annual Convention, American Council of the Blind, Richmond, Va. Contact ACB (202) 393-3666.

• *July 9-14* "The Deaf Way: An International Festival and Conference on the Language, Culture and History of Deaf People," Gallaudet University, Washington, D.C. Contact G.U. (202) 651-5400.

Handbook Page Changes in Supplement No.126

May 1989

Pages to be DISCARDED	Pages to be ADDED (Dated May 1989)	Description of Revisions
v & vi (April 1989)	v & vi	Contents of Basic 504 Compliance Guide
Chapter 200 Entire Tab (Various dates)	Chapter 200 Table of Contents pp. 201: 1-2 210: 1 220: 1-10 230: 1-6 240: 1-4 250: 1 260: 1 270: 1-6	Update of chapter contents
Appendix IV pp. 243-244 (April 1989)	Appendix IV p. 243-245	Addition of court case Nos. 467-468

DISCARD THIS SHEET AFTER CHANGES HAVE BEEN MADE

Contents of Basic 504 Compliance Guide

The following is a listing of all pages that make up the Basic 504 Compliance Guide of the *Handicapped Requirements Handbook* with the inclusion of the May 1989, Supplement No. 126 update pages.

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CHAPTER 200: OVERVIEW OF SECTION 504 AND THE GOVERNMENT-WIDE REGULATIONS

¶201 Background Of Section 504 Of The Rehabilitation Act And Resultant Regulations

With passage of the Rehabilitation Act of 1973, Congress required that federal fund recipients make their programs and activities accessible to the handicapped. In April 1976 Executive Order 11914 (Appendix III:D) was issued. It called upon the then-Department of Health, Education and Welfare (HEW) to issue general standards and procedures to serve as guidelines for all funding agencies in developing individual sets of section 504 regulations. The general standards and procedures (the guidelines) to be followed by all federal funding agencies were published in the Jan. 13, 1978, *Federal Register*. In 1980 President Carter signed Executive Order 12250, transferring lead agency coordination authority from HEW (now the Department of Health and Human Services) to the Department of Justice (see Appendix III:D). The Justice Department reissued the regulations for government-wide enforcement of section 504 (see Appendix III:B) on Aug. 11, 1981, but it made no changes from the original HEW regulations.

These government-wide regulations include specific requirements related to agency regulations and interagency cooperation which are analyzed in this chapter. It must be noted, however, that these standards and procedures are *minimum* requirements which may be exceeded in the rules of individual agencies. Agencies may impose additional standards or require additional procedures for their recipients, depending on the nature of their funded programs.

Coverage extended to include federal government agencies

Although the *Handbook* specifically addresses regulations governing ''recipients'' of federal financial assistance and federal contractors (covered by section 503 and discussed at Chapter 700), some mention should be made of the protections against discrimination based on handicap applicable to federal executive agencies. In 1978, Congress passed the Rehabilitation, Comprehensive Services and Developmental Disabilities Act; among other things, it amended the Rehabilitation Act of 1973 and extended coverage of section 504 to include ''any program or activity conducted by an Executive agency or by the United States Postal Service'' (see Appendix III:A:3). The 1978 amendments further require that ''the head of each agency shall promulgate such regulations as may be necessary to carry out the [intent of the] amendments.'' As lead agency for section 504 enforcement and implementation, the Department of Justice prepared a ''prototype'' guideline for use by federal funding agencies.

Although federal agencies are required to issue section 504 regulations, courts have held that federal offices such as the Federal Communications Commission have no such responsibility. (See cases abstracted at Appendix IV:255 and 443.)

Federal agencies are also required by section 501 of the Rehabilitation Act of 1973 (Appendix III:A) to prepare ''an affirmative action plan for the hiring, placement, and advancement of handi-

capped individuals in such department, agency or instrumentality.'' Section 501 also created an Interagency Committee on Handicapped Employees to oversee federal activity in this area.

Appendix IV of the *Handbook* contains federal court rulings in various suits alleging discrimination on the basis of handicap by federal agencies. For discussions relating to these court actions, see ¶270 (private right to sue and exhaustion of administrative remedies) and ¶860 (awards of damages and attorneys' fees). For discussions of other issues relating to employment, see Chapter 600.

¶210 Source of Government-Wide Regulations

The *Handbook's* Basic 504 Compliance Guide focuses on the government-wide regulations that have shaped the handicapped-related requirements issued by each individual granting agency for its recipients. These standards, referred to as ''government-wide guidelines,'' were issued on Jan. 13, 1978, and reissued Aug. 11, 1981, by the Department of Justice (Appendix III:B). Information cited from the ''Summary of Rule and Analysis of Comments,'' which precedes the final regulations, is referred to throughout as ''the government-wide interpretation.''

It should be repeated that the government-wide regulations are directed to federal agencies, and not to fund recipients. However, they contain basic information regarding standards and procedures that are likely to appear in individual agency rules and thus apply to all recipients of federal financial assistance. *While a recipient should base its action under section 504 on the final regulations issued by its funding agencies, a review of the government-wide regulations affords recipients an opportunity identify and coordinate what is required of them.*

The *Handbook's* Basic 504 Compliance Guide also refers to the regulations which the Department of Health and Human Services issued for its own grantees (Appendix III:C) when these rules clarify or further delineate issues of eventual concern to all recipients.

¶220 Purpose, Application And Coverage

The government-wide guidelines (Appendix III:B) are designed to coordinate the implementation of section 504 through the federal government. The regulations, applicable to each federal department and agency empowered to extend federal financial assistance (§41.2), cover:

- Definitions (§41.3)
- Issuance of agency regulations (§41.4)
- Enforcement (§41.5)
- Interagency cooperation (§41.6)
- Coordination with sections 502 and 503 (§41.7)
- Standards for determining who are handicapped persons (§§41.31–41.32)
- Guidelines for determining discriminatory practices. Within ''Guidelines for determining discriminatory practices,'' major subparts of the regulations are devoted to:
  - General prohibitions (§41.51)
  - Employment (§§41.51–41.55)
  - Program (and facility) accessibility (§§41.56–41.58)

Program accessibility, facility accessibility, employment and enforcement are covered in separate chapters of the *Handbook* (see Chapters 300, 400, 600 and 800, respectively) for the sake of clarity. All other parts of the regulations (as listed above) are treated in this chapter. Several definitions of terms essential to an understanding of and compliance with section 504 are discussed in this paragraph.

Only parties receiving ''federal financial assistance'' must comply

Section 504 regulations are designed to eliminate discrimination on the basis of handicap in programs and activities receiving federal financial assistance. For purposes of section 504, ''federal financial assistance'' (§41.3(e)) is any grant, loan, contract (other than a procurement contract or a contract of insurance or guaranty), or any other arrangement by which the agency provides or otherwise makes available assistance in the form of:

(1) funds;

(2) services of federal personnel; or

(3) real or personal property or any interest in or use of such property, including:

(a) transfers or leases of such property for less than fair market value or for reduced consideration; and

(b) proceeds from a subsequent transfer or lease of such property if the federal share of its fair market value is not returned to the federal government.

In the interpretation following the then-HEW section 504 regulations, that agency clarified its position on two questions about the definition of federal financial assistance (see Appendix III:C:x).

The department maintains that Medicare Part B—like other social security programs—is basically a program of payments to direct beneficiaries and therefore is not covered by section 504. Courts have ruled similarly that section 504 does not apply to the hospital where Medicare and Medicaid funds are the only form of federal assistance received by the hospital (see Appendix IV:59 and 389). Other federal courts (both at the district and appellate levels) have ruled, however, that Medicaid and Medicare funds are considered federal financial assistance for purposes of triggering section 504 coverage (see Appendix IV:204, 248, 285, 320 and 407.) Procurement contracts, not covered by section 504, are covered by the affirmative action requirements of section 503 (see Chapter 700). (See also Appendix IV:94, 126, 288, 289 and 359.)

Organizations which receive ''significant assistance'' from a federal fund recipient are also covered by section 504. However, primary responsibility for ensuring compliance with section 504 rests with the recipient organization (see ¶230).

Courts have ruled differently on the question of whether airlines which use federally funded airports are covered by section 504 (see Appendix IV:126, 158 and 1018). The guiding decision on this issue, however, is *United States Department of Transportation v. Paralyzed Veterans of America* (Appendix IV:274), in which the Supreme Court on appeal found that federal financial assistance to airport operators is not an extension of federal funds to commercial air carriers (see discussion at ¶310).

A court has ruled that a baseball club's use of a municipal stadium (where the city is a recipient of federal funds) does not constitute receipt of federal assistance for purposes of triggering section 504 coverage (see Appendix IV:193). For discussions of whether the granting of a license by the Federal Communications Commission constitutes receipt of federal funds for purposes of complying with section 504, see Appendix IV:124, 247, 255, 436 and 443.

''Program or Activity''

The language of section 504 prohibits discrimination in a ''program or activity'' which receives federal finanical assistance. The Civil Rights Restoration Act of 1988, enacted on March 22, 1988, amends section 504 by defining the term ''program or activity'' to include: state and local government agencies and entities that receive funds from such agencies; entire colleges, universities or school systems; corporations or other private organizations that are engaged in providing education, health care, housing, social services, or parks and recreation, or that receive federal financial assistance as a whole; and any other organization that is established by two or more of the entities described above. The new law was specifically designed to overturn the Supreme Court's 1984 *Grove City College v. Bell* decision (Appendix IV:902) by restoring institution-wide coverage to four federal civil rights statutes: Section 504 of the Rehabilitation Act of 1973, Title IX of the Education Amendments of 1972 (sex discrimination), the Age Discrimination Act of 1975 and Title VI of the Civil Rights Act of 1964 (race, color, religion and national origin discrimination).

In *Grove City College v. Bell*, the Court specifically declined to interpret direct grants of financial aid to students (through the Basic Educational Opportunity Grant (BEOG) or Pell Grant program) as non-earmarked, direct grants to the college. The Court determined that receipt of such grants by some of the students triggered coverage of Title IX, but that such coverage did not extend throughout the institution. The Court interpreted the receipt of BEOG grants as ''assistance to the college's own financial aid program, and it is that program that may properly be regulated under Title IX.'' The fact that such funds might have eventually reached the college's general operating budget did not subject it to institution-wide coverage. Because the language of Title IX is almost identical to that of section 504 it was generally assumed that *Grove City* applied to section 504, as well.

After *Grove City*, the term ''program or activity'' in section 504 was interpreted very narrowly by the courts. For instance, in *Doyle v. University of Alabama* (Appendix IV:171), an appeals court held that a handicapped plaintiff did not have standing to sue the university because, even though the university as a whole received federal financial assistance, the particular program that employed her did not directly benefit from federal funding. The Civil Rights Restoration Act widens the scope of section 504 and the other federal civil rights statutes by making them applicable to entire institutions.

A further discussion of the definition of ''program or activity'' appears at ¶310. For the text of section 504 as amended by the Civil Rights Restoration Act, see Appendix III:A:4.

Who is a ''handicapped'' person?

Section 504 protects handicapped persons from discrimination based on their handicap status. A person is ''handicapped'' within the meaning of section 504 (§41.3) if he or she:

(1) has a mental or physical impairment which substantially limits one or more of such person's major life activities;

(2) has a record of such impairment; or

(3) is regarded as having such an impairment.

''Major life activities'' include functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.

The judgment whether any given person is ''substantially limited'' depends upon the nature and severity of that person's handicapping condition. For example, a federal district court held that persons who suffer from ''any pulmonary problem, however minor, or all persons who are harmed or irritated by tobacco smoke'' are not handicapped as defined by section 504 (see Appendix IV:53). Temporary disabilities arguably fall within the definition of ''handicapped person'' to the extent they ''substantially limit one or more major life activities,'' according to the Department of Education. For court rulings to the contrary, however, see Appendix IV:24, 26, 27, 83 and 244.

When a condition does not substantially limit a major life activity, the individual will not be a qualified handicapped individual. This principle was applied in *Forisi v. Heckler* (Appendix

IV:341) to a plaintiff who had acrophobia (fear of heights). It was also applied in *Pridemore v. Legal Aid Society of Dayton* and *Pridemore v. Rural Legal Aid Society* (Appendix IV:352), to preclude the claims of an individual who had a mild case of cerebral palsy. In *De la Torres v. Bolger* (Appendix IV:327), the court held that lefthandedness was not a condition protected by the Rehabilitation Act.

In a policy memorandum issued by the then-Department of Health, Education and Welfare, that agency ruled that pregnancy was not considered a handicap for purposes of section 504 (see OSPR Memorandum of April 20, 1979, Appendix III:C:3:ii).

If an individual's handicap cannot be verified or its substantiality ascertained by ordinary observation, an employer may ask for medical verification of the existence of a handicapping condition. Such information must be kept confidential and should be accorded the same protections regarding the use of preemployment information under section 504 (see discussion at ¶660 and chart at Appendix VII).

Cases have arisen where courts have found handicap discrimination to have taken place despite the fact that the plaintiffs do not regard themselves as being handicapped. This has occurred when employers and school officials have discriminated against job applicants or students on the basis of a *perceived* handicap in violation of section 504 (see Appendix IV:54 and 379).

''Physical or mental impairments'' that fall within discrimination prohibitions *include*: (1) 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; genitourinary; hemic and lymphatic; skin; and endocrine; or (2) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term ''phsyical or mental impairment'' includes, but is not limited to, such diseases and conditions as 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.

Courts rule on coverage of substance abusers under section 504

Section 7(6)(A) of the Rehabilitation Act provides some guidance on this issue. The Act provides here that ''the term 'handicapped individual' means, for purposes of titles IV and V of this Act, any 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. For purposes of section 503 and 504 as such sections relate to employment, such term does not include 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'' (Appendix III:A:4).

When the provisions of section 7(6)(A) were proposed [it was added to the Rehabilitation Act in 1978], HEW received a number of negative comments from employers who were concerned that the act would provide undue protection to alcoholics and drug abusers in the workforce. Responding to this criticism, HEW stated that ''[t]he fact that drug addiction and alcoholism may be handicaps does not mean that these conditions must be ignored in determining whether an individual is qualified for services or employment opportunities...if it can be shown that the addiction or alcoholism prevents successful performance of the job, the person need not be provided the employment opportunity in question'' (Appendix III:C:xi).

The courts have interpreted section 7(6)(A) in a fairly consistent manner, finding that employment discrimination against former alcoholics or drug abusers is prohibited, while ruling in favor of employers in cases where the employee's alcohol or drug abuse is clearly affecting job performance. Still, questions continue to arise. A description of cases where the courts have attempted to determine the circumstances under which substance abusers should be afforded the protection of sections 503 and 504 appears below. A substance abuse case decided under section 501 (*Whitlock v. Donovan,* Appendix IV:271), which mandates affirmative action on behalf of handicapped federal employees, is also included.

In *Simpson v. Reynolds Metals Co., Inc.* (Appendix IV:83), an alcoholic who was discharged after missing work several times because of his drinking problem filed suit against his former employer under sections 503 and 504. The court found that the plaintiff qualified as a handicapped individual, although it stated that the defendants could have disputed this finding. The court further determined that the plaintiff had no standing to sue under section 504 because the metals company did not receive federal funding for any program which he participated in or could have participated in. The plaintiff's section 503 claim was also dismissed; the court noted that Congress did not intend to create a private right of action under section 503.

* The Department of Veterans Affairs has been the defendant in a number of court cases involving alcoholics, most notably, *Traynor v. Turnage* (Appendix IV: 304). In this case (which was consolidated with *McKelvey v. Turnage,* Appendix IV:346), the Supreme Court found that a VA regulation defining alcoholism as ''willful misconduct'' in the absence of an underlying psychiatric disorder does not conflict with anti-discrimination provisions of section 504.

* Traynor and McKelvey had asked the VA to extend their eligibility to receive G.I. educational benefits, explaining that alcoholism prevented them from taking advantage of the program within the allotted 10-year period. But the VA denied their applications on the grounds that their drinking was the result of willful misconduct, not a disease.

* While the Court found that the VA's willful misconduct provision did not undermine section 504, it sidestepped the issue of alcoholism as a handicapping condition and instead based its

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* Indicates new or revised material.

decision on an interpretation of legislation. The Court ruled that amendments passed in 1978 that extended section 504 protection to "any program or activity conducted by any executive agency" did not repeal the willful misconduct provision.

* The Court did observe that there was a "substantial body of medical literature that contests the proposition that alcoholism is a disease...for which the victim bears no responsibility." But the Court also noted that there was significant debate on the medical issues and that it did not have to decide them.

* (In 1988, Congress effectively overturned *Traynor* when it voted to extend eligibility for VA education and rehabilitation benefits beyond the 10-year period to veterans whose dependency on alcohol prevents them from participating. Disabilities associated with alcoholism would not be considered a product of willful misconduct.)

The plaintiff in *Tinch v. Walters* (Appendix IV:239) was honorably discharged from the military in December 1957 and his entitlement to Veterans Administration (VA) educational benefits was to extend through June 1, 1976. This date could be extended, under VA procedures, if the plaintiff was prevented from completing his education by a physical or mental impairment that was not the result of his own "willful misconduct."

The plaintiff sought an extension of his delimiting date on the basis that he was prevented from completing his education from 1966 to 1974 because he is an alcoholic. The VA refused, citing the 1977 GI Bill Improvements Act, which terms the excessive drinking of alcoholic beverages as "willful misconduct."

A Tennessee district court found in 1983 that the VA violated section 504 by discriminating against the plaintiff on the basis of his alcoholism, which the court determined to be a protected handicap. The VA appealed, but in 1985 the 6th Circuit affirmed the district court's ruling.

In *Heron v. McGuire* (Appendix IV:370), the U.S. Court of Appeals for the 2nd Circuit affirmed the ruling of a New York district court, finding that a police officer whose current use of heroin prevents him from performing job duties is not an "otherwise qualified" handicapped individual under Section 504 of the Rehabilitation Act. The appeals court also found that the New York City Police Department's practice of dismissing heroin addicts and treating alcoholics did not violate equal protection laws. Noting that past drug addiction may be considered a handicap under section 504, the court of appeals affirmed the district court's grant of summary judgment for the defendants.

In *Davis v. Butcher* (Appendix IV:26), a Pennsylvania district court determined that the city of Philadelphia violated the Rehabilitation Act by denying employment to three former drug users. The court stated that drug addiction is a protected handicap and that the Rehabilitation Act conferred a private right of action on the plaintiffs. After reviewing the supporting case law, the court

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* Indicates new or revised material.

also granted the plaintiffs' request to represent a class of all persons who had been denied employment by Philadelphia solely on the basis of previous drug use or addiction. The city of Philadelphia was ordered to review its employment records for similar instances of discrimination, and to establish an impartial administrative tribunal to determine the individual claims of class members.

The plaintiff in *Whitaker v. Board of Higher Education of the City of New York* (Appendix IV:27), a professor who suffered from alcoholism, sued Brooklyn College and the board of higher education on the basis of illegal employment discrimination under section 504. The plaintiff's claim rested on his assertion that, although he was an alcoholic, his handicap did not affect his performance of essential job duties. The defendants sought a dismissal of the complaint on the grounds that the professor failed to exhaust administrative remedies before filing suit under the Rehabilitation Act. The district court ruled that, according to HEW regulations, a private right of action exists under section 504 and plaintiffs are not required to exhaust administrative remedies. Based on this finding, the court denied the defendants' motion to dismiss. However, the court also denied the plaintiff's motion for a preliminary injunction, since the plaintiff had left Brooklyn College for employment elsewhere and the status quo could therefore not have been preserved.

In *Huff v. Israel* (Appendix IV:243), the plaintiff was fired from his job after his third conviction for driving under the influence of alcohol (DUI). He filed suit alleging that he was an alcoholic and that his termination violated Section 504 of the Rehabilitation Act.

The court disagreed, finding that the plaintiff was fired not because of his alcoholism, but because he had received three DUI convictions. The court, referring to section 7(6)(A)'s ''current use'' provision, stated that the plaintiff could not function effectively in his law enforcement position when he himself could not comply with the law as evidenced by the three DUI convictions. Judgment was entered in favor of the defendants.

A district court in *Whitlock v. Donovan* (Appendix IV:271) determined that federal employers are required under Section 501 of the Rehabilitation Act to provide the opportunity for intensive, long-term treatment for alcoholic employees. The court found that the U.S. Department of Labor ''fell short of the statutory mandate for accommodating handicapped employees'' by not presenting a lapsed alcoholic who had been treated once with the ''firm choice'' option of reentering an appropriate treatment program or being dismissed. In its concluding remarks, the court stated that ''This is not to say that in every instance where an agency confronts an alcoholic employee who has failed in treatment that it must offer leave without pay or some other specific arrangement. But if there is evidence...that such a leave...might have been beneficial, the reasonable accommodation duty requires the agency to evaluate whether such a leave...would have imposed an undue hardship on the agency. The agency made no such evaluation.'' The court allowed the plaintiff to reapply for the same or similar position with the Labor Department and ruled that the plaintiff should be eligible to seek disability retirement in the event he failed a fitness-for-duty examination.

The plaintiff in *Johnson v. Smith* (Appendix IV:340) was a job applicant at the Director of Prisons, where he was rejected, despite high qualifying scores, on the basis of a past history of

drug and alcohol dependency. A district court in Minnesota found that the plaintiff was at least minimally qualified for the job and had been discriminated against on the basis of a handicap protected under section 504. However, questions of fact remained as to whether the plaintiff was as qualified as other applicants and whether his handicap would prevent adequate performance of the job of correctional officer. The district court rejected the defendants' motion for summary judgment.

* A U.S. District Court in New York ruled that drug abusers who are not rehabilitated or currently seeking treatment are not qualified handicapped individuals under section 504 (*Burka v. New York City Transit Authority*, Appendix IV:439). The plaintiffs, who had tested positive for marijuana use in the New York City Transit Authority's drug testing program, argued that the 1978 amendments to the Rehabilitation Act protected them from dismissal, unless it could be shown that they could not perform their jobs. The court disagreed, saying that Congress did not intend for section 504 to protect all drug abusers, only those who were seeking or received rehabilitation.

In *McCleod v. City of Detroit* (Appendix IV:343), firefighter job applicants who were rejected because of positive marijuana use test results brought suit against the city alleging handicap discrimination in violation of the Rehabilitation Act. The city argued that the plaintiffs were not handicapped persons within the meaning of the Act and that there is a rational relationship between the positive test results for marijuana and disqualification for the job of firefighter. The court agreed with the city and dismissed the claims.

The district court based its dismissal on the basis that the ''impairment'' caused by marijuana use only affected the plaintiffs' ability to be employed as firefighters, not general major life activities. The court therefore concluded that the plaintiffs were not handicapped for purposes of the Act, and that the challenged criteria were job related and required by business necessity.

* Similarly, the court in *Copeland v. Philadelphia Police Department* (Appendix IV:440) ruled that even if a police officer who tested positive for marijuana use can be considered a handicapped individual under section 504, he is not otherwise qualified for a law enforcement position. The court said ''accommodating a drug user within the ranks of the police department would constitute a 'substantial modification' of the essential functions of the police department and would cast doubt upon the integrity of the police force.''

A federal district court in New Jersey found in *Moore v. Borough of Monmouth Beach* (Appendix IV:371) that a municipal clerk for the borough who was suffering from alcoholism was protected by Section 504 of the Rehabilitation Act and the New Jersey Law Against Discrimination. Finding that the plaintiff held a cognizable property right in a salary increase that was denied her as a result of her handicap, the court refused to grant the defendants' motion to dismiss the plaintiff's claims.

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* Indicates new or revised material.

***Protections afforded persons with contagious diseases, such as AIDS, under section 504**

In 1988, Congress passed the Civil Rights Restoration Act, which amended the Rehabilitation Act to ensure protection against discrimination for persons with contagious diseases, such as AIDS and tuberculosis. The amendment says that sections 503 and 504 protect affected individuals, unless their infection or disease would constitute a direct threat to the health and safety of others, or persons who, because of their condition, could not perform their job (see Appendix III:A:4 and ¶310).

The basis for this amendment was *Arline v. School Board of Nassau County* (Appendix IV:329), in which the Supreme Court found in favor of Gene Arline, an elementary school teacher who was dismissed from her job due to the ''continued recurrence of tuberculosis.'' The Court held that the contagious effects of a disease could not be separated from its physical effects in a case in which contagiousness and physical impairment resulted from the same condition. The justices also ruled that persons with contagious diseases must be evaluated individually to determine if they are otherwise qualified for a job or program.

The ruling was highly publicized because AIDS, like tuberculosis, is a contagious disease that is not easily transmitted. While the court explicitly refused to rule whether AIDS would be considered a handicapping condition, the decision served as a catalyst for subsequent interpretations of the law.

In 1988 the Department of Justice, the agency responsible for government-wide enforcement of section 504, issued an opinion which said persons with AIDS and persons infected with the human immunodeficiency virus (HIV) are considered individuals with handicaps and covered by section 504. This reversed an earlier DOJ opinion that AIDS was not a protected handicap and that fear of catching the disease, whether reasonable or not, abrogated section 504 coverage.

The memo prohibits both federal employers and federally funded programs and activities from discriminating against an HIV carrier, so long as the infected individual poses no health or safety risk or performance problem. In some situations where the risk of transmission is slight, infection may still render someone not otherwise qualified. For example, AIDS is known to cause dementia, and the risk of an afflicted air traffic controller suffering an attack could be especially dangerous.

If someone with AIDS is otherwise qualified, then an employer or program administrator must make reasonable accommodations. Employment examples would be limiting an HIV-infected surgeon to teaching-only duties at a hospital or assigning a police officer a job where there is little chance of bloodshed. For program accessibility, an example would be accepting an HIV-infected person as a tenant in public housing, provided the applicant could meet the terms of the lease (such as paying the rent on time).

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* Indicates new or revised material.

Following the DOJ opinion, the Office of Federal Contract Compliance Programs issued a memorandum which extends section 503 protection to otherwise qualified persons with AIDS in federal contracts and subcontracts (see ¶720).

¶230 General Prohibitions Affecting Recipients Of Federal Funds

This paragraph covers general prohibitions against discrimination based on handicap as outlined in the government-wide regulations under ''Guidelines for determining discriminatory practices'' (Appendix III:B, §41.51). Subscribers are reminded that any recipient organization or institution is covered by section 504 if it receives *any* federal financial assistance, regardless of the type of assistance or from which agency(ies) it comes.

The government-wide guidelines begin with a slight rephrasing of the statutory language of section 504 and include a blanket prohibition against any discrimination based on handicap (Appendix III:B, §41.51(a)):

> No qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity that receives or benefits from federal financial assistance.

Section 41.51(b) of the government-wide rules contains prohibitions related to aid, benefits and services that incorporate basic principles developed by the Department of Health and Human Services (HHS) and used in its regulations for HHS recipients (Appendix III:C). These include the standard that a recipient, in providing any aid, benefit or service, *may not*, directly or through contractual, licensing or other arrangement, *on the basis of handicap:*

- deny a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit or service (§41.51(b)(1)(i));
- afford a qualified handicapped person an opportunity to participate in or benefit from the aid, benefit or service that is not equal to that afforded others (§41.51(b)(1)(ii));
- provide a qualified handicapped person with an aid, benefit or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others (§41.51(b)(1)(iii)); or
- provide different or separate aid, benefits or services to handicapped persons or to any class of handicapped persons than is provided to others unless such action is necessary to provide qualified handicapped persons with aid, benefits or services that are as effective as those provided to others (§41.51(b)(1)(iv)).

Only ''qualified handicapped persons'' are protected

Only ''qualified handicapped individuals'' are protected from discrimination by section 504 (and section 503, see Chapter 700). (For a discussion of who is a ''handicapped'' person, see p. 220:3.) For purposes of section 504, ''qualified handicapped person,'' as defined in the government-wide guidelines at §41.32, means—

(1) with respect to employment, a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question (see p. 601:3); and

(2) with respect to services, a handicapped person who meets the essential eligibility requirements for the receipt of such services (see p. 301:1).

In *Southeastern Community College v. Davis*, the Supreme Court ruled on the question of who is a ''qualified handicapped person.'' The Court held: ''[A]n otherwise qualified handicapped person is one who is able to meet all the program's requirements in spite of his handicap'' (see Appendix IV:22). The *Davis* Court further held that: ''Section 504 by its terms does not compel educational institutions to disregard the disabilities of handicapped individuals or to make substantial modifications in their programs to allow disabled persons to participate.'' This opinion has been much cited by lower courts when ruling on the question of whether the plaintiff in a suit is a qualifed handicapped person and, therefore, protected by section 504.

Equal opportunity, not merely equal treatment

As pointed out in the HHS interpretation preceding its regulations, section 504 prohibits not only those practices that are overtly discriminatory, but also those that have the *effect* of discriminating (see discussion below). Equal opportunity, and not merely equal treatment, is essential to the elimination of discrimination. Thus, in some situations, identical treatment of handicapped and nonhandicapped persons is not only insufficient but is itself discriminatory. Identical treatment will not in some cases provide handicapped persons with the adjustments or accommodations that they require to achieve equal opportunity. On the other hand, separate or different treatment is permitted under section 504 only where it is necessary to ensure equal opportunity and truly effective benefits and services. (See discussion below regarding the delivery of aid, benefits and services in the ''most integrated setting appropriate.'')

Three Department of Education (ED) policy memoranda serve to clarify what is meant by providing an equal opportunity for participation by disabled persons. A local school district refused to provide late bus service to permit a deaf student's participation in after-school extracurricular activities (transportation during regular commuting hours was provided). ED ruled that under its section 504 regulations, the school district was expected to make whatever special transportation arrangements are necessary to permit handicapped students' participation in extracurricular activities. Handicapped children must be afforded an opportunity to engage in such activities equal to that provided to nonhandicapped children. (For a copy of the complete memorandum, see Appendix III:C:3:xxiii.)

In another situation, ED was asked to rule if section 504 requires a school district to establish intramural athletic programs to accommodate handicapped students who are unable to successfully compete with non-handicapped students for placement in the district's regular competitive interscholastic program. ED replied that section 504 does not require the creation of any ''new athletic programs'' to accommodate students who are unable to successfully compete for placement in the school district's regular athletic program, providing the ''opportunity'' for handicapped students to compete does exist. (For a copy of the complete memorandum, see Appendix III:C:3:xxx.)

A third case involved a rule of a state high school athletic association that prohibited students over the age of 19 from competing in varsity sports. The complaint was made on behalf of a hearing-impaired student who could not compete on varsity teams because of his age. Although the state high school athletic association is neutral on its face and, therefore, is not *per se* discriminatory, its effect in particular situations, however, may be. If the reason that a particular student is 19 years old at the beginning of his or her senior year is because the school system has discriminated against that student on the basis of handicap, the rule may not be applied to that student. In this case, the student was 19 at the beginning of his senior year because he had been required, as were all handicapped students, to repeat both first and second grades. ED based its ruling on the ''equal opportunity'' and ''significant assistance'' clauses of its regulations. (For a copy of the complete memorandum, see Appendix III:C:3:xvii; for a contrary view, see court case at Appendix IV:233.)

Prohibitions against practices which have the ''effect'' of discriminating

A recipient may not directly, or through contractual or other arrangements, use criteria or methods of administration that (according to §41.51(b)(3)):

- have the effect of subjecting qualified handicapped persons to discrimination based on handicap;
- have the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the recipient's program with respect to handicapped persons; or
- perpetuate the discrimination of another recipient if both recipients are subject to common administrative control or are agencies of the same state.

As noted in the government-wide interpretation, this provision applies primarily to state agencies that receive federal funds and then distribute funds to other entities. These state agencies are obligated to develop methods of administering the distribution of federal funds so as to ensure that handicapped persons are not subjected to discrimination either by second-tier recipients or by the manner in which the funds are distributed. These prohibitions apply not only to direct actions of a recipient but also to actions committed through contractual agreements or similar arrangements. This provision is based on the premise that a recipient should not be able to do indirectly that which it cannot do directly.

Recipients may not, in determining the site or location of a facility, make selections that have (§85.51(b)(b)):

- the effect of excluding handicapped persons from, denying them the benefits of, or otherwise subjecting them to discrimination under any program or activity that receives or benefits from federal financial assistance; or
- the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the program or activity with respect to handicapped persons.

As pointed out in the interpretation that accompanied the regulations for HHS recipients, this requirement regarding the site selection is not intended to prohibit a recipient which is located on hilly terrain from erecting any buildings or new facilites at its present site (Appendix III:C:xiv).

The exclusion of nonhandicapped persons from the benefits of a program limited by federal statute or executive order to handicapped persons, or the exclusion of a specific class of handicapped persons from a program limited by federal statute or executive order to a different class of handicappped persons, is not prohibited by section 504 (§41.51(c)).

A recipient is prohibited from perpetuating discrimination on the basis of handicap in any program or activity of a federally funded secondary recipient. A recipient should, therefore, make certain that organizations funded are aware of its policy of nondiscriminiation and do not, themselves, discriminate on the basis of handicap. To this end, a recipient could ask secondary recipients to complete a self-evaluation of programs and activities, and return a copy of the document to the primary recipient. Another approach may be to ask secondary recipients to sign an ''assurance of compliance'' for attesting to its compliance with the section 504 mandate of nondiscrimnation on the basis of handicap. In preparing funding agreements between primary and secondary recipients, primary recipients could fashion an agreement that encompasses the following items and assurances:

- a formal request submitted prior to formal consideration of a budget;
- full disclosure of a secondary recipient's budget;
- audit coverage; and
- compliance with civil rights/nondiscrimination requirements (including nondiscrmination on the basis of race, color, creed, national origin, sex, age and handicapped status). Whatever approach is taken, it is suggested that any documentation provided by the secondary recipient should be kept on file and attached to the primary recipient's self-evaluation materials.

The concept of ''equally effective''

The concept of an ''equally effective'' aid, benefit or service is an important one that is not addressed in the government-wide guidelines or the government-wide interpretation that precedes these rules. However, the HHS regulations (Appendix III:C) and the interpretation appended to the rules include a more detailed discussion of ''equally effective'' aids, benefits and services. The term ''equally effective'' is intended to encompass the concept of ''equivalent,'' as opposed to ''identical.'' In order to be ''equally effective,'' an aid, benefit or service need not produce the identical result or level of achievement for handicapped and nonhandicapped persons; it merely must afford equal *opportunities* to achieve equal results, or to gain equivalent benefits and reach the same level of achievement.

Prohibitions against perpetuating discrimination through ''significant assistance''

Recipients are prohibited (§41.51(b)(1)(v)) from aiding or perpetuating discrimination against a qualified handicapped person by providing ''significant assistance'' to an agency, organization or

person that discriminates based on handicap in providing any aid, benefit or service to beneficiaries of the recipient's program.

Although the concept is not addressed in the government-wide regulations, recipients may have to develop standards for measuring the ''substantiality'' of their assistance to other organizations or persons. Criteria to be considered may *include* financial support by the recipient and whether the activities of the outside organization or person are so closely related to those of the recipient that, fairly, they should be considered activities of the recipient itself. Also, it may be relevant to ask whether an outside organization could continue to exist without the recipient's support. The prohibition against providing significant assistance to organizations or persons that discriminate based on handicap should initiate an analysis of all external relationships maintained by the recipient.

Ensuring that discrimination does not exist may require the recipient to communicate its policy of nondiscrimination to all outside organizations and persons with which it deals; to receive written assurances from such organizations; and to take whatever other steps may be required to ensure an absence of discrimination against participants in the recipient's programs and activities. Relationships that may require scrutiny *include* those with labor unions and other organizations representing or serving employees (including referral agencies), those providing insurance and other employee benefits, and social or recreational organizations that provide programs or activities to the employees and other participants in the recipient's programs and activities. (For a further discussion of ''outside'' organizations used in the employment process, see ¶610).

In one of its policy memorandum, the Department of Education (ED) offers an example of what is meant by ''significant assistance.'' An art college operates a Saturday morning class for young children. The class is offered on the college campus and is taught by undergraduate students. A primary purpose of the program is to provide training for student instructors. The workshop does not receive direct federal assistance but the college does. ED ruled that the children's workshop program is an integral part of the postsecondary education program operated by the recipient. The recipient provides the teachers and facilities for the program and requires its students to teach in the program as a condition for graduation. Therefore, the workshop is subject to the requirements of section 504, and it is the recipient's duty to ensure compliance. (See Appendix III:C:3:i for a copy of the complete memorandum.)

Handicapped participation ''in the most integrated setting appropriate''

In general, recipients may not limit a qualified handicapped person in the enjoyment of any right, privilege, advantage or opportunity enjoyed by others receiving the aid, benefit or service (§41.51(b)(1)(vii)). The regulations (§41.51(b)(2)) further state that recipients may not deny a qualified handicapped person the opportunity to participate in programs or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities. The purpose of this requirement is to allow each individual to participate in existing programs and activities (those in which nonhandicapped persons are participating) to the extent that he or she is

capable and desires. Accommodations or adjustments that are made for one handicapped person may not be necessary or desirable for another handicapped person who has a similar disability. Separate programs or activities that may be required to ensure equal opportunity for one handicapped person may not be necessary or desirable for another handicapped person who has a similar disability. Also, *individuals* should be free to participate in programs or activities with only slight modifications or adjustments, even in cases where major modifications or adjustments are being made for other persons with similar disabilities. (For a more detailed discussion and explanation of the most integrated setting appropriate, particularly as it relates to program accessibility, see ¶340.)

Communications—a major emphasis of 504 compliance

Recipients must take appropriate steps to ensure that communications with their applicants, employees and beneficiaries are available to persons with impaired vision and hearing (§41.51(e)). Adequate communications to handicapped persons (particularly those who are blind and deaf) will be essential to the full participation of such persons in the recipient's programs and activities. Regardless of the accommodations and adjustments that are (or would be) made by the recipient for handicapped persons, equal opportunity will not be achieved in individual instances unless handicapped persons are aware that such accommodations and adjustments have been or will be made. Communications, in general, should be a major emphasis in the recipient's compliance with section 504. Alternate methods of communication, in particular, will be essential in individual instances if persons with vision and hearing impairment are to have equal opportunities and participate fully in the recipient's programs and activities.

Designation of section 504 coordinator

The lead requirement with respect to the designation of a section 504 coordinator is found in the HHS (and ED) section 504 regulations at §84.7 (see Appendix III:C:v). The requirement states that recipients employing 15 or more persons must name at least one person to coordinate compliance with section 504 rules. Other federal agencies in their section 504 regulations have adopted a similar provision. (One notable exception is the Department of Justice, which sets 50 as the minimum number of persons recipients must employ before they are subject to the requirement.) This coordinator should help ensure that the organization's self-evaluation and transition plan (see Chapters 300 and 400) are effectively completed.

¶240 Timetable and Procedures for Issuance of Individual Agency Regulations

The government-wide regulations state that each agency shall, after notice and opportunity for comment, issue a regulation to implement section 504 with respect to the programs and activities for which it provides assistance (§41.4). These agency regulations are to be consistent with the government-wide regulations (see Appendix III:B).

In accordance with the government-wide rules, each agency was required to issue a notice of proposed rulemaking (notice is issued when the proposed rules are published in the *Federal Register*) no later than 90 days after the effective date of the government-wide regulations; thus, no later than April 11, 1978, since the government-wide rules were published on Jan. 13, 1978, and became effective immediately. The government-wide rules further state that each agency shall issue final regulations no later than 135 days after the end of the period for comment on its proposed regulation, provided that the agency shall submit its proposed final regulations for ''review'' at least 45 days before they are to be issued. Pursuant to Executive Order 12250 (see Appendix III:D), signed by President Carter in November 1980, the Department of Justice is the agency responsible for ''reviewing'' an agency's rules before they become final.

Required content of agency regulations

Standards in the government-wide regulations stipulate that each agency's regulations shall:

- define appropriate terms, consistent with the definitions (§41.3) and the standards for determining who are ''handicapped persons'' (§41.31-§41.32) set forth in the government-wide regulations (see ¶210 of this *Handbook* and the Appendix I Glossary); and
- prohibit discriminatory practices against qualified handicapped persons in employment and in the provision of aid, benefits or services, consistent with the guidelines set forth in §41.51-§41.55 of the government-wide regulations (see ¶220 and Chapters 300, 400 and 600 of this *Handbook*).

Agency regulations must also include, where appropriate, specific provisions adapted to the particular programs and activities receiving financial assistance from the agency. In the interpretations preceding the government-wide regulations, agencies are encouraged to examine §84.1-§84.23 of the Department of Education's and Department of Health and Human Services' agency rules (Appendix III:C) to determine whether their regulations should include any of the more detailed provisions to be found there. In addition, each agency is invited to examine the programs and activities to which it provides assistance in order to determine whether detailed requirements concerning any such program or activity should be included.

In general, federal agencies have closely followed the government-wide guidelines and the ED/HHS agency rules in promulgating their own regulations under section 504. (A listing of where in the *Federal Register* to find federal agencies' section 504 rulemakings is included at

Page 240:3.) To determine the individual requirements of a particular funding agency's section 504 rules, a recipient could consult the appropriate Agency Requirements Chapter of the *Handicapped Requirements Handbook*.

For a discussion of rulemakings with respect to section 504 coverage of federally conducted programs and activities, see ¶201.

Section 504 Rulemaking Chart (for federal recipients)

Agency/Department	Status*	Date in *Federal Register*
ACTION	F	May 30, 1979
	P	Sept. 19, 1980 (complaint handling)
International Development	F	Oct. 6, 1980
Agriculture	F	June 16, 1982
Commerce	F	April 23, 1982
Defense	F	April 8, 1982
Energy	F	June 13, 1980
Environmental Protection	F	Jan. 12, 1984
General Services	F	June 11, 1982
Education	F	May 4, 1977
Health & Human Services	F	May 4, 1977
Education (voc. ed.)	F	March 4, 1979
Government-wide regulations	F	Jan. 13, 1978
Housing and Urban Development	F	June 2, 1988
Interstate Commerce Commission	F	June 23, 1986
Interior	F	July 7, 1982
Labor	F	Oct. 7, 1980
Justice	F	June 3, 1980
Legal Services Corporation	F	Sept. 25, 1979
	P	March 23, 1981

(continued on next page)

* F - final
P - proposed

Agency/Department	Status*	Date in *Federal Register*
Arts Endowment	F	Apr. 17, 1979
Humanities Endowment	F	Nov. 12, 1981
National Science Foundation	F	March 1, 1982
Nuclear Regulatory Commission	F	March 6, 1980
Office of Revenue Sharing	F	Oct. 17, 1983
Small Business Administration	F	Apr. 4, 1979
State	F	Oct. 21, 1980
Tennessee Valley Authority	F	Apr. 4, 1980
Transportation	F	May 30, 1979
	F	May 23, 1986 (mass transit)
Veterans Affairs	F	Sept. 24, 1980

* F - final
P - proposed

¶250 Requirements For Interagency Cooperation

The government-wide regulations address issues related to interagency cooperation on section 504 (see ¶41.6). Where each of a substantial number of recipients is receiving assistance for similar or related purposes from two or more agencies, or where two or more agencies cooperate in administering assistance for a given class of recipients, the agencies shall:

- coordinate compliance with section 504; and
- designate one of the agencies as the primary agency for section 504 compliance purposes.

Also, any agency conducting a compliance review or investigating a complaint of an alleged section 504 violation shall notify any other affected agency upon discovery of its jurisdiction and shall inform it of the findings made. Reviews or investigations may be made on a joint basis.

The government-wide interpretation points out that a potential problem exists for recipients who receive grants from more than one agency, and may be subjected to multiple assurance forms, inconsistent regulations or enforcement procedures, and multiple investigations. To deal with these problems, agencies are encouraged to extend existing Title VI enforcement procedures to section 504 (see ¶840). Also, ensuring that consistent regulations are promulgated by the individual agencies should alleviate the problem.

In promulgating the government-wide rules (see Appendix III:B), the government (represented by the Department of Health, Education, and Welfare) envisioned a ''primary agency'' approach to be used in cases in which a recipient would have one primary agency designated for purposes of compliance with section 504, presumably the agency from which it receives the most funding. (See ¶41.6, ''Interagency Cooperation,'' Appendix III:B:2; see also interpretative comment related to ¶41.6, Appendix III:B:8.)

In their compliance efforts, recipients should be aware of the section 504 guidelines of other agencies from which funding is received, particularly to the extent that requirements may vary from agency to agency and program to program. Problems with multi-agency funding and compliance will be most difficult in cases where recipients receive funding from agencies with jurisdiction over programs that are significantly different. This is true because the section 504 rules of such agencies will vary to reflect the unique nature of the different programs (e.g., education, transportation, housing).

Role of the Interagency Coordinating Council

The Interagency Coordinating Council (ICC) was established by section 507 of the Rehabilitation Amendments of 1978 (P.L. 95-602, see Appendix III:A:5). The Council has the responsibility for developing and implementing agreements, policies and practices to create uniformity and to solve jurisdictional disputes between the various federal agencies responsible for section 504 implementation and enforcement.

¶260 Coordination With Sections 502 and 503

The government-wide guidelines (at §41.7, Appendix III:C) cover matters related to coordination between section 504 compliance activities and those related to Sections 502 and 503 of the Rehabilitation Act of 1973, as amended.

The rules require agencies to ''consult'' with the Architectural and Transportation Barriers Compliance Board (A&TBCB) in developing requirements for the accessibility of new facilities and alterations (§41.58). Agencies must also coordinate with the A&TBCB in enforcing such requirements with respect to facilities that are subject to Sections 502 *and* 504 of the Rehabilitation Act. (The relationship between sections 502 and 504 is further discussed in ¶510.)

Agencies are also required to ''coordinate'' with the Department of Labor (Office of Federal Contract Compliance Programs) in enforcing requirements concerning employment discrimination with respect to recipients that are also federal contractors subject to section 503 (see ¶720). To further this aim, many agencies have included statements in their section 504 rules claiming that recipients who are in compliance with the employment provisions of section 503 are also in compliance with the employment provisions of these agencies' section 504 regulations. The reverse, however, would not necessarily be true, since section 503 mandates *affirmative action* in employment, while section 504 requires only *nondiscrimination.* (For a brief discussion of these terms, consult the Glossary, Appendix I.)

The government-wide interpretation reveals that the words ''consult'' and ''coordinate,'' as used above, are not intended to specify any explicit procedures. Requirements related to sections 502 and 503 are the subject of separate sections of this *Handbook* — Chapters 500 and 700 respectively.

¶270 Private Civil Actions

Sections 503 and 504 of the Rehabilitation Act do not explicitly create or authorize private civil litigation by handicapped persons against a recipient of a federal contract (section 503) or federal financial assistance (section 504). Nevertheless, judicial decisions occasionally recognize the right of private persons to sue in federal courts for alleged violations of statutes which do not explicitly permit private suits. The Supreme Court has long recognized this "implication doctrine" as necessary to effective enforcement of certain laws and has set out four tests to judge whether it is appropriate to imply such private rights. These include:

(1) reviewing the legislative history of the statute to ascertain whether Congress intended to permit private enforcement;

(2) determining whether the complainant is a special or intended beneficiary of the statute;

(3) determining whether permitting a private action would be consistent with the broad purposes of the statute; and

(4) analyzing whether the area of law is one which is primarily reserved to the states for enforcement or if it is one primarily covered by federal laws.

The Supreme Court did not indicate that all four of these tests must be met, nor did it assess the relative weight to be given to any particular factor. (See *Cort v. Ash,* Appendix IV:900.)

There has been general agreement among the federal circuit courts of appeals that there is a private right of action under section 504 (see discussion below). Those courts have generally reached the opposite conclusion with respect to section 503, however (see discussion at ¶770). Once a court determines that a private cause of action should be implied as existing in an otherwise silent statute, a private party may generally seek any form of relief available under the statute. These may include temporary restraining orders, preliminary or permanent injunctions, suspension or termination of federal funds, and, in some cases, monetary damages. (For a discussion of these remedies, see ¶860.)

Private right of action under section 504

The Supreme Court has now recognized that private plaintiffs have standing to sue for violations of section 504, at least in the context of employment discrimination (see *Consolidated Rail Corp. v. Darrone,* Appendix IV:95 and discussion at ¶601). While the Court's holding in *Conrail* is limited to a case involving employment discrimination, Justice Powell, writing for the Court, phrased the case as one "to clarify the scope of the private right of action to enforce §504." This seems to imply that the Court had no doubt that private rights are implicit in the statute, only that some question exists as to how broadly those private rights are to be interpreted.

Further support for this position lies in the High Court's ruling in another section 504 case, *Southeastern Community College v. Davis* (Appendix IV:22). Although the Court did not discuss

private rights of action in its opinion, an individual whose application for admission to the College's nursing program was rejected was permitted to sue the College under section 504.

To more fully understand this concept, some background into the earlier cases may be helpful. One of the earliest cases on private rights to sue under section 504 is *Lloyd v. Regional Transportation Authority* (Appendix IV:5), in which the 7th Circuit saw the similarity between section 504 and the affirmative rights found in Title VI of the Civil Rights Act of 1964 (42 U.S.C. §2000d) as it was construed by the Supreme Court in *Lau v. Nichols*, 414 U.S. 563 (1974). In further support of its analysis, the *Lloyd* court also concluded that section 504 satisfies the legal tests relevant to determining whether a private right of action is implicit in a statute, as dictated by the Supreme Court in *Cort v. Ash, supra.* The Supreme Court's ruling in *Cannon v. University of Chicago* (441 U.S. 677 (1979)), that Title IX of the Education Amendments of 1973 grants a private right of action, has also been cited by a number of courts in support of the proposition that section 504 provides private remedies because of the similarity in the language of the two statutes.

All 11 circuit courts of appeal have held that section 504 permits private actions.* A long line of federal district courts has also concluded that section 504 should be privately enforced. Most of these decisions rely on the *Lloyd* analysis and the *Cort v. Ash* factors to conclude that the purposes of the Rehabilitation Act would be severely frustrated by denying to handicapped persons who are discriminated against the right to a remedy in the federal courts.

** The only judicial limitations to the scope of private suits under section 504 to date have involved employment (see ¶601), damages (see ¶860), and suits against government agencies. In four recent cases, the rule has emerged that individuals may indeed bring section 504 suits against agencies of the federal government concerning regulatory practices. (See *Cousins v. Secretary of*

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* All 11 circuit courts have implied private cause of actions under section 504:

1st	*Cousins v. Secretary of Transportation*	IV:457
2nd	*Leary v. Crapsey*	IV:17
	Jose P. v. Ambach	IV:162
3rd	*Pennhurst State School and Hosp. v. Halderman*	IV:33
	NAACP v. Medical Center	IV:41
4th	*Trageser v. Libbie Rehab. Center Inc.*	IV:31
	Southeastern Community College v. Davis	IV:22
5th	*University of Texas v. Camenish*	IV:46
6th	*Jennings v. Alexander*	IV:130
7th	*Lloyd v. RegionalTrans. Auth.*	IV:5
	Simpson v. Reynolds Metals, Inc.	IV:83
8th	*Carmi v. Metropolitan St. Louis Sewer Dist.*	IV:51
	United Handicapped Federation v. Andre	IV:2
9th	*Kling v. County of Los Angeles*	IV:93
10th	*Pushkin v. Regents of Univ. of Colorado*	IV:96
11th	*Jones v. MARTA*	IV:142

** Indicates new or revised material.

Transportation, Appendix IV:457). However, such suits may not be considered to compel agency administrative action, such as termination of funding (*Eastern Paralyzed Veterans Association v. Southeastern Pennsylvania Transportation Authority*, Appendix IV:373), or to overturn an administrative decision not to seek relief (*Salvador v. Bell*, Appendix IV:333, and *Marlow v. Department of Education*, Appendix IV:412).

* From all these cases it is clear that handicapped individuals may seek to enforce the provisions of section 504 in the courts without fear of dismissal initially for lack of standing. Of course the other jurisdictional requirements must still be met, *i.e.*, the handicapped plaintiff must be "otherwise qualified" and the defendant must be a recipient of federal financial assistance.

Exhaustion of administrative remedies under section 504

The majority of district and appeals courts which have considered it have concluded that exhaustion of administrative remedies is not a prerequisite to judicial action under section 504. Decisions repeatedly cite the traditionally accepted exception to the exhaustion doctrine, that a plaintiff will not be required to pursue administrative action which cannot provide him or her relief, or where such remedy would be inadequate. Courts also rely on the Supreme Court's decision in *Cannon v. University of Chicago* (441 U.S. 677 (1979)), dealing with similar language from Title IX of the Education Amendments of 1972, that exhaustion is not required. For example, the court in *Medley v. Ginsburg* (Appendix IV:85) held that the administrative enforcement scheme of section 504 is intended to be complementary to and independent of private actions. See also *Peterson v. Gentry*, *Jose P. v. Ambach*, *Greater Los Angeles Council on Deafness, Inc. v. Community Television of Southern California* (Appendix IV:156, 162, and 247, respectively). (See below for discussions relating to exhaustion of adminstrative remedies when claims are filed under section 504 and the Education for All Handicapped Children Act and sections 504 and 501.)

When claims are brought under section 504 and the EAHCA

Prior to 1986, plaintiffs who sued under the Education for All Handicapped Children Act (EAHCA) and pressed a related claim under section 504 were required by the courts to first exhaust administrative remedies under the EAHCA. The EAHCA and the regulations promulgated under it set out a detailed administrative scheme to protect the rights of handicapped children and afford frequent interaction between parents and school authorities. Since it also provides for several levels of appeals in the event a parent is dissatisfied, courts reasoned, allowing a plaintiff to come directly into court under a closely related section 504 claim "would work to eviscerate the procedural safeguards set forth in [the EAHCA] for the court would be asked to make in the first instance the same determination which would be made at the administrative level" *Davis v. Maine Endwell Central School District*, Appendix IV:181. (See also *Lombardi v. Ambach*, *Reinemann v.*

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* Indicates new or revised material.

Valley View Community School District, Turillo v. Tyson, Colin K. v. Schmidt, and *Mitchell v. Walter,* Appendix IV:150, 160, 169, 170, and 173, respectively.)

In June 1984 the Supreme Court in *Smith v. Robinson* (Appendix IV:213) wrote: ''Allowing a plaintiff to circumvent the [EAHCA] administrative remedies would be inconsistent with Congress's carefully tailored scheme.'' The Court went on to hold that the EAHCA is the ''exclusive avenue'' through which a claim of denial of a free appropriate public education can be pursued, and section 504 ''is inapplicable when relief is available under the [EAHCA] to remedy a denial of educational services.'' Bringing a suit under both the EAHCA and section 504 to obtain attorneys' fees, for example, which were recoverable under section 504 but (pre-1986) not available under the EAHCA, would therefore not be allowed in accordance with *Smith.* (See also the Supreme Court's ruling in *Irving Independent School District v. Tatro,* IV:63.)

In its ruling in *Smith,* the Supreme Court warned of the ''narrowness'' of its decision and that its holding that the EAHCA is the exclusive remedy for redressing such claims may be inappropriate in certain circumstances. The Court wrote: ''We do not address a situation where the [EAHCA] is not available or where 504 guarantees substantive rights greater than those available under the [EAHCA].'' An example of when this might occur can be found in the appellate court ruling in *Students of California School for the Blind v. Honig,* in which section 504 was found to provide ''greater substantive rights'' than the EAHCA to the plaintiffs because unlike the EAHCA, section 504 contains provisions specifically addressing the issue of facility accessibility. (See Appendix IV:266.) (See also *Georgia State Conference of Branches of NAACP v. Georgia*, Appendix IV:336).

To correct this deficiency in the EAHCA, the Handicapped Children's Protection Act of 1986 was signed into law on Aug. 5, 1986. The law overturns the parts of the Supreme Court's decision in *Smith v. Robinson* (Appendix IV:213) barring the award of reasonable attorneys' fees in cases brought under the EAHCA by holding section 504 inapplicable when relief is available under the EAHCA. The language of the EAHCA as originally enacted did not contain a provision for the award of attorneys' fees for successful challenges brought under the statute. The act modified the EAHCA in two ways:

- First, the act provides for the award of reasonable attorneys' fees to parents or guardians of handicapped children who prevail in suits brought under the EAHCA. These awards may be made for cases filed after *Smith,* or which were pending at the time of the *Smith* decision.
- Second, the act provides that relief may be sought under section 504, even though relief is also available under the EAHCA, provided that administrative remedies under the EAHCA are first exhausted.

Two district courts in New York ruled the same year in cases involving the act. In *J.G. v. Board of Education* 648 F. Supp. 1452 (W.D.N.Y. 1986) the court awarded attorneys' fees to the plaintiffs on the basis of the retroactive application of the attorneys' fees provision in the Act. In

Taylor v. Board of Education, (Appendix IV:398) the court dismissed the plaintiff's claim under section 504 because relief was also available under the EAHCA and, unlike the specific retroactive provision dealing with attorneys' fees in the act, the remaining provisions of the act did not become effective until they were signed into law.

* At least two federal district courts have ruled on the second requirement of the act, that potential plaintiffs must first exhaust EAHCA administrative remedies before bringing a section 504 action in federal court. (See *School Committee of Town of Acton v. Bennett*, Appendix IV:411, and *G.C. v. Coler*, Appendix IV:427). In the *Town of Acton* case, the court ruled this requirement applies to government agencies such as the Office of Civil Rights, as well as to private plaintiffs.

Where claims are brought under sections 504 and 501

Coverage of section 504 was extended to include ''any program or activity conducted by an Executive agency or by the United States Postal Service'' by the Rehabilitation Amendments of 1978. Federal agencies are also required by Section 501 of the Rehabilitation Act of 1973 to take affirmative action in the hiring, placement, and advancement of handicapped individuals (Appendix III:7). Although courts have ruled both ways as to whether there is a private cause in section 504 cases involving federal agencies, recent court decisions have held that: (1) section 501 is the proper statute, not section 504, for redressing charges of discrimination by disabled federal employees; and (2) exhaustion of administrative remedies under section 501 (those pursuant to Title VII of the Civil Rights Act of 1964) must precede a right of action. The leading case in this area is *Prewitt v. U.S. Postal Service* (Appendix IV:146), in which the court ruled that a complainant must exhaust mandatory administrative procedures under section 501, and has a private right to sue in court only after having done so. (For courts which have ruled similarly, see Appendix IV:25, 50, 73, 237, 271 (where, however, there is no discusison of exhaustion of administrative remedies), 275, 276, 282, 283, 284, and 287.) A few courts have ruled on claims brought only under section 504 against a federal agency by a disabled employee (see Appendix IV:123, 141, 195, 206, 232, and 239). Where a plaintiff is suing a federal agency alleging discrimination not in employment, but in access to a program (Appendix IV:118) or a facility (Appendix IV:203), courts have allowed actions brought under section 504.

(For discussions of awards of damages and attorneys' fees in actions against federal agencies, see ¶860. For a discussion of employment practices under federally conducted programs and activities, see ¶601.)

Section 504 and the 11th Amendment

The Supreme Court ruled in *Scanlon v. Atasadero State Hospital* (Appendix IV:172) that states are protected from suits based upon the Rehabilitation Act by the provisions of the 11th Amend-

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* Indicates new or revised material.

ment, and that the traditional exceptions to the Amendment do not apply to section 504. In reversing the decision of the 9th Circuit Court of Appeals, the Supreme Court determined that the general authorizing language of sections 504 and 505, which provides for suits to be filed in federal courts, does not rise to the level of specificity required to abrogate the 11th Amendment's immunity. According to the Court, "Congress may abrogate the states' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute. The fundamental nature of the interests implicated by the 11th Amendment dictates this conclusion."

The Court also rejected the argument that the state implicitly consented to suit in *Scanlon* by accepting Rehabilitation Act funds. Even this, according to the Court, "falls short of manifesting a clear intent to condition participation in the programs . . . on a state's consent to waive its constitutional immunity."

This ruling is consistent with earlier decisions of the 1st and 8th Circuits in *Ciampa v. Massachusetts Rehabilitation Comm'n* and *Meiner v. Missouri* (Appendix IV:238 and 69, respectively). The decision applies only to suits in federal courts, however, not to suits brought in state courts to enforce state nondiscrimination laws. The decision is significant for it precludes the broader federal remedies, such as recovery of attorneys' fees and injunctive relief, that are often unavailable under state laws.

For other cases construing the bar to section 504 suits on the basis of the 11th Amendment sovereign immunity, see Appendix IV: 335, 392 and 429.

is limited to a specific activity that receives federal funds. In this case, the training program didn't receive federal funds, so it was not subject to section 504, said the department.

The court upheld Schmidt's right to bring suit on the basis that disputes over program specificity belong in the realm of summary judgment motions. Citing *Byers v. Rockford Mass Transit District* (Appendix IV:369), it said "the issue of program specificity cannot be properly analyzed in the abstract, but instead requires a concrete set of facts." These facts, the court noted, would be the subject of a motion for summary judgment.

Schmidt's claim that the Police Department receives federal assistance is sufficient to survive a motion to dismiss, the court said. But it left open the possibility of the department raising the issue again on summary judgment should "facts come to light that make the challenge appropriate." (Editor's note: The Civil Rights Restoration Act of 1988 applies federal civil rights statutes to all programs of a federal funds recipient, not just the program receiving the money — see ¶310.)

The court also affirmed Schmidt's claims under title VII of the Civil Rights Act, the 14th amendment and the equal protection clause. It dismissed a due process claim she brought against the Police Department.

465 *Leake v. Long Island Jewish Medical Center*, No. 88-7815, (2nd Cir. 1989)

Civil Rights Restoration Act applies retroactively to suits pending at time of enactment

The 2nd U.S. Circuit Court of Appeals has ruled that Congress intended the 1988 Civil Rights Restoration Act to apply retroactively to suits pending at the time of enactment.

This case involves Robert Leake, a man with one arm who was discharged in 1985 from his job at Long Island Jewish Medical Center. After exhausting administrative remedies, Leake sued the medical center in 1987 under Section 504 of the Rehabilitation Act.

When the suit was filed, the Supreme Court's *Grove City College v. Bell* decision prevailed. In that case, the Court interpreted section 504 to cover only the specific programs that received federal financial assistance, and not other programs that did not receive federal funding within the same institution.

In 1988, however, Congress passed the Civil Rights Restoration Act, which overturned *Grove City* and amended section 504. The law extends federal civil rights coverage, including that provided by the Rehabilitation Act, to all programs of a federal funds recipient, not just to the ones receiving federal funding.

Contending that the law does not apply retroactively, the medical center filed for summary judgment. But the District Court denied the motion, ruling that Congress did intend the act to cover suits pending when it was passed. The appellate court affirmed this decision, and remanded the case for further proceedings.

466 *Hall v. United States Postal Service*, 857 F.2nd 1073 (6th Cir. 1988)

Postal Service failed to demonstrate that reasonable accommodation is not possible with a particular handicapped employee

The U.S. Postal Service failed to demonstrate that it could not reasonably accommodate a disabled employee who applied for a clerk position that required heavy lifting, the 6th U.S. Circuit Court of Appeals ruled.

Odis Hall was a letter carrier with the Postal Service who would perform clerk work in the main post office during Christmas "rush" periods. She said the clerk job mostly involved sorting mail, but never heavy lifting. In 1973 while on her route, Hall was hit by a car and suffered hip, foot and back injuries. When her worker's compensation expired, she asked to be reinstated as a distribution clerk.

According to the job description, distribution clerks are required to kneel, bend and lift up to 70 pounds. Because both her doctor and the Postal Service physician said such activity would pose a serious risk to Hall's health, the Postal Service rejected her application.

However, Hall claimed that the physical requirements were not essential to the clerk job as she remembered it. She filed a complaint against the Postal Service in the U.S. District Court for the Eastern District of Michigan, charging that she had been denied the clerk's job because of a physical handicap in violation of the Rehabilitation Act.

The Postal Service argued that Hall had no claim under the Rehabilitation Act because she was not an otherwise qualified handicapped person. It said lifting was an essential function of the clerk's job, and that under the Rehabilitation Act, it was not required to eliminate such a task to accommodate a disabled employee. The District Court agreed and granted summary judgment.

The appellate court, however, rejected that decision, because "there are genuine issues of material fact as to whether Hall could perform the essential functions of the distribution clerk position and, if she could not, whether a reasonable accommodation would enable her to perform those functions."

As required by *Arline v. Nassau County School Board* (Appendix IV:329), the Postal Service should have conducted an individual inquiry because questions of physical qualifications were raised, the court held. "Such a determination should be based upon more than statements in a job description and should reflect the actual functioning and circumstances of the particular enterprise involved," it said.

Hall raised a legitimate factual dispute about whether the 70-pound lifting requirement was indeed essential, the court said, adding that the Postal Service produced no evidence to refute Hall's observation that no clerk ever did any heavy lifting when she worked in a clerk capacity.

The court noted that federal employers have the "affirmative obligation to make reasonable accommodations for handicapped employees," and that the burden rests with them to prove that such an accommodation is not possible in a particular situation.

"In this case," the court said, "the Postal Service failed to introduce any evidence suggesting that it could not reasonably accommodate Hall."

Finally, the court criticized both the District Court and the Postal Service for operating "under the assumption that *every* accommodation relating to an essential function of a position necessarily *eliminates* that function (emphasis included)." This, the court said, "is simply not the law."

The dissent found that summary judgment was appropriate because, it said, Hall failed to follow the proper administrative procedures and because she *"has never claimed or demonstrated any filing of a written complaint asserting handicap discrimination* as is required (emphasis included)." Further, the dissent noted, "there was no factual material

issue as to Hall's inability to perform that job as to one or more of its essential functions. The grant of summary judgment was clearly indicated."

The summary judgment was reversed and the case remanded for further proceedings.

467 *Leckelt v. Board of Commissioners of Hospital District No. 1*, No. 86-4235, (E.D. La., 1989)

Hospital's need to monitor employee infection and protect patients precludes finding that discharge of employee who refused to supply HIV test results violates section 504

A hospital did not violate Section 504 of the Rehabilitation Act when it discharged a nurse who refused to disclose his human immunodeficiency virus (HIV) test results, the U.S. District Court for the Eastern District of Louisiana has ruled.

At the request of the hospital, the nurse, Leckelt, was tested for HIV infection. The hospital requires employees to report any infectious or communicable disease to the employee health service; this policy is spelled out in the employee manual. For three weeks, the hospital asked Leckelt to produce his test result, but he refused. The hospital first suspended and then discharged him, citing his failure to comply with hospital policy.

Leckelt claimed that the hospital fired him because it suspected he tested positive for HIV. He sued, claiming the discharge violated section 504. Under section 504, people who are perceived to be impaired are considered to be individuals with handicaps. (And under the Civil Rights Restoration Act, contagious diseases are considered handicapping conditions.)

The court dismissed Leckelt's claim, saying he failed to prove that the discharge was based on a perceived handicap. "The fact that the hospital repeatedly insisted that the nurse produce his test results flies in the face of a conclusion that it perceived him as being HIV positive," the court said. "No evidence was produced that anyone involved in the decision had concluded that he was seropositive."

During this period, the hospital learned that Leckelt had not reported that he was a hepatitis B carrier and that he had had syphilis, the court noted. These facts, as well as the nurse's failure to submit the HIV test results in compliance with hospital policy, established a legitimate motive for the discharge. "When an employer has a lawful motive for discharging an employee, the employer's coincidental consideration of the employee's handicap does not prevent the employer from acting on its lawful motive," the court said.

If the hospital had known Leckelt's HIV status, then it would have been able to accommodate him like any other affected employee, the court said. Hospital policy for infected employees includes leave of absence and change in work assignments. Were Leckelt to be HIV positive, the hospital could modify his work duties to protect both him and the patients, the court said. The hospital fired the nurse not "out of fear and ignorance," the court said, but because he had violated the hospital's infection policy.

The court also rejected Leckelt's section 504 claim on the basis that he was not otherwise qualified. "Hospitals must establish policies and procedures for controlling the risk of transmitting infectious or communicable diseases," the court said, and Leckelt's refusal to comply with that policy rendered him not otherwise qualified to perform his job.

468 *Rogers v. Bennett*, 868 F.2d 415 (11th Cir. 1989)

State must exhaust administrative remedies before suing Department of Education over jurisdiction to investigate complaints under section 504

A plaintiff must exhaust administrative remedies before it brings suit against a federal agency for lack of jurisdiction, the 11th U.S. Circuit Court of Appeals has ruled.

The dispute here, between the U.S. Department of Education's (ED) Office of Civil Rights (OCR) and Georgia education officials, is whether OCR has the jurisdiction to investigate complaints brought under Section 504 of the Rehabilitation Act regarding educational opportunities for disabled students.

Parents have an exclusive procedure under the Education of the Handicapped Act (EHA) to challenge a state's denial of educational benefits to handicapped children. OCR also has the authority to review state and local schools to ensure compliance with section 504. OCR can initiate these reviews periodically or when it receives a complaint, usually from a parent. If the state or local school district refuses to cooperate with the investigation, ED may terminate federal funding.

In this case, OCR, responding to several complaints filed under section 504, initiated investigations of special education programs operated by DeKalb and Chatham counties (Ga.) and the state department of education. However, both the county and state officials refused to cooperate. Consequently, OCR began administrative proceedings to terminate federal funding for the three handicapped programs.

The Georgia State Board of Education and the county administrators sued, charging that OCR was acting beyond its jurisdiction under section 504. OCR moved to dismiss on the grounds that the Georgia educators must exhaust administrative remedies as a precondition to adjudication.

The District Court ruled in favor of OCR, and the appellate court upheld that decision. Requiring plaintiffs to exhaust administrative appeals, the appeals court said, assures that "courts review ripe controversies, presenting concrete injuries." Until OCR decides whether or not to cut off federal funding, the court said, "the issues presented by this action will not be ripe for adjudication."

The court noted that a plaintiff may pursue a lawsuit without exhausting administrative remedies only if: (1) exhausting administrative remedies clearly will result in irreparable injury; (2) the agency's jurisdiction is plainly lacking; and (3) the agency's special expertise is of no help on the question of its jurisdiction.

The Georgia educators failed on all three conditions. "The appellants in this case have failed to demonstrate that they will be irreparably injured" if they fulfill the first condition, the court said. Should OCR terminate funding, the Georgia officials could then file suit challenging OCR's jurisdiction, the court noted. The state could avoid injury to the handicapped students by asking a court to stay the termination until the case is decided.

Second, the court found that OCR's exercise of supervisory power over the Georgia special education programs is "not plainly outside of the agency's jurisdiction." Examining the interplay between EHA and section 504, the court

determined that EHA provides the appropriate remedy when a parent files suit against a school. But in this case a federal agency is bringing the action. ''Law may allow — and Congress may have intended — two overlapping, complementary schemes of enforcement: one exercised by private litigants through the provision of the EHA, the other provided by OCR supervisory investigations as authorized under the regulations to section 504,'' the court said.

Finally, the court concluded that ''the Department of Education's expertise in this area will greatly aid judicial review of the issues presented in this case.'' Without OCR's official interpretation of its regulations, a court is faced with the ''difficult task of guessing what the agency's interpretation will be, and then passing on its propriety,'' the court said.

May 23, 1989

Memorandum

To: Interested Parties

From: Pat Morrissey (225-7101), Professional Staff and
Randy Johnson (225-3725), Labor Counsel
of the Committee on Education and Labor

Subject: *Background on the Americans with Disabilities Act of 1989*

This legislation would prohibit discrimination on the basis of disability by the private sector and state and local governments. Introduced May 9, 1989 in both the House and Senate (H.R. 2273 and S. 933), as of May 22, 1989, it had 110 House cosponsors and 35 Senate cosponsors. It is on a fast track, with final passage anticipated before the August recess.

Attached is some background information on the ADA:

(a) a status report,
(b) an overview of the bill, and
(c) major problems.

May 23, 1989

Americans with Disabilities Act of 1989
Status Report

Introduction: The ADA was introduced in the House (H.R. 2273) and the Senate (S. 933) on May 9, 1989. The House sponsor is Mr. Coelho with 84 cosponsors. The Senate sponsor is Mr. Harkin with 33 cosponsors.

History: In April, 1988, the ADA was originally introduced. It was developed by the National Council on Disability, an independent agency with 15 members appointed by President Reagan. The legislation had many cosponsors. A hearing was held in September, 1988, but no other action was taken in the 100th Congress.

Justin Dart, with the endorsement of Chairman Major Owens of the Subcommittee on Select Education, created the Task Force on the Rights and Empowerment of Individuals with Disabilities in May, 1988. Throughout the remaining months of 1988, he conducted forums in every State, some territories, and Puerto Rico, to collect testimony with examples of how individuals with disabilities have been discriminated against in the areas covered by the legislation. Testimony was received from 9,000 individuals and grassroots support for the legislation was mobilized.

1988 Republican Platform -- This platform contains language that reflects and endorses the intent of the ADA.

President Bush: President Bush endorsed the concept of the ADA during the fall campaign. Currently Executive Branch agencies are now analyzing the bill. The White House anticipates a final position by September, 1989.

The Senate: Senator Harkin anticipates speedy passage. Three hearings were held this month. Senator Hatch urged that the White House be given to June 19, 1989, to react to the ADA. If it does not, he indicated then the Committee on Labor and Human Resources could go forward without its formal input. Senators Harkin and Kennedy agreed to Senator Hatch's suggestion.

The House: The ADA has been referred to four Committees -- Education and Labor, Energy and Commerce, Judiciary, and Transportation and Public Works. Mr. Michel asked Mr. Coelho to work with him to develop a bipartisan bill. Mr. Coelho has agreed. The first meeting between Republican and Democrat Committee is scheduled for May 31, 1989. Mr. Michel plans to meet with representatives of the disability community and to arrange meetings with this group and the business community.

The Business Community: The Chamber of Commerce sponsored a briefing for business organizations on May 5, 1989. It is anticipated that small working groups on different issues will be established to work with Congressional staff. The Chamber has scheduled a second briefing for May 24, 1989.

The Disability Community: This community has become very organized since the Justin Dart forums. It is agressively seeking rapid passage of the bill. It appears, however, that there is not much awareness or full understanding, among the members of the group both inside and outside of Washington, D.C., of the specific provisions in the ADA or their implications for the private sector.

May 23, 1989

OVERVIEW OF THE AMERICANS WITH DISABILITIES ACT OF 1989

Purpose

The purpose of the Americans with Disabilities Act of 1989 (ADA) is to "establish a clear and comprehensive prohibition of discrimination on the basis of disability." Currently such a prohibition applies to the Executive Branch, Federal contractors and recipients of Federal financial assistance through title V of the Rehabilitation Act and to matters related to the sale and rental of housing through the Fair Housing Amendments of 1988. **The ADA (H.R. 2273 and S. 933) would extend the prohibition against discrimination on the basis of disability to the private sector and to state and local governments in such areas as -- employment, public services provided by state and local governments, public accommodations and services provided by private entities, and telecommunications relay services.** It is viewed as an extension of civil rights similar to those now available on the basis of race, national origin, and religion through the Civil Rights Act of 1964.

Definitions

The definition for disability is the same as that contained in section 504 of the Rehabilitation Act and in the Fair Housing Amendments of 1988. With respect to an individual, the term disability means -- a physical or mental impairment that substantially limits one or more of the major life activities; a record of such an impairment; or **being regarded as having such an impairment.**

The term "qualified individual with a disability" is defined further in title II pertaining to employment to *"mean an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position the individual holds or desires."* A similar clarification for "qualified individual with a disability" is contained in title III pertaining to public services provided by state and local governments and is defined to mean --

> *an individual who with or without reasonable modifications to rules, policies, and practices, the removal of architectural, communication, and transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements...for services....*

Discrimination

Discrimination is construed differently in titles I though V of the ADA to accommodate the different foci in each. For example, in title I which addresses general prohibitions against discrimination, discrimination is viewed as denying opportunities, providing an opportunity that is not equal to or as effective as that provided to others, or helping others to perpetuate the same forms of discrimination.

Under title II which relates to employment, discrimination includes the failure to provide reasonable accommodation; to hire someone because he/she needs such accommodation; or the application of qualification standards, tests, or eligibility criteria that identify or limit individuals on the basis of disability.

Title III, Public Services, addresses principally transportation systems and facilities associated with such systems, and thus contrues discrimination as the failure to make such systems and facilities accessible to individuals with disabilities, including those in wheelchairs.

Title IV, Public Accommodations and Services Operated by Private Entities covers privately operated establishments -- auditoriums, convention centers, stadiums, theaters, restaurants, shopping centers, inns, hotels and motels. Discrimination is construed in terms similar to those found in titles I and III.

Title V applies to telecommunications relay services offered by private companies, and includes services regulated by states. Discrimination is viewed as the failure to provide access to nonvoice terminal devices to those who cannot use the conventional telephone system.

Standards of Compliance

The ADA provides exemptions and conditions for compliance that vary across titles. For example, title I allows for qualification standards that require the current use of alcohol or drugs, by an abuser of such substances, not pose a direct threat to the property and safety of others; or that an individual with a contagious disease or infection, not pose a direct threat to the health or safety of others.

Elected officials and their staff, nonprofit entities, and entities that employ less than 15 individuals are exempt from coverage under title II. In addition, an employer is not required to make reasonable accommodation for an individual on the basis of disability, if such an employer can demonstrate that it would constitute an undue hardship on the operation of the business. Finally, special standards and criteria that may discriminate against an individual on the basis of disability may be used if an employer can demonstrate that they are necessary and substantially related to the ability of an individual to perform the essential functions of the position.

Under title III no retrofitting of buses is required, but all new vehicles and remanufactured vehicles with a life of more than five years must be accessible. In the purchase of used vehicles only a good faith effort must be demonstrated. All new facilities and those subject to alterations must be made accessible. Intercity, rapid, light, and commuter rail systems must be accessible within five years. Key stations must be made accessible within 3 years, but the Secretary of Transportatation may give waivers for up to 20 years for extraordinarily expensive structural alterations.

Under title IV, private entities may be exempted if they can demonstrate that making reasonable accommodation would fundamentally alter the nature of priviliges, advantages, and accommodations; that providing auxillary aids constitutes an undue burden; or that removing a barrier and providing an alternative are not readily achievable. Facilities that are altered, to the maximum extent feasible, must be accessible and new facilities that would be occupied 30 months after enactment must be accessible. New vehicles that carry more than 12 individuals must be accessible.

Under title V dealing with telecommunications relays, compliance by covered entities is required within one year of enactment of the ADA.

Remedies and Procedures

Remedies and procedures vary both within and across titles, encompassing the full range from injunctive relief and attorney's fees to compensatory and punitive damages. In addition, title V alone allows for administrative actions as well as individual suits. Finally, the ADA calls for the development of regulations by varying Federal entities, including the EEOC, the Departments of Transportation and Justice, and the Federal Communications Commission. The variety in remedies and procedures throughout the ADA may cause multiple interpretations in the area of enforcement.

Further, the ADA would not preempt other disability laws that may be applicable to the same extent as the ADA. Thus, an employer could possibly be subject to different suits in different forums under different standards of compliance although the underlying facts giving rise to the disability discrimination claim were the same.

May 23, 1989

AMERICANS WITH DISABILITIES ACT OF 1989
MAJOR PROBLEMS

1. Definition of disability -- The ADA includes a provision which would allow an individual, "regarded as having an impairment," to be considered an individual with a disability. Although such a provision is contained in other legislation that prohibits discrimination on the basis of disability, it would appear to allow very expansive coverage of individuals and classes of individuals, such as those suspected of having AIDS.

2. Equal treatment standard -- The ADA requires that equal and as effective means be offered to an individual with a disability so that such an individual may achieve the same result or outcome as other individuals. This appears to be a very rigorous standard that would not allow for a covered entity to offer a comparable treatment/service/opportunity for an individual to achieve a comparable, rather than the same, outcome. It is unclear how this standard would affect, and possibly restrict, efforts to provide reasonable accommodation.

3. Coverage of individuals who are alcohol and drug abusers and those with contagious diseases or infections -- The ADA would prohibit discrimination against such individuals unless they posed a direct threat to the property and safety or health and safety, respectively, of others in the workplace. (This provision is contained only in title I which addresses general prohibitions.) The alcohol and drug provision would seem to potentially conflict with legislation requiring a drug free workplace. The provision pertaining to contagious disease or infection would extend coverage to individuals with AIDS or regarded as having AIDS.

4. Anticipated discrimination -- The ADA would allow an individual to sue if he/she was discriminated against on the basis of disability or ***believes he/she is about to be discriminated against on such a basis.*** It is unclear how a case of ***anticipated discrimination would be proved or disproved.***

5. Access to varied and multiple penalties -- The ADA would allow an individual who successfully sues because of discrimination on the basis of disability, to obtain injunctive, and possibly compensatory, relief and attorney's fees, and/or compensatory and punitive damages, in employment cases and those involving public accommodations and services operated by private entities; to obtain injunctive relief and attorney's fees in cases involving public services (likely to be transportation cases); and to seek individual cause of action (injunctive relief and attorney's fees, and/or compensatory and punitive damages) or administrative action (which would include cease and desist orders and fines), in cases involving telecommunications relay services. Having such a range of penalties may lead to severe opposition to the legislation, and, if enacted, full employment for attorneys and inconsistency in interpretation of the law.

6. Allowance of suits in cases of both intentional and unintentional discrimination -- Because of the phrase "fail to..." in the provisions which define discrimination (for example, fail to provide opportunity, access, reasonable accommodation etc.), it is likely that covered entities would be subject to suits involving either kind of discrimination. "Fail to" does not require conscious intent, it just requires that an action or the failure to act has the effect of discrimination. Other language in the ADA also appears to prohibit practices with an adverse impact, regardless of intent, on idividuals with disabilities. It would seem appropriate to limit the right to sue in cases of unintentional discrimination to specific circumstances where covered entities have experience, knowledge, and resources that would allow tham to avoid such discrimination.

7. Inclusion of section 504 references in ADA -- Section 504 of the Rehabilitation Act prohibits discrimination on the basis of handicap by recipients of Federal financial assistance. The ADA includes references to section 504 in its provisions pertaining to transportation. The reason for such references is unclear. Do the references to section 504 in the ADA change standards related to transportation that now apply to recipients of Federal financial assistance covered by section 504?

8. Burden of proof -- The ADA appears unclear on where the burden of proof lies in most titles. Such lack of clarity needs to be resolved, especially in cases of unanticipated discrimination.

91-291 A
March 28, 1991

CRS Report for Congress

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The Americans with Disabilities Act: Equal Employment Opportunity Commission Proposed Regulations on Equal Employment Opportunity for Individuals with Disabilities

Nancy Lee Jones
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American Law Division

SUMMARY

The Americans with Disabilities Act (ADA) is a major civil rights statute covering individuals with disabilities. Proposed regulations have recently been published by the Equal Employment Opportunities Commission (EEOC) for title I of the ADA. These proposed regulations may raise several issues, including questions about who is considered to be an individual with disabilities, and whether a qualifications standard may include a requirement that an individual not pose "a direct threat to the health or safety of the individual or others."

BACKGROUND

The ADA, P.L. 101-336, 42 U.S.C. secs. 12101 et seq., has often been described as the most sweeping nondiscrimination legislation since the Civil Rights Act of 1964. Enacted on July 26, 1990, it provides broad based nondiscrimination protection for individuals with disabilities in employment, public services, public accommodations and services operated by private entities, transportation, and telecommunications. The act specifically provides for the issuance of regulations by various entities and recently four sets of proposed regulations have been promulgated: accessibility guidelines by the Architectural and Transportation Barriers Compliance Board[1], regulations for nondiscrimination on the basis of disability by public accommodations by the Department of Justice[2], regulations for nondiscrimination on the basis of

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[1] 56 Fed. Reg. 2296 (Jan. 22, 1991)(Comments due by March 25, 1991).

[2] 56 Fed. Reg. 7452 (Feb. 22. 1991)(Comments due April 23, 1991).

disability in state or local government services by the Department of Justice[3], and regulations concerning equal employment opportunity for individuals with disabilities by the EEOC.[4]

ANALYSIS

Section 106 of the ADA, 42 U.S.C. sec. 12116, requires the EEOC to issue regulations implementing title I of the Act within one year of the act's passage. Proposed regulations were issued on February 28, 1991 and comments will be considered if received by April 29, 1991. On August 1, 1990, the Commission had published an advance notice of proposed rule making[5] inviting comment on the development of the proposed rule and numerous comments were received.

The ADA is a detailed statute which is described by the EEOC as "unusual...in that it contains a level of detail more commonly found in regulations, leaving very little room for regulatory discretion....The regulation merely explains and provides guidance on the statutory requirements by relying primarily on existing case law, which is another limitation on Commission discretion in constructing the regulation."[6] Prior to a discussion of the February proposed regulations, therefore, it is helpful to examine briefly the ADA's statutory language and legislative history regarding title I.

Statutory Requirements of the ADA Regarding Employment

The Americans with Disabilities Act was based on the regulations and judicial interpretation of section 504 of the Rehabilitation Act of 1973, 29 U.S.C. sec. 794.[7] The definition of the term "disability" is the same as that applicable to section 504: the term disability is defined as meaning with respect to an individual "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment."[8]

The core requirement of title I of the ADA is that no covered entity shall discriminate against a qualified individual with a disability because of the disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions and privileges of employment. The term employment is defined as a

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[3] 56 Fed. Reg. 8538 (Feb. 28, 1991)(Comments due by April 29, 1991).

[4] 56 Fed. Reg. 8578 (Feb. 28, 1991)(Comments due by April 29, 1991).

[5] 55 Fed. Reg. 31192 (Aug. 1, 1990).

[6] 56 Fed. Reg. 8579 (Feb. 28, 1991).

[7] S.Rep. No, 116, 101st Cong., 1st Sess. 24-44 (1989).

[8] 29 U.S.C. sec. 706(8); ADA sec. 3, 42 U.S.C. sec. 12102(2).

person engaged in an industry affecting commerce who has 15 or more employees; however, for the two years following the effective date of the title, an employer means a person engaged in an industry affecting commerce who has 25 or more employees. The term qualified individual with a disability is defined as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that the person holds or desires."[9] These requirements also echo those in the section 504 regulations, particularly with regard to the requirement to provide reasonable accommodation unless such accommodation would pose an undue hardship on the operation of the business. The ADA specifically lists some defenses to a charge of discrimination including (1) that the alleged application of qualification standards has been shown to be job related and consistent with business necessity and such performance cannot be accomplished by reasonable accommodation, (2) the term qualification standards can include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the work place, and (3) religious entities may give a preference in employment to individuals of a particular religion to perform work connected with carrying on the entities' activities.[10]

Major Issues Raised by the EEOC's ADA Regulations

The EEOC's ADA regulations closely parallel the statutory language of the ADA, its legislative history, and regulatory and judicial interpretation of section 504 of the Rehabilitation Act. However, certain additions are made, such as definitions for the terms "substantially limits," "essential functions," and "reasonable accommodation." A proposed appendix is also included at the end of the regulations which provides further interpretation. In addition, the Commission has stated it will provide more detailed guidance in a compliance manual which is expected to be issued prior to the ADA's effective date. The Commission has indicated that the compliance manual will contain guidance on issues such as theories of discrimination, definitions of disability and of qualified individual with a disability, and reasonable accommodation and undue hardship.[11]

The EEOC specifically asked for comments on several of the difficult issues raised by title I. These include comments on how to determine whether an employer regards a particular individual as having an impairment that substantially limits the major life activity of working; insurance; worker's compensation; and collective bargaining agreements. With regard to insurance, one of the most difficult issues in disability law, the EEOC has asked for comments on four questions: (1) what are the current risk assessment or

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[9] ADA, sec. 101(8), 42 U.S.C. sec. 12111.

[10] For a more detailed discussion of the statutory requirements of the ADA see "The Americans with Disabilities Act: An Overview of Major Provisions," CRS Rep. No. 90-366A (July 31, 1990).

[11] 56 Fed. Reg. 8578 (Feb. 28, 1991).

classification practices with respect to health and life insurance coverage in the area of employment? (2) must risk assessment or classification be based on actuarial statistics? (3) what is the relationship between "risk" and "cost"? and (4) must an employer or insurance company consider the effect on individuals with disabilities before making cost saving changes in its insurance coverage?[12] With regard to worker's compensation, the EEOC has asked for comment on three questions: (1) is submission of medical information to worker's compensation offices a permissible use of information obtained as a result of a medical examination or inquiry? (2) is an inquiry into the medical history of an individual's worker's compensation claims a prohibited pre-employment inquiry or could it ever be a job-related inquiry? (3) what has been the experience of federal contractors subject to section 503 of the Rehabilitation Act with respect to State worker's compensation requirements? Finally, with regard to collective bargaining agreements, the EEOC has posed four questions: (1) can the effect of a particular accommodation on the provisions of a collective bargaining agreement ever be considered an undue hardship? (2) what is the relationship between collective bargaining agreements and the accommodation of reassignment to a vacant position? (3) should a position be considered vacant when the employer has other obligations, such as consent decrees or arbitration agreements, with respect to filling the position? and (4) if a necessary reasonable accommodation is challenged as a violation of a collective bargaining agreement, would the employer or union violate the confidentiality requirements of the ADA by explaining that the accommodation was made to comply with the ADA?

In addition to the issues that the EEOC has specifically sought comment on, several others may prove to be controversial. The issues revolving around the definition of individual with disabilities are among the most critical. Among the specific areas which may be of concern to commentators in this regard is the proposed regulatory guidance on factors to be considered concerning whether an individual is substantially limited in a major life activity. These factors include "the duration or expected duration of the impairment." This raises the issue of whether temporary disabilities such as a broken leg would be covered. In the proposed appendix, the EEOC states that a broken leg that takes 8 weeks to heal is an impairment of a fairly brief duration but does not indicate that this would be an automatic exclusion although it does note that "temporary, non-chronic impairments of short duration, with little or no long term or permanent impact are usually not disabilities."[13] The EEOC emphasizes that "the determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis."[14] Similarly, the proposed EEOC regulations do not directly address the controversial issue of whether

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[12] 56 Fed. Reg. 8579 (Feb. 28, 1991).

[13] 56 Fed. Reg. 8594 (Feb. 28, 1991).

[14] 56 Fed. Reg. 8593 (Feb. 28, 1991).

obesity is a disability but note in the appendix that "except in rare and limiting circumstances, obesity is not considered a disabling impairment."[15]

One of the more controversial aspects of the EEOC proposed regulations is the definition of "direct threat." The ADA defines the term "qualifications standards" so as to allow inclusion of a requirement that an individual not pose "a direct threat to the health or safety of other individuals in the workplace."[16] The proposed EEOC regulations would define the term qualifications standard to allow inclusion of a requirement that an individual not pose a "direct threat to the health or safety *of the individual* or others."[17] The proposed appendix elaborates on this. "If performing the particular functions of a job would result in a high probability of substantial harm to the individual, the employer would reject or discharge the individual unless a reasonable accommodation that would not cause an undue hardship would avert the harm. For example, an employer would not be required to hire an individual, disabled by narcolepsy, who frequently and unexpectedly loses consciousness for a carpentry job the essential functions of which require the use of power saws and other dangerous equipment, where no accommodation exists that will reduce or eliminate the risk."[18] However, the legislative history of the ADA refers only to a direct threat to others although the case law under section 504 is more ambiguous.[19]

Of perhaps more significance as an argument by analogy is the Supreme Court's recent decision under title VII of the Civil Rights Act of 1964 in *Automobile Workers v. Johnson Controls, Inc.*, No. 89-1215 (March 20, 1991). In *Johnson Controls*, the Court found that an employer could not, in an attempt to protect potential fetuses, discriminate against women just because of their ability to become pregnant. The safety exception for title VII was seen as "limited to instances in which sex or pregnancy actually interferes with the employee's ability to perform the job....Decisions about the welfare of future children must be left to the parents who conceive, bear, support, and raise them rather than to the employers who hire those parents." The Court also addressed the issue of the potential liability of the employer for harm and stated: "[i]f under general tort principles, Title VII bans sex-specific fetal-protection policies, the employer fully informs the woman of the risk, and the employer has not

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[15] 56 Fed. Reg. 8594 (Feb. 28, 1991).

[16] ADA sec. 103, 42 U.S.C. sec. 12113.

[17] 56 Fed. Reg. 8588 (Feb. 28, 1991).

[18] 56 Fed. Reg. 8597 (Feb. 28, 1991).

[19] See *Davis v. Meese*, 692 F.Supp. 505 (E.D.Pa. 1988), *aff'd without opinion*, 895 F.2d 592 (3d Cir. 1989), where an insulin dependent diabetic was denied employment as an investigative specialist and special agent with the FBI due to a "very real danger of serious harm to the special agent or investigative specialist and uninvolved third parties, as well as potential serious harm and disruption to the operation of the FBI..." At 520.

acted negligently, the basis for holding an employer liable seems remote at best." If the logic of *Johnson Controls* was applied to the direct threat language in the ADA, it would appear that the safety of an individual with disabilities would not be a criteria which could be used to deny employment to such an individual unless the disability interferes with the ability to do the job. It could be argued that the example given in the EEOC proposed appendix regarding an individual with narcolepsy who wanted to become a carpenter might fall within a *Johnson Controls* type of test in that arguably the disability in that situation would interfere with the ability to do the job. However, the more general language of the proposed EEOC regulation may not be consistent with the type of rationale used by the Court.

Another issue which has been controversial is that concerning the employment of former drug addicts. The ADA specifically provides that the term "individual with a disability" "does not include an individual who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use."[20] However, the ADA definition does not exclude individuals who are no longer engaging in such activity. This has given rise to questions concerning whether certain employers, particularly law enforcement agencies, can take a previous history of drug abuse into account. This issue is not directly addressed in the EEOC proposed regulations but is discussed in the proposed appendix. "An employer, such as a law enforcement agency, may also be able to impose a qualification standard that excludes individuals with a history of illegal use of drugs if it can show that the standard is job-related and consistent with business necessity."[21]

Nancy Lee Jones
Legislative Attorney
March 28, 1991

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[20] ADA, sec. 510, 42 U.S.C. sec. 12210.

[21] 56 Fed. Reg. 8597 (Feb. 28, 1991).

March 20th
staff mtg.

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ADA Regs

ADA 9.a. - Dec. 5th - vol 50237
#6 on TA - supp. approp.

12 ATBCB - 1/22/91 - FR vol 56 - 2296 comment 3/25/91
10 EEOC (2 sets) PA 2/22/91 vol 56 - 7452 comment expires
4 DOJ → S.Ct 2/28/91 vol 56 8538 comment 4/23/91
FCC 4/29/91
9.6 DOT - paratransit

2/28/91
FR 8578
4/29/91
comment

meetings across country
more specific examples
copies of Regs - Bobby

final form 1 yr ~~p~~ enactment - time
4 yrs for 75 Regs / 88

DOJ - 514-0301
rating

coordinate DOJ / ~~EEOC~~ Regs
Resources - nat'l, state · local
get info out

TA
waiver
Nutter
CEC briefing
Ashton
Davis letter
Letter re Article

May 24, 1990

TO: Senator Dole

FROM: Mo West

SUBJECT: Senate/House ADA Differences

The Americans with Disabilities Act passed the House by a vote of 403-20. Four of the eight scheduled amendments passed during House floor debate. The only substantial and controversial change made to the House bill was Rep. Chapman's "Food Handlers" amendment.

Rep. Chapman's AIDS amendment to the employment title of the ADA specifies that it is not a violation of the Act for any employer to refuse to assign any employee with an infectious or communicable disease of public health significance (AIDS) to a job involving food handling, provided that the employer shall make a reasonable accommodation which offers an alternative employment opportunity for which the employee would sustain no economic loss. -- (The amendment does not take into account whether the individual poses a "direct threat" to the health or safety of others, thereby, discriminating against people with AIDS who pose no direct threat to others in food handling).

The Senate version specified that any person with a contagious disease who poses a "direct threat" to the health and safety of others may be fired or reassigned.

The Senate version in consistent with current statutes regarding people with AIDS and other contagious diseases, as well as, recent Supreme Court decisions. The Chapman amendment is based on unfounded fears and misperceptions about AIDS which only perpetuates discrimination. As you will note from the attached letter from Secretary Sullivan opposing the Chapman amendment -- AIDS cannot be transmitted during the preparation or serving of food or beverages and is inconsistent with anti-discrimination protections for people with AIDS and the intent of the Americans with Disabilities Act.

With reagrd to the public transportation provisions of the Act the House passed version specified that key transportation stations must be made accessible within 30 years with two thirds of the key stations accessible in 20 years. The Senate version required all key stations be made accessible within 20 years.

A House-Senate compromise was made during House Public Works & Transportation Committee action on the private transportation provisions of the Act. The Senate version required that within 6 years all new private buses be made "readily accessible and useable " to people with disabilities. In addition, the Senate

bill also mandated a study by OTA to be completed within 3 years to look at the most cost effective means of compliance. The compromise will mandate access but not require lifts. Instead regulations will define what constitutes access after reviweing the recommendations of the OTA study. The study's purpose has been changed to look at alternative means of providing access.

With respect to enforcement, the House amendment clarifies that the Attorney General may not seek damages on behalf of an aggrieved party and a person can bring suit for injunctive relief only if he or she is being subject to discrimination or has reasonable grounds for believing that he or she is about to be subject to discrimination because the covered entity is about to construct a new building in an inaccessible manner.

Finally, the House amendment changes the time frame under which a small business may be sued for violations under the public accommodations title. The House amendment retains the provisions delaying the effective date for 18 months. However, the House amendment specifies that with the exception of violations of provisions pertaining to making alterations and new construction "readily accessible to" and usable by people with disabilities, civil actions may not be brought against businesses that employ 25 or fewer employees and have gross receipts of $1,000,000 or less during the first 6 months after the effective date. Additionally, no civil actions may be brought against businesses that employ 10 or fewer employees and have gross receipts of $500,000 or less during the first year after the effective date.

The House only made one technical change to the telecommunications title of the Act which stipulates that every common carrier must still ensure that relay services are provided unless a state has already enacted legislation providing relay services.

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AMERICAN LAW DIVISION
MEMORANDUM

June 5, 1990

SUBJECT: The Americans With Disabilities Act: Major Distinctions Between the Senate and House Versions As Passed

AUTHOR: Nancy Lee Jones

I. Introduction

The Americans with Disabilities Act (ADA), S. 933 and H.R. 2273, 101st Cong., lst Sess., would provide broad based protection against discrimination for persons with disabilities in the private sector. The ADA would cover employment, public services, public accommodations and services operated by private entities, transportation, and telecommunications.[1] S. 933 and H.R. 2273 were introduced on May 9, 1989. S. 933 passed the Senate on September 7, 1989[2] and H.R. 2273 passed the House on May 22, 1990. Both the House and Senate versions as passed were substantially amended from their original forms.[3] These passed versions also differ from each other and will be the subject of a conference to reconcile these differences. This report

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[1] The ADA originated in a proposal from the National Council on Disabilities, an independent federal agency whose statutory functions include providing recommendations to the Congress regarding individuals with disabilities (29 U.S.C. sec. 781). Similar legislation, S. 2345 and H.R. 4495, was introduced in the 100th Congress.

[2] For a discussion of the Senate passed version see "The Americans with Disabilities Act, S. 933 as Passed by the Senate: An Overview," CRS Rep. No. 89-582 A (October 20, 1989).

[3] For a comparison of the original version as introduced in the House and Senate with the Senate passed version see "The Americans with Disabilities Act (ADA): A Comparison and Analysis of the Bill as Introduced and as Passed by the Senate," CRS Rep. No. 89-544A (September 27, 1989).

will analyze the major differences between the House and Senate versions as passed.

II. Selected Major Distinctions

A. Food Handlers (Chapman) Amendment

The distinction between the House and Senate passed versions which will likely cause the most controversy is section 103(d), an amendment relating to food handlers which was added during House floor debate by Representative Chapman. This amendment, adopted by the House by a vote of 199 to 187,[4] states: "It shall not be a violation of this act for an employer to refuse to assign or continue to assign any employee with an infectious or communicable disease of public health significance to a job involving food handling, provided that the employer shall make reasonable accommodation that would offer an alternative employment opportunity for which the employee is qualified and for which the employee would sustain no economic damage."

The amendment, often referred to as the "Chapman Amendment" or the "food handlers amendment," makes a substantive change from the ADA as introduced and as passed by the Senate. Prior to passage of the amendment, the ADA would have prohibited discrimination against persons with communicable diseases in food handling positions or who sought food handling positions unless they posed a direct threat to the health or safety of other individuals.[5] The Chapman amendment would not require proof of a direct threat but would allow an employer to refuse to assign any employee "with an infectious or communicable disease of public health significance" to a job involving food handling. The ADA was patterned on section 504 of the Rehabilitation Act of 1973, 29 U.S.C. sec. 794, which prohibits discrimination against otherwise qualified individuals with disabilities solely on the basis of disability in any program or activity that receives federal financial assistance. The Chapman amendment constitutes a different approach from the interpretation given section 504 by the Supreme Court. In *School Board of Nassau County v. Arline,* 480 U.S. 273 (1987), the Court held that a "person

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[4] 136 Cong. Rec. H 2484 (daily ed. May 17, 1990).

[5] Section 103 provides for defenses to the general prohibition of discrimination and states in relevant part: "It may be a defense to a charge of discrimination under this Act that an alleged application of qualifications standards...that screen out...or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this title.
(b) Qualification Standards. -- The term 'qualification standards' may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace."

who poses a significant risk of communicating an infectious disease to others in the workplace will not be otherwise qualified for his or her job if reasonable accommodation will not eliminate that risk." The Court also provided guidelines based on medical determinations for when there is a significant risk.

In the House debate on the Chapman amendment, the main argument supporting the amendment was that customers would refuse to patronize food establishments if an employee was known to have a communicable disease and that this could cause the business to close with a resulting loss of jobs. It was also emphasized that qualified individuals with communicable diseases would be offered alternative employment opportunities.[6] Representative Bartlett, in his comments supporting the amendment, stated: "[t]he Chapman amendment does not allow an employer to fire anyone because of a public health disease in this case, nor to refuse to hire someone unless there is a direct threat, nor does it change the prohibition against discrimination against someone who has a disability, nor does it redefine disability from current law which does include those with contagious diseases. What this amendment does is a very reasonable and careful balancing of the equities in which the amendment would say that, if there is an infectious or communicable disease that has a public health significance, then the employer may, first, make a reasonable accommodation that would, first offer an alternative employment opportunity for the employee, and second, for which the employee would suffer no economic damage."[7] In addition to these comments, Representative Rose indicated that the amendment was necessary since there are many unknowns about communicable diseases. [8]

The Chapman amendment was strongly criticized as "perpetuat(ing) the fear and prejudice that a restaurant worker can maybe transmit a disease like AIDS by simply working in that establishment" and it was further urged that Congress "should not cater to fear or prejudice. We should say, if there is a threat to someone, then they could be denied that work. They should not be there if they are a threat, but, if they are not a threat, do not let them be discriminated against."[9]

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[6] 136 Cong. Rec. H 2479 (daily ed. May 17, 1990) (Comments of Representative Bartlett).

[7] *Id.* (Comments of Representative Bartlett).

[8] *Id.* (Comments of Representative Rose).

[9] *Id.* (Comments of Rep. Waxman). See also, comments by Representative McDermott. "In medical school, I was trained to protect my patients from disease, to use the best medical knowledge to protect the public health. So was the gentleman from Georgia, Dr. Rowland. If either of us believed for one second that this amendment would do anything to protect the public against any disease, we would support it. But the amendment is not about

B. Coverage of Congress

Another major substantive difference between the House and Senate versions of the ADA concerns the coverage of Congress by the Act. The Senate passed version simply provides that the provisions of the ADA "shall apply in their entirety to the Senate, the House of Representatives, and all the instrumentalities of the Congress, or either House thereof." This language would apparently incorporate the remedies applicable to the various titles of the ADA which provide for administrative enforcement in the executive branch as well as judicial enforcement. The vesting of this enforcement authority against the Congress in other branches of government would raise constitutional issues regarding separation of powers and speech and debate clause immunity. Although a detailed analysis of these complex issues is beyond the scope of this memorandum, it would appear that with regard to employment, a Member's actions might not be protected by speech and debate clause immunity.[10] However, the possibility of administrative enforcement by an executive agency, as is raised by the Senate passed language, would present serious separation of powers questions.[11]

In response to the possibility of these difficulties, the House took a different approach and provided that the rights and protections of the Act shall apply to the Senate, House and each instrumentality of Congress but that the official of each instrumentality of Congress shall establish remedies and procedures to be utilized with respect to these rights. The House applied the remedies and procedures of House Resolution 15 of the 101st Congress or any other current provision of the Fair Employment Practices Resolution (House Resolution 558 of the 100th Congress) and also provided that the Architect of the Capitol shall establish remedies and procedures. This language raises several issues, notably, whether the remedies will be parallel

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the reality of contagious disease. Let us be honest: it is about the fear of AIDS....As long as anyone in our country remains ignorant, this amendment says, as long as anyone is still afraid, the food service industry may cater to that ignorance and fear." *Id.* at H. 2489.

[10] See e.g., *Forrester v. White,* 108 S.Ct. 538 (1988), where the Supreme Court, applying the concept that determining whether immunity attaches is dependent upon a "functional" approach, held that a state court judge did not have judicial immunity from a suit brought by an employee he had fired. Although this was not a congressional case governed by the speech or debate clause, its principles might well be applied by the Court. This type of functional approach has been utilized regarding congressional employment decisions in two D.C. court of appeals decisions, *Walker v. Jones,* 733 F.2d 923 (D.C. Cir. 1984), *cert. den.,* 469 U.S. 1036 (1984); *Browning v. Clerk, U.S. House of Representatives,* 789 F.2d 923 (D.C.Cir. 1986).

[11] See e.g., *Morrison v. Olson,* 108 S.Ct. 2597 (1988).

to those applicable to the private sector and/or of equal force. In a colloquy during House debate Representative Bartlett asked the House manager of the ADA, Representative Hoyer, for clarification "that the public accommodation requirements of the bill for the Congress will be enforced with remedies of equal force ad impact to those applicable to the private sector." Representative Hoyer agreed that the House bill would provide such equality and stated that "[t]his bill requires the development of procedures and remedies that will result in the ability of persons to get prompt correction of any ADA violation. Although I do not expect that a problem of recalcitrant behavior regarding public accommodations in the Congress would occur, I want to assure the gentleman that any such violation will be addressed with severity."[12] It is important to emphasize that while this colloquy confirms remedies of equal force and impact, it does not require identical remedies. Indeed, the House provision does not specify whether a private right of action would be applicable to aggrieved individuals and the resolution of this issue would appear to give rise to a complicated issue of statutory construction.

III. Other Differences in House and Senate Passed Versions

Certain other differences may well have substantive effects but will most likely be less controversial. For example, the House passed ADA version contains, among others, provisions allowing the Attorney General to certify that certain State or local building codes meet the standards required by the ADA,[13] providing for addition time for certain small businesses to come into compliance,[14] and providing for close captioning of certain public service announcements.[15]

Many of the other differences between the House and Senate passed versions are technical clarifications which would probably not change the legal significance of the statutory language. As noted above, many of the underlying concepts of the ADA are drawn from section 504 of the Rehabilitation Act of 1973, 29 U.S.C. sec. 794, which prohibits discrimination against an otherwise qualified individual with handicaps, solely by reason of handicap, in any program or activity that receives federal financial assistance. Although section 504's statutory language is considerably more succinct than

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[12] 136 Cong. Rec. H 2442 (daily ed. May 17, 1990).

[13] Section 308(b)(1)(A)(ii), 136 Cong. Rec. H. 2650 (daily ed. May 22, 1990).

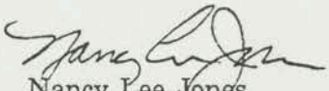
[14] Section 310, 136 Cong. Rec. H. 2650 (daily ed. May 22, 1990).

[15] Section 402, 136 Cong. Rec. H. 2651 (daily ed. May 22, 1990).

that of the ADA, section 504 has been the subject of detailed regulations[16] and extensive judicial interpretation, including Supreme Court analysis. Much of the ADA language is drawn from this regulatory and judicial interpretation of section 504. And many of the House and Senate differences result from adding specific language to assure conformity with existing section 504 interpretation. For example, the House passed version of title I on employment provides that "qualification standards" may include a requirement "that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." The Senate passed version provides that qualification standards may include a requirement that "an individual with a currently contagious disease or infection shall not pose a direct threat to the health or safety of other individuals in the workplace." Although the Senate language is more limited than the House, the legal result of the two versions when read in the context of the entire act, would most likely be the same. Under both versions, an individual must be "otherwise qualified" and this language, drawn from section 504, has been interpreted to mean that an individual not pose a direct threat to others.[17]

IV. Summary

The Americans with Disabilities Act would prohibit discrimination against persons with disabilities in the private sector. It has passed both the Senate and the House and will shortly be the subject of a conference to reconcile differences in the two versions. Most of the essential requirements of the legislation are parallel but there are some significant differences, notably a House amendment limiting coverage for food handlers with communicable diseases, and the manner in which Congress would be covered by the legislation. There are other, less controversial, distinctions many of which are clarifications.



Nancy Lee Jones
Legislative Attorney

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[16] See 28 C.F.R. Part 41, for the Department of Justice lead agency regulations. Other departments and agencies have also promulgated their own section 504 regulations. See "Regulations Promulgated Pursuant to Section 504 of the Rehabilitation Act of 1973: A Brief History and Present Status," CRS Report No. 86-53A (February 28, 1986).

[17] For example see *Davis v. Meese,* 692 F. Supp. 505 (E.D.Pa. 1988), *aff'd without opinion,* 865 F.2d 592 (3d Cir. 1989). In *Davis*, the plaintiff, an insulin dependent diabetic, was denied employment as an investigative specialist and special agent with the FBI pursuant to an FBI policy. The court upheld the policy, finding that there was a "very real danger of serious harm to the special agent or investigative specialist, co-workers, and uninvolved third parties, as well as potential serious harm and disruption to the operation of the FBI." At 520.

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Congressional Research Service • The Library of Congress

Americans with Disabilities Act: Final Rules and Information Sources

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SUMMARY

The Americans with Disabilities Act (ADA), Pub. Law No. 101-336, prohibits discrimination against individuals with disabilities in employment, public services, public accommodations and services operated by private entities, transportation, and telecommunications. Numerous regulations have been promulgated under the ADA. This report contains citations to these regulations, telephone numbers where copies of the regulations can be ordered, and telephone numbers of organizations which may be of assistance to constituents.[1] TDD numbers are included when available.

FINAL RULES UNDER THE AMERICANS WITH DISABILITIES ACT (ADA) AS OF MARCH 10, 1992.

Architectural and Transportation Barriers Compliance Board
Rule: Availability of records, effective July 26, 1991
Cite: Vol. 56 Federal Register (FR) No. 144, July 26, 1991, pp. 35408-35542

Rule: Accessibility guidelines for transportation facilities, effective Sept. 6, 1991.
Cite: Vol. 56 FR No. 173, Sept. 6, 1991, pp. 45499-45527

Rule: Accessibility guidelines for transportation facilities, effective Sept. 6, 1991.
Cite: Vol. 56 FR No. 173, Sept. 6, 1991, pp. 45529-45581
(202) 272-5434-Voice/TDD

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[1] The inclusion of an organization on this list does not constitute an endorsement by the Congressional Research Service or the Library of Congress of these organizations or of any interpretations of the Americans with Disabilities Act offered by them. It should also be emphasized that this list is representative, not exhaustive, and that the non-inclusion of an organization of the list is not a comment on the organization or its services.

Department of Justice
Rule: Delegates authority of Attorney General under ADA to Assistant Attorney General, Civil Rights Division, effective Sept. 24, 1990.
Cite: Vol. 55 FR No. 193, Oct. 4, 1990, pp. 40653-40654

Rule: Nondiscrimination by public accommodations and in commercial facilities, effective Jan. 26, 1992.
Cite: Vol. 56 FR No. 144, July 26, 1991, pp. 35544-35691

Rule: Nondiscrimination in state and local services, effective Jan. 26, 1992.
Cite: Vol. 56 FR No. 144, July 26, 1991, pp. 35694-35723
(202) 514-0301-Voice
(202) 514-0381-TDD
(202) 514-0383-TDD

Department of Transportation
Rule: Transportation for individuals with disabilities, effective Oct. 7, 1991 [49 CFR 37, 38; Oct 7, 1991 (49 CFR 27, except the deletion of subparts B and C thereof and the redesignation of subpart F as subpart C and subpart D as subpart B, which are effective Jan. 26, 1992)].
Cite: Vol. 56 FR No. 173, Sept 6, 1991, pp. 45583-45778
(202) 366-9306-Voice
(202) 775-7687-TDD
(202) 336-4011-Voice (mass transit)
(202) 336-2979-TDD (mass transit)

Equal Employment Opportunity Commission
Rule: Procedural regulations for enforcement of Title I (employment) ADA, effective Apr. 8, 1991.
Cite: Vol. 56 FR No. 45, Mar. 7, 1991, pp. 9623-9626

Rule: Availability of records, effective June 28, 1991.
Cite: Vol. 56 FR No. 125, June 28, 1991, pp. 29577-29582

Rule: Equal employment opportunity for individuals with disabilities, effective July 26, 1992.
Cite: Vol. 56 FR No. 144, July 26, 1991, pp. 35726-35753

Rule: Recordkeeping and reporting under Title VII and ADA, effective Aug. 26, 1991.
Cite: Vol. 56 FR No. 144, July 26, 1991, pp. 35753-35756
(800)-669-3362-Voice
(800)-800-3302-TDD

Federal Communications Commission
Rule: Telecommunications services for hearing and speech disabled, effective Sept. 30, 1991.

Cite: Vol 56 FR No. 148, Aug. 1, 1991, pp. 36729-36733
(202) 632-7260-Voice
(202) 632-6999-TDD

President's Committee on Employment of People With Disabilities
General employment information and publications
(800) 526-7234-Voice
(202) 378-6205-TDD

OTHER SOURCES OF INFORMATION AND ASSISTANCE

The Arc
Accessibility to public accommodations for people with mental retardation
(800) 433-5255-Voice
(800) 855-1155-TDD

American Civil Liberties Union
General ADA information.
(212) 944-9800 ext. 545-Voice

American Foundation for Vision Impairment
General information regarding assistive technology for persons who have vision impairments. (until September 30, 1992)
(202) 223-0101-Voice/TDD

Association on Higher Education and Diversity (AHEAD)
Information regarding examinations compliance, ADA compliance of boards of licensure and certification, student service programs, and postsecondary education.
(800) 247-7752-Voice/TDD

Cerebral Palsy Research Foundation of Kansas
Provides information and conducts research regarding assistive technologies.
(316) 688-1888-Voice

Disability Rights Education and Defense Fund (DREDF)
General ADA provisions training, technical assistance, public policy advocacy, and litigation.
(800) 466-3232-Voice/TDD

Job Accommodation Network
Equal employment opportunity for individuals with disabilities database contains 16,000 specific reasonable accommodations.
(800) 526-7234-Voice/TDD
(800) 526-4698-Voice/TDD (WV)

Mental Health Law Project

Information regarding disability laws with emphasis on persons who are mentally ill.
(202) 467-5730-Voice
(202) 467-4232-TDD

National Association of the Deaf

Promotes the rights of those who are deaf or hard of hearing.
(301) 587-1788-Voice
(301) 587-1789-TDD

National Conference of States on Building Codes and Standards

Promotes certification of state codes for equivalency with ADA standards and promotes the development of alternative dispute resolution procedures within the existing state regulatory framework.
(703) 437-0100-Voice
(703) 481-2019-TDD

National Association of Protection and Advocacy Systems

Will conduct three regional "train the trainer" seminars that will focus on nonlitigatory dispute resolution techniques, self advocacy, and voluntary compliance. Will provide funding to twelve state protection and advocacy systems which will conduct statewide training.
(202) 408-9518-Voice
(202) 408-9521-TDD

National Council on Disability

Required under Section 507 of the ADA to conduct a study and report on the effect of wilderness land management practices on the ability of people with disabilities to enjoy National Wilderness Preservation Systems.
Advises law makers and produces publications tracking federal laws and programs affecting people with disabilities.
(202) 267-3846-Voice
(202) 267-3232-TDD

National Easter Seal Society, Office of Public Affairs

Access to transportation for individuals with disabilities.
(202) 347-3066-Voice
(202) 347-7385-TDD

National Information Center for Children and Youth with Disabilities (NICHCY)

Information and referral service for people with disabilities, their families and professionals. Disseminates publications and information on self-help advocacy, ADA, and a broad array of disability matters. Has particular expertise in matters of concern to children with disabilities and their parents.
(703) 893-6061-Voice/TDD (VA)
(800) 999-5599-Voice/TDD

National Institute on Disability and Rehabilitation Research
Provides technical assistance in implementation of the ADA for business and others through regional centers.
(800) 949-4232-Voice/TDD

National Rehabilitation Information Center
Equal employment opportunity for individuals with disabilities.
(800) 346-2742-Voice/TDD

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July 7, 1992