October 1, 1992

TO: Senator Dole

FROM: Mo West

SUBJECT: Technical Assistance Legislation

The EEOC has been working with the House Education & Labor Committee on legislation (H.R.5925), the "EEOC Education, Technical Assistance, and Training Revolving Fund Act", which passed the House on September 16 and was referred to the Senate Labor & Human Resources Committee. The Committee is planning to discharge the bill today and have it passed by UC this evening.

The purpose of the bill is to establish a revolving fund within the EEOC to be supported by payments received from recipients of technical assistance and training to pay administrative and personnel expenses of providing education, technical assistance, and training relating to laws administered by the Commission. You authored both amendments to the Americans with Disabilities Act and the Civil Rights Act of 1991 specifically requiring the EEOC carry out training and technical assistance activities on these laws.

To start up the Fund, $1,000,000 would be transferred from the Salaries and Expenses appropriation of the Commission. Senators, Hatch, Packwood, Kennedy, Harkin and Metzenbaum are supporting passage of this bill. I believe you should support its passage as the author of EEOC's technical assistance amendments. I just wanted you to be aware that it may come before the Senate tonight to pass by UC.

102D CONGRESS
2D SESSION

H. R. 5925

IN THE HOUSE OF REPRESENTATIVES

September 10, 1992

Mr. FORD of Michigan (for himself, Mr. GOODLING, and MR Peakins, MR. Gunderson and Mr. Smith) introduced the following bill; which was referred to the Committee on

A BILL

To amend title VII of the Civil Rights Act of 1964 to establish a revolving fund for use by the Equal Employment Opportunity Commission to provide education, technical assistance, and training relating to the laws administered by the Commission.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "EEOC Education, Technical Assistance, and Training Revolving Fund Act of 1992".

Conv 663-4947

SEC. 2. REVOLVING FUND.

Section 705 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-4) is amended by adding at the end the following:

"(k)(1) There is hereby established in the Treasury of the United States a revolving fund to be known as the 'EEOC Education, Technical Assistance, and Training Revolving Fund' (hereinafter in this subsection referred to as the 'Fund') and to pay the cost (including administrative and personnel expenses) of providing education, technical assistance, and training relating to laws administered by the Commission. Monies in the Fund shall be available without fiscal year limitation to the Commission for such purposes.

"(2)(A) The Commission shall charge fees in accordance with the provisions of this paragraph to offset the costs of education, technical assistance, and training provided with monies in the Fund. Such fees for any education, technical assistance, or training—

"(i) shall be imposed on a uniform basis on persons and entities receiving such education, assistance, or training,

"(ii) shall not exceed the cost of providing such education, assistance, and training, and

"(iii) with respect to each person or entity receiving such education, assistance, or training, shall

bear a reasonable relationship to the cost of providing such education, assistance, or training to such person or entity.

"(B) Fees received under subparagraph (A) shall be deposited in the Fund by the Commission.

"(C) The Commission shall include in each report made under subsection (e) information with respect to the operation of the Fund, including—

"(i) the identity of each person or entity to which the Commission provided education, technical assistance, or training with monies in the Fund, in the fiscal year for which such report is prepared,

"(ii) the cost to the Commission to provide such education, technical assistance, or training to such person or entity, and

"(iii) the amount of any fee received by the Commission from such person or entity for such education, technical assistance, or training.

"(3) The Secretary of the Treasury shall invest the portion of the Fund not required to satisfy current expenditures from the Fund, as determined by the Commission, in obligations of the United States or obligations guaranteed as to principal by the United States. Investment proceeds shall be deposited in the Fund.

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, DC 20507

Office of
the Chairman

October 1, 1992

The Honorable Edward M. Kennedy
United States Senate
Washington, D.C. 20510

Dear Senator Kennedy:

This is in regard to the Technical Assistance Revolving Fund legislation, H.R. 5925, which is pending in the Labor and Human Resources Committee.

Under existing law, the EEOC currently provides education, technical assistance and training through appropriated funds. These activities are provided to the public at no cost.

As a result of the Civil Rights Act of 1991 and the Americans with Disabilities Act, the EEOC anticipates a 20 to 30 percent increase in charges to process. A workload increase of that magnitude will strain the agency's resources, making it impossible for the EEOC to expand or even to continue the current level of outreach activities.

The Revolving Fund will give the EEOC the ability to charge reasonable fees to particular audiences for certain specialized products and services relating to all of the laws under the EEOC's jurisdication. The Revolving Fund will help to reduce the demand on appropriated funds, thereby permitting the EEOC to continue and to expand its current free education, technical assistance and training activities.

The Revolving Fund will in no way reduce the EEOC's commitment or legal responsibility to provide free technical assistance and training. On the contrary, it will permit us to increase our outreach efforts.

The EEOC will continue to offer education, technical assistance and training to the general public at no cost. It is our intention that no one will be denied access to these products and services because of lack of ability to pay.

U.S. Equal Employment Opportunity Commission
Office of Communications and Legislative Affairs
1801 L Street, N.W., Room 9024
Washington, D.C. 20507

FAX TRANSMITTAL FORM

DATE: 10/1 TIME 7:20

TO: Maureen West

FAX TELEPHONE NUMBER: 224-6721

FROM: Ann Colgrove

DOCUMENT:

NUMBER OF PAGES TRANSMITTED (INCLUDING COVER): 18

SPECIAL INSTRUCTIONS:

IF THE ENTIRE DOCUMENT IS NOT RECEIVED, PLEASE NOTIFY US IMMEDIATELY AT: 202/663-4900.

OCLA FAX NUMBER: 202/663-4192

U.S. Equal Employment Opportunity Commission
Office of Communications and Legislative Affairs
1801 L Street, N.W., Room 9024
Washington, D.C. 20507

FAX TRANSMITTAL FORM

DATE: 10/1 TIME 9:40 ~~7:20~~

TO: Maureen West

FAX TELEPHONE NUMBER: 224-6721

FROM: Ann Colgrove

DOCUMENT:

NUMBER OF PAGES TRANSMITTED (INCLUDING COVER): ~~1~~ 2

SPECIAL INSTRUCTIONS: Replace first page of letter to Kennedy

IF THE ENTIRE DOCUMENT IS NOT RECEIVED, PLEASE NOTIFY US IMMEDIATELY AT: 202/663-4900.

OCLA FAX NUMBER: 202/663-4192

EEOC-K____	Title VII Kit, includes guidelines and regulations regarding procedures, record keeping, and employee selection. Compiled into franked envelope. **NOTE:** To be available December 30.	7,000
EEOC-K____	Age Discrimination Kit, includes fact sheet, resource list, regulations and guidelines regarding discrimination on the basis of age. Compiled into franked envelope. **NOTE:** To be available December 30.	15,000
EEOC-K____	Civil Rights Act of 1991 Kit, includes resource list, regulations and guidelines regarding the new Act. Compiled into franked envelope. **NOTE:** To be available December 30.	5,000
EEOC-M-1___	ADA Technical Assistance Manual: Update. At least three new sections are anticipated, updating the Manual's explanation of ADA-related policies. 8 1/2"x11" loose-leaf, shrink-wrapped, not to exceed 150 pages. **NOTE:** To be available March 1, 1993; to be delivered to all recipient of ADA Technical Assistance Manual.	200,000
EEOC-BK-10	Laws Enforced by EEOC: Revised, compiles all statutes enforced by EEOC. @ 50 pages, 8 1/2"x 11" bound. **NOTE:** To be available January 15, 1993.	50,000
EEOC-K____	Affirmative Action Kit, includes guidelines and resource list regarding affirmative action. Compiled into franked envelope. **NOTE:** To be available December 30.	2,000

* Kits will average 25-30 pages, with no kit exceeding 55 pages.

EEOC-BK-__	24th Annual Report (1989). 8 1/2"x11" bound, @ 65 pages. **NOTE:** To be available December 1.	1,000
EEOC-BK-__	25th Annual Report (1990). 8 1/2"x11" bound, @ 65 pages. **NOTE:** To be available December 1.	1,000
EEOC-K_____	Sex Discrimination/Sexual Harrassment/Equal Pay Kit, includes fact sheet, resource list, regulations and guidelines regarding sex discrimination, equal pay, and sexual harrassment. Compiled into franked envelope. **NOTE:** To be available December 30.	20,000
EEOC-K_____-E	National Origin Discrimination Kit (English), includes fact sheet, resource list, regulations and guidelines regarding discrimination on the basis of national origin. Compiled into franked envelope. **NOTE:** To be available December 30.	10,000
EEOC-K____-S	National Origin Discrimination Kit (Spanish), includes fact sheet, resource list, regulations and guidelines regarding discrimination on the basis of national origin. Compiled into franked envelope. **NOTE:** To be available December 30.	5,000
EEOC-K_____	Religious Discrimination Kit, includes fact sheet, resource list, regulations and guidelines regarding discrimination on the basis of religion. Compiled into franked envelope. **NOTE:** To be available December 30.	2,000
EEOC-K_____	Federal Sector Kit, includes fact sheet, resource list, regulations and guidelines regarding job discrimination against federal employees or applicants for federal employment. Compiled into franked envelope. **NOTE:** To be available December 30.	15,000

EEOC-M-1AI	To All Recipients of the ADA Title I Technical Assistance Manual and the GPO Order Form for the Handbook and the TA Manual. 1 page insert to all orders for the ADA TA Manual. **NOTE:** Will be available November 1.	75,000
EEOC-K/ADA-EMP	Americans with Disabilities Act Kit: Employers, includes fact sheets, booklets, regulations, resource listings, and GPO Order Form. Compiled into EEOC franked envelope. **NOTE:** To be available December 1.	25,000
EEOC-K/ADA-IWD	Americans with Disabilities Act Kit: Individuals with Disabilities, includes fact sheets, booklets, regulations, resource listings, and GPO Order Form. Compiled into EEOC franked envelope. **NOTE:** To be available December 1.	45,000
EEOC-BK-15	The ADA: Questions and Answers, revised question and answer format of issues regarding the employment and public accommodation provisions of the ADA. Joint EEOC and Department of Justice publication. 9 1/2"x 6" booklet, 27 pages. **NOTE:** To be available December 1.	50,000
EEOC-FS-E-2	Fact Sheet: Pregnancy Discrimination. 1-page. **NOTE:** To be available November 15.	25,000
EEOC-FS-S-2	Fact Sheet: Pregnancy Discrimination. (Spanish) 1-page. **NOTE:** To be available November 15.	6,000
EEOC-FS-E-3	Fact Sheet: Religious Discrimination. 1-page. **NOTE:** To be available November 15.	20,000
EEOC-FS-E-7	Fact Sheet: Nondiscrimination Protections for Federal Employees. 1-page. **NOTE:** To be available November 1.	15,000
EEOC-BRV-E	Voluntary Assistance Symposia, brochure for employers describing availability of EEOC's symposia on how to voluntarily comply with nondiscrimination laws. **Note:** To be available December 1.	15,000

TO BE PRODUCED

	Publications to be Added to Inventory	Projected Order Levels
EEOC-_____	EEOC Publications Order Form, basic order form to accompany all responses to publication requests. 1 page, self-mailer. **NOTE:** To be available November 1.	75,000
EEOC-BK-19I	To All Those Requesting the ADA Handbook, 1-page flyer informing requestors that EEOC has exhausted its supply of ADA Handbook and provides an order form for ordering the publication from GPO. **NOTE:** To be available November 1.	5,000
EEOC/DOL-FR/ADA-1	Procedures for Complaints/Charges of Employment Discrimination Based on Disability Filed Against Employers Holding Government Contracts or Subcontracts; Joint Final Rule. EEOC 29 CFR Part 1641; Department of Labor/OFCCP 41 CFR Part 60-742. Procedures for investigation of charges/compaints of job discrimination based on disability filed against government contractors under Title I of the ADA and Section 503 of the Rehabilitation Act of 1993, as amended. 8 1/2"x11" side stapled, 7 pages. **NOTE:** To be available December 1.	5,000
EEOC/DOJ-FR/ADA-1	Coordination Procedures for Complaints or Charges of Employment Discrimination Based on Disability Subject to the Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973; Final Rule. Department of Justice 28 CFR Part 37; EEOC 29 CFR 1640. 8 1/2"x11" side stapled, 8 pages. **NOTE:** To be available December 1.	20,000
EEOC-BRF-E	Information for the Federal Sector, provides general information on the mission of EEOC, the laws and regulations providing equal employment opportunity for federal employees, and how to file a charge. 16 pages, 4"x9" brochure. **Note:** To be available December 1.	50,000

Publications Available In Alternate Format

Publications	Stock #	Formats				
		Regular Print	Large Print	Braille	Disk	Tape
ADA Technical Assistance Manual	M-1A					
ADA: Your Rights as an Individial with a Disability	BK-18					
ADA: Your Rights as an Individual with a Disability (Spanish)	BK-21			■	■	
ADA: Your Responsibilities as an Employer	BK-17					
ADA: Your Responsibilities as an Employer (Spanish)	BK-20			■	■	
Fact Sheet: ADA	FS/E-5					■
Fact Sheet: ADA (Spanish)	FS/S-5		■	■		■
Fact Sheet: ADA Tax Provisions	FS/E-6		■			■
Fact Sheet: ADA Tax Provisions (Spanish)	FS/S-6		■	■		■
Poster: EEO is the Law	P/E-1		■			
Poster: EEO is the Law (Spanish)	P/S-1		■	■		
Poster: EEO is the Law (Mandarin Chinese)	P/C-1		■	■		■
Regulations: ADA Title I	FR/ADA-1					

EEOC-POP-1

EEOC-BK-16C	Legislative History of the ADA - Vol. III, third volume of publication described above. **NOTE:** For distribution to EEOC staff only. 1262 pages. 5 1/2"x9".	489
EEOC-BK-1	14th Annual Report (1979). 8 1/2"x11" bound, 38 pages.	50
EEOC-BK-2	15th Annual Report (1980). 8 1/2"x11" bound, 45 pages.	50
EEOC-BK-3	16th Annual Report (1981). 8 1/2"x11" bound, 152 pages.	50
EEOC-BK-4	17th Annual Report (1982). 8 1/2"x11" bound, 65 pages.	50
EEOC-BK-5	18th Annual Report (1983). 8 1/2"x11" bound, 71 pages.	50
EEOC-BK-6	19th Annual Report (1984). 8 1/2"x11" bound, 30 pages.	49
EEOC-BK-7	20th Annual Report (1985). 8 1/2"x11" bound, 50 pages.	50
EEOC-BK-8	Combined Annual Report: FY 1986-1988. 8 1/2"x11" bound, 143 pages.	498
EEOC-BK-10	Laws Enforced by the Equal Employment Opportunity Commission, compiles all statutes currently enforced by EEOC. 36 pages, 8 1/2"x 11" bound. **NOTE:** Will be revised prior to the end of calendar year 1992.	4,310
EEOC-P/E-1	Equal Employment Opportunity Is the Law (English) 14"x17" poster. Folded to 9"x6 1/2"; packaged in lots of 50.	490,645
EEOC-P/S-1	Equal Employment Opportunity Is the Law poster (Spanish).	173,224
EEOC-P/C-1	Equal Employment Opportunity Is the Law poster (Mandrian Chinese). To be available December 1.	
EEOC-P/E-1I	Accessible Posting Notice, describes employer's obligation to display poster in a manner that is accessible to individuals with disabilities. **NOTE:** One copy of the notice accompanies all orders for posters.	38,962

EEOC-M-1A	Americans with Disabilities Act Technical Assistance Manual and Resource Directory, provides comprehensive guidance and examples on how to comply with the nondiscrimination in employment provisions of Title I of the ADA. 350+ pages, loose-leaf 8 1/2"x11" manual. **NOTE:** 1 per requestor, orders to be compared against database.	111,086
EEOC-BK-17	The ADA: Your Responsibilities as an Employer, 17-page booklet in a question and answer format dealing with some of the most often asked questions about the Act from employers. 9 1/2"x6".	386,082
EEOC-BK-20	The ADA: Your Responsibilities as an Employer (Spanish), [Same as above.]	15,940
EEOC-BK-18	Your Rights as an Individual with a Disability Under the ADA, 11-page booklet in a question and answer format dealing with some of the most asked questions about the Act by individuals with disabilities. 9 1/2"x6".	593,875
EEOC-BK-21	Your Rights as an Individual with a Disability Under the ADA (Spanish), [Same as above.]	89,029
EEOC-BK-22	The ADA: Questions and Answers (Spanish), original 19-page booklet in a question and answer format dealing with the most often asked questions about the employment and public accommodations provisions of the Act. 9 1/2"x6".	83,879
EEOC-BK-16A	Legislative History of the ADA - Vol. 1, first volume of compilation of legislative documents surrounding passage of the ADA. **NOTE:** For distribution to EEOC staff only. 924 pages, 5 1/2"x9".	492
EEOC-BK-16B	Legislative History of the ADA - Vol. II, second volume of publication described above. **NOTE:** For distribution to EEOC staff only. 895 pages. 5 1/2"x9".	484

CURRENTLY AVAILABLE

Stock Number	Description	Inventory Level
	Publications for Immediate Inventory	
EEOC-BK-19	Americans with Disabilities Act Handbook, 500+ page handbook containing annotated regulations for Titles I, II, and III; resources for obtaining additional assistance; and an appendix which contains supplementary information related to the implementation of the ADA. 8 1/2"x11" loose-leaf/boxed. **NOTE:** The current stock of the ADA Handbook are for internal EEOC needs only. Requestors for the publication from the general public should receive the notice on how to order the ADA Handbook from GPO (EEOC-BK-19I).	1,925
EEOC-BRP-E	Information for the Private Sector, provides general information on the mission of EEOC, the laws providing equal employment opportunity for private sector employees, and how to file a charge. 16 pages, 4"x9" brochure.	57,903
EEOC-BRP-S	Information for the Private Sector (Spanish). [Same as above.]	4,184
EEOC-FR/ADA-1	29 CFR Part 1630 Equal Employment Opportunity for Individuals with Disabilities (Title I/ADA); Final Rule. 29 CFR Parts 1602 and 1627 Recordkeeping and Reporting Under Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act (ADA); Final Rule, July 26, 1991. 8 1/2"x11" bound, 32 pages.	96,565

7. STAFFING

Project Manager
The project manager will be responsible for the overall management and operation of the publication distribution process.

Information Specialist (5)
The Information Specialists will serve as the live operators for order intake and customer service for the EEOC publication system. They should be trained in data entry for the ordering process. In addition, they should have knowledge of the EEOC publications and proper procedures for handling consumer requests.

Information Specialist - Spanish Speaking(1)
At least one of the information specialist must be Spanish speaking in order to process the small number of Spanish requests received from the public. Alternative safeguards must be built into the system when this individual is not on the phones receiving calls.

Data Entry Clerk
This position will be used to handle and process the written requests received for EEOC publications. This position will read requests, enter the information or forward requests to proper location. In addition, the data entry clerk should be trained as a live operator in case of overload or lack of proper staffing.

8. EEOC FIELD OFFICES

All EEOC Field Offices and Headquarters will be linked into the EEOC Publication Ordering System via modem and in-house computer system. All offices should be able to order EEOC publications directly from field offices. Data entry of consumer requests should be handled and processed from the field office as well.

All EEOC field offices will require training on the ordering system. This training component should be handled by the distribution center contractor and considered part of the EPA contract.

9. EQUIPMENT, SUPPLIES AND INVENTORY

All equipment and supplies needed to accomplish the distribution and processing of EEOC publications will be furnished by the EPA and be considered part of the contract, with the exception of a postage meter that will be furnished by the EEOC.

Upon an agreeable delivery date, all EEOC publications will be transferred from the Department of Agriculture's CFPDC in Landover, Maryland to the EPA center in Cincinnati, Ohio.

4. INVENTORY

EEOC publications currently number 27 titles. This includes manuals, posters, fact sheets and audio visual materials. Additional titles will be added but will not surpass 40 titles.

Accommodate more than 5,000 square feet of storage for EEOC publications.

Generate status, marketing, system and mailing reports on a weekly or daily basis.

Accommodate and fulfill request for alternate format publications which includes braille and audio services.

5. FULFILLMENT OF WRITTEN REQUESTS

In addition to the large number of calls received on the 800 number, the EEOC receives numerous written requests for publications. The following tasks will be required to fulfill the written orders.

Data entry of all requests into the distribution computer system

Fulfilling orders based upon the two-four day turnaround from receipt of request.

Establishment of a post office box in Cincinnati to allow direct access to distribution center.

Sorting and reading of requests to assure that consumer is requesting EEOC publications only. Any other requests will be forwarded to EEOC headquarters for proper handling.

6. TDD SYSTEM

The publication distribution process must include a TDD component to meet the needs of the hearing impaired. Computer software is currently available and can be integrated into the distribution ordering system.

EEOC-FS/E-5	Fact Sheet: ADA. 1-page.	92,678
EEOC-FS/S-5	Fact Sheet: ADA. (Spanish). 1-page.	6,203
EEOC-FS-E-6	Fact Sheet: Disability-Related Tax Provisions. 1-page.	104,509
EEOC-FS-S-6	Fact Sheet: Disability-Related Tax Provisions. (Spanish). 1-page.	21,833
EEOC-FS-E-1	Fact Sheet: National Origin Discrimination. 1-page.	49,066
EEOC-FS-S-1	Fact Sheet: National Origin Discrimination. (Spanish). 1-page.	9,335
EEOC-FS-S-3	Fact Sheet: Religous Discrimination. (Spanish) 1-page.	12,345
EEOC-FS-E-4	Fact Sheet: Sexual Harassment. 1-page.	44,826
EEOC-FS-S-4	Fact Sheet: Sexual Harassment. (Spanish) 1-page.	8,843
EEOC-107-1	EEOC Compliance Manual - Vol. 1, 8 1/2"x11", @ 300 pages, loose-leaf, shrink-wrapped. **NOTE:** For distribution to EEOC staff only.	69
EEOC-107-2	EEOC Compliance Manual - Vol. 2, 8 1/2"x11", @ 700 pages, loose-leaf, shrink-wrapped. **NOTE:** For distribution to EEOC staff only.	77

2. On-Line Ordering System

The EPA will provide computer equipment and software that will allow for an on-line ordering system to be used in conjunction with the Cincinnati location (live operators) and in the EEOC Field Offices and Headquarters. This system will be compatible with the EPA ordering system currently in operation.

System guidelines:

Operators will enter publication requests directly into an on-line system using windows and automatic prompt pop-up screens.

On-line system needs to work interactively with current EPA distribution system.

System must be able to accommodate building and manipulation of a customer database for future mailings and manual updates.

System design to assure that the EEOC's policy of providing one copy of the ADA Technical Assistance Manual per requestor is observed.

The on-line ordering system should gather the following information:

Name
Organization or Company
Address
Phone and Fax
Date of Call
Publication(s) requested
Tracking (How 800 number was found)
Requester Demographics
Other Notes or Information

3. Distribution Parameters

Requests must be mailed within a two-four day turnaround upon receiving order.

Documents and publications will be mailed in the most cost-efficient manner.

Maintenance of a reporting system for tracking individual requests for a period sufficient to assure that the requests for fulfillment has been completed.

Maintaining and providing a back-up tape of all stored data.

Selection of proper mailing bags and envelopes in accordance with mailing regulations.

Equal Employment Opportunity Commission

Office of Communications and Legislative Affairs

Public Information Unit

The EEOC Office of Communication and Legislative Affairs (OCLA) requests that the Environmental Protection Agency develop and submit a management plan (including budget) for the design and implementation of a Publications Distribution System for EEOC materials.

The following is an outline of recommendations and parameters for the requested system:

1. EEOC 800 Number

Using US Sprint and their Network 2000 system, the 1-800-669-EEOC will be transported to the Cincinnati facility from the Washington Headquarters. All billing for the 800# will continue to be received and processed by the EEOC in Washington D.C.

The following guidelines are requested for the 800 system:

800# will be used for ordering EEOC publications *only*. The educational script format will be discontinued.

New system will be designed using live operators during the hours of 8:30 am to 5:30 pm EST.

After hours a recorded message will direct callers to call back during business hours.

800# will not be designed or used as a information referral service. All information requests beyond the ordering of publications will be directed to the EEOC's 800-669-4000 outward bound transfer system or the OCLA at 202-663-4900 depending on the type of call. No automatic transfer of calls to this number will be requested unless the outward bound transfer system can be used.

Fax on demand system will be initiated allowing callers to receive a complete listing of EEOC publications instantly via fax.

8. Attorney-of-the-day -- Staff members in the Office of Legal Counsel are available on a rotating basis to assist with technical assistance questions from field office staff.

9. The Office of Communications and Legislative Affairs provides information, both written and verbal, to Congress, the public, and print and electronic media.

Education, Technical Assistance and Training Services Provided by the EEOC at No Cost to the Public

1. Written education/technical assistance materials in FY 1992

   - More than two million public information pieces were distributed to the public.
   - 18 new pieces were made available in English, Spanish, Creole and Mandarin Chinese (also understood by Vietnamese-speaking individuals).
   - 34 ADA-related publications were put into alternate formats: braille, tape, large print and disc.

2. New educational/technical assistance materials (full listing attached)

3. New Publications Distribution System (project description attached)

4. Outward bound transfer capability of toll-free telephone service automatically transfers the caller to the nearest EEOC field office (14,000 to 22,000 calls per month).

5. Speakers Bureau -- Approximately 100 professional staff members are available upon request to speak to audiences about the laws under the EEOC's jurisdiction.

6. Field office outreach

   - Six field offices have each established one program analyst position for a pilot program of outreach to underserved populations.
   - In the first, second and third quarters of FY 1992, 1749 field staff members made presentations to approximately 125,000 individuals, including members of civil rights groups, advocacy groups, educational institutions, trade associations and businesses.
   - Expanded presence -- Outreach activities focus on geographical areas with a history of low charge numbers.

7. Technical assistance is available to individuals and groups from the Office of Legal Counsel.

I hope you and the other members of the Senate will support H.R. 5925. Its passage is vital to our ability to inform people of their rights under the law and to educate employers about their responsibilities.

Attached is a list of products and services which the EEOC provides to the public at no cost.

Sincerely,

Evan Kemp

Evan J. Kemp, Jr.
Chairman

Attachment: Education, Technical Assistance and Training Services Provided by the EEOC at No Cost to the Public

P.S. How's Ted, Jr.?

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, DC 20507

Office of
the Chairman

October 1, 1992

The Honorable Edward M. Kennedy
United States Senate
Washington, D.C. 20510

Dear Senator Kennedy:

This is in regard to the Technical Assistance Revolving Fund legislation, H.R. 5925, which is pending in the Labor and Human Resources Committee.

Under existing law, the EEOC currently provides education, technical assistance and training through appropriated funds. These activities are provided to the public at no cost.

As you may know, Congress is about to approve a budget for the EEOC which is much lower than the President's recommendation. In fact, Congress has given the agency less money than the President recommended for 11 out of the last 13 years. The reduced budget, along with the anticipated increase in charges to process as a result of the Civil Rights Act of 1991 and the Americans with Disabilities Act, will make it impossible for the EEOC to expand or even to continue our current level of outreach activities.

The Revolving Fund will give the EEOC the ability to charge reasonable fees to particular audiences for certain specialized products and services relating to all of the laws under the EEOC's jurisdication. The Revolving Fund will help to reduce the demand on appropriated funds, thereby permitting the EEOC to continue and to expand its current free education, technical assistance and training activities.

The Revolving Fund will in no way reduce the EEOC's commitment or legal responsibility to provide free technical assistance and training. On the contrary, it will permit us to increase our outreach efforts.

The EEOC will continue to offer education, technical assistance and training to the general public at no cost. It is our intention that no one will be denied access to these products and services because of lack of ability to pay.

U.S. Equal Employment Opportunity Commission
Office of Communications and Legislative Affairs
1801 L Street, N.W., Room 9024
Washington, D.C. 20507

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U/C
Comm-discharge
* Sen-discharge bill
HOTLINE
bill 3rd Rdg
bill passed
as long as UC

WED MARK up 9 2
Oct 1,

102D CONGRESS
2D SESSION

H. R. 5925

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002 COMMITTEE ON EDUCATION & LABOR 14:17 09/11/92

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Section 705 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-4) is amended by adding at the end the following:

"(k)(1) There is hereby established in the Treasury of the United States a revolving fund to be known as the 'EEOC Education, Technical Assistance, and Training Revolving Fund' (hereinafter in this subsection referred to as the 'Fund') and to pay the cost (including administrative and personnel expenses) of providing education, technical assistance, and training relating to laws administered by the Commission. Monies in the Fund shall be available without fiscal year limitation to the Commission for such purposes.

"(2)(A) The Commission shall charge fees in accordance with the provisions of this paragraph to offset the costs of education, technical assistance, and training provided with monies in the Fund. Such fees for any education, technical assistance, or training—

"(i) shall be imposed on a uniform basis on persons and entities receiving such education, assistance, or training,

"(ii) shall not exceed the cost of providing such education, assistance, and training, and

"(iii) with respect to each person or entity receiving such education, assistance, or training, shall

bear a reasonable relationship to the cost of providing such education, assistance, or training to such person or entity.

"(B) Fees received under subparagraph (A) shall be deposited in the Fund by the Commission.

"(C) The Commission shall include in each report made under subsection (e) information with respect to the operation of the Fund, including—

"(i) the identity of each person or entity to which the Commission provided education, technical assistance, or training with monies in the Fund, in the fiscal year for which such report is prepared,

"(ii) the cost to the Commission to provide such education, technical assistance, or training to such person or entity, and

"(iii) the amount of any fee received by the Commission from such person or entity for such education, technical assistance, or training.

"(3) The Secretary of the Treasury shall invest the portion of the Fund not required to satisfy current expenditures from the Fund, as determined by the Commission, in obligations of the United States or obligations guaranteed as to principal by the United States. Investment proceeds shall be deposited in the Fund.

"(4) There is hereby transferred to the Fund $1,000,000 from the Salaries and Expenses appropriation of the Commission.".

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

September 24, 1992

Ms. Maureen P. West
Office of Senator Dole
141 Hart Senate Building
Washington, D.C. 20510-1601

Dear Mo:

As you know, Chairman Kemp convened an emergency meeting of the Commission on September 21. The purpose of the session was to discuss the severe budgetary constraints that the EEOC faces in the coming fiscal year. I thought you would be interested in reviewing the Chairman's remarks.

The President requested $245 million for the EEOC for FY 1993. The House appropriations bill contains $218 million and the Senate measure provides only $212 -- far short of the projected needs for the agency for the next fiscal year. When you consider that the mission of the EEOC has been broadly expanded by the enactment of the Civil Rights Act of 1991 and the Americans with Disabilities Act, it is imperative that the agency receives its full budgetary request.

I have enclosed the Chairman's prepared remarks and additional background materials, including a concise summary of the agency's situation published by the Washington Post, for your information. Please contact me if you have any questions.

Sincerely,

Ann Colgrove

Ann Colgrove
Director of Communications
and Legislative Affairs

Enclosures

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, DC 20507

Office of
the Chairman

EMERGENCY COMMISSION MEETING

September 21, 1992

CHAIRMAN'S INTRODUCTION

I have called this emergency commission meeting to discuss a situation of grave importance to the future of the U.S. Equal Employment Opportunity Commission.

The EEOC -- the agency whose only mandate is to enforce our nation's anti-employment discrimination laws -- is on the brink of peril. If we were a business, we'd be out of business. If Congress gets its way, our financial situation will force a Chapter 11-type reorganization, jeopardizing the very product we deliver.

Congress has given EEOC two new and complicated laws to enforce - the Americans with Disabilities Act and the Civil Rights Act of 1991. President Bush -- following through on his commitment to vigorous enforcement of civil rights laws -- requested $245 million, including 300 additional staff positions, for the EEOC in FY 1993. This is a $35 million increase over this year's budget. But the House and Senate rejected the request, approving only $218 million and $212 million respectively.

Even the House Appropriations Committee stated upon issuing its budget recommendations: "The Committee recognizes that this amount may not be sufficient to allow the EEOC to carry out the provisions of the ADA ... adequately and continue its ongoing workload under existing statutes."

I know there's a lot of talk about the taxpayer and his or her rights to a workplace free of discrimination. But I'm wondering if this isn't just lip-service. I must question this Congress' commitment to civil rights in light of years and years of a slashed budget, and the current funding recommendations for EEOC.

The House and Senate allocations are but a sliver of an increase over our FY 1992 budget of $210 million. They will not even begin to cover costs for mandatory pay raises, let alone inflation. This will stretch an already overloaded investigative staff, making it impossible to enforce civil rights laws in the manner Congress intended.

Congress has cut the White House request for EEOC ten out of the last 12 years. This means, among other things, that we are operating with almost 600 fewer employees than we had in 1980 -- or about a 20 percent decrease in staff.

Despite this -- and largely due to the excellent management procedures initiated by former Chairman Clarence Thomas -- our productivity has increased. Each EEOC investigator resolved an average of 88.5 cases in FY 91. This compares to 33 cases per investigator at the Department of Housing and Urban Development, the next closest federal agency with similar responsibilities.

Indulge me while I take off the budget hat, and put on the management hat. I believe that there needs to be a more equitable distribution of the civil rights dollar. The EEOC's only mandate is to enforce civil rights laws, yet a disproportionate amount of money is allocated to larger agencies to carry out their civil rights responsibilities.

Congress passed the Civil Rights Act of 1991 and the Americans with Disabilities Act without providing any real funds for enforcement. Because the ADA is so new, it is likely to require more work per case, at least in the initial stages of enforcement. Further, we are expecting a sizable increase in charges due to the new laws.

On top of this, the intense spotlight on sexual harassment over the past year has doubled the number of those charges filed with the agency. And to make matters worse, Congress now is considering a bill that would give the EEOC responsibility for complaints filed in the federal sector.

EEOC investigators already are stretched to the limit. They will break under these conditions. We are losing good staffers because of low morale. After all, who would want to stay at a job that required such a demanding workload when another agency was offering better pay for one-third of the work?

We're already seeing the toll on staff. But the human fallout from the funding recommendations will be grave. Those who turn to the EEOC for relief will be forced to wait nearly three years before the agency can resolve their charges. A woman who files a charge of pregnancy discrimination, for example, will not see her case resolved until her child is in pre-school.

The practical implications of such a delay are horrendous. They are horrendous not only for the charging party who feels his or her rights have been violated, but for the business charged with the alleged violation. An employer would be faced with the administrative nightmare of producing information to justify actions of three or four years earlier.

I am sympathetic to the tough budget decisions Congress must make this year. But the EEOC is in a unique position. While other agencies can handle budget cuts by reducing or even eliminating programs and grants, EEOC has no choice but to vigorously enforce the laws under our jurisdiction.

If Congress approves the budget as currently proposed, EEOC will be forced to make some painful choices. No one will be happy: not the aggrieved worker who comes to us for relief; not the employer accused of discrimination; not the oversight committees in Congress that review our work.

Our dedicated employees do not want the EEOC to become another paper-shuffling federal agency. We are proud of our long history of vigorous enforcement of anti-employment discrimination laws. If Congress is going to continue passing laws -- good laws -- to protect the American worker, it had better follow through and provide the funding to enforce those laws. Otherwise, Congress is wasting taxpayers time and money.

Now I would like to introduce Ann Colgrove, Director of Communications and Legislative Affairs, who will give us a brief overview of congressional activities.

OUTLINE OF FY 1993 FUNDING STATUS

- Historical Context: 1980's to Present
- FY 1993 Unprecedented Requirements/Funding Reality
- FY 1993 Potential Funding Status

  President's Request

  House/Senate Marks
- Reality Impact of Potential FY 1993 Congressional Funding

  Funding/Staffing

  Workload
- Bottom-Line Prognosis

HISTORICAL CONTEXT:

1980'S TO PRESENT

HISTORICAL CONTEXT: 1980'S TO PRESENT

	Funding ($000)		Staffing (FTE)	
FY	Requested	Enacted	Requested	Actual
1980	$130,622	$124,562	3,527	3,390
1981	$147,647	$144,610	3,696	3,358
1982	$145,239	$144,739	3,740	3,166
1983	$149,598	$147,421	3,327	3,084
1984	$157,940	$154,039	3,125	3,044
1985	$164,055	$163,655	3,125	3,097
1986	$158,825	$165,000	2,976	3,017
1987	$172,220	$169,529	3,125	2,941
1988	$193,457	$179,812	3,198	3,168
1989	$194,624	$180,712	3,198	2,970
1990	$188,700	$184,926	3,050	2,853
1991	$195,867	$201,930	3,050	*2,796
1992**	$210,271	$210,271	2,821	2,790 (est)
1993***	$245,341		3,071	

* From FY 1980 to FY 1991, FTE was reduced by 594.

** Excludes Proposed Supplemental of $1,000,000 and 50 additional FTE.

*** Includes Proposed Amendment of $2,496,000.

FY 1993 UNPRECEDENTED REQUIREMENTS/FUNDING REALITY

FY 1993 UNPRECEDENTED REQUIREMENTS/ FUNDING REALITY

FY 1993 MARKS THE FIRST FULL YEAR OF IMPLEMENTATION OF:

CRA

ADA

1614

FUNDING REALITY:

- CRA - no resources were provided (i.e., signed into law 11/21/91 after passage of FY 1992 appropriation)
- ADA - only $4 million dollars increase was provided in FY 1992 for ADA implementation
- 1614 - limited additional resources ($1.5 million) are included in President's FY 1993 Budget Request

FY 1993 POTENTIAL FUNDING STATUS

- PRESIDENT'S REQUEST
- HOUSE/SENATE MARKS

FY 1993 POTENTIAL FUNDING STATUS	
$ Increase	
FY 1993 President's Request	$245,341,000
FY 1992 Appropriation	210,271,000
Increase	+$35,070,000
Staff Increase	
FY 1993 President's Request	3,071
FY 1992 Appropriation	2,821
	+250

FY 1993 POTENTIAL FUNDING STATUS HOUSE/SENATE MARKS		
	House Mark	+/-
	+$8,411,000	-$26,659,000
	($218,682,000)	
President's Request		
+$35,070,000		
($245,341,000)		
	Senate Mark	+/-
	+2,711,000	-$32,359,000
	($212,982,000)	

REALITY IMPACT OF POTENTIAL FY 1993 CONGRESSIONAL FUNDING

- Funding/Staffing
- Workload

FUNDING/STAFFING

REALITY IMPACT OF POTENTIAL FY 1993 CONGRESSIONAL FUNDING

KEY FACTS:

EEOC is a small agency/single appropriation. . . As such, no ability to reprogram from other areas/accounts

EEOC is labor intensive . . . Approximately 76% of its appropriation pays for staff salaries

In FY 1993, EEOC will have to pay the fixed, noncontrollable cost increases for:

Fixed Costs	'93 Increases
Salaries & Benefits (Pay raise, WIGS, promotions, PMRS increases)	+$9,932,000
Rent, Communications, Utilities	+$2,046,000
Total	+$11,978,000
Inflation Estimate	+$714,714
Total	+$12,692,714

FUNDING REALITY IMPACT
Scenario #1

Current Staff
(2,821 FTE)

Assumptions

- Assume EEOC maintains the FY 1992 staff level of 2,821 FTE
- Assume no inflation for all operational costs; hold at the FY 1992 funding levels, including State and Local

Salaries and Benefits	$149,356,000
Fixed Costs	27,810,000
All Operational Costs (e.g., litigation, travel, training, equipment, supplies, printing, etc.)	21,658,000
State and Local	25,000,000
	$223,824,000

OPERATIONAL COSTS OVERVIEW			
	FY 1992 Level	FY 1993 Request	+/-
Travel	$2,845	$3,147	+$302
Transportation of HHG, etc.	136	136	0
Printing	938	2,453	+1,515
Other Services	9,961	12,463	+2,502
Litigation Support	3,171	4,321	+1,150
Supplies, Books, etc.	2,615	2,806	+191
Building Alterations	811	811	0
Training	300	2,100	+1,800
Equipment	881	1,588	+707
TOTAL	$21,658	$29,825	+$8,167

FUNDING REALITY IMPACT
Scenario #2

Senate Mark
($212,982,000)

Assumptions

- Assume no inflation for all operational costs; hold at the FY 1992 funding levels, including State and Local
- Assume Avg. Salary/Benefits ($52,169)

Funding

Salaries and Benefits	$138,514,000
Fixed Costs	27,810,000
All Operational Costs	21,658,000
State and Local	25,000,000
	$212,982,000

Staffing

EEOC could only afford 2,655 FTE . . . a reduction of 166 from FY 1992 and 416 from FY 1993 Request

Reduction:

'92 Level	'93 Request
2,821	3,071
-2,655	-2,655
-166	-416

STAFFING REALITY IMPACT

- Cut staff 416 FTE (13.5%) from the FY 1993 requested level of 3,071

- Cut requested FY 1993 level of 250 FTE (all dedicated to field operations)

- Cut remaining staff of 166 FTE from headquarters and field operations

- Chairman's Priority:

  Continue downsizing headquarters; minimize cuts to the field.

STAFFING REALITY IMPACT

- Chairman's priority - optimal staffing for field offices

- Current FY 1992 Goal

Field	2200
HQ	621
	2,821

- To achieve Chairman's priority - need to consider/review all options for cost savings

OPTIONS FOR CONSIDERATION/REVIEW:

Cost Savings Examples (Assume FY 1992 funding; no inflation)

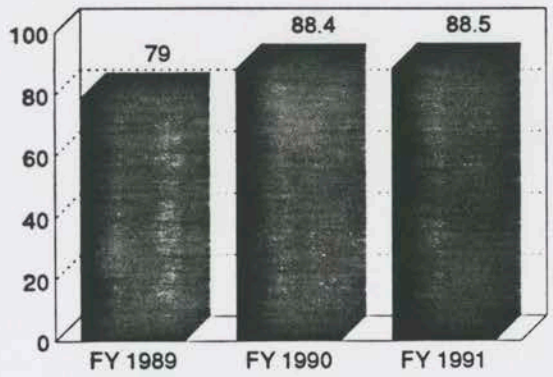
- Furlough (e.g., all non-essential personnel)
- Close select EEOC offices (virtually no immediate cost savings)
- Reduce/eliminate Training (e.g., jeopardize implementation of new legislation) (Only $300,000 in FY 1992 President's Budget . . . $106 avg/per staff)
- Reduce Travel (e.g., jeopardize quality investigations) (Only $2,845,000 in FY 1992 President's Budget . . . $35 avg/per investigation)
- Reduce Litigation Support (Only $3,171,000 in FY 1992 President's Budget . . . $2,377 avg/per case)
- Reduce Equipment (e.g., jeopardize efficiency) (Only $881,000 in FY 1992 President's Budget . . . $312 avg/per staff)

WORKLOAD

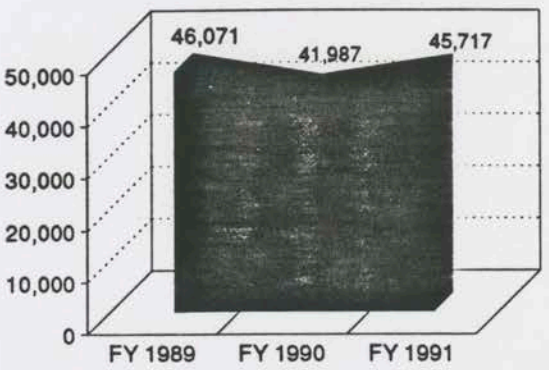
- Productivity Successes

- Impact in FY 1993 (Examples)

RESOLUTIONS PER INVESTIGATOR

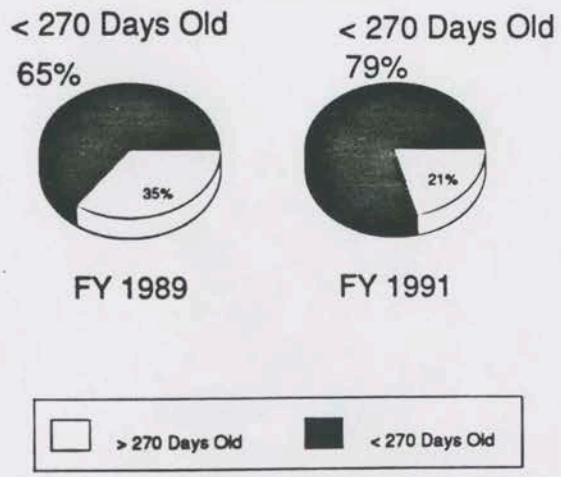


PENDING INVENTORY

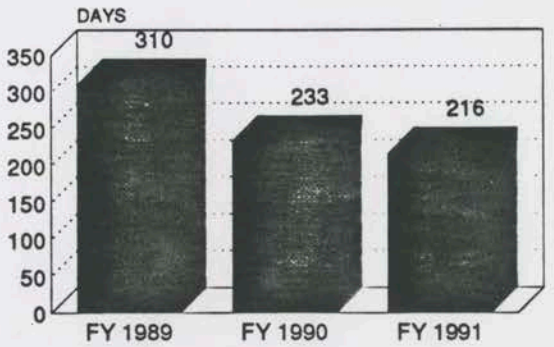


PRODUCTIVITY SUCCESSES
FY 1989 - FY 1991
(PRIVATE SECTOR)

270 DAY OLD CASES
AS A PERCENT OF INVENTORY

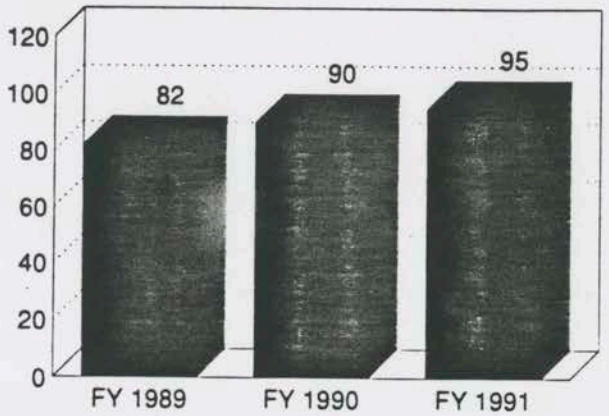


AVERAGE CHARGE
PROCESSING TIME



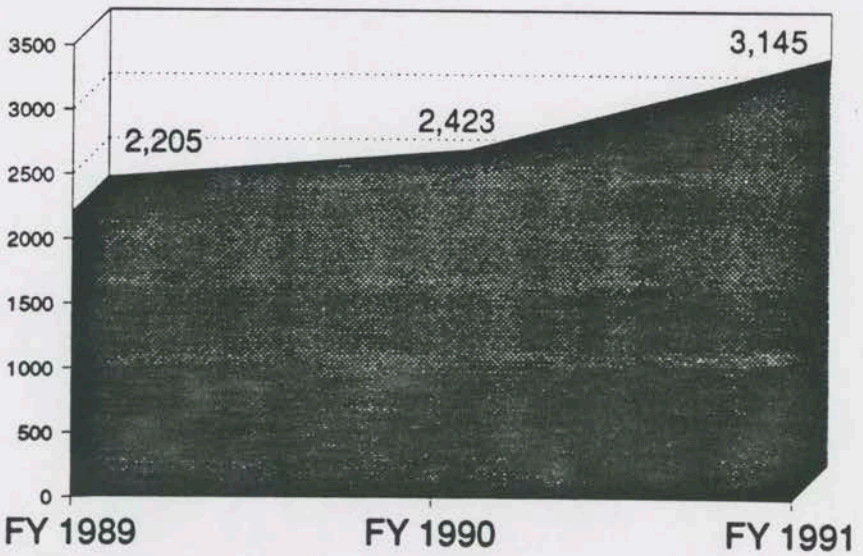
HEARINGS

RESOLUTIONS PER INVESTIGATOR

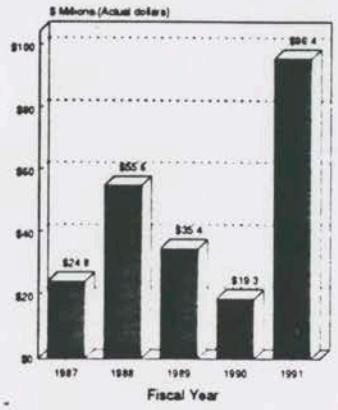


PRODUCTIVITY SUCCESSES
FY 1989 - FY 1991
(FEDERAL SECTOR)

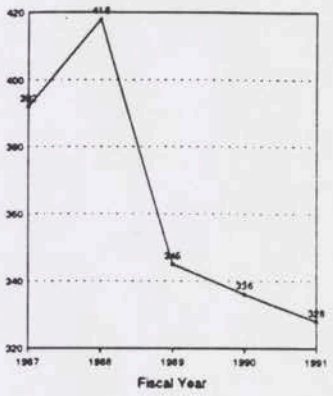
PENDING INVENTORY



MONETARY RELIEF (MILLIONS)



FIELD LEGAL UNIT STAFFING



LITIGATION SUPPORT PROGRAM

FY 1991 Workload*		FY 1991 Funding	
Cases Entering FY	682	Actual	$2,900,000
Cases Filed	495	40 Cases (3% of Caseload)	-1,600,000
Total Workload	1177	Remaining	$1,300,000

KEY POINT: **Only $1,300,000 remaining for 1,137 cases**

Only $1,143 avg/per case

***Final FY 1991 Reconciled Data**

WORKLOAD IMPACT

IN

FY 1993

WORKLOAD DATA

PRIVATE SECTOR EEOC ENFORCEMENT (COMPLIANCE ACTIVITY)					
WORKLOAD/WORKFLOW	FY 1991 ACTUAL	FY 1992 ESTIMATE	FY 1993 ESTIMATE	FY 1994 ESTIMATE	FY 1995 ESTIMATE
TOTAL PENDING CHARGE/COMPLAINTS	42,480	45,717	60,470	100,970	141,469
TOTAL RECEIPTS TO PROCESS	62,848	70,771	82,181	82,181	82,181
NET TRANSFERS AND DEFERRALS	4,731	4,826	4,826	4,826	4,826
TOTAL WORKLOAD	110,059	121,314	147,477	187,977	228,476
CHARGES/COMPLAINTS RESOLVED	64,342	60,844	46,507	46,507	46,507
CHARGES/COMPLAINTS FORWARDED	45,717	60,470	100,970	141,469	181,968
CHARGES/COMPLAINTS INVENTORY (MONTHS)	10.8	14.4	26.2	36.7	47.2
PERSONNEL RESOURCES					
PRODUCTIVE STAFF - YEARS ASSIGNED	779.4	779.4	714.4	714.4	714.4
PRODUCTIVE STAFF - YEARS AVAILABLE	727.1	724.8	664.4	664.4	664.4
AVERAGE CLOSURES PER PRODUCTIVE STAFF-YEAR	88.5	83.9	70.0	70.0	70.0

FEDERAL SECTOR					
HEARINGS					
Workload	1991	1992 Estimate	1993 Estimate	1994 Estimate	1995 Estimate
Complaints Pending	2,423	3,145	3,824	7,604	12,184
Complaints Received	5,773	6,500	7,300	8,100	8500
Total Workload	8,196	9,645	11,124	15,704	20,684
Complaints Resolved	5,051	5,821	3,520	3,520	3,520
Complaints Forwarded	3,145	3,824	7,604	12,184	17,164
Months of Inventory	7.4	7.8	25.9	41.5	58.5

BOTTOM-LINE PROGNOSIS

BOTTOM-LINE PROGNOSIS

- EEOC faces new unprecedented statutory requirements in FY 1993 (CRA, ADA, 1614, etc.)
- Yet . . . EEOC faces <u>actual</u> and significant <u>cuts</u> to current staffing/operations.
- EEOC is facing unprecedented trouble in doing its job.
- EEOC will seriously REGRESS in the current Congressional climate.

Trouble in the Workplace at EEOC

As Enforcement Demands Increase, Agency Feels the Squeeze

By Liz Spayd
Washington Post Staff Writer 9-27

The federal agency charged with investigating discrimination in the workplace claims it is so overworked and understaffed that without a sizable budget increase, its chief function could soon dissolve from government enforcement to bureaucratic paper-pushing.

In an emergency meeting of the Equal Employment Opportunity Commission yesterday, managers there warned that the agency could be forced to lay off more than 100 people, furlough others and possibly close field offices if Congress adopts its proposed budget.

Details of such pending cutbacks come as EEOC Chairman Evan J. Kemp Jr. is waging an intensive door-to-door lobbying effort to convince legislators on Capitol Hill that he needs more funding because conditions are so perilous that two tough new civil rights laws will have little effect unless he has the manpower to enforce them.

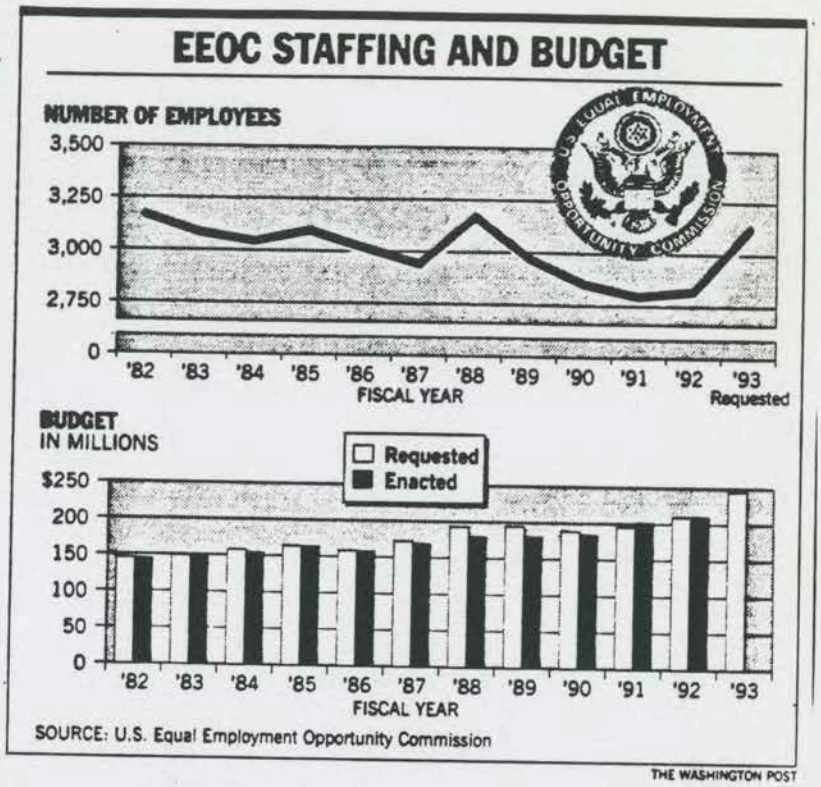
"If we were in business, we'd be out of business," he said. "If Congress gets its way, our financial situation will force a Chapter 11-type reorganization, jeopardizing the very product we deliver."

Owing largely to the Civil Rights Act of 1991 and the Americans with Disabilities Act, the agency estimates that discrimination claims will climb by 30 percent next year. In the first one-month period of the Americans With Disabilities Act after its employment provisions went into effect in late July, 248 complaints were generated. And in the nine months since the Civil Rights Act of 1991 became law, claims have jumped by 11 percent.

The question now is whether the agency will be given a funding increase to match its climbing caseload. So far, the answer from Congress seems to be no.

Although President Bush submitted a request that would bolster the EEOC's budget by $35 million to $245 million for fiscal 1993, the House is looking at an increase of just $8 million and the Senate is proposing a less generous increase of $2 million.

Those kinds of numbers, according to Kemp and his top aides, won't even cover inflation and ultimately could force the agency to "ration justice" among women, minorities and the disabled.



Bleak as things appear, Rep. Neal Smith (D-Iowa), who heads the House Appropriations subcommittee on commerce, justice, state and the judiciary, warns there is simply not enough money to grant the funding that Bush requested.

"They need the money, but they're not the only ones," Smith said. "Most agencies are being hit far worse than they are."

The budget battles come when morale at the agency is down, in part because of unwanted attention following the hearings last year on the nomination of Clarence Thomas to the Supreme Court, but more recently because of increased workloads that are causing late nights and long weekends at the office.

Computers often are shared among large groups of staffers, equipment breakdowns have become commonplace in many offices and, increasingly, the EEOC is losing investigators to other government agencies where the pay is higher and the hours shorter.

Although the agency insists it is doing complete investigations of the 45,000 complaints that came into its office this year, some who deal with the agency aren't so sure.

"As a practical matter, I don't see the EEOC as anything but a place where you're required to file a complaint," said Robert Fitzpatrick, a Washington lawyer who handles discrimination cases. "In terms of doing anything meaningful for my clients, they can't because they simply don't have the staff."

For a complaint filed at the agency now, an investigation will not get underway for 10 months. At the current rate of increase in complaints, and with no additional staff, the average case will not be reviewed for more than two years.

Such backups are bad not only for those filing suit but also for those getting sued, because an employer could be forced to justify a layoff or other employment decision from three years back.

Richard Seymour, who handles employment discrimination cases for the Lawyers Committee for Civil Rights Under Law, said the agency already is weak in investigating discrimination cases. And as the EEOC takes on the rights of the disabled, it inherits a formidable task.

"It's terribly important to get the enforcement of this law off to a roaring start," Seymour said. "This is the time when the landmark cases are going to be filed, and how the EEOC takes on the responsibility is critical."

BOB DOLE
KANSAS

United States Senate

OFFICE OF THE REPUBLICAN LEADER
WASHINGTON, DC 20510

March 20, 1991

Senator Ernest F. Hollings
Chairman
Subcommittee on Commerce, Justice, State and Judiciary
Committee on Appropriations
S-146 U.S. Capitol
Washington, D.C. 20510

Dear Fritz:

Last year, Congress demonstrated its commitment to ensuring equality of opportunity for citizens with disabilities. With the support of President Bush, Congress passed the Americans with Disabilities Act (P.L. 101-336), an historic civil rights law that prevents discrimination against people with disabilities in employment, public accommodations and services, transportation and telecommunications. This landmark law is intended to establish an inclusive society where all individuals -- regardless of disability -- have the opportunity to participate in the mainstream of American life.

During Congressional consideration of ADA, I successfully offered a technical assistance amendment to design a government-wide technical assistance program. This program disseminates information to educate people with disabilities about their rights and the business community about their obligations under ADA. Many private sector entities desperately need information that answer their questions regarding compliance with the new law. For example, technical assistance is instrumental in assisting small businesses make necessary, cost-effective accommodations to achieve ADA's intent.

Therefore, I respectfully request that the inclusion of 6.2 million for ADA technical assistance in the Senate Supplemental Appropriations bill remain in the final conference report. This appropriation will enable both the Equal Employment Opportunity Commission (EEOC) and the Department of Justice to effectively implement the technical assistance program required under ADA.

As you are aware, both agencies recently published their proposed regulations in the Federal Register. The expedient submission of regulations is very impressive and moves the nation closer to fulfilling the promise of a strong civil rights mandate for people with disabilities. A comprehensive technical assistance program, however, is still necessary to ensure

implementation of ADA's regulations. I am confident that the requested appropriation of 6.2 million will go a long way towards helping small businesses and people with disabilities plan and implement ADA.

For your information, I have enclosed a copy of the amendment language as well as the appropriation language included in the Senate Supplemental bill. Thank you in advance for your consideration of my request.

With warmest personal regards.

Sincerely,

BOB DOLE
United States Senate

BD/mw

BOB DOLE
KANSAS

United States Senate

OFFICE OF THE REPUBLICAN LEADER
WASHINGTON, DC 20510

March 20, 1991

The Honorable Neal Smith
Chairman
House Appropriations Subcommittee on Commerce,
Justice and State, the Judiciary, and Related
Agencies
H 309, The Capitol
Washington, D.C. 20515

Dear Neal:

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As you are aware, both agencies recently published their proposed regulations in the Federal Register. The expedient submission of regulations is very impressive and moves the nation closer to fulfilling the promise of a strong civil rights mandate for people with disabilities. A comprehensive technical assistance program, however, is still necessary to ensure

implementation of ADA's regulations. I am confident that the requested appropriation of 6.2 million will go a long way towards helping small businesses and people with disabilities plan and implement ADA.

For your information, I have enclosed a copy of the amendment language as well as the appropriation language included in the Senate Supplemental bill. Thank you in advance for your consideration of my request.

With warmest personal regards.

Sincerely,

BOB DOLE
United States Senate

BD/mw

BOB DOLE
KANSAS

United States Senate

OFFICE OF THE REPUBLICAN LEADER
WASHINGTON, DC 20510

March 20, 1991

The Honorable Harold Rogers
Ranking Chairman
House Appropriations Subcommittee on Commerce,
Justice and State, the Judiciary, and Related
Agencies
343 Cannon House Office Building
Washington, D.C. 20515

Dear Harold:

Last year, Congress demonstrated its commitment to ensuring equality of opportunity for citizens with disabilities. With the support of President Bush, Congress passed the Americans with Disabilities Act (P.L. 101-336), an historic civil rights law that prevents discrimination against people with disabilities in employment, public accommodations and services, transportation and telecommunications. This landmark law is intended to establish an inclusive society where all individuals -- regardless of disability -- have the opportunity to participate in the mainstream of American life.

During Congressional consideration of ADA, I successfully offered a technical assistance amendment to design a government-wide technical assistance program. This program disseminates information to educate people with disabilities about their rights and the business community about their obligations under ADA. Many private sector entities desperately need information that answer their questions regarding compliance with the new law. For example, technical assistance is instrumental in assisting small businesses make necessary, cost-effective accommodations to achieve ADA's intent.

Therefore, I respectfully request that the inclusion of 6.2 million for ADA technical assistance in the Senate Supplemental Appropriations bill remain in the final conference report. This appropriation will enable both the Equal Employment Opportunity Commission (EEOC) and the Department of Justice to effectively implement the technical assistance program required under ADA.

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With warmest personal regards.

Sincerely,

BOB DOLE
United States Senate

BD/mw

BOB DOLE
KANSAS

United States Senate

OFFICE OF THE REPUBLICAN LEADER
WASHINGTON, DC 20510

June 17, 1991

The Honorable Warren Rudman
Ranking Member, Subcommittee on Commerce,
Justice, State, and Judiciary
152 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

The purpose of this letter is to make a personal request that you give careful consideration to the level of funds provided to the Department of Justice, the Equal Employment Opportunity Commission, and the Federal Communication Commission for the implementation of the Americans with Disabilities Act, landmark civil rights legislation that prevents discrimination against people with disabilities.

We request that you to include, at a minimum, $2.5 million to the Justice Department and $4 million to the Equal Employment Opportunity Commission for salaries and expenses.

In addition, we request that you include $10 million for the Justice Department, $7 million for the Equal Employment Opportunity Commission, and $1 million to the Federal Communications Commission for technical assistance, including public education and training.

Funding for technical assistance will be instrumental in enabling the disability community and the business community to establish partnerships that will foster voluntary compliance and in providing invaluable information to small businesses, small communities and others responsible for making the necessary accommodations required by the legislation in the most cost-effective manner. The Department of Justice, in coordination with the other federal agencies, has already developed a comprehensive technical assistance plan.

Similar technical assistance efforts, funded at a $50 million level over a three year period, were used following the issuance of regulations implementing section 504 of the

Rehabilitation Act of 1973, which prohibits discrimination on the basis of disability by recipients of Federal financial assistance. These effort proved to be invaluable in increasing compliance and decreasing litigation.

Thank you for considering our request.

Sincerely,

Tom Harkin
U.S. Senator

Bob Dole
U.S. Senator

BOB DOLE
KANSAS

United States Senate

OFFICE OF THE REPUBLICAN LEADER
WASHINGTON, DC 20510

June 17, 1991

The Honorable Warren Rudman
Ranking Member, Subcommittee on Commerce,
Justice, State, and Judiciary
152 Dirksen Senate Office Building
Washington, D.C. 20510

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Thank you for considering our request.

Sincerely,

Tom Harkin
U.S. Senator

Bob Dole
U.S. Senator

TOM HARKIN
IOWA

(202) 224-3254
TTY (202) 225-1904

COMMITTEES:
AGRICULTURE
APPROPRIATIONS
SMALL BUSINESS
LABOR AND HUMAN RESOURCES

United States Senate

WASHINGTON, DC 20510

June 17, 1991

The Honorable Ernest F. Hollings
Chairman, Subcommittee on Commerce,
Justice, State, and Judiciary
S146-Capitol
Washington, D.C. 20510

Dear Mr. Chairman:

The purpose of this letter is to make a personal request that you give careful consideration to the level of funds provided to the Department of Justice, the Equal Employment Opportunity Commission, and the Federal Communication Commission for the implementation of the Americans with Disabilities Act, landmark civil rights legislation that prevents discrimination against people with disabilities.

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210 WALNUT ST.
ROOM 733 FEDERAL BLDG.
DES MOINES, IA 50309
(515) 284-4574

880 LOCUST ST.
SUITE 125
DUBUQUE, IA 52001
(319) 582-2130

307 FEDERAL BLDG.
BOX H
COUNCIL BLUFFS, IA 51502
(712) 328-8933

BOX 74884
LINDALE MALL
CEDAR RAPIDS, IA 52407-4884
(319) 393-[illegible]

131 E. 4TH ST.
314B FEDERAL BLDG.
DAVENPORT, IA 52801
(319) 322-1536

FOURTH AND JACKSON STS.
901 BADGEROW BUILDING
SIOUX CITY, IA 51101
(712) 252-1550

Rehabilitation Act of 1973, which prohibits discrimination on the basis of disability by recipients of Federal financial assistance. These effort proved to be invaluable in increasing compliance and decreasing litigation.

Thank you for considering our request.

Sincerely,

Tom Harkin
U.S. Senator

Bob Dole
U.S. Senator

The disability community together with the Department of Justice's Office of ADA Technical Assistance has requested an appropriation of $20 million to carry out the necessary technical assistance to implement the ADA -- an increase of $10 million over last year's funding. The increase is needed to meet the mandates of the law which have take full effect on July 26, 1992. While the Public Accommodations Title of the law has been in effect for a year, the Employemnt provisions under Title I take effect on July 26, 1992. various Agencies are having a difficult time keeping up with requests for information and technical assistance.

Title I of the Americans with Disabilities Act will take effect on July 26, 199

The Public Accommodations Title of the law has been in full effect for a year with Title I due to .

U.S. Equal Employment Opportunity Commission
Office of Communications and Legislative Affairs
1801 L Street, N.W., Room 9024
Washington, D.C. 20507

FAX TRANSMITTAL FORM

DATE: 9/10/91 TIME: 5:30 p.m.

TO: Maureen West

FAX TELEPHONE NUMBER: 224-8952

FROM: Howard Moses - Deputy Director

DOCUMENT: EEOC Technical Assistance Revolving Account Authorization Language

NUMBER OF PAGES TRANSMITTED (INCLUDING COVER): 4

SPECIAL INSTRUCTIONS:

IF YOU DO NOT RECEIVE THE ENTIRE MESSAGE, PLEASE NOTIFY US IMMEDIATELY AT: (202) 663-4900
OCLA FAX #: (202) 663-4912

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

September 10, 1991

TO : Maureen West, Legislative Assistant
Office of Senator Robert Dole
Room 141 Senate Hart Office Building

FROM : Howard Moses, Deputy Director
Office of Communications and
Legislative Affairs
U.S. Equal Employment Opportunity Commission

SUBJECT : Proposed Authorization Language for EEOC Technical Assistance Revolving Account

Attached is the language we discussed regarding authorizing the establishment of a Technical Assistance Revolving Account for the U.S. Equal Employment Opportunity Commission. The language has been reviewed and approved by OMB.

Senator Dole's sponsorship of [and your staff work on] the technical assistance provisions of the ADA will prove invaluable to our efforts to secure passage of this proposed language.

I look forward to meeting with you on Thursday, September 19 at 10:00 a.m. Kassie Billingsley, Director, Financial and Resource Management Services will accompany me.

cc: Kassie Billingsley

Judiciary re HR5.

An Act

To establish a Technical Assistance Revolving Fund for the United States Equal Employment Opportunity Commission for technical assistance and training.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Section 1. SHORT TITLE.

This Act may be cited as "EEOC Technical Assistance Revolving Fund Authorization Act of 1991".

Section 2. REVOLVING FUND AUTHORIZATION.

(a) There is hereby created within the United States Treasury a separate fund (hereafter in this section called "the fund") which shall be available to the Chairman of the Commission without fiscal year limitation for the purposes of this Act. A business-type budget for the fund shall be prepared, transmitted to the Congress, considered and enacted in the manner prescribed by law (31 U.S.C. 9103) for wholly-owned Government corporations.

(b) There is authorized to be transferred to the fund from Salaries and Expenses not to exceed $1,000,000 to provide capital for the fund including $525,000 from the Salaries and Expenses Account for capital investments necessary to finance a Technical Assistance Training Institute. Funds transferred from the Salaries and Expenses account shall be available to the Technical Assistance Revolving Fund through September 30, 1993.

(c)(1) Any reimbursement received as a result of providing technical assistance and training in the laws and regulations enforced by the EEOC shall be deposited in the fund to carry out technical assistance and training. Fees shall be assessed at rates determined by the Chairman to cover the expenses incurred in providing technical assistance and training as well as the administrative expenses of the fund including depreciation of equipment, accrued leave, and probable losses.

(2) All expenses, including reimbursements to other government accounts, and repayments pursuant to operations of the Chairman under this Act shall be paid from the fund. If at any time the Chairman determines that monies in the fund exceed the anticipated operating requirements of the fund, the excess funds shall be transferred to the general fund of the Treasury.

Section 3. EFFECTIVE DATE.

This Act shall take effect on the date of the enactment of this Act.

the ADA? That is, can we assure employers that they will not face litigation under the ADA by current users of illegal drugs and alcohol?

Mr. HARKIN. Let me state it as clearly as I can. Users of illegal drugs, including those addicted to illegal drugs, are not protected by the ADA, regardless of whether the employee or applicant is otherwise qualified and the employee is meeting performance standards.

The technical amendment with respect to illegal drugs and alcohol was made to remove any question about the meaning of the statutory language. Although many of us believe that the language of the bill, as reported, was clear, others criticized the bill as being too vague with respect to the issue of the use of illegal drugs.

The new language assures employers that they need not worry about having to defend actions brought by casual drug users, who are not covered under the act. The act does protect drug addicts who are not current users. And we all agree that people who use controlled substances under medical supervision, are unaffected by this provision of the act.

With respect to drug testing, the ADA explicitly states that nothing in the act prohibits or restricts either drug testing or employment decisions taken on the basis of such drug tests. Therefore, an applicant who is tested and not hired because of a positive test result for illegal drugs, or an employee who is tested and is fired because of a positive test result for illegal drugs, does not have a cause of action under the ADA. If an employer performed a test which actually measured the current use of illegal drugs and the test was positive for the use illegal drugs, the applicant or employee has no protection under the ADA. It is not a question of the employer having a defense in an action by the applicant or employee. The employer needs no such defense because the applicant or the employee has no cause of action.

So, I think we can assure the Senator and employers, without hestitation, that employers will not face litigation under the ADA on the part of current users of illegal drugs and alcohol either for testing or for taking disciplinary action against such individuals based on such testing.

Mr. ARMSTRONG. Mr. President, I have not had a chance to see the amendment. This is a matter of interest to me. Do we have a copy of the amendment?

Mr. HARKIN. It is at the desk. We tried to clear this with both sides. I thought it had been cleared.

Mr. President, in the meantime, I ask unanimous consent that we can move ahead in the interest of time to accommodate the distinguished minority leader. I move to set aside the amendment.

The PRESIDING OFFICER. Without objection, the amendment will be set aside.

The Senator from Kansas.

AMENDMENT NO. 719

(Purpose: To provide a plan to provide entities with technical assistance)

Mr. DOLE. Mr. President, I send an amendment on behalf of myself and Senator DOMENICI and Senator GRASSLEY to the desk and ask for its immediate consideration.

The PRESIDING OFFICER. The amendment will be stated.

The legislative clerk read as follows:

The Senator from Kansas [Mr. DOLE], for himself, Mr. DOMENICI and Mr. GRASSLEY, proposes an amendment numbered 719.

Mr. DOLE. Mr. President, I ask unanimous consent that reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

On page 95, strike lines 4 through 14 and insert the following new subsections:

(a) PLAN FOR ASSISTANCE.—

(1) IN GENERAL.—Not later than 180 days after the date of enactment of this Act, the Attorney General, in consultation with the Chairman of the Equal Employment Opportunity Commission, the Secretary of Transportation, the National Council on Disability, the Chairperson of the Architectural and Transportation Barriers Compliance Board, and the Chairman of Federal Communications Commission, shall develop a plan to assist entities covered under this Act, along with other executive agencies and commissions, in understanding the responsibility of such entities, agencies, and commissions under this Act.

(2) PUBLICATION OF PLAN.—The Attorney General shall publish the plan referred to in paragraph (1) for public comment in accordance with the Administrative Procedure Act (5 U.S.C. 551 et seq.).

(b) AGENCY AND PUBLIC ASSISTANCE.—The Attorney General is authorized to obtain the assistance of other Federal agencies in carrying out subsection (a), including the National Council on Disability, the President's Committee on Employment of People with Disabilities, the Small Business Administration, and the Department of Commerce.

(c) IMPLEMENTATION.—

(1) AUTHORITY TO CONTRACT.—Each department or agency that has responsibility for implementing this Act may render technical assistance to individuals and institutions that have rights or responsibilities under this Act.

(2) IMPLEMENTATION OF TITLES.—

(A) TITLE I.—The Equal Employment Opportunity Commission and the Attorney General shall implement the plan for assistance, as described in subsection (a), for title I.

(B) TITLE II.—

(i) IN GENERAL.—Except as provided for in clause (ii), the Attorney General shall implement such plan for assistance for title II.

(ii) EXCEPTION.—The Secretary of Transportation shall implement such plan for assistance for section 203.

(C) TITLE III.—The Attorney General, in coordination with the Secretary of Transportation and the Chairperson of the Architectural Transportation Barriers Compliance Board, shall implement such plan for assistance for title III.

(D) TITLE IV.—The Chairman of the Federal Communications Commission, in coordination with the Attorney General, shall implement such plan for assistance for title IV.

(d) GRANTS AND CONTRACTS.—

(1) IN GENERAL.—Each department and agency having responsibility for implementing this Act may make grants or enter into contracts with individuals, profit institutions, and nonprofit institutions, including educational institutions and groups or associations representing individuals who have rights or duties under this Act, to effectuate the purposes of this Act.

(2) DISSEMINATION OF INFORMATION.—Such grants and contracts, among other uses, may be designed to ensure wide dissemination of information about the rights and duties established by this Act and to provide information and technical assistance about techniques for effective compliance with this Act.

(e) FAILURE TO RECEIVE ASSISTANCE.—An employer, public accommodation, or other entity covered under this Act shall not be excused from meeting the requirements of this Act because of any failure to receive technical assistance under this section.

Mr. DOLE. Mr. President, let me explain this amendment. It has been cleared on both sides. It is a technical assistance amendment.

It is important that both the employers and businesses and the handicapped fully understand this legislation, once it is passed, if it is to be implemented. So that is precisely what the amendment does. It will enable the responsible Federal agencies to establish a strong Governmentwide technical assistance program. Such a program will help to educate the public about the requirements of this bill.

Entities in the private sector need to be aware of what accommodations are both necessary and cost effective, as well as what is the best suited for particular disabled individuals.

Since many of these accommodations will be made in areas which traditionally have not been covered under the Rehabilitation Act—that is, other than universities or Federal contractors in excess of $2,500—a longstanding expertise can be applied in implementing the ADA in these new areas.

The same standards exist in the ADA that have existed for over a decade in the Rehabilitation Act. For example, reasonable accommodations which do not provide an undue burden and are limited by business necessity and safety are principles which can be defined by a decade of experience.

Technical assistance is instrumental in providing these definitions to the private sector. A thorough understanding of these principles will greatly hasten the implementation and practice of this important piece of legislation.

Given the comprehensive nature of the ADA, I believe it is our obligation to see that people with disabilities understand their new rights under the bill and that employers and businesses understand the nature of their new obligations.

The PRESIDING OFFICER. Is there further debate?

The Senator from New Mexico.

Mr. DOMENICI. Mr. President, unless the distinguished minority

BOB DOLE
KANSAS
141 SENATE HART BUILDING
(202) 224-6521

COMMITTEES
AGRICULTURE, NUTRITION, AND FORESTRY
FINANCE
RULES

United States Senate

WASHINGTON, DC 20510-1601

May 24, 1990

Senator Ernest F. Hollings
Chairman
Subcommittee on Commerce, Justice, State and Judiciary
Committee on Appropriations
S-146 U.S. Capitol
Washington, D.C. 20510

Dear Fritz:

With recent passage of the Americans with Disabilities Act in both the House and Senate, Congress has demonstrated its commitment to enhancing equal rights and opportunities for all Americans. This landmark civil rights legislation for people with disabilities will go far to insure an all inclusive society. We must not be blind, however, to the work that lies ahead in effectively implementing this law. Given the comprehensive nature of the ADA, I believe it is our obligation to see that people with disabilities understand their new rights under the bill and employers and businesses understand their obligations.

During Senate consideration of the ADA I offered a technical assistance amendment that would enable the responsible Federal agencies to carry out a government-wide technical assistance program. Such a program would educate the public about the requirements of this law. Entities in the private sector need to be aware of what accommodations are both necessary and cost effective, as well as, what accommodations are best suited to particular disabled individuals. Technical assistance is instrumental in providing accurate information and training in carrying out the intent of this law. Therefore, I respectfully request a $1.8 million dollar appropriation which will enable the Equal Employment Opportunity Commission to create and implement a technical assistance program.

I am certain that this requested appropriation will go far to ensure appropriate planning and implementation of the Americans with Disabilities Act. For your information, I am enclosing a copy of the amendment language passed by the Senate during consideration of this bill. Thank you for your consideration to this request. If you have any questions, please call Kathy Ormiston (4-2765) on my staff.

Sincerely,

BOB DOLE
United States Senate

BD/mw

COMMITTEE ON SMALL BUSINESS

HEARING ON
THE AMERICANS WITH DISABILITIES ACT

2359-A RAYBURN HOUSE OFFICE BUILDING

FEBRUARY 22, 1990

9:00 A.M.

WITNESS LIST

Honorable Steny H. Hoyer
Representative from the State of Maryland

Mr. Joseph Dragonette
founder and President
Joseph Dragonette, Inc., Chicago, Illinois
representing the U.S. Chamber of Commerce

Mr. Kenneth E. Lewis
President
Kenneth E. Lewis, CPA, Portland, Oregon
representing the National Federation of Independent Business

Mr. David Pinkus
President
North Haven Gardens, Dallas, Texas
representing National Small Business United

Mr. Lex Frieden
former Executive Director
National Council on the Handicapped

Ms. Arlene Mayerson
Directing Attorney
Disability Rights Education and Defense Fund

Mr. James Turner
Acting Assistant Attorney General for Civil Rights
U.S. Department of Justice

STATEMENT OF REP. JOHN J. LaFALCE, CHAIRMAN
COMMITTEE ON SMALL BUSINESS

HEARING ON THE AMERICANS WITH DISABILITIES ACT
FEBRUARY 22, 1990

Our purpose today is to examine the potential effects of the Americans with Disabilities Act on small businesses.

This legislation is intended to usher in an era of access to and participation in employment, public services, public accommodations, transportation, and telecommunications for the disabled. I believe I can speak for all of us here when I say that it is in the best interest of the United States to get the disabled into the economic and social mainstream of our country.

I realize, however, that private sector small businesses have legitimate concerns as to their role in effecting this public policy goal. In order for the ADA to be a vehicle that leads to the further integration of our society, we must have a bill that unites us by being as equitable and workable as possible.

The ADA has already been the subject of many House and Senate hearings. The version that was passed by the Senate and the version reported out of the House Committee on Education and Labor reflect many compromises between the Administration, the Congress, and the business and disabled communities. But questions remain that merit further discussion.

Clearly, it is everyone's desire to have the rights of the disabled and the concerns of business hammered out through legislation, not litigation. No one wants a small business owner to go under because complying with or defending oneself under the ADA requires costly and time consuming lawsuits.

On the other hand, stereotypes concerning abilities and fears of the unknown should not freeze us into inaction where we close ourselves off as employers, colleagues, shopkeepers, and elected representatives to a segment of the American population whose potential contributions remain largely untapped.

I am hopeful that today's hearing will serve as a forum for realistic discussions. Let us clear away problems that do not exist in fact, but let us not gloss over legitimate concerns.

I am pleased to begin the hearing with the testimony of Representative Steny Hoyer of Maryland, who is the ADA's lead cosponsor and has been coordinating its movement through the House.

He will be followed by a distinguished group representing the small business and disabled communities. Mr. Joseph Dragonette, founder and President of Joseph Dragonette, Inc., of Chicago is representing the U.S. Chamber of Commerce. Mr. Kenneth E. Lewis, President of Kenneth E. Lewis, CPA, in Portland, Oregon is representing the National Federation of Independent Business. Mr. David Pinkus, President of Northhaven Gardens in Dallas, is representing National Small Business United. Mr. Lex Frieden is Executive Director of Houston's TIRR Foundation, which develops resources to support The Institute for Rehabilitation and Research. He is also assistant professor of rehabilitation at Baylor College of Medicine and is former Executive Director of the National Council on the Handicapped. Ms. Arlene Mayerson is Directing Attorney of the Disability Rights Education and Defense Fund in Berkeley, California and is also a professor of law in that state.

Our last witness will be Mr. James Turner, Acting Assistant Attorney General for Civil Rights at the Justice Department.

STATEMENT OF THE HONORABLE STENY H. HOYER

FEBRUARY 22, 1990

COMMITTEE ON SMALL BUSINESS

THANK YOU, MR. CHAIRMAN. I APPRECIATE THE OPPORTUNITY TO APPEAR BRIEFLY BEFORE THE COMMITTEE TODAY AS THE LEAD HOUSE MANAGER OF THE AMERICANS WITH DISABILITIES ACT. AS MOST OF YOU ALREADY KNOW, THE AMERICANS WITH DISABILITIES ACT WAS ORIGINALLY INTRODUCED IN THE HOUSE IN THE 100TH CONGRESS AND AGAIN IN THIS CONGRESS BY TONY COELHO, THEN THE MAJORITY WHIP. UPON HIS RESIGNATION IN JUNE OF LAST YEAR, TONY ASKED ME TO COORDINATE THE PASSAGE OF THE ADA IN THE HOUSE. I HAVE TAKEN ON THAT ROLE BOTH FOR TONY, AND ON BEHALF OF THE DEMOCRATIC LEADERSHIP.

CLEARLY, SMALL BUSINESSES ARE THE BACKBONE OF OUR NATION. FOR MILLIONS OF AMERICANS, A SMALL BUSINESS IS EITHER THEIR LIVLIHOOD OR THEIR SOLE SOURCE OF FOOD, ENTERTAINMENT, EMPLOYMENT OR SERVICES. IT IS IMPORTANT TO ENSURE THAT THE ADA AND SMALL BUSINESSES ARE COMPATIBLE. THEREFORE, I AM PLEASED TO HAVE THE OPPORTUNITY TO DISCUSS THE MANY WAYS IN WHICH I BELIEVE WE HAVE WORKED TOWARDS THAT GOAL.

THE PURPOSE OF THE AMERICANS WITH DISABILITIES ACT IS TO EXTEND CIVIL RIGHTS PROTECTIONS TO PEOPLE WITH DISABILITIES IN EMPLOYMENT, PUBLIC AND PRIVATE TRANSPORTATION, PUBLIC ACCOMMODATIONS, STATE AND LOCAL GOVERNMENT AND TELECOMMUNICATIONS. THE ADA IS BASED ON THE RECOMMENDATIONS OF THE NATIONAL COUNCIL ON DISABILITY, WHICH WAS COMPRISED OF 18 INDIVIDUALS APPOINTED BY PRESIDENT RONALD REAGAN.

THE COUNCIL FOUND, AFTER EXTENSIVE AND EXHAUSTIVE STUDY AND REVIEW, THAT AMERICANS WITH DISABILITIES FACE DISCRIMINATION IN ALMOST EVERY ASPECT OF THEIR LIVES INCLUDING EMPLOYMENT, HOUSING TRANSPORTATION, COMMUNICATIONS AND RECREATION. AS A RESULT, PEOPLE WITH DISABILITIES ARE MORE LIKELY TO BE POOR, UNEMPLOYED, AND LESS LIKELY TO TRAVEL, OR ATTEND SPORT OR LEISURE ACTIVITIES. IN FACT, PEOPLE WITH DISABILITIES ARE NOT LIKELY TO PARTICIPATE IN THE MAINSTREAM ACTIVITIES OF AMERICAN LIFE.

THE COSTS OF THAT DISCRIMINATION ARE TREMENDOUS TO EVERY SINGLE AMERICAN. IN ADDITION TO THE LOSS OF THE PRODUCTIVE TALENTS AND CONTRIBUTIONS OF THESE AMERICANS, OUR NATION IS SPENDING ALMOST $170 BILLION ON MAINTAINING THE DEPENDENCY OF THE DISABLED. A STUDY BY RUTGERS UNIVERSITY SHOWED THAT THE FEDERAL GOVERNMENT ALONE SPENDS UP TO $75 BILLION ANNUALLY. THE NATIONAL COUNCIL ON THE HANDICAPPED STATES THAT CURRENT SPENDING ON DISABILITY BENEFITS AND PROGRAMS EXCEEDS $60 BILLION ANNUALLY.

YET, PEOPLE WITH DISABILITIES WANT TO WORK AND NOT BE DEPENDENT. ALTHOUGH TWO-THIRDS OF ALL DISABLED AMERICANS BETWEEN THE AGE OF 16 AND 64 ARE UNEMPLOYED, ACCORDING TO A RECENT LOU HARRIS POLL, SIXTY-SIX PERCENT OF THE NON-WORKING DISABLED AMERICANS SAY THEY WANT TO WORK. FURTHERMORE, EIGHTY-TWO PERCENT OF PEOPLE WITH DISABILITIES

SAID THEY WOULD RELINQUISH THEIR GOVERNMENT BENEFITS IN FAVOR OF A FULL-TIME JOB.

THE SENATE APPROVED THE AMERICANS WITH DISABILITIES ACT ON SEPTEMBER 7 BY A VOTE OF 76-8. THE ACT AS APPROVED BY THE SENATE IS A FAR DIFFERENT BILL THAN THE BILL ORIGINALLY INTRODUCED. THE BILL THAT PASSED THE SENATE, WITH THE ENDORSEMENT AND ASSISTANCE OF PRESIDENT GEORGE BUSH, IS A RESULT OF LONG NEGOTIATIONS BETWEEN THE SENATE, THE WHITE HOUSE, THE BUSINESS COMMUNITY AND THE DISABILITY COMMUNITY. AS A RESULT, THE BILL IS A CAREFULLY CONSTRUCTED COMPROMISE WHICH PROVIDES CIVIL RIGHTS PROTECTIONS TO THE DISABLED WHILE RECOGNIZING THE LEGITIMATE NEEDS AND CONCERNS OF AMERICAN BUSINESSES. THE IMPORTANT AND UNIQUE NEEDS OF SMALL BUSINESSES ARE PARTICULARLY RECOGNIZED THROUGHOUT EVERY MAJOR PROVISION OF THE LEGISLATION.

MORE RECENTLY, THE HOUSE EDUCATION AND LABOR COMMITTEE MARKED-UP THE ADA AND APPROVED THE BILL BY A UNANIMOUS VOTE OF 35 - 0. THE MEASURE APPROVED BY THE EDUCATION AND LABOR COMMITTEE IS ESSENTIALLY THE BILL AS APPROVED BY THE SENATE BUT WITH A NUMBER OF MODIFICATIONS AND CLARIFICATIONS THAT WERE NEGOTIATED WITH CONGRESSMAN STEVE BARTLETT AND CONGRESSMAN STEVE GUNDERSON. THE RESULTS OF THESE NEGOTIATIONS WERE OFFERED AS A SUBSTITUTE AMENDMENT TO H.R. 2273 AND ADOPTED BY THE COMMITTEE.

THESE NEGOTIATIONS AND THEIR OUTCOME WERE THE RESULT OF MANY LONG MEETINGS THAT WERE HELD WITH MEMBERS OF THE BUSINESS COMMUNITY IN ORDER TO RESPOND TO THEIR CONCERNS AND TO ENSURE THAT THE ADA IS A COMPREHENSIVE AND EFFECTIVE BILL. I WANT TO ALLAY MY COLLEAGUES OF ANY CONCERNS OR MISUNDERSTANDINGS THEY MAY HAVE, IN MY CONSIDERATION THE EDUCATION AND LABOR BILL IS THE OPERATIVE BILL, NOT THE ORIGINAL HOUSE BILL.

YOU WILL HAVE MANY MORE EXPERT WITNESSES THAN I BEFORE YOU TODAY WHO WILL LIKELY DISCUSS THE CHANGES MADE IN THE ADA FROM THE BILL AS ORIGINALLY INTRODUCED. I WOULD LIKE TO JUST BRIEFLY DISCUSS THE CHANGES IN THE SENATE AND OUR FURTHER MODIFICATIONS IN EDUCATION AND LABOR.

AS YOU KNOW, THE ADA PARALLELS CURRENT FEDERAL CIVIL RIGHTS LAW AS MUCH AS POSSIBLE. FIRST, THE ADA BUILDS ON THE SUCCESSFUL FEDERAL ANTI-DISCRIMINATION MEASURE, SECTIONS 503 AND 504 OF THE REHABILITATION ACT OF 1973, WHICH PROHIBIT DISCRIMINATION ON THE BASIS OF DISABILITY BY CONTRACTORS OR RECIPIENTS OF FEDERAL FUNDS. ALSO, IN MANY RESPECTS, INCLUDING SMALL BUSINESS ACCOMMODATION AND REMEDIES, THE ADA PARALLELS THE CIVIL RIGHTS ACT OF 1964. THUS, THE EMPLOYMENT PROVISIONS OF THE BILL DO NOT FULLY GO INTO EFFECT UNTIL <u>FOUR</u> YEARS AFTER THE DATE OF ENACTMENT AND CONTAIN AN EXEMPTION FOR EMPLOYERS WITH FIRST 25 AND THEN 15 EMPLOYEES. AND, BY REFERENCING THE CIVIL RIGHTS ACT OF 1964, THE ADA PROVIDES THAT AN INDIVIDUAL CAN ONLY SEEK ADMINISTRATIVE RELIEF THROUGH THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION OR INJUNCTIVE RELIEF FROM A COURT. NO OTHER REMEDY IS AVAILABLE AND DAMAGES CANNOT BE SOUGHT.

FURTHERMORE, LIKE THE REHABILITATION ACT, A BUSINESS IS REQUIRED TO MAKE A REASONABLE ACCOMMODATION TO A QUALIFIED INDIVIDUAL WITH A DISABILITY UNLESS IT WOULD CAUSE THE BUSINESS AN UNDUE HARDSHIP. UNDUE HARDSHIP IS A TERM WHICH HAS BEEN USED FOR 15 YEARS UNDER THE REHABILITATION ACT AND IS SPECIFICALLY DESIGNED TO ADDRESS THE CONCERNS OF SMALL BUSINESS. THE STANDARD SPECIFICALLY TAKES INTO ACCOUNT THE SIZE OF THE BUSINESS, ITS BUDGET, AND THE TYPE OF BUSINESS.

OTHER LANGUAGE INCLUDED IN THE EDUCATION AND LABOR BILL CLARIFIES THAT CURRENT USERS OF ILLEGAL DRUGS HAVE NO PROTECTIONS UNDER THE ADA. THE TECHNICAL ASSISTANCE AMENDMENT WHICH WAS ADOPTED IN THE SENATE WAS FURTHER EXPANDED TO REQUIRE THE DEVELOPMENT AND DISSEMINATION OF TECHNICAL ASSISTANCE MANUALS FOR THOSE WHO HAVE RIGHTS AND RESPONSIBILITIES UNDER THE ACT.

THE GOAL OF THE PUBLIC ACCOMMODATIONS SECTION OF THE ADA, WHICH IS PATTERNED AFTER TITLE II OF THE CIVIL RIGHTS ACT, WILL ENSURE THAT PEOPLE WITH DISABILITIES CAN GAIN ACCESS TO PUBLIC PLACES. BOTH THE SENATE BILL AND THE EDUCATION AND LABOR VERSION CONTAIN ADDITIONAL PROVISIONS TO ACCOMMODATE THE NEEDS OF A SMALL BUSINESS SO THAT IT WILL NOT BE OVERLY BURDENED BY THIS ACT.

AS YOU MAY KNOW, THE BILL DOES NOT REQUIRE RETROFITTING OF EXISTING FACILITIES. AN EXISTING FACILITY MUST BE MADE ACCESSIBLE ONLY IF IT IS READILY ACHIEVABLE TO DO SO. THIS IS A LOWER STANDARD THEN ANY OTHER STANDARD IN CURRENT LAW OR IN THE ACT. READILY ACHIEVABLE IS DEFINED AS EASILY ACCOMPLISHABLE WITHOUT MUCH DIFFICULTY OR EXPENSE. THE NEW CONSTRUCTION AND RENOVATION REQUIREMENTS OF THE LEGISLATION INCLUDE AN ELEVATOR EXEMPTION FOR SMALL BUILDINGS. ALSO, AS PART OF THE NEGOTIATIONS IN EDUCATION AND LABOR, LANGUAGE WAS ADOPTED FROM THE 1964 CIVIL RIGHTS ACT TO CLARIFY THE STANDARDS FOR ANTICIPATORY DISCRIMINATION. THIS STATES THAT THERE MUST BE "REASONABLE GROUNDS" TO BELIEVE THAT ONE IS ABOUT TO BE DISCRIMINATED AGAINST IN A PUBLIC SERVICE.

THE ADA ALSO INCORPORATES THE TITLE II REMEDIES OF THE CIVIL RIGHTS ACT OF 1964. THUS, AN INDIVIDUAL CAN ONLY SEEK INJUNCTIVE RELIEF FROM A JUDGE. THEN, SIMILAR TO OTHER CIVIL RIGHTS LAWS, ONLY THE ATTORNEY GENERAL HAS THE RIGHT TO BRING PATTERN AND PRACTICE CASES. IF THE JUDGE DETERMINES IT IS NECESSARY TO VINDICATE THE PUBLIC INTEREST, THEN, AND ONLY THEN, CAN A CIVIL PENALTY BE ASSESSED. WHILE I BELIVE THAT IT IS UNLIKELY THAT AN ATTORNEY GENERAL WILL BRING A PATTERN AND PRACTICE CASE AGAINST A SMALL BUSINESS, YOU WILL BE INTERESTED TO KNOW THAT LANGUAGE WAS ADDED IN EDUCATION AND LABOR TO CLARIFY THAT THE FIRST AND SECOND VIOLATION REFER TO COMPLETELY DIFFERENT ACTIONS, NOT MULTIPLE VIOLATIONS IN ONE CASE. FURTHERMORE, ADDITIONAL LANGUAGE WAS ADDED TO FLATLY AND CLEARLY STATE THAT MONETARY DAMAGES DO NOT INCLUDE PUNITIVE DAMAGES. FURTHERMORE, THE EDUCATION AND LABOR VERSION EXPANDS ON THE SENATE PROVISION REGARDING GOOD FAITH EFFORTS TO COMPLY WITH THE LAW WHEN ASSESSING CIVIL DAMAGES. THE BILL NOW REQUIRES THAT THE COURT CONSIDER WHETHER AN ENTITY COULD HAVE REASONABLY ANTICIPATED THE NEED FOR AN APPROPRIATE TYPE OF AUXILIARY AID NEED TO ACCOMMODATE THE PARTICULAR NEEDS OF AN INDIVIDUAL WITH A DISABILITY.

THERE WERE A NUMBER OF OTHER MODIFICATIONS MADE TO THE ADA, REGARDING HISTORIC PROPERTIES, RENOVATIONS AND INTERIM ACCESSIBILITY STANDARDS. ALSO, INCLUDED IS A PROVISION WHICH DIRECTS THE ADMINISTRATIVE AGENCIES TO DEVELOP PROCEDURES AND COORDINATING MECHANISMS TO ENSURE THAT ADA AND REHABILITATION ACT OF 1973 ADMINISTRATIVE COMPLAINTS ARE HANDLED WITHOUT DUPLICATION OR INCONSISTENT, CONFLICTING STANDARDS.

THE ADA AS APPROVED BY THE SENATE APPROPRIATELY RESPONDED TO A NUMBER OF CONCERNS RAISED BY MANY INTERESTED PARTIES. THE BILL AS APPROVED BY EDUCATION AND LABOR FURTHER REFLECTS THE COMMITMENT OF THE SPONSORS OF THE LEGISLATION TO ENACTING A CAREFULLY CRAFTED, EFFECTIVE

CIVIL RIGHTS BILL. I BELIEVE THE ATTORNEY GENERAL OF THE UNITED STATES, DICK THORNBURGH, PERHAPS BEST SUMMARIZED THE ADA IN HIS TESTIMONY BEFORE THE HOUSE JUDICIARY COMMITTEE,

> " IT BUILDS ON AN EXTENSIVE BODY OF STATUTES, CASE LAW AND REGULATIONS TO AVOID UNNECESSARY CONFUSION; IT ALLOWS MAXIMUM FLEXIBILITY FOR COMPLIANCE; AND IT DOES NOT PLACE UNDUE BURDENS ON AMERICANS WHO MUST COMPLY."

MR. CHAIRMAN, THE AMERICANS WITH DISABILITIES ACT IS ONE OF THE MOST IMPORTANT BILLS BEFORE THE 101ST CONGRESS. OUR NATION WAS FOUNDED ON THE FUNDAMENTAL PRINCIPLE THAT ALL AMERICANS SHOULD HAVE AN EQUAL OPPORTUNITY TO LIVE IN OUR SOCIETY AND TO LIVE PRODUCTIVE LIVES. IF AN INDIVIDUAL CHOOSES NOT TO MAKE THE MOST OF HIS OR HER OWN TALENTS, THEN SO BE IT. BUT IN AMERICA, ONE MUST NOT BE DENIED AN OPPORTUNITY BECAUSE OF IGNORANCE OR PREJUDICE.

BUT FOR FAR TOO MANY AMERICANS WITH DISABILITIES, THE COURSE OF THEIR LIVES HAS BEEN DICTATED AND DEFINED NOT BY THEIR TALENTS, DREAMS OR DESIRES, BUT BY THEIR DISABILITY. UNNECESSARY ATTITUDINAL AND PHYSICAL BARRIERS HAVE MADE THE WORDS EQUAL OPPORTUNITY RING HOLLOW FOR 43 MILLION AMERICANS WITH DISABILITIES.

THE ADA WILL ENSURE THAT THE DOORS OF OPPORTUNITY ARE TRULY ACCESSIBLE FOR ALL AMERICANS. WHILE I CANNOT STAY FOR THIS MORNING'S ENTIRE HEARING, I LOOK FORWARD TO REVIEWING THE TESTIMONY. AS ALWAYS, I AM AVAILABLE TO DISCUSS THESE ISSUES AT ANY TIME. THANK YOU AGAIN FOR THE OPPORTUNITY TO MAKE THESE BRIEF REMARKS.

Statement of the U.S. Chamber of Commerce

ON: THE AMERICANS WITH DISABILITIES ACT

TO: HOUSE COMMITTEE ON SMALL BUSINESS

BY: JOSEPH J. DRAGONETTE

DATE: FEBRUARY 22, 1990

The U.S. Chamber of Commerce is the world's largest federation of business companies and associations and is the principal spokesman for the American business community. It represents nearly 180,000 businesses and organizations, such as local/state chambers of commerce and trade/professional associations.

More than 93 percent of the Chamber's members are small business firms with fewer than 100 employees, 45 percent with fewer than 10 employees. Yet, virtually all of the nation's largest companies are also active members. We are particularly cognizant of the problems of smaller businesses, as well as issues facing the business community at large.

Besides representing a cross section of the American business community in terms of number of employees, the Chamber represents a wide management spectrum by type of business and location. Each major classification of American business--manufacturing, retailing, services, construction, wholesaling, and finance--numbers more than 10,000 members. Yet no one group constitutes as much as 32 percent of the total membership. Further, the Chamber has substantial membership in all 50 states.

The Chamber's international reach is substantial as well. It believes that global interdependence provides an opportunity, not a threat. In addition to the 59 American Chambers of Commerce Abroad, an increasing number of members are engaged in the export and import of both goods and services and have ongoing investment activities. The Chamber favors strengthened international competitiveness and opposes artificial U.S. and foreign barriers to international business.

Positions on national issues are developed by a cross section of its members serving on committees, subcommittees and task forces. Currently, some 1,800 business people participate in this process.

STATEMENT
on
THE AMERICANS WITH DISABILITIES ACT
before the
HOUSE COMMITTEE ON SMALL BUSINESS
for the
U.S. CHAMBER OF COMMERCE
by
Joseph J. Dragonette
February 22, 1990

I. Statement of Interest

Mr. Chairman, members of the Committee, I am Joe Dragonette, founder and President of Dragonette, Inc., located in Chicago, Illinois. My company is a public relations and marketing services firm that represents many key corporations and organizations on a national, regional, and local basis. Accompanying me today is Nancy Fulco, Human Resources Attorney of the U.S. Chamber of Commerce's Employee Relations Policy Center.

I founded Dragonette, Inc. in 1984, after having spent 15 years with an international public relations firm, where I had risen to the position of midwest president. Since 1984, my business has grown steadily. I now employ 35 people and last year my company generated $2.3 million in revenues, making Dragonette, Inc. the 11th-largest public relations firm in the Chicago area and ranking it in the top 40 nationally. I have done all of this despite the fact that 15 years ago I was diagnosed with multiple sclerosis and operate my business from a wheelchair.

I am here today representing the Chamber. I also represent both sides of the issue -- the disabled and small business. My specific purpose is to share with you my individual thoughts and observations about the Americans with Disabilities Act (ADA).

I feel strongly that the ADA should become law, but that it pass in a way that is both productive and an incentive to all parties involved.

The Chamber would like to thank you for holding this hearing. The goal of the ADA is a vitally important one: opportunity for all individuals to participate fully in society. Not only is it important for the dignity of disabled people -- it makes good business sense.

Businesses need access to a trained work force and this work force needs access to businesses. This will only work, however, if a balance is struck between the interests of the disability community and the business community.

For this reason, the Chamber and small businesses are concerned with the ADA as presently drafted, specifically with the degree of uncertainty surrounding the requirements of the bill and its punitive nature, particularly with respect to small businesses. Small and entrepreneurial businesses are this nation's greatest weapon in its battle to retain a competitive edge in world markets. America's 18 million small firms are the economic engine of this country, annually creating most new jobs and encouraging product innovation and technological advancement. They need an environment that encourages this growth, not hampers it. The ADA is important, far-reaching legislation that deserves careful consideration.

The Chamber and small business do recognize that significant progress has been made in addressing the concerns of the business community and we applaud those efforts. It is of major concern to us, however, that this bill be fully clarified before final passage to avoid the enactment of confusing, burdensome legislation,

such as Section 89 or catastrophic health care, that has to be repealed. The Chamber and small business stand ready and able to assist in any way we can.

Forging an alliance between the business community and the disability community requires something other than vague requirements and a dependency on the court system to make it work. Enabling the disabled will only work if these two communities and the government are partners in progress: each working together rather than at odds.

II. Suggestions for Clarifying the ADA

The Chamber and small business believe that if the following suggestions were adopted, the concerns of both communities would be mutually addressed:

- Title I (the employment section) provides that individuals with disabilities must be able to perform the "essential functions" of the jobs that they want or hold. The "essential functions" of a given job will vary from business to business and among different segments of the same business. It should be made clear, through statutory language, that employers have the discretion to decide what constitutes the "essential functions" of a job.
- Many definitions that are supposed to give guidance to an employer regarding his/her obligations are extremely vague. The Chamber and small business recognize that, with the numerous situations that could arise under this bill, more precise definitions are difficult. However, allowing full and fair consideration of an employer's or business owner's assessment of what is meant by the terms "undue hardship" or "readily

achievable" in any given "real world" situation, rather than leaving this to the courts, would truly make the business community a partner in the process of making the ADA work. It would ease confusion over the meaning of those terms, encourage efforts to voluntarily arrive at acceptable solutions, and reduce the fear of lawsuits. Statutory language providing for this input could be added as a factor in determining the meaning of those terms.

- Employers will be required to comply with Title I (the employment section) two years after the effective date and businesses must comply with Title III (the public accommodations section) 18 months after the effective date, whether or not the implementing regulations are completed. To ensure maximum compliance and to avoid forcing businesses to guess at their obligations, the compliance date should be one year from the date that the final regulations are in place.
- The ADA does not preempt any civil rights protections for the disabled at any level -- federal, state or local. These laws are not uniform; and in many instances, there are additional or conflicting obligations. A business could be faced with multiple lawsuits at the same time on the same set of facts. At a minimum, the ADA should contain a provision requiring the complaining party to elect only one statute under which he/she wants to proceed.
- The special needs of small businesses were addressed in Title I (the employment section) through a small business exemption, yet those

same small businesses will be required to comply with the more burdensome provisions of Title III (the public accommodations section). There was an attempt to provide some relief for small businesses in this section through limitations on obligations, such as requiring only what is "readily achievable." Definitions of terms, however, are vague and subjective and, therefore, do not provide the necessary relief. Lawsuits will arise over what is required; and the costs of these lawsuits, both direct and indirect, could be very burdensome to small businesses. To avoid this punitive result, the Chamber believes that it would be appropriate to include a phase-in period, starting with businesses that have fewer than 25 employees and then decreasing in increments to 15 or 10 employees. During this time, these small businesses would be expected to begin complying, but would not have to face lawsuits or penalties for failure to comply. We would be happy to work with others to develop the appropriate mechanism to accomplish this goal.

- Title III (the public accommodations section) contains a provision allowing an individual to file a lawsuit if he/she has "reasonable grounds" to believe that he/she is "about to be" discriminated against. The only situation where this is appropriate is with construction of buildings, where there is physical evidence that access for the disabled will not be possible in the future. In all other situations, however, this cause of action is inappropriate -- it will be frivolous. Statutory language should

make clear that a cause of action for anticipatory discrimination is available only for construction violations.

- When a "pattern and practice" case is brought under Title III (the public accommodations section), monetary damages and civil penalties are available at the discretion of the Attorney General and the court. First, a distinction should be made between unintentional violations and those that are willful and egregious. Second, monetary damages should be limited to actual, out-of-pocket expenses. Third, it should be made clear that civil penalties may be imposed in cases of willful and egregious violations only.

- Small businesses, generally, do not have extra money available for the financial obligations of new mandates and often operate on a very narrow profit margin. Financial incentives would go far in helping small businesses to comply with the ADA and perhaps even encourage compliance where a small business might not otherwise be required to comply, i.e., because a particular accommodation is beyond what would be considered to be "readily achievable." Section 190 of the Internal Revenue Code should be expanded to allow deductions for all expenditures made to accommodate the disabled. Currently, this section permits a business to deduct a maximum of $35,000 annually for structural alterations.

III. Conclusion

Ensuring that all individuals have the opportunity to participate fully in society is a laudable and necessary goal -- one that the Chamber and small business support. Indeed, integration into this country's economic life of people with disabilities is essential to ensuring their opportunity for personal achievement as well as in facing the nation's global economic challenges.

Despite this positive goal, the complexity of the ADA requires further careful consideration. The importance of this issue necessitates taking the time to resolve its problems to ensure that the bill is the best that it can be. It must be a three-part effort: government, business, and the disabled should join under one umbrella to develop workable solutions. By addressing the concerns raised above, the effort of bringing the disabled into the mainstream shifts from one of confrontation to one of cooperation. The focus of ADA should be on opening up opportunities for the disabled, not on imposing unreasonable and unworkable demands on the business community.

Thank you, Mr. Chairman, for the opportunity to testify. I would be pleased to answer any questions.

STATEMENT BY

KENNETH E. LEWIS
OWNER OF KENNETH E. LEWIS, CPA
PORTLAND, OREGON

Before: House Small Business Committee

Subject: Americans with Disabilities Act, H.R. 2273

Date: February 22, 1990

My name is Kenneth E. Lewis. As owner of Kenneth E. Lewis, CPA, I employ 5 people in various accounting-related capacities and 2 secretaries. In addition, I am the owner of a ranch in Oregon which employs 2 people who work as ranch hands, tractor drivers, and the like . I have been active in the Junior Chamber of Commerce, the Rotary Club, the Washington County Rodeo Committee, and numerous other civic organizations. I was Chairman of the Oregon delegation for the White House Conference on Small Business. Today I am here as Chairman of the Oregon Guardian Council of the National Federation of Independent Business, which represents more than a half million small business owners nationwide.

I am also disabled as a result of polio which I contracted in 1952.

I am very appreciative of those who have made efforts to provide accommodations and jobs for the disabled. And much more can be done through incentives, encouragement, and a cooperative community spirit. However, the ADA takes a very different approach by mandating that business owners cover the full expense of making those changes. If we as a society desire full accessibility, we need to come up with a fair approach to arrive at that goal.

As the owner of two small businesses, I have a number of concerns about the Americans with Disabilities Act that I feel must be addressed before the bill goes any further. Let me outline a few of those problems for you today.

The current bill exposes small businesses to possible economic hardship, allows little flexibility in an employer's decisions to hire the best person for the job, and most importantly creates a risk of exposing businesses to potential liability that they can ill afford.

As you know, the bill requires businesses to make accommodations if they are readily achievable, or if they do not constitute an undue burden. These are generally defined as those actions that do not require much difficulty or expense. That may sound reasonable on the surface, but it will require a judicial ruling or an Equal Employment Opportunity Commission proceeding to determine what is too difficult or expensive for each and every business.

In my case, I employ one individual who is an accountant in my firm, but who also serves as my aide. My aide must be able to lift me and drive me to various locations related to my work. To a certain degree, I am dependent upon my aide's responsiveness. However, the ADA bill would not let me exclude a former drug addict or an individual who suffers from a mental illness from consideration for the position if that individual can perform the "essential functions" of the job. As you can imagine, my inability to exclude recovering drug addicts from working as aides is of more than a little concern to me.

Several years ago, a shabbily dressed man came into my business and asked for a job. I felt sorry for him, and decided to hire him as my aide. I even bought new shoes for him. However, my wife took one look at him and couldn't believe what I had done. The next morning when he came in to get me ready, we had a very difficult time and I began to question my wisdom in giving him a job. Then during a conversation on the drive in to work, he said he wanted to renegotiate the terms of the job. I suggested that we'd both be better off going our separate ways.

He then blurted out that he really needed the job because he had been on drugs and was currently on methadone. Yet it was quite clear to me by then that he was entirely unstable and certainly not a person I felt comfortable relying upon. I was able to send him on his way in that case, but from my reading of the ADA bill, it would appear that I would have been unable to fire him if it had been in effect. Certainly, this type of situation is not what the drafters of this legislation intend, but it illustrates what could happen if changes are not made.

Here is another example of what could occur under the ADA bill. Let's say that I hire an aide and that person becomes physically unable to lift. Since lifting is only a portion of my aide's duties, would I be required to restructure that job and have someone else in the firm perform these services for me in order not to discriminate against my disabled employee? And how does an employer handle the problem without fear of a lawsuit? You cannot terminate the aide and find him another position with no reduction in pay and with no stigma attached to the new position.

As I mentioned, my other business is ranching. In the case of a sheep ranch, the sheep are herded by a person on horseback with the help of dogs. The ranchhands must coordinate their actions and those of the dogs by verbal commands and whistles. If a hearing impaired individual applies for a job as a ranch hand, would I have to provide visual beeper equipment so he can work in that capacity? And what is my liability if his equipment that I purchase on his behalf fails and he should have an accident? Or what if he is not able to do the job for reasons other than his disability and I need to replace him? How can I possibly prove that I fired him for inability to perform the job rather than his disability?

This is just one example. Let me give you a few more. If someone interviewed to run a tractor and was missing a hand or a foot, would I be required to install hand controls for that person's benefit? Would I have to make the bunk houses and outhouses accessible, and to what degree? It would appear from the language in the ADA bill that I would never know until a complaint was made and a decision rendered on just what is required of me as the owner of the farm.

The employment provisions are clearly troublesome to small business owners, but the public accommodation provisions are no less problematic. The bill indicates that accommodations must be maintained for visitors and clients who may be hearing impaired, blind, have physical limitations, or have mental disorders, to enable them to utilize a business' services.

This can include certified sign language interpreters, auditory equipment, ramps, electronic eye doors, hiring an assistant when necessary, and taking the time to read contracts and forms aloud. The bill indicates that you must provide accommodations to the disabled whether or not you can charge extra for these services. If a business owner feels providing these accommodations is not readily achievable and does not provide them, he can still be sued and face legal fees and court action before he knows if he "guessed" right or wrong on what the court believes is readily achievable in his particular business.

Some time ago, I was visiting a friend who owns the Rainbow Bar in Pendleton, Oregon. A year or so earlier, he had spent $2,000 to provide a restroom that was accessible to people in wheelchairs. During my visit, he pleaded with me to use his restroom since he'd spent all that money and had not yet had a single person use it who was in a wheelchair. Don't misunderstand me, I appreciate the fact that accommodations are being made to help the disabled, but it should be done with reason and an understanding of what we are demanding of small business owners.

Let me point out one more problem that seems to have been lost in the debate. The ADA bill indicates that I have to provide an accommodation when it is readily achievable or not an undue burden. But what am I required to do if I have three employees with different disabilities and six customers come into my business who are hearing impaired, all of whom need sign-language interpreters?

The bill gives no meaningful ceiling or "cut off" on how much is considered excessive to provide any or all of these services for small businesses. The bill gives no guidelines on the cumulative costs of providing for many different types of disabilities. If I am asked to provide a sign-language interpreter for a client for ten hours at a cost of roughly $230, the court may consider that to be readily achievable. However, will they count in my credit the fact that I may have purchased a $5,000 computer for a blind accountant, installed a $2,000 ramp, a $900 electronic door, and various other equipment of lesser cost?

The bill gives little practical guidance on what is considered a reasonable expense. You may be interested to know about a case involving a car rental company in New York. I have been told that a woman who had a cast on her leg wanted to rent a small car. The rental agency owner felt that she would be unable to drive the small car safely so the car was upgraded to the next size at no extra charge to the client. The client was not satisfied and brought legal action against the rental agency, and won the case.

This is just one example that car rental agencies will face. What about equiping rental cars for people missing a left hand, or a right hand, or a left foot, or a right foot, or a person who needs hand controls that take four hours to install and several hours more to remove? The bill does not indicate that a business owner can charge more for the extra costs incurred. And the owner is legally liable if the accommodations are not provided.

You have probably heard proponents of the bill say that the penalties for violating the ADA bill are reasonable. I don't believe this is the case, particularly for small businesses. If you are accused of violating the bill by a client or visitor, you would have to provide your own attorney and you would have to defend why you did not provide the device the disabled person required. If the plaintiff wins, you are responsible for their attorney fees as well as your own. Legal fees alone could devastate a small business even if the business owner eventually wins.

If you have a second violation, you can be sued for up to $50,000 by the Attorney General's office, plus you may incur further damages that the court may deem appropriate. A third violation could result in being sued for up to $100,000 plus other damages. And keep in mind, you can be sued not just for willful violations of the law, but even if you violated the law accidentally.

Mr. Chairman and members of the committee, I urge you to work for substantive changes in the ADA bill that put reason into the bill. Most small business owners don't want to discriminate against the disabled, but they do not have unlimited funds to make multiple accommodations. Nor are they able to withstand a lawsuit if they are unable to determine what is readily achievable in their business.

Several changes are needed. These include the following:

1) good monetary guidelines on what businesses are expected to provide;
2) removal of language that states businesses can be sued if a disabled person believes he or she is "about to be" discriminated against;
3) a reasonable phase-in period for small businesses after the final regulations are issued so we know what is expected of us;
4) a refundable tax credit for making accommodations for businesses that will have difficulties providing expensive alterations, equipment, and services.

These are just a few changes that would improve the ADA bill and make it workable in the real world. A better bill would have encouraged voluntary compliance through incentives, awards programs, and other positive steps. Business owners have done a great deal on their own to employ the disabled and make accommodations for their customers. This is the right type of action to encourage.

Unfortunately, the ADA bill unnecessarily pits disabled individuals and business owners against each other where the outcome will only be determined by the EEOC or the courts.

I urge you to do everything possible to alter the path of the ADA bill. On behalf of small business owners like myself, we are asking for your help.

0811G

NATIONAL SMALL BUSINESS UNITED

"Serving America's small businesses since 1937"

Statement
of
David Pinkus

on behalf of
National Small Business United

regarding
The Americans With Disabilities Act

before the
U.S. House Committee on Small Business

February 22, 1990

1155 15th Street N.W. Suite 710, Washington, DC 20005
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Mr. Chairman and Members of the Committee:

Good morning. My name is David Pinkus; I own and operate North Haven Gardens—a landscape firm and nursery—in Dallas. I am also a member of the Board of Directors of National Small Business United (NSBU), whom I am representing here today at my own expense. I want to thank you for holding this hearing. Very often in the past, it has been the light that the Small Business Committee has shed on important issues that has been the catalyst for action in the rest of the House.

As you may well know, NSBU is the oldest association exclusively representing this country's small business community—for over 50 years now. NSBU is a volunteer-driven association of small businesses from across the country, founded from a merger of the National Small Business Association and Small Business United. NSBU serves some 50,000 individual companies with members in each of the 50 states, as well as local, state, and regional associations.

First, let me say that we whole-heartedly support the stated goals of an Americans with Disabilities Act (ADA), that we need to "assure equality of opportunity, full participation, independent living, and economic self-sufficiency" for persons with disabilities. Our concern is with the impact HR.2273 will have on small business, and how the goals can be achieved without hindering the development of small businesses and the jobs they produce.

In the spirit of this hearing, we shall attempt to outline our remaining very specific concerns with the proposals for an Americans with Disabilities Act. We do not oppose an ADA, but we believe that the final legislation should be made much clearer and more workable from a small business perspective. While the

most recent bill, voted out of the House Education and Labor Committee, is a definite improvement over the original bill, some problem areas remain.

1. Title I — Employment

We applaud the Education and Labor Committee's efforts to make Title I—the employment section of the bill—better suited to the unique needs of small employers. First, the Committee exempted employers with fewer than 25 employees for the first two years, and those with fewer than 15 employees from then on. The Committee improved upon the Senate version by linking "undue hardship" and "reasonable accommodation" everywhere they appear in the bill. With this change, the defense of undue hardship will be available to small businesses otherwise required to make a reasonable accommodation. The Committee inserted provisions to allow the courts to take into consideration site-specific factors when determining an "undue hardship." This rule should be very beneficial for the wide range of diverse small businesses with unique situations.

The last point illustrates a continuing problem with this legislation: a lack of clarity which results in a lack of certainty. The fact is that this legislation is so vague that the court is required to determine what exactly constitutes undue hardship and what does not. Small businesses—in fact, all businesses—must know what is expected of them and not be forced to wait for a court to decide whether or not they are in compliance.

The vague terms we are concerned about include "undue hardship", "reasonable accommodation," "readily achievable," and "essential functions," among others. These are all terms and concepts which the bill leaves up to judicial discretion. The point is that small businesses do not have the resources to hire

legal counsel and disabilities specialists to consult on whether they are inside the law every time they must make a physical or staff change; but they also must know whether their action is legal. Their need to know is all the greater because this same law that is so ambiguous also dictates similar penalties without regard to whether the violation is malicious or simply an ignorant mistake.

We believe there are several possible solutions to the many problems presented above. The first problem concerns the ambiguity of the language. The solution here is for Congress to be much more specific about the sorts of requirements which will be necessary. Many of our objections would be handled if the definition of "reasonable accommodation" as defined in Chapter 168A North Carolina Handicapped persons Protection Act were to be substituted in HR.2273 (See Appendix A). Moreover, the language is frequently at once both vague and expansive. For instance, in Title I Section 101(8)(B) the definition of "reasonable accommodation" is ambiguous, yet also goes so far as to say that reasonable accommodation may include "the provision of readers or interpreters. . . ." This listing may lead to such an expansive definition of reasonable accommodation, that it should be deleted altogether.

The next problem is the inability of a business to discover whether it is in compliance with the law without being taken to court. There is no intervening government agency with any authority to approve or disapprove a business' practices. No one but a judge—with all the expense and difficulties a courtroom implies—can make such a ruling. Businesses—especially small ones—both need and deserve more certainty from their government about what will be expected of them, short of being dragged to court.

These reasons are all ones which cause us to believe that the exemption for the smallest businesses makes sense. The smallest businesses are the ones least equipped to know or understand what is required of them, and they certainly do not have the resources to be taken to court if their employment practices should be challenged.

II. Title III — Public Accommodations

The Public Accommodations section of the ADA probably cries out most for significant change. Perhaps the most outrageous segment of the Title is Section 308, which calls for fines of up to $50,000 for a first violation and up to $100,000 for subsequent violations. A $50,000 fine of any sort could easily put many small businesses completely out of business. Moreover, since there is no distinction made between willful and unintentional violations of the Act, this ambiguous law could be an ambush waiting to happen for many unsuspecting small businesses.

We recommend, first, that these fine schedules be dramatically scaled back. Under this bill, an employer who discriminates unknowingly could be subject to the same penalties as those who discriminate as a matter of policy. NSBU recommends that small employers found to be in unintentional violation of the Public Accommodations section should be given a warning and be allowed a period (3-6 months) to correct their violations before being subject to civil and criminal proceedings.

Many of the problems of Title III stem from the General Rule listed in Section 302(a). This section prohibits discrimination against the disabled in their "full and equal enjoyment" of public accommodations. The essential problem is that, unfortunately, "full and equal enjoyment" may never be possible for many individuals,

no matter what accommodations are made. In such a circumstance, what accommodation would be required? Frequently, a different (as distinct from "full and equal") accommodation may provide greater accommodation. For these reasons, we would recommend deletion of the words "full and equal" from the text of the bill.

It is also the case that small businesses have the same informational problems with the Public Accommodations section of the bill that they have with the Employment section. It may, therefore, be appropriate for small employers to be exempt from this section in the same manner in which they were exempt from the employment section. Opponents of the exemption argue that it is unnecessary in the same way that small businesses were not exempt from Title II of the 1964 Civil Rights Act. They must realize, however, that Title II only disallowed discrimination; it did not require the expenditure of financial resources for compliance. For other violators, purely injunctive relief—as provided by Title II of the 1964 Civil Rights Act—may be more appropriate than stiff penalties.

There is a further provision that the Attorney General has the authority to request further "monetary damages" to be awarded to the plaintiff. The Education and Labor Committee has made it clear that these damages include compensatory damages for pain and suffering. These damages should in some way be redefined, or, at least, the total award should be limited in some way, perhaps to simply actual out-of-pocket expenses.

III. Other Concerns

The primary concern of small businesses with regard to ADA is cost. Many small employers—no matter how much they may want or need to hire and serve

disabled individuals—simply cannot find the financial resources to do so. NSBU believes that the federal government has an obligation to help those employers comply with a law that will heap major new financial commitments upon them. Bringing appropriate rights and working conditions to this country's disabled is certainly a worthy goal for society. Small business simply needs help from the rest of society to make that goal a reality. We believe that a tax credit is in order for all small businesses making physical changes and financial outlays in order to accommodate disabled individuals into their workforce and place of business.

Over 500,000 small businesses employing over 47,000,000 workers will have to comply with this law. At an average capital cost of $10,000 per business, over $5 billion may have to be spent just to renovate existing bathrooms to accommodate wheel chairs. More will have to be spent to provide wider aisles, etc. Small businesses already have a tough time raising capital to facilitate growth. An infusion of $5 billion into America's small businesses could create 250,000 to 1,000,000 new jobs. Instead, a great deal of money will be spent to comply with this law with a result that instead of opening up jobs for the disabled, a net loss of jobs may result.

There is a strong need also to allow adequate phasing in of this law. Small businesses need an adequate amount of time in order to learn about, understand, and take appropriate steps to comply with the ADA. Implementation of ADA should be no less than one year after final promulgation of the rules, with an additional 1-year educational period during which no fines should be levied without a written warning. With such enormous authority and latitude going to the rule-makers to clarify the vagueness of the law, it is necessary to insure a time-frame for proper understanding of the rules and for proper comment upon them.

I appreciate the opportunity to have testified before you here today. I want to thank the Committee and Chairman LaFalce for holding these important hearings. It is good to know that we can always turn to the Small Business Committee to at least listen to our concerns and give us the chance to air them. I hope you continue in this tradition of activism. In the mean time, we will continue to work within the process to reform the ADA so that it takes into consideration the appropriate concerns of small business. The concerns I have listed above are merely the major concerns with the bill, but I hope that the Committee now has a better of understanding of the reasons for our reservations.

provided that the handicapped person shall not be held to standards of performance different from other employees similarly employed, and (ii) further provided that the handicapping condition does not create an unreasonable risk to the safety or health of the handicapped person, other employees, the employer's customers, or the public;

b. With regard to places of public accommodation a handicapped person who can benefit from the goods or services provided by the place of public accommodation; and

c. With regard to public services and public transportation a handicapped person who meets prerequisites for participation that are uniformly applied to all participants, such as income or residence, and that do not have the effect of discriminating against the handicapped.

(10) "Reasonable accommodations" means:

a. With regard to employment, making reasonable physical changes in the workplace, including, but not limited to, making facilities accessible, modifying equipment and providing mechanical aids to assist in operating equipment, or making reasonable changes in the duties of the job in question that would accommodate the known handicapping conditions of the handicapped person seeking the job in question by enabling him or her to satisfactorily perform the duties of that job; provided that "reasonable accommodation" does not require that an employer:

1. Hire one or more employees, other than the handicapped person, for the purpose, in whole or in part, of enabling the handicapped person to be employed; or

2. Reassign duties of the job in question to other employees without assigning to the handicapped employee duties that would compensate for those reassigned; or

3. Reassign duties of the job in question to one or more other employees where such reassignment would increase the skill, effort or responsibility required of such other employee or employees from that required prior to the change in duties; or

4. Alter, modify, change or deviate from bona fide seniority policies or practices; or

5. Provide accommodations of a personal nature, including, but not limited to, eyeglasses, hearing aids, or prostheses, except under the same terms and conditions as such items are provided to the employer's employees generally; or

6. Make physical changes to accommodate a handicapped person where:

I. For a new employee the cost of such changes would exceed five percent (5%) of the annual salary or annualized hourly wage for the job in question; or

II. For an existing employee the cost of the changes would bring the total cost of physical changes made to accommodate the employee's handicapping conditions since the beginning of the employee's employment with the employer to greater than five percent (5%) of the employee's current salary or current annualized hourly wage; or

7. Make any changes that would impose on the employer an undue hardship, provided that the costs of less than five percent (5%) of an employee's salary or annualized wage as determined in subsection (6) above shall be presumed not to be an undue hardship.

b. With regard to a place of public accommodations, making reasonable efforts to accommodate the handicapping conditions of a handicapped person, including, but not limited to, making facilities accessible to and usable by handicapped persons, redesigning equipment, provide mechanical aids or other assistance, or using alternative accessible locations, provided that reasonable accommodations does not require efforts which would impose an undue hardship on the entity involved. (1985, c. 571, s. 1.)

CASE NOTES

Person who had eye disease but whose vision was functioning normally with glasses was not visually disabled within the meaning of § 168-1 and thus was not a "handicapped person" who was granted a right of employment by former § 168-6. Burgess v. Joseph Schlitz Brewing Co., 298 N.C. 520, 259 S.E.2d 248 (1979).

Testimony of Lex Frieden

U.S. House of Representatives

Committee on Small Business

Hearing on the Americans with Disabilities Act

February 22, 1990

Mr. Chairman and distinguished members of the Committee, my name is Lex Frieden. I am currently Executive Director of the T.I.R.R. Foundation and Assistant Professor of Rehabilitation at Baylor College of Medicine, Houston, Texas. From 1984 to 1988, I served as Executive Director of the National Council on the Handicapped, now called the National Council on Disability.

I am pleased to have the opportunity to testify today about the Americans with Disabilities Act. I am anxious to describe for you the historical development of this bill, and the changes which have been made to it since it was originally conceived. You will see that many compromises have been made which take into consideration the legitimate needs and real concerns of small business. I believe that the ADA has been crafted to be responsive to the needs of America's disabled citizens while it is considerate of the interests of America's small businesses.

The Americans with Disabilities Act was originally drafted by the National Council on the Handicapped in 1987, after four years of thorough research and investigation. The National Council is an independent federal agency which is composed of fifteen members who are appointed by the President and confirmed by the Senate.

In 1983, the Council was charged by Congress with the responsibility to "assess the extent to which Federal programs serving people with disabilities provide incentives or disincentives to the establishment of community-based services for handicapped individuals, promote the full integration of such individuals in the community, in schools, and in the workplace, and contribute to the independence and dignity of such individuals." The Council was directed to report its findings and recommendations to the President and Congress by January, 1986.

To carry out this mandate, the Council conducted extensive examinations of current legislation and disability programs, consulted with experts in many disability-related fields, conducted special seminars and hearings, and held public forums for persons with disabilities and their families throughout the United States.

In these nationwide forums, Council members heard over and over again that discrimination is the number one problem faced by individuals with disabilities. Discrimination creates barriers which make education, rehabilitation, and employment programs ineffective. As a result of hearing testimony and comments of hundreds of people with disabilities, parents, and others; the Council concluded that the most pervasive and recurrent problem faced by disabled persons was unfair and unnecessary discrimination.

In its 1986 report to the President and Congress, Toward Independence, the Council wrote: "...(W)hatever the limitations associated with particular disabilities, people with disabilities have been saying for years that their major obstacles are not inherent in their disabilities, but arise from barriers that have been imposed externally and unnecessarily."

In the report Appendix, the Council explained, "A major obstacle to achieving the societal goals of equal opportunity and full participation of individuals with disabilities is the problem of discrimination. Discrimination consists of the unnecessary and unfair deprivation of an opportunity because of some characteristic of a person. It is the antithesis of equal opportunity. The severity and pervasiveness of discrimination against people with disabilities is well-documented."

The Council learned of severe discrimination in many walks of life experienced by people with disabilities, including employment, public accommodations, transportation, housing, and public services. Council members examined the current status of disability-related nondiscrimination laws and identified large gaps in coverage, shortcomings and inconsistencies in interpretation and application, and deficiencies in enforcement.

The Council found that existing non-discrimination measures, such as Section 504 of the Rehabilitation Act of 1973, are extremely important and have resulted in much progress. However, in an overall context, they found that our Nation's laws provide inadequate protection from discrimination for people with disabilities. Current statutes are not comparable in their scope of protection against discrimination to those afforded racial, ethnic, and religious minorities and women under civil rights laws.

The Council stated its belief that equality of opportunity is a bedrock right in our society, and that discrimination against people because of their disabilities is an unacceptable denial of that right. Such discrimination is not only an affront to the dignity of the individual involved, but it undermines Federal programs that attempt to promote the independence and self-sufficiency of persons with disabilities. Discrimination is a significant reason why many people with disabilities are trapped in situations of dependency -- dependency which costs our nation dearly, both in lost potential productivity and in dollars spent for support programs.

In conjunction with its other research, the Council also analyzed Federal spending on disability. It concluded, "Our nation's current annual Federal expenditure on

disability benefits and programs exceeds $60 billion." Further examination revealed that programs oriented toward independence and economic self-sufficiency were greatly underemphasized. Funding for independence-oriented programs, such as those providing education for handicapped children and vocational rehabilitation consisted of less than $3 billion, or less than 5%, of the total national expenditure on service programs and benefits for people with disabilities. The bulk of expenditures were for programs aimed at maintaining costly dependence while the underlying cause of the dependence went virtually unchallenged on the federal level. For this reason, the Council targeted its policy and legislative proposals in Toward Independence toward the more fiscally-responsible goals of productivity and self-determination.

Mr. Chairman, it is exactly to cease the costly dependency of people with disabilities that the Americans with Disabilities Act was conceived by the National Council on Disability. The original legislative proposal was drafted by the Reagan-appointed Council to implement their chief legislative recommendation which was the enactment of a comprehensive equal opportunity statute providing clear standards of non-discrimination, with broad coverage paralleling laws prohibiting discrimination on the basis of race, sex, religion, and national origin.

While the primary recommendation in Toward Independence was a general call for Congress to enact a comprehensive statute guaranteeing equal opportunities for persons with disabilities, the second through the fifth recommendations gave more detail as to the proposed content of such a law. The second recommendation described the broad scope of statutory coverage that the law should encompass. The third recommendation stated that the law should include a definition of discrimination and standards for applying it. Recommendation number four discussed enforcement mechanisms and regulations that should be issued under the law. The fifth recommendation dealt with guidelines for accessibility, and the role of the Architectural and Transportation Barriers Compliance Board under the proposed comprehensive statute. The ADA proposal addressed all these recommendations.

It should be noted that the original Americans with Disabilities Act draft legislative proposal was a product of and unanimously recommended by the Reagan-appointed, fiscally-conservative National Council on Disability. The original draft bill was written in such a way as to obtain equal opportunity for America's disabled citizens as quickly as possible. It was far more strident and demanding than the current Americans with Disabilities Act, as passed by the Senate and amended by the House Education and Labor Committee. All of the major differences between the

original draft and the bill which unanimously passed the House Education and Labor Committee last November consist of compromises intended to make the bill a more workable policy for American business. Nevertheless, I believe that the original ADA would also have representated a legitimate and workable disability policy for business and for the people of the United States of America.

Let me give you one example of a big difference between the original bill, which was introduced in 1988, and the current ADA. The original Americans with Disabilities Act required employers, state and local governments, existing public accommodations and others to remove all architectural, transportation and communications barriers that prevent participation by people with disabilities unless doing so would fundamentally alter the essential nature, or threaten the existence of, a program, activity, business, or facility. Two years were allowed for barrier-removal, with an option to extend this time period to five years where reasonably necessary.

This bankruptcy standard was a far higher and vastly more stringent standard than that required by the current ADA. As you know, the ADA, as passed by the Education and Labor Committee, provides that existing facilities will be required only to make the most modest and inexpensive changes, using a very flexible standard to take their

particular circumstances into account. This is only one example of the compromising changes that have been made in the ADA since it was originally introduced.

As the ADA has moved forward through the legislative process, the disability community has accepted an extensive number of compromises which limit our discrimination protections to a certain extent, in order to take into account the expressed concerns of the business community, and in particular, the small business community. Business interests were well-represented in lengthy negotiations on the bill which occurred last summer, and representatives of business were consulted and involved in crafting the compromise which received the full endorsement of the White House.

Now, despite these compromises and specific accommodations, there is a great deal of stated misunderstanding about the ADA's impact upon business. This is apparently due to a lack of familiarity with existing disability anti-discrimination measures, misinformation about the actual requirements of the bill, and lack of knowledge about the needs and rights of people with disabilities. Regretfully, parts of the business community have become alarmed that this bill would be costly and burdensome for them.

The ADA's major requirements have been crafted to take the small business operator's needs into consideration. I would like to discuss specific ways in which the current ADA accommodates the needs of small business. I will focus on the public accommodations section of the bill, since other witnesses are directly addressing the employment title, but I want to note in passing that similar considerations have been given to business in the employment and transportation sections of the bill as well.

The ADA's approach is to make compliance requirements for small business flexible and considerate of the particular situation of most small businesses -- to require what is reasonable, and not to impose unrealistic or debilitating obligations.

The requirements of the ADA recognize that some businesses are very small local enterprises, with very limited resources. Under each requirement of the bill, either the size and resources of businesses are explicitly considered in determining what is required, or an accommodation for small business is built into its substantive requirement.

For example, I first would like to discuss the requirements of existing public accommodations to remove architectural and communication barriers. As I mentioned

earlier, only the most modest requirements are placed on existing establishments: barriers need not be removed unless doing so is "readily achievable," which is defined as "easily accomplishable and able to be carried out without much difficulty or expense." In determining whether an action is readily achievable, the ADA lists numerous factors to be considered, which include "the overall size of the covered entity with respect to number of employees, number and type of facilities, and the size of budget" as well as "the type of operation of the covered entity, including the composition and structure of the entity."

In this way, the ADA deliberately takes into account the factors about small businesses which vary and which pose limits on their resources. If these factors indicate that a barrier is too costly to remove, it can legally remain.

Therefore, the size and budget of a business are specifically considered. A small, mom-and-pop store is held to a much lower standard than a larger, more prosperous enterprise. The readily achievable standard takes into account the particular physical and financial realities of each individual establishment and requires more of those realistically able to do more, and less of those who are only able to do less.

In the House Education and Labor Committee, an even further accommodation was made to small business' needs. Added to the factors to be considered when determining if a barrier-removal will be "readily achievable" are the resources available to the specific site where the barrier is located, even if the site is part of a chain of stores or service establishments belonging to a large national concern. This amendment is yet another example of the modification of the ADA based on a specific voiced concern from the business community.

Where removing barriers in existing facilities is not "readily achievable," the ADA allows alternative methods to serve customers. The Report accompanying the Senate bill cites examples of such alternative methods: "...coming to the door to receive or return drycleaning; allowing a disabled person to be served beverages at a table even though nondisabled persons having only drinks are required to drink at the inaccessible bar; providing assistance to retrieve items in an inaccessible location; and rotating movies between the first floor accessible theater and a comparable second floor inaccessible theater" are examples of alternative methods, all of which are completely cost-free.

Another way in which the ADA is responsive to the needs of business is in limiting the extent to which auxiliary

aids and services must be provided to people with disabilities. The requirement does not apply in cases where provision of such aids and services would "fundamentally alter" or would "result in an undue burden." The Senate Report notes that the term "undue burden" is analogous to the phrase "undue hardship" in the employment section of the ADA, and that "the determination of whether the provision of an auxiliary aid or service imposes an undue burden on a business will be made on a case-by-case basis, taking into account the same factors used for purposes of determining 'undue hardship.'" The factors to be taken into account are similar to those which are used in connection with the readily achievable standard. In determining whether providing an auxiliary aid or service amounts to an undue burden, the size, budget, and circumstances of a business are expressly relevant. Therefore, a struggling small business will be excused from providing an auxiliary aid or service in circumstances where a larger, more prosperous business might be required to provide it.

The ADA focuses on barrier-removal in brand new construction. All parties agree that it is easiest and cheapest to make facilities accessible when they are new; a common estimate is that access adds, at most, an average of 1/2 of 1% to a new building's cost. Even in this case, where access is comparatively inexpensive, there is a protection for small business. The Senate bill incorporates

a specific exception to the accessibility requirements with regard to elevators in small buildings. While the previous version of the bill would have required elevators in any new building, the current bill specifically provides that elevators are not required "for facilities that are less than three stories or that have less than 3,000 square feet per story." Arguably, elevators in such circumstances might make up only a small and manageable percentage of overall building costs, but to make absolutely sure that small building owners and builders would not be unduly burdened, the bill exempts small buildings from the elevator requirement. This exemption applies in all facilities other than shopping malls, medical facilities, and types of facilities singled out in particular by the Attorney General.

Even in newly constructed facilities, the ADA does not require total or universal accessibility. Instead, it incorporates a standard of accessibility which has been developed in federal statutes and regulations: "readily accessible to and usable by." This term means that not every single feature needs to be accessible, depending on the type and use of each facility. Specifically, the Senate report describes it in this way: "The term is not intended to require that all parking spaces, bathrooms, stalls within bathrooms, etc. are accessible; only a reasonable number must be accessible, depending on such factors as their

location and number." The term is intended to enable people with disabilities to "get to, enter, and use a facility." Making facilities "readily accessible to and usable by" people with disabilities is a much more achievable standard than making every single portion of a facility fully accessible.

Another important accommodation made in the current ADA to the needs of small business is the establishment of telecommunications relay services to assist people with speech and hearing impairments to use the telephone. While it may not be apparent on the surface, the development of this relay service is a major accommodation to the interests of small business. In prior versions of the ADA, there was no relay service established, and one of the potential obligations upon places of public accommodation was the purchase and operation of a Telecommunications Device for the Deaf (or TDD) so that deaf customers could call on their TDD's to inquire about tickets, ask about available products, etc.

While portable TDD's are relatively inexpensive (good models are generally available for around $200), there was some concern that it would be too burdensome to require small businesses to buy TDD's. Under the current ADA, Title IV requires each region of the country to establish a telecommunications relay service so that individuals who use

TDD's in their homes, but who can't use regular telephones, can call a center where their call is relayed by operators using regular telephones. The result of the service is that the modest cost of incurring the TDD is no longer required of any public accommodations, and the world of the telephone is still available to deaf and speech-impaired people.

As you can see, the ADA's public accommodations requirements are quite tailored to the interests of the small business sector. Passage of the ADA will have no dire consequences for America's small businesses. Yet, the ADA will provide an important advance toward equal opportunity for people with disabilities.

In summary, Mr. Chairman, I believe the current version of the ADA strikes a good balance between the rights of people with disabilities and the legitimate concerns of business. For people with disabilities, the Act mandates that they be treated equally and judged as individuals on the basis of their abilities. The ADA assures Americans with Disabilities the opportunity to become independent and productive members of society. It guarantees them the right to be a part of the social and economic fabric of life in their communities.

For the business community, the ADA recognizes cost in devising standards and making accommodations. It provides sufficient time to make needed changes, and it takes into consideration the unique and variable circumstances of small business.

Frankly, Mr. Chairman, I believe passage of the ADA will benefit Americans with disabilities and American business alike. By prohibiting discrimination and encouraging equal opportunity for people with disabilities, this legislation will enable millions of people, heretofore dependent on government disability benefit payments and subsidies, to be more productive, more independent, and more self-sufficient. In so doing, it will create opportunity for business to serve an emerging minority and reduce the risk of increasing taxes to cover the costs of higher benefit payments and more custodial service programs. I encourage your strong support of the Americans with Disabilitiels Act.

TESTIMONY

OF

ARLENE B. MAYERSON
on behalf of the

DISABILITY RIGHTS EDUCATION & DEFENSE FUND

CONCERNING THE

AMERICANS WITH DISABILITIES ACT OF 1989

BEFORE THE

COMMITTEE ON SMALL BUSINESS

FEBRUARY 22, 1990

I. INTRODUCTION

The general public does not associate the word "discrimination" with the segregation and exclusion of disabled people. Most people assume that disabled children are excluded from school or segregated from their non-disabled peers because they cannot learn or because they need special protection. Likewise, the absence of disabled co-workers is simply considered confirmation of the obvious fact that disabled people can't work. These assumptions are deeply rooted in history.

Most people are never forced to examine their assumptions or stereotypes about disabled people unless they themselves or a family member become disabled, or they have a disabled child. At that point the falseness of the stereotypes and the injustice of the policies based on those stereotypes become all too apparent.

Historically, the inferior economic and social status of disabled people was viewed as an inevitable consequence of the physical and mental limitations imposed by disability. Over the years, this assumption has been challenged by policy makers, professionals, disabled citizens, the courts and by Congress. Gradually, disability public policy has recognized that many of the problems faced by disabled people are not inevitable, but instead are the result of discriminatory policies based on unfounded, outmoded stereotypes and perceptions and deeply embedded prejudices toward disabled people. These discriminatory policies and practices affect disabled people in every aspect of their lives.

The first major challenge to the notion that being disabled meant life-long economic dependency was prompted by the return of a vast number of disabled World War I veterans and the ever increasing incidence of industrial accidents. Recognizing the social and financial benefit of returning these injured persons to work, Congress passed the original landmark federal rehabilitation legislation, the Smith Fess Act of 1920. The prevalent view of disabled people as "helpless" and "hopeless" was challenged by legislation designed to enable disabled people to become productive, contributing members of society. Most importantly, by the mid 1960's the explicit goal of rehabilitation policy was the integration of disabled people into the mainstream of American life.[1] This "integrationist" goal set the stage for an examination of the social barriers that impede the attainment of equal opportunity for disabled Americans.

From a civil rights perspective, a profound and historic shift in disability policy occurred in the 1970's.[2] Following

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[1] See H. R. Rep. No. 432, 89th Cong. 1st Sess. 2 (1965).

[2] This shift in public policy is well portrayed in a statement made by Senator Williams prior to the enactment of the 1973 Rehabilitation Act:

> For too long, we have been dealing with [the handicapped] out of charity . . . . This is medieval treatment for a very current problem . . . . Most of us see the handicapped only in terms of stereotypes that are relevant for extreme cases. This ancient attitude is in part the result of the historical separation of our handicapped population. I wish it to be said of America in the 1970's that when the attention at last returned to domestic needs, it made a strong and new commitment to equal opportunity and equal justice under law; . . . The handicapped are one part of our Nation that have been denied these fundamental rights for too long. It is time for the Congress and the Nation to

the powerful civil rights activism of the 1960's, the 1970's produced a more fundamental change in the social and legal status of disabled people than any prior era of American history. Through landmark litigation[3] and legislation,[4] disabled Americans were recognized for the first time as a legitimate minority subject to discrimination and worthy of basic civil rights protections.

This major shift in disability public policy culminated in the passage of a broad anti-discrimination provision, Section 504 of the Rehabilitation Act of 1973. Section 504 evidences Congress' recognition that while there are major physical and mental variations in different disabilities, disabled people as a

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assure that these rights are no longer denied. 118 Cong.Rec. 3321-22 (1972).

[3]Two landmark cases Pa. Assoc. for Retarded Citizens v. Commonwealth of Pa., 334 F.Supp. 1257 (E.D. Pa. 1971); and Mills v. Bd. of Education of the Dist. of Columbia, 348 F.Supp. 866 (D.D.C. 1972), held that disabled children who had previously been excluded from public education had the right to a public education appropriate to their educational needs.

[4]In addition to the 1973 Rehabilitation Act, Congress enacted several other pieces of legislation designed to promote equal opportunity and integration of disabled people into the mainstream of American life. Chronologically, these statutes included: 1968--Architectural Barriers Act, 42 U.S.C. Section 4151 et seq. (required federally funded or leased buildings to be accessible); 1970--Urban Mass Transportation Act, 49 U.S.C. Section 1612 (required eligible jurisdictions to provide accessibility plans for mass transportation); 1975--Education for All Handicapped Children Act, 20 U.S.C. Section 140 et seq. (provided that each handicapped child was entitled to a free appropriate education in the least restrictive environment); and 1975--National Housing Act Amendments, 12 U.S.C. Section 1701 et seq. (provided for barrier removal in federally supported housing).

group faced similar discrimination in employment, education and access to society. As with racial minorities and women, Congress recognized that legislation was necessary to ameliorate widespread institutionalized discrimination.[5]

Nothing is more central to the goal of independence than employment. As demonstrated below, disabled Americans face widespread discrimination in seeking to secure equal employment opportunities. The Rehabilitation Act covers private employers only when they receive federal funds or federal contracts. It is now time to finish the work begun in 1973--to recognize the basic civil rights of people with disabilities by providing the same protection against employment discrimination as is afforded other minorities and women. Passage of the ADA is essential to assure Americans with disabilities equal employment opportunity.

II. THE NATURE AND HISTORY OF PREJUDICE TOWARDS DISABLED PEOPLE

The roots of prejudice against and stereotypes about disabled people reach far back in history and persist today. Disabled people have throughout history been regarded as incomplete human beings--"defective." In early societies this

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[5] That section 504 was intended to include disability within the general corpus of federal anti-discrimination law is unmistakable. As stated in the Senate Report accompanying the 1974 amendments:

> Section 504 was patterned after, and is almost identical to, the anti-discrimination language of section 601 of the Civil Rights Act of 1964 . . . and section 901 of the Education Amendments of 1972 . . . . 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. Id. at 39, reprinted in 1974 U.S. Code Cong. & Ad. News at 6390.

view of disabled people resulted in persecution, neglect and death.[6] These practices gradually gave way to the more humanitarian belief that disabled people should be given care and protection. Persecution was largely replaced by pity, but the exclusion and segregation of disabled people remained unchallenged.[7] Over the years, the view of disabled people as incompetent and dependent upon charity, custodial care and protection became firmly embedded in the public consciousness. The invisibility of disabled Americans was simply taken for granted. Disabled people were out of sight and out of mind.

The discriminatory nature of policies and practices that exclude and segregate disabled people has been obscured by the unchallenged equation of disability with incapacity and by the gloss of "good intentions." The innate biological and physical "inferiority" of disabled people is considered self-evident. This "self-evident" proposition has served to justify the exclusion and segregation of disabled people from all aspects of life. The social consequences that have attached to being disabled often bear no relationship to the physical or mental

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[6]For an historical overview of persecution of disabled people in early societies, See Burgdorf and Burgdorf, A History of Unequal Treatment: The Qualifications of Handicapped Persons as a 'Suspect Class' Under the Equal Protection Clause, 15 Santa Clara Law. 882-86 (1975).

[7]Interestingly, a positive relationship has been established between tendencies to pity blind people on the one hand, and the tendency to espouse community segregation for the blind on the other. Lukoff & Whiteman, Attitudes Towards Blindness, 55 The New Outlook for the Blind 39, 42 (1961)

limitations imposed by the disability. For example, being paralyzed has meant far more than being unable to walk--it has meant being excluded from public school,[8] being denied employment opportunities,[9] and being deemed an "unfit" parent.[10] These injustices co-exist with an atmosphere of charity and concern for disabled people.

It is only within the last decade that a fundamental challenge to traditional notions about disability has been launched. Increasingly, the social science and psychological literature has explored the implications of a socio-political

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[8]"Many of the physically handicapped children do have the mental ability to attend public school but are denied that right due to architectural barriers and-or transportation problems." 117 Cong. Rec. 42293 (1971).

[9]In Heumann v. Bd. of Education of the City of N.Y., 320 F.Supp. 623 (S.D. N.Y. 1970) plaintiff was denied a license to teach "on the grounds that being confined to a wheelchair as a result of polio, she was physically and medically unsuited for teaching.

[10]"Historically, child-custody suits almost always have ended with custody being awarded to the non-disabled parent, regardless of whether affectional or socio-economic advantages could have been offered by the disabled parent." I. Vash, The Psychology of Disability 155 (1981).

This issue was eloquently addressed in a landmark decision by the California Supreme Court, Carney v. Carney, 24 Cal. 3d 725, 598 P.2d 36, 157 Cal. Rptr. 383 (1979). In that case the lower court awarded custody to the mother of two boys after the father was injured and became a quadriplegic. The California Supreme Court reversed, stating that ". . .the court's preconception . . . also stereotypes William as a person deemed forever unable to be a good parent simply because he is physically handicapped. Like most stereotypes, this is both false and demeaning." Id. at 737, 598 P.2d at 42, 157 Cal. Rptr. at 389.

definition of disability that recognizes the critical impact of social factors on the lives of disabled Americans.[11] There is a growing awareness of the similarities between racial prejudice and the prejudice experienced by disabled people.[12] And like women, disabled people have identified "paternalism" as a major obstacle to economic and social advancement.

III. DOCUMENTATION OF THE REALITY OF DISABILITY-BASED EMPLOYMENT DISCRIMINATION

Employers, like other members of the general public, hold stereotypes and prejudices about disabled people that impede their ability to objectively evaluate the qualifications of disabled applicants and workers. Disabled people face discrimination in employment in a variety of ways. Many disabled people are excluded from the outset by medical requirements that screen out all people with specific disabilities or by inflated physical or other job requirements that bear no relationship to the successful performance of the job. Disabled people who are not completely excluded at the outset are often channeled into disability-stereotyped dead-ended jobs or denied promotional opportunities. These discriminatory policies affect all disabled people, whether their disabilities are severe, moderate or

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[11]For a look at works which have utilized the socio-political definition of disability see Hahn, Disability and Rehabilitation Policy: Is Paternalistic Neglect Really Benign? (Book Review), 42 Pub. Ad. Rev. 385 (1982); Bowe, Rehabilitating America: Barriers to Disabled People (1978); Gliedman & Roth, supra p. 14; and Eisenberg, supra p. 12.

[12]See p. 11, infra

perceived. The unemployment rate among persons with disabilities is staggering. While 88% of working-age men and 69% of working-age women are employed, only 33% of disabled working-age Americans work--only one disabled woman out of five and four disabled men out of ten have jobs.[13]

The presumption that these figures reflect the actual inability of disabled people to work is refuted by the many sociological, psychological and government studies that have documented that employment opportunities for disabled adults are severely impeded by misconceptions and generalizations about disabilities, unfounded fears about increased costs and decreased productivity,[14] and outright prejudice toward disabled people.

A recent report by the U.S. Advisory Commission on Intergovernmental Relations[15] stated:

> Probably the most significant barriers faced by persons with disabilities relate to the attitudes, predispositions, and behaviors of nondisabled persons. Such attitudes range from negative views of disability to discomfort in associating with people who experience some form of disability. The nature and extent of attitudes about disability have been documented through an extensive set of research studies conducted in many settings. One common finding is that nonhandicapped people tend to be preoccupied with disabling conditions and often incapable of seeing beyond these conditions to the whole person. Such predispositions lead

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[13]Jay Rocklin, President's Committee on Employment of the Handicapped, will provide additional statistical information on the participation of persons with disabilities in the workforce.

[14]The studies that address these concerns are discussed on pp. 17, 20, infra.

[15]Federal and State Government Compliance with Disability Rights Mandates: Policy Issues and Performance Contrasts, Oct. 14, 1988.

nondisabled persons to overlook and ignore the full range of abilities possessed by persons with disabilities.

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Researchers have shown that negative and discriminatory attitudes extend to the employment capabilities of disabled individuals. Both potential employers and coworkers have been shown to have negative views and expectations about the productivity and reliance of workers who experience some form of mental or physical disability. As Peter Jamero has noted, "employers, more often than not, appear more inclined to judge handicapped persons on the basis of disability rather than on what they are capable of performing." The reluctance of employers to hire persons with disabilities is rooted in common myths and misunderstandings, including the notions that the employment of disabled workers will increase insurance and worker compensation costs, lead to higher absenteeism, harm efficiency and productivity, and require expensive accommodations.

These attitudes, common to many employers in the United States, have persisted despite empirical evidence from several quarters that disabled workers perform at levels equal to or superior to other employees. (Footnotes omitted).

The 1973 Rehabilitation Act authorized a needs study, which was reported to Congress in 1976, Urban Institute, Report of the Comprehensive Service Needs Study (1975) (herein cited as Needs Study). The Needs Study summarized existing literature on employer attitudes as follows:

> Virtually all the studies on employer attitudes have found that large proportions of employers disfavor hiring disabled people. There are strong indications that these attitudes are in large part based on non-rational, negative feelings--prejudice, in other words. Id. at 324.

In keeping with the historical evolution of disability public policy, the Needs Study recommended:

> a major shift in research and development emphasis toward a focus on the interaction of the individual and

> the barriers in the environment . . . . The major problems seem to be not so much with the severely handicapped, as with the severely handicapping environment. Id. at 818.

Hence, stereotypes and prejudices rather than handicaps themselves were viewed as the most potent barrier to equal employment opportunity.

While few people would openly admit to feelings of hostility towards disabled people, the persistence of deeply rooted prejudices has been well documented. In one study reported in the Needs Study, the author probed the attitudes of employers by asking them to rank various groups in terms of which ones they believed most employers would be more likely to hire. Colbert, Kalish & Chang, Two Psychological Portals of Entry for Disadvantaged Groups, 34:7 Rehab. Literature 194 (1973), cited in Needs Study at 314-15. The list included physically and mentally disabled groups, minority groups, controversial groups (student militants, prison parolees), old people and "neutral" groups (e.g. whites, Canadians). The study found that "physical disability groups were clustered together and ranked lower than all minority groups and old people and higher than all . . . mentally disabled groups." Id. at 315. Employers were more willing to hire student radicals or prison parolees than people who were either physically or mentally disabled. Id. This finding is consistent with a frequently cited study that found that all disabled groups were subject to prejudice and that personnel directors would prefer to hire a former prison inmate

or mental hospital patient than an epileptic. Triandis & Patterson, Indices of Employer Prejudice Toward Disabled Applicants, 47 J. of Applied Psychology 52 (963).[16]

Numerous studies have been conducted that conclude that disabled people are subject to the same type of prejudices and discrimination as members of racial and ethnic minorities. The earliest work in this area, Barker, the Social Psychology of Physical Disability, 4:4 J. of Soc. Issues 28 (1948), concluded that "the physically handicapped person is in a position not unlike that of the Negro, the Jew and other underprivileged racial and religious minorities; he is a member of an under-privileged minority." Id. at 31.[17] In a later study, Barker specifically reported that persons with various disabilities were unable to find adequate employment as a result of "irrational prejudice." Barker, Wright, Meyerson & Gonich, Adjustment to Physical Handicap and Illness: A Survey of the Social Psychology of Physique and Disability, 55 Bull. of the Soc. Science Research Council (1953).

Often reflective of the employer's own prejudices are the fears about the "reaction of others" to a disabled worker. In a

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[16]See discussion of employer bias against epileptics on p. 14 infra.

[17]See also Cowen, Underberg & Verillo, The Development and Testing of an Attitudes to Blindness Scale, 48 J. of Soc. Psychology 297 (1958); Wright, Physical Disability--A Psychological Approach (1960); Safilios-Rothschild, The Sociology and Social Psychology of Disability and Rehabilitation III (1970).

survey reported in the Needs Study, employers were found to believe that paraplegics were best suited for jobs requiring a minimum of public contact. Employers feared the negative "reactions of others to the disability." Felton & Litman, Study of Employment of 222 Men with Spinal Cord Injury, 46 Archives of Physical Med. and Rehab. 809 (1965) cited in Needs Study at 321 n.32.[18]

This rationale for not hiring disabled workers persists today. In a recent case a doctor with multiple sclerosis was denied admission to a psychiatric residency program because the admissions committee feared the negative reactions of patients to his disability.[19] Pushkin v. Regents of the Univ. of Col., 658 F.2d 1372 (10th Circ. 1981). The 10th Circuit found these fears to be based on general stereotypes rather than any actual

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[18]This response is reminiscent of "customer preference" cases brought under Title VII. See e.g. Diaz v. Pan American World Airways Inc., 442 F.2d 385 (5th Cir. 1971).

[19]Fears of the "reactions of others" have served to justify the exclusion of disabled people from many aspects of life. In 1971 one million handicapped children were excluded entirely from public school. 117 Cong. Rec. 45974 (1971). As stated by Congressman Vanick:

> [I]n the past, the reason for excluding these children from their right to an education has never been very clear . . . In one case a court ruled that a cerebral palsied child, who was not a physical threat and was academically competitive, should be excluded from public school, because his teacher claimed his physical appearance "produced a nauseating effect" on his classmates. Id.

Similarly, in 1972, Congressman Vanick commented on an airline rule that allowed carriers to "refuse transportation to 'crippled' persons on the grounds that they make passengers uncomfortable." 118 Cong. Rec. 11363 (1972).

information about the disabled applicant. After evaluating the evidence, the 10th Circuit affirmed the district court's order directing the admission of the plaintiff to the residency program.

The study referred to above on the attitudes toward and experiences with hiring paraplegics also found that most employers believed that paraplegics were best suited for non-professional jobs. This stereotype was directly contrary to the fact that paraplegics are actually found to be employed most frequently as professionals. Felton, supra p. 20, at 321.

Often the image of what disabled people "should" do or can do has no basis in reality. Different stereotypes attach depending on the disability involved. See Himes, Measuring Social Distance in Relations with The Blind, 54 Outlook for the Blind 54 (1960). ("Each physical disability--deafness and crippleness as well as blindness--is significantly, though differently, stereotyped." Id. at 55.) Another study cited in the Needs Study indicated "that most employers would not consider people with most kinds of disabilities for production and sales jobs, but would for clerical and, to a lesser extent, managerial jobs; (and) that over 50% of the employers would never consider hiring a blind or mentally retarded person for any type of job . . ." Williams, Is Hiring the Handicapped Good Business, 38:2 J. of Rehab 30 (1972) cited in Needs Study at 312.

Discriminatory employer attitudes are manifested in a variety of ways. Most obvious is the continued use of medical

standards that exclude all persons with particular disabilities from employment opportunities. The individual who has a disability that is exempted has no opportunity to prove his/her individual abilities to perform the job. Medical standards that are not formalized in writing are utilized in practice. Disabled people are rejected for employment as a result of pre-employment medical exams that merely reveal the existence of a disability without demonstrating any actual job-related limitation.

Although at least 85% of people with epilepsy have obtained control of their seizures, through medication, a significant number of employers flatly refuse to hire epileptics without any consideration of the effect the condition will have on safety and job performance.[20] Likewise, employers frequently refuse to hire persons who have cancer. A study performed in 1972 by the California Division of the American Cancer Society concluded that most corporations and governmental agencies in that state discriminated in hiring against job applicants for an average period of five years after treatment for cancer.[21] The study revealed that this discrimination by employers stemmed from concerns that applicants with cancer, or a history of cancer, might not survive long enough to justify the training, that they

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[20] See U.S. Dept. of Labor, D.O.L. Bull. No. 923, The Performance of Physically Impaired Workers in Manufacturing Industries, 116-117 (1948); Sands & Zalkind, Effects of an Educational Campaign to Change Employer Attitudes Toward Hiring Epileptics, 13 Epilepsia 87, 99 (1972).

[21] R. McKenna, Employability and Insurability of the Cancer Patient, 2-3 (Nov. 25, 1974).

might need extended periods of sick leave, and that they would cause increases in the cost of health insurance, workers compensation, and life insurance. Some employers believed that other employees would object to employees who were cancer victims because of the mistaken belief that cancer is contagious.

All of these reasons were proven false in a study performed in 1972 by the Metropolitan Life Insurance Company of its employees who were known to have had treatments for cancer. The study indicated that their work records were good relative to employees who had never had cancer. The conclusion was that hiring persons who have been treated for cancer for jobs for which they are qualified is sound industrial practice.[22] Hence, a significant percentage of persons who have had treatment for cancer suffer unjustifiable and discriminatory loss of job opportunities.

Many employers require applicants to have back x-rays taken, and then disqualify anyone whose results are abnormal. However, studies show that there is no difference between the incidence of low back pain in groups with low back abnormalities discoverable by x-ray and groups without such abnormalities.[23] Hence, many qualified persons with abnormal back x-rays are unnecessarily

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[22]Wheatley, Cunnick, Wright & Van Keuren, The Employment of Persons With a History of Treatment for Cancer, 33 Cancer 441, 445 (1974).

[23]Rockey, Fantel, Omenn, Discriminatory Aspects of Pre-employment Screening: Low Back X-ray Examinations in the Railroad Industry, 5 Am. J. of Law & Med. 197, 202 (1979).

precluded from working.

Seemingly more objective, but no less discriminatory, are job "requirements" that in fact bear no relation to the successful performance of the job. Moreover, "employers frequently underestimate the capabilities of disabled workers" to perform legitimate job functions. Nagi, Work, Employment & the Disabled, 31 Am.J. Econ. Soc. 21 (1972), cited in Needs Study at 314.[24]

The Needs Study cited two pioneering studies that confirm that private employers, as well as state and local governments, utilize job "requirements" that bear no relationship to the successful performance of the job. Viscardi, The Adaptability of Disabled Workers, 2:3 Rehab. Rec. 3 (1981), cited in Needs Study at 326 n.45; Greenleigh Associates, Inc., A Study to Develop a Model for Employment Services for the Handicapped (1969), cited in Needs Study at 326 n.46. Examples given are requiring employees to stand up for jobs that "can just as easily--or more easily--be performed sitting down" and requiring the "taking of written civil service tests that mentally retarded people cannot

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[24]The use of stereotypes about the physical abilities of women are analogous to the stereotypes about disabled people. For example, Weeks v. Southern Bell Telephone & Telegraph Co., 408 F.2d 228 (5th Cir. 1969), involved a regulation that prohibited women from lifting over 30 pounds. The court overruled the regulation because it was based on general presumptions instead of individual ability. See also LeBlanc v. Southern Bell Telephone & Telegraph Co., 333 F.Sup. 602 (E.D. La., 1971), aff'd, 460 F.D 1229 (5th Car. 1972) cert. denied, 409 U.S. 990 (1972); Rosenfeld v. Southern Pacific Co., 444 F.2d 1219 (9th Car. 1971).

pass for jobs that they are capable of performing." Id. at 326. The Needs Study also reported a situation where "workers suffering upper limb amputations on the job were retained after a job analysis performed by the union involved discovered that, contrary to popular belief, over 80 percent of the work required on the job did not require the use of both arms." Id. at 804.

Outmoded stereotypes whether manifested in medical or other job "requirements" that are unrelated to the successful performance of the job, or in decisions based on the generalized perceptions of supervisors and hiring personnel, have excluded many disabled people from jobs for which they are qualified. The function of anti-discrimination laws is to assure that decisions are made based on individual merit.

Employers often attempt to justify the rejection of disabled applicants by claiming that hiring disabled workers will cause decreased productivity and safety, and increased absenteeism and costs. An examination of the literature on the actual performance of disabled workers reveals the fallacies those rationalizations contain.

According to the Needs Study, the best and most comprehensive study of the job performance of disabled workers was conducted by the Bureau of Labor Statistics, U.S. Dept. of Labor, and appears in Bull. No. 923, The Performance of Physically Impaired Workers in Manufacturing Industries (1948), cited in Needs Study at 318. In this comprehensive study Department staff examined the employment records of 11,000

disabled and 18,000 carefully matched non-disabled workers in manufacturing plants throughout the country. Data on productivity, absenteeism, nondisabling injuries, disabling injuries and quits were abstracted. Company records rather than supervisors' impressions were the data source. For each disabled worker, one to three non-disabled workers were matched, not only for sex, age, and occupation but also for plant, shift, and particular job within the same plant and shift.

As reported in the Needs Study:

> The most important finding was that differences between impaired and unimpaired workers in any of the performance categories measured were slight . . . . Impaired workers had significantly higher involuntary termination (firing) rates. The authors attribute this to postwar practice of firing disabled workers to hire returning (able-bodied) war veterans . . . . One of the conclusions that the authors draw is that the physically impaired worker is not necessarily a handicapped worker. The results of this major study are strong evidence that employers' fears of low performance rates among disabled workers are unjustified. (emphasis added) Id. at 318-19.[25]

Interestingly, the authors found that many of the manufacturing plants surveyed reinstated policies against hiring disabled workers after having relaxed such policies during the

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[25] For example, the study specifically stated:
> The data suggest that. . . an orthopedic impairment left more abilities than it took away. A man who has lost an arm was not necessarily incapable of performing jobs that required the use of two hands. Nor. . . did the survey indicate that the worker who had lost a leg necessarily had to be confined to sedentary occupations. . . . Men who had lost a hand were found engaged in machine operations or in handling materials; and workers who had lost a leg were engaged in work requiring considerable walking and moving about. Bureau of Labor Statistics, Bull. No. 923, supra p. 27, at 59.

war years. See Needs Study at 296-97. The reinstatement of exclusionary policies, despite the positive employment records of disabled workers, is strong evidence that these standards are not related either to functional skill or ability required for job performance or to a concern for the safety of workers.

Other government studies have also found that handicapped workers performed as well as, or better than, their non-handicapped co-workers. U.S. Bureau of Labor Standards, Dept. of Labor, Bull. No. 122, Proceedings of the National Conference on Workmen's Compensation & Rehabilitation 19 (1950). All studies on the subject support the fact that disabled workers have as good as or better safety records than non-disabled workers. U.S. Dept. of Labor, Bull. No. 122 at 8.[26] Government studies have also concluded that the employment of handicapped persons does not affect the premium rates either for non-occupational benefit plans or for workers' compensation. U.S. Bureau of Labor Standards, Dept. of Labor Bull. No. 234 at 10.[27]

Over the last twenty-five years the Dupont Corporation has conducted a number of studies on the performance of its handicapped employees. The most recent report, E. I. DuPont de

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[26]See also Pati and Gopal, Countdown on Hiring the Handicapped, 57:3 Personnel J. 144 (1978); Ellner & Bender, Hiring the Handicapped (1980); Kalaenik, Myths About Hiring the Physically Handicapped, The Ca. Governor's Comm. for Employment of the Handicapped, A Blueprint for Action (1980).

[27]See also National Institutes on Rehabilitation and Health Services, Report of the National Workshop on Rehabilitation and Workmen's Compensation 105 (1971.

Nemours & Co., Equal to the Task (1981) (DuPont Survey of Employment of the Handicapped), concluded "Dupont studies over a period of twenty-five years have shown that the performance of handicapped employees is equivalent to that of their unimpaired co-workers. In safety, job duties and attendance, the handicapped hold their own." Id. at 4.

IV. ADA EMPLOYMENT PROVISIONS / THE REHABILITATION ACT MODEL

The anti-discrimination in employment sections of the ADA are modelled after Section 504 of the 1973 Rehabilitation Act. The primary difference in the ADA and Section 504 is scope, not content. While Section 504 applies only to recipients of federal funds, the ADA would extend employment coverage to all entities covered by Title VII of the 1964 Civil Rights Act. The purpose is simple--to complete the commitment begun in 1973 to extend to Americans with disabilities the same protections against discrimination as that afforded other minorities and women.

The statutory framework is designed to ensure that persons with disabilities are treated as individuals and that employment decisions are not made on the basis of stereotypes about certain disabilities. Only those individuals who are qualified to perform the job in question are protected. Hence, employers are not required to employ an unqualified individual simply because he or she has a disability.

Section 201(5) of the ADA defines a "qualified individual with a disability" as "an individual with a disability who, with or without reasonable accommodation, can perform the essential

functions of the employment position that such individual holds or desires." The term "reasonable accommodation" is a term of art from the Section 504 regulations. The ADA also incorporates the Section 504 limitation on reasonable accommodation, which is that of "undue hardship." The ADA states that the term discrimination includes the failure to make reasonable accommodation unless the covered entity "can demonstrate that the accommodation would impose an undue hardship on the operation of its business." The Section 504 standard has been further clarified in the substitute to H.R. 2273 reported out of the Committee on Education and Labor (hereinafter "House Substitute"). In determining undue hardship the Court is now directed to consider site specific factors as well as overall company resources. Section 101(a) provides:

DETERMINATION -- In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include:

(i) the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; the overall financial resources of the entity and the financial resources of its facility or facilities involved in the provision of the reasonable accommodation;

(ii) the type of operation or operations of the covered entity, including he composition and structure of its workforce, in terms of such factors as functions of the

workforce, geographic separateness, and administrative relationship to the extent that such factors contribute to a determination of undue hardship; and

(iii) the nature and cost of the accommodation needed under this Act.

Hence, reasonable accommodation is a flexible standard that balances the rights of the applicant or employee with the employer's legitimate business interests. The determination of undue hardship must therefore be made on an individual basis. As explained in the "Analysis of the Final [504] Regulation," twelve years ago, 42 Fed. Reg. 22685, 22688 (1977):

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

In determining whether an individual is qualified under the ADA, an employer may use selection criteria that are necessary and related to the ability of an individual to perform the essential functions of the particular employment position. This

protects employers while assuring that persons with disabilities are not subject to disqualifying physical or mental criteria that bear no relationship to job performance.

To assure that qualified applicants are not excluded because of a physical or mental condition, it is critical that the selection procedure not include pre-employment inquires that serve solely to identify a person's disability. It has been common practice for pre-employment questionnaires to include sweeping questions such as: do you have any physical defect; have you ever been treated for mental illness; have you ever been hospitalized; do you ever experience seizures. These types of intrusive inquiries identify a person's disability without serving any legitimate job-related purpose. In order to insure that improper bias does not enter into the selection process, the ADA adopts the 504 procedure which limits employers' inquires to those that evaluate a person's ability to perform job-related functions. As explained in the Section 504 Regulations, Analysis, supra, 42 Fed. Reg. at 22689, "an employer may not ask on an employment form if an applicant is visually impaired but may ask if the person has a current driver's license." This type of procedure assures that subjective stereotyping about disabling conditions, which as shown above is prevalent, does not enter into the determination of whether an applicant is qualified for the job.

As in Section 504 and Title VII, the ADA's non-discrimination provisions extend to "job application procedures,

the hiring or discharge of employees, employee compensation, advancement, job training, and other terms, conditions and privileges of employment."

In order to provide uniform enforcement procedures, the ADA makes the EEOC the enforcing agency. The House Substitute specifically directs administrative agencies to develop procedures and coordinating mechanisms to ensure that ADA and Rehabilitation Act administrative complaints are handled without duplication or inconsistent, conflicting standards.

Finally, under the ADA a private right of action and the remedies of Title VII are available. The Senate compromise limited the ADA employment discrimination remedies by removing the provisions which would have allowed compensatory and punitive damages. This was a major concession to allay the concerns of the business community, the administration and some members of Congress.

Section 605 of the ADA allows for attorney's fees to the prevailing party. This provision has long been recognized as essential to the right of protected groups, in order to fully utilize anti-discrimination statutes. As Senator Cranston states when enacting the attorney's fees provision in the 1978 Amendments to Title VII, "a right without a remedy is no right at all."

V. The Anti-Discrimination in Employment Sections of the Rehabilitation Act Have Created Workable Standards Which Take Into Consideration the Rights of Workers With Disabilities and the Business Interests of Employers

A review of the case law prohibiting employment discrimination under the 1973 Rehabilitation Act provisions demonstrates a reasoned approach that considers both the rights of workers with disabilities and the business interests of employers. The cases also illustrate the drastic need for anti-discrimination provisions to assure that people with disabilities who are qualified to work are not forced onto the welfare rolls by employer ignorance and prejudice.

The threshold jurisdictional issue in Section 504 cases, as in the ADA, is whether a person is "handicapped" or "disabled."[28] The U.S. Supreme Court's seminal decision on this issue is School Board of Nassau County v. Arline, 107 S.Ct. 1123 (1987). In that case the court was called upon to interpret the Rehabilitation Act definition of "handicapped" person, which is identical to that contained in the ADA. The term includes an individual who (i) has a physical or mental impairment, which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

The Arline Court stated that this definition:

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[28]The definition of persons with disabilities in the ADA is not intended to be substantively different than the definition of "handicapped person" in Section 504. The substitution of disabilities for handicaps merely reflects a preference in terminology.

> . . . reflected Congress' concern with protecting the handicapped against discrimination stemming not only from simple prejudice but from 'archaic attitudes and laws' and from 'the fact that the American people are simply unfamiliar with and insensitive to the difficulties confronting individuals with handicaps.' "...[t]o combat the effects of erroneous but nevertheless prevalent perceptions about the handicapped, Congress expanded the definition of 'handicapped individual' so as to preclude discrimination against 'a person who has a record of, or is regarded as having, an impairment [but who] may at present have no actual incapacity at all.'"
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> By amending the definition of 'handicapped individual' to include not only those who are actually physically impaired, but also those who are regarded as impaired and who, as a result, are substantially limited in a major life activity, Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment.[29]

Since Arline, the Congress has adopted language that recognizes coverage of persons with contagious diseases and incorporates "direct threat to others" as a legitimate qualification standard. [See Civil Rights Restoration Act of 1987; Fair Housing Act Amendments of 1988 (not limited to contagious diseases)]. The ADA also adopts this approach:

> The term qualification standard may include (B) requiring than an individual with a currently contagious disease or infection not pose a direct threat to the health or safety

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[29]The specific question in Arline was whether a person with a contagious disease is covered by the Act. The Court held in the affirmative stating that an exclusion for contagious diseases "would mean that those accused of being contagious would never have the opportunity to have their condition evaluated in light of medical evidence and a determination made as to whether they are 'otherwise qualified.'" After Arline, the Solicitor General issued an opinion that persons with HIV-infection are covered by the Act. As stated above, this conclusion has been endorsed by Congress.

of other individuals in the workplace or program.

As is true with contagious diseases, a review of the case law shows that the legitimate concerns of employers are taken into account in all types of cases. However, it is also clear that many employers utilize outmoded job criteria that screen out qualified workers. The employer always has the opportunity to show that the criteria are job related and are consistent with business necessity and the safe performance of the job. If such a showing is made, the disabled person is disqualified unless alternative criteria that do not have an adverse impact would also meet legitimate business interests. The requirement of reasonable accommodation has also resulted in the employment of qualified persons with disabilities without compromising legitimate business interests. Finally, the case law reveals that persons with disabilities are still subject to outright prejudice and ignorance based on unfounded stereotypes. Clearly, employers have no legitimate interest in failing to employ on that basis.

Pushkin v. Regents of the University of Colorado, 658 F.2d 1372 (10th Cir. 1981), illustrates the pervasive use of stereotypes to deny qualified persons with disabilities employment opportunities. In that case a physician who had multiple sclerosis sought and was denied admission to the University's Psychiatric Residency Program. The Tenth Circuit agreed with the district court's determination that Dr. Pushkin was an otherwise qualified individual who had been rejected

solely on the basis of his handicap, in violation of the Rehabilitation Act.

The evidence presented at trial indicated that the defendant had made the following assumptions about Dr. Pushkin: (1) that he was angry and emotionally upset due to his handicap, and would thus be unable to do an effective job as a psychiatrist, (2) that he had difficulties with mentation, delirium and disturbed sensorium due to the MS and steroid use, (3) that his handicap would render him unable to handle the workload, and (4) that he would miss too much time away from work.

At trial the district court found that these assumptions were rebutted by evidence of Dr. Pushkin's past competence in dealing with his condition, and by witnesses' testimony that his emotional responses were normal and that he treated patients appropriately.

The Tenth Circuit affirmed the finding that the University's reasons for rejecting Dr. Pushkin "were based on incorrect assumptions or inadequate factual grounds." Id. at 1383. The appellate court opined that handicap discrimination usually results from "invidious causative elements and often occurs under the guise of extending a helping hand or a mistaken, restrictive belief as to the limitations of handicapped person." Id. at 1385. In this case, the University's actions were not "predicated on any known deficiency of Dr. Pushkin himself" but based on a general knowledge of MS that did not apply to Dr. Pushkin, the individual.

Likewise in Smith v. Fletcher, 393 F.Supp. 1366 (S.D. Tex. 1975), modified, 559 F.2d 1014 (5th Cir. 1977), a paraplegic who had a Master's degree in physiology was assigned menial clerical tasks because her supervisor had made "an arbitrary and unfounded decision as to her physical capabilities." The court ordered that she be promoted from a GS-9 to a GS-13.

Strathie v. Department of Transportation, 716 F.2d 227 (3rd Cir. 1983), illustrates that strict adherence to outmoded physical requirements serves to exclude qualified disabled employees. In that case, a hearing impaired person sought a position as a public school bus driver. He was denied the necessary driver's license on the grounds that he could not meet the Department of Transportation regulation requiring a specified level of hearing without the use of a hearing aid. With a hearing aid Mr. Strathie meet the Department's standards.

The district court held that the regulation was valid and that Mr. Strathie was not therefore an "otherwise qualified" handicapped individual under the Rehabilitation Act. In support of this decision the court accepted defendant's arguments that the accommodation of a hearing aid was unreasonable because of the risks of dislodgement, mechanical failure, inability to localize sound, and the possibility that the wearer would lower the volume of the aid and thus decrease its usefulness.

The Third Circuit reversed, noting that the district court had failed to consider Mr. Strathie's proposed modifications that would reduce the risks. The modifications included frequent

inspections of the aid and carrying a spare aid and batteries to minimize mechanical failures, pre-setting volume to avoid variability, and individualized assessment of ability to localize sound. With respect to the risk of dislodgement, the court noted that certain types of hearing aids are "less likely to become dislodged than are regular eyeglasses." The court emphasized that it was anomalous for the Department to allow vision standards to be met with corrective lenses, yet did not allow candidates to meet hearing requirements with the help of a hearing aid. The opinion as a whole highlighted the need to address the realities of a given individual's situation, instead of relying on overly broad general assumptions.

The need for individualized determination under Section 504 with respect to the qualifications of persons with disabilities was also emphasized by the court in Jackson v. State of Maine, 544 A.2d 291 (Me. 1988). Mr. Jackson was an insulin-controlled diabetic who was prevented from taking the examination for public school bus driver on the basis of a regulation requiring him to be "free from...diabetes". Id. at 298. The Court noted that the denial of plaintiff's application "was automatic and based solely on his diabetes." Defendants offered no evidence that Mr. Jackson, as an individual, could not safely drive a school bus. The doctor who examined him concluded that he was "free from any condition that might affect his ability to safely operate a school bus." Moreover, at the time of the appeal Mr. Jackson was working successfully as a bus driver.

In Stutts v. Freeman, 694 F.2d 666 (11th Cir. 1983), the Eleventh Circuit found that the use of a written test as the sole criterion for a job as an equipment operator discriminated against Mr. Stutts, who had dyslexia (a learning disability).

Nelson v. Thornburgh, 567 F.Supp. 369 (E.D.Pa. 1983), illustrates the importance of reasonable accommodation to maintain qualified disabled workers and the flexible approach taken by courts when considering the burden on defendants. Thornburgh involved blind income maintenance workers who alleged that the Department of Public Welfare had unlawfully discriminated against them, failing to accommodate their disability by providing part-time readers. The employees themselves had hired readers, and with the assistance of these readers were able to perform the job as well as their sighted colleagues. The court held that inability to read did not mean that the employees were not "otherwise qualified," as this was not essential to successfully meeting the requirements of the position. Several accommodations, including brailling forms and manuals, and using technology like a Versabraille, and possible schedule changes to make the most efficient use of readers, would insure that employees were able to function on the job.

The court acknowledged that "accommodation...will impose some further dollar burden upon an already overtaxed system of delivery of welfare benefits", but noted that "the additional dollar burden is a minute fraction of the DPW/PCBA personnel budgets." Moreover, the court emphasized that the failure to

accommodate in the workplace would impose very real costs on American society and the American economy, in light of the consequence of having to support these employees on government benefits if they were not allowed to contribute their productivity as members of the workforce.

Finally, Chalk v. United States District Court Central District of California, 840 F.2d 701 (9th Cir. 1988), illustrates how irrational fear of contagion can serve to deny a qualified disabled person his profession, unless court review is available. In that case Mr. Chalk, a certified teacher of hearing-impaired students, was barred from teaching after a diagnosis of AIDS. The Ninth Circuit reviewed all relevant medical literature and concluded that there was no significant risk of transmission in the classroom setting. Among the cited literature was a Surgeon General's Report that stated, "casual social contact between children and persons infected with the AIDS virus is not dangerous." The Court stated that "the basic purpose of Section 504 is to ensure that handicapped individuals are not denied jobs or other benefits because of the prejudicial attitudes or ignorance of others."

VI. REPORTS OF EMPLOYERS HAVE BEEN POSITIVE

Reports from employers demonstrate that many of the fears associated with passage of the Rehabilitation Act anti-discrimination provisions were unfounded. In addition to the studies that refute employers fears about productivity,

absenteeism and safety,[30] a comprehensive study by the Department of Labor regarding accommodations to disabled employees by federal contractors demonstrates that accommodations that allow participation can often be done without great expense.[31] Almost one-forth of the disabled employees in the study received some type of accommodation. Over fifty percent of the accommodations in the study cost nothing; an additional thirty percent cost less than $500; only eight percent cost more than $2000. The experience of providing accommodations was positive for employers. The report stated that "accommodation is seen by firms as sensible business practice to secure a reliable worker with needed skills, akin to the provision of tools or other aids to non-disabled workers to increase their productivity".

The Wall Street Journal reported on the change in federal contractor employer practices under Section 503 as early as January, 1976. More than 275,000 companies employing more than one-third of the work force were affected at that time.[32] As a result of Section 503, companies reviewed their hiring practices. The Wall Street Journal article provides interesting anecdotal

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[30] See, discussion, supra, pp. 17-20

[31] "A Study of Accommodations Provided to Handicapped Employees by Federal Contractors," Executive Summary, U.S. Department of Labor, June 1982.

[32] Unfortunately, the courts have not recognized a private cause of action under Section 503 and agency action has been hampered by back-logs and limited enforcement. Hearings before the Subcommittee on Employment Opportunities of the House Committee on Education & Labor, 96th Cong., 1st Sess., 25 (1979).

evidence of the positive effect of the non-discrimination provisions on a number of major American enterprises:

"We had a medical department that thought it was saving the company money by only hiring Greek gods," says a personnel officer for a large Midwestern manufacturing firm. "We have completely abandoned that approach." Now, he adds, "we're trying to fit a person to a particular job." The company, for example, has begun considering applications from the deaf.

GTE Sylvania has changed more than its attitude toward former cancer patients. The company used to have rigid weight limits for all jobs. "We've thrown all those out the window," says John McKeith, who handles industrial relations.

International Telephone & Telegraph Corp. has scraped rules that barred applicants with epilepsy, cancer and some other health problems. An epileptic has been hired as a packer for an ITT subsidiary.

Bell Helicopter Co. of Fort Worth, Texas, became the target of a Section 503 complaint when it turned a man down for a position as a contract analyst. He had spinal curvature and it was corporate policy "not to hire anyone with a bad back," says Jim Kight, a Labor Department specialist in Dallas. The complaint was resolved when Bell changed corporate physicians - which, Mr. Kight says, was "the same thing as changing its policies."

Written tests, too, are sometimes being modified. In Chicago, officials at Continental Illinois National Bank & Trust Co. quickly devised a braille version of its computer-programming aptitude test because they feared that a blind applicant was about to complain under the federal law. He got the job.

For some firms, the new attack on job discrimination has altered stereotypes rather than formal hiring practices. In the past, says one personnel executive, "we were tempted to say, 'This girl can't type; she's blind.' We had preconceived notions." Now, [business] concerns are starting to explore their whole range of jobs, finding ways that disabled employes [sic] might perform them with minor changes in hours or duties.

Thus, Union Carbide Corp. is advertising sales-representative job openings in handicapped groups'

newspapers, merely specifying that "car maneuverability" is required. U.S. Steel did recruiting last spring at the National Technical Institute for the Deaf, in Rochester, N.Y.; it was the school's first such visit in its seven-year history.

And in 1974, Sears, Roebuck & Co. hired Brad Shorser as its first blind management trainee despite a few officials' misgivings about his ability to deal with customers. Now a successful assistant customer-service manager for the Hichsville, N.Y., store, 28-year-old Mr. Shorser says the federal law's existence "most definitely" helped him get the job.

Seven years later the Wall Street Journal again highlighted the advantages of employing persons with disabilities pursuant to non-discrimination provisions. The article, which appeared on November 22, 1983, noted that "[w]ork accommodations for the disabled often cost little and benefit others." It observed that a poll of 2,000 federal contractors found that "81% of changes made cost $500 or less." Moreover, modifications often helped able-bodied workers as well. For example, in addition to providing wheelchair access, "[w]idened doorways at Western Electric allow easier moves of heavy equipment. Scientific Atlanta likes its enlarged elevators for similar reasons." And the benefits are not limited to improved physical arrangements. "when Tektronic altered an assembly line supervisor's tasks to aid a mentally retarded man, all 12 workers' output rose and errors fell."

VII. A UNIFORM FEDERAL LAW IS NECESSARY TO PROTECT PERSONS WITH DISABILITIES WHO ARE QUASLIFIED TO SORK FROM DISCRIMINATION

While 44 states have passed laws prohibiting employment discrimination against persons with disabilities, only twelve are

comparable to the Rehabilitation Act in providing protections against discriminatory practices.[33] This demonstrates how unprotected persons with disabilities are from private employment discrimination. Persons with disabilities are now the only major group that, while recognized by Congress as face widespread discrimination in employment, still has no adequate federal protection. Until the ADA is passed, Americans with disabilities will continue to be kept out of the workforce because of stereotypes and ignorance.

The state statutes provide for coverage of private employers, at least to the extent of Title VII. The majority do not limit coverage to moderate sized employers as in Title VII. Hence, restrictions on the right of private employers to exclude disabled workers is not new to the ADA. However, the state laws vary widely, and do not provide as much protection as the Rehabilitation Act once the primary hurdle of coverage is overcome.

One major problem is the failure of many state statutes to cover mental disabilities. In addition, many state statutes have very restrictive definitions of "handicap." Many define handicap as a limitation on work. This type of definition gives rise to the anomalous result that a person whose disability was the cause

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[33] Handicap Discrimination Legislation: With Such Inadequate Coverage at the Federal Level, Can State Legislation Be of Any Help? 40 Arkansas Law Review, pp. 261, 322. (Five additional states prohibit state agencies and recipients of state funds from discriminating. (Only Delaware and Wyoming have passed no legislation at all.)

of the adverse employment decision but does not affect the ability to work is not protected against employment discrimination. The same anomaly results when statutes cover only severe handicaps. Others list specific handicaps leaving all other subject to arbitrary employment practices. For example, New Hampshire excludes handicaps caused by illness and Arizona excludes handicaps that were first manifested after age 18. Many statutes require a presently disabling condition despite the fact the employers often use signs of a future disabling condition to disqualify an employee. It is estimated that between 150,000 and 1.2 million pre-employment lower back x-rays are given each year. Despite the fact that they have been totally discredited in the scientific literature, they are still widely used to screen out asymptomatic applicants.[34] Hawaii actually limits coverage to impairments which will last a lifetime without substantial improvement. Hence, a person with cancer may be excluded just because he may get better.

Over one-half of the states do impose a reasonable accommodation requirement. However, several define the term restrictively. In Minnesota, a $50 cap is provided. Many restrict the requirement to employers of over a certain number. This makes no sense, when the accommodation may involve simple readjustments of work space (lowering a desk). With the undue burden protection of federal law, there is no reason to exempt

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[34] Id. at 288.

employers or limit the type of accommodation which can be made. Finally, nearly one-half of the states do not require any reasonable accommodation despite extensive documentation that accommodations are most often not costly.[35] Yet for many disabled people the willingness to accommodate can make the difference between fruitful employment and welfare.

In the Committee on Education and Labor's first hearing on the ADA, the business community circulated two working papers, outlining their concerns with the ADA. The primary concerns in the employment area addressed were the confusion crated by Title I and Title II provisions which seemed to apply differently to the same situation, the inclusion of 1981 remedies in employment, the request for a definition of undue burden, the clarification that the ADA did not conflict with drug-free workplace policies, and the removal of the word "identify" from the selection criteria. Every one of these concerns was dealt with in the Senate compromise and the House substitute. Title I was eliminated, "identify" was eliminated with an exact description of its meaning incorporated instead, the coverage of drug addicts was clarified, and undue burden was defined. The business community was actively involved in the process and has been "reasonably accommodated"..

Now is the time for Congress to make a national commitment to the equal employment opportunities of persons with

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[35]Dupont study, supra, Wall Street Journal, Nov. 22, 1983, at 1 col. 4.

disabilities. The federal law is too limited in coverage and state laws vary widely and are often too restrictive. The result is the sanctioning of widespread proven employer bias and the exclusion of millions of Americans from jobs that they can perform and deserve to hold.

VIII. EXTENT AND EFFECTS OF DISCRIMINATION IN PUBLIC ACCOMMODATIONS

In the first ever nationwide poll of people with disabilities conducted in 1986, the Louis Harris organization asked a number of questions regarding the social integration and activities of Americans with disabilities. The pollsters discovered that people with disabilities are an extremely isolated segment of the population. As the National Council on Disability summarized the poll's results:

> The survey results dealing with social life and leisure experiences paint a sobering picture of an isolated and secluded population of individuals with disabilities. The large majority of people with disabilities do not go to movies, do not go to the theater, do not go to see musical performances, and do not go to sports events. A substantial minority of persons with disabilities never go to a restaurant, never go to a grocery store, and never go to a church or synagogue.... While a decided majority of other Americans report that they are not active in religious, volunteer, and recreation groups, most persons with disabilities are not active in such groups. The extent of non-participation of individuals with disabilities in social and recreational activities is alarming.
> (Implications for Federal Policy of the 1986 Harris Survey of Americans with Disabilities, p. 35 (1988))

Specific findings of the poll included the following:

* Nearly two-thirds of all disabled Americans never went to a movie in the past year. In the full adult population, only 22% said they had not gone to a movie in the past year.

> * Three-fourths of all disabled persons did not see live theater or a live music performance in the past year. Among all adults, about 4 out of 10 had not done so.
> * Two-thirds of all disabled persons never went to a sports event in the past year, compared to 50% of all adults.
> * Disabled people are three times more likely than are nondisabled people to never eat in restaurant. Seventeen percent of disabled people never eat in restaurants, compared to 5% of nondisabled people. Only 34% of disabled people eat at a restaurant once a week or more, compared to a 58% majority of nondisabled people.
> (Louis Harris and Associates, The ICD Survey of Disabled Americans: Bringing Disabled Americans into the Mainstream, p. 3 (1986)

Another specific finding of the poll had to do with grocery shopping and similar activities:

> Disability also has a negative impact on vital daily activities, like shopping for food. A much higher proportion of disabled persons than nondisabled persons never shop in a grocery store. Thirteen percent of disabled persons never shop in a grocery store, compared to only 2% of nondisabled persons. About 6 out of 10 disabled persons visit a grocery store at least once a week, while 90% of nondisabled adults shop for food this often. (Id., p.3)

Why don't people with disabilities frequent places of public accommodation and stores as often as other Americans? The Harris poll sheds some light on the reasons for this isolation and nonparticipation by persons with disabilities in the ordinary activities of life. Two of the major reasons have to do with not feeling welcome and inaccessibility.

The preeminent reason why people with disabilities do not participate in various aspects of commercial, social, and recreation activities that are a routine part of ordinary life for most other Americans is that they do not feel that they are welcome and can participate safely. Two of the major reasons

most commonly identified by the Harris Poll why the activities of people with disabilities are limited are fear and self-consciousness about their disability. The Harris organization reported that "Fear is the barrier mentioned most frequently by disabled people as an important reason why their activities are limited," with nearly six out of ten (59%) of those reporting activity limitations listing fear as an important reason (Id., p. 63). And self-consciousness about their disability was reported as an important factor by forty percent (Id., p. 64). To a disturbing degree, people with disabilities do not feel safe or welcome to attend or visit ordinary places open to the public for socializing, doing business, or engaging in recreation and other major activities in our society.

Another way in which people with disabilities are prevented from visiting social, commercial, and recreational establishments (and in which the lesson of not being welcome is underscored) is by the presence of physical barriers. Many people with mobility impairments, including in particular those who use wheelchairs, cannot get into or use a facility that has steps, narrow doorways, inaccessible bathrooms, and other architectural barriers that keep them out. People having visual and hearing impairments are often unable to make effective use of or to participate safely in activities and services if the facility in which they occur has included no features for communication accessibility. According to the Harris poll, forty percent of individuals with disabilities reporting limitations on their

activities say that an important reason why they are limited is inaccessibility of buildings and restrooms (Id., p. 64).

The Harris poll documents the social isolation of people with disabilities that results, in large part, from discrimination they encounter when they try to engage in the ordinary social and commercial transactions of daily life.

IX. NEED FOR ANTI-DISCRIMINATION PROTECTION IN PUBLIC ACCOMMODATIONS

Nearly three decades ago, four black students sat down at a lunch counter at a Woolworth's store in Greensboro, North Carolina, ordered a cup of coffee, and refused to move until they were served. Although it was not known to the four young men at the time, their act of courage would precipitate a series of sit-ins and other forms of civil disobedience challenging the racial segregation of lunch counters, restaurants, hotels, motels, parks, and other facilities. The segregation of such places was a principal target of civil rights protests, lawsuits, and proposals for legislative reform during the early sixties.

These efforts culminated in a major section of the Civil Rights Act of 1964 -- Title II, which prohibits discrimination on the basis of race, color, religion, or national origin in places of public accommodation. Since 1964 it has been illegal for public establishments to discriminate on the basis of race, color, religion, or national origin. Unfortunately, it is not unlawful today for these same establishments to exclude,

segregate, mistreat, insult, or otherwise discriminate against people with disabilities.

People with various disabilities are turned away from public accommodations because proprietors say that their presence will disturb or upset other customers. Steps, narrow doorways, curbs, and other physical barriers block people who use wheelchairs from entering many arenas, stadiums, theaters, and other public buildings. People with visual or hearing impairments find that no arrangements have been made for their attendance or effective participation.

At the height of civil rights confrontations in the early sixties, some parks and zoos were closed by entrenched authorities rather than permit these facilities to be integrated. Nearly thirty years later, people with disabilities are still having trouble gaining admission to many such establishments. Last year, the Washington Post reported that a New Jersey zookeeper refused children with Down syndrome admission to his zoo because he was afraid they would upset his chimpanzees.

The ADA seeks to correct this inequity. It addresses the two major ways in which discrimination keeps people with disabilities from making equal use of public accommodations. It prohibits discriminatory practices -- rules and attitudinal barriers that bar people with disabilities from participating or participating equally. And, in certain circumstances, it prohibits architectural and communication barriers that can keep people from even getting into a facility.

X. **THE PUBLIC ACCOMMODATION PROVISIONS ARE REASONABLE**

The forms of discrimination which are prohibited are based upon existing concepts of nondiscrimination in law and regulations, particularly under Section 504 of the Rehabilitation Act of 1973. Thus, the requirements of providing reasonable modifications to policies and practices, of providing auxiliary aids and services, and of removing architectural, transportation, and communication barriers to make facilities readily accessible to and usable by individuals with disabilities, are well-established principles of disability nondiscrimination law. Likewise, limits upon nondiscrimination requirements, such as not requiring any modification which would result in a "fundamental alteration in the nature" of a program or financial "undue burden", or limiting access requirements where they are "structurally impracticable", are all drawn from existing regulatory language under Section 504, the Architectural Barriers Act of 1968, and UFAS.

The ADA reflects a reasoned approach, explicitly setting limits upon the obligation of achieving full accessibility. Thus, the ADA does not require full accessibility when (1) in the case of new facilities, access would be "structurally impracticable"; (2) in the case of existing facilities, access is not "readily achievable"; or (3) in the case of altered facilities, access would be beyond the "maximum extent feasible", and in the case of amenities which serve the altered area, where

within this modest requirement,the standard is flexible, taking into account the size and resources of the business. For example, a public accommodation which has one or two steps may be required to install a simple ramp. However, a real estate agency doing business in a three story walk-up office would not be required to install an elevator to provide access to the upper floors. In order to ensure program access, however, it would be required to provide its services to customers with mobility impairments in the first floor accessible offices.

When barrier removal is not readily achievable, the provision of access via alternative methods allows a wide variety of service provision to assist disabled people. For example:

* Many restaurants have a cafe-style eating area on the ground floor, and a more elegant and expensive restaurant on the second floor, which may not be accessible through an elevator. If access to the second floor restaurant cannot be arranged in a way that is readily achievable, people with disabilities who cannot use the stairs may be served from the restaurant menu in the downstairs facility.

* Facilities with entrances consisting of several steps directly on a public sidewalk, which cannot ramp their steps due to encroachment on the public way, might be able to purchase a portable ramp for the situations when wheelchair users need entry.

* A drycleaning service with six steps at its entrance might serve its disabled patrons who cannot enter by collecting and returning their clothing to them on the sidewalk.

There are other examples in which some accommodations would be considered as too burdensome to require under this standard. For example:

* While the drycleaning service mentioned above would serve its disabled patrons on the sidewalk, it wouldn't be required to transport their clothing to their home.

* While grocery stores and supermarkets with at least several employees would be expected to assist disabled patrons by carrying the bags of groceries to their cars, small "mom and pop" style grocery stores with one staff person at a time would not be expected to do so.

* A barber would not be expected to cut a disabled person's hair out on the street, if numerous steps prohibited entry.

While the ADA does not require all existing buildings to be made accessible because of costs, new commercial facilities are required to be built in an accessible manner. The construction cost is minimal while the very real costs of exclusion are tremendous.

The regulatory impact statement issued in connection with the Section 504 rule by HEW in 1977 estimated that a new building could be made accessible at an additional cost of one half of one percent (.5%0 of the total cost of construction (41. Fed. Reg. 20,333). Offsetting this cost, of course, is the savings to taxpayers of permitting employment for millions of persons with disabilities, by reducing public assistance payments and increasing tax revenues.

Other studies, prior and subsequent to the 1977 estimate, have supported the conclusion that accessibility costs in the construction of new buildings are extremely low. In the mid 60's the National League of Cities studied costs of access for people with disabilities for a national commission on architectural barriers; the study showed that when planned into the initial design, accessibility features usually cost less than one-half of one percent. A Syracuse University study conducted for HUD

reached the same conclusion. In 1975, the General Accounting Office estimated that accessibility in a new building can be accomplished for less than one-tenth of one percent of overall costs.

Other authorities have concurred with these estimates that accessibility in a new building should not cost more than one-tenth to one-half of one percent of construction costs: ATBCB, (About Barriers, p. 5 (1982); National Council on Disability, Toward Independence, Appendix, pp. F-28 & F-29 (1986); U.S. Commission on Civil Rights, Accommodating the Spectrum of Individual Abilities, pp. 81-82 (1983); Congressional Record, April 29, 1988 (Remarks of Representative Owens). All of these studies and authorities agree that the costs of accessibility in new construction is very, very low.

XI. DEFERENCE TO NEEDS OF SMALL BUSINESSES

A great deal of concern has surfaced among the small business community that the requirements of the ADA will impose serious hardships upon small businesses. Lack of familiarity with existing measures that prohibit discrimination against people with disabilities, serious misinformation about the actual requirements of this bill, and a great deal of misunderstanding about the needs and rights of people with disabilities have combined to whip up sentiments that the bill does not take into account the needs of small businesses and that it will be disastrous for them.

Actually, the bill has been very carefully crafted to take into account the needs and situation of small businesses at every juncture. I have no hesitancy whatever in stating that this bill is the most responsive to the particular situations and characteristics of small businesses of any federal civil rights law that has ever been considered by the Congress. Each of the major requirements of the bill has been tailored in some way to consider and make allowance for the important and unique needs of the small business operator. It is true that small businesses have not been wholly exempted from the coverage of the public accommodations provisions of the bill; small businesses are too important a source of goods and services for the American public to have them totally exempted and told that it is okay to go ahead and discriminate against people with disabilities. Small businesses make up a large percentage of the establishments that provide services and goods on a daily basis; to cut them out of the ADA would seriously undermine the bill's goal of opening up our society to people with disabilities on an equal basis. In many contexts, small business is business in America today. The approach of the ADA is not to eliminate small businesses from the requirements of the bill, but rather to tailor the requirements of the Act to take into account the needs and resources of small businesses -- to require what is reasonable to require and not to impose obligations that are unrealistic or debilitating to businesses.

Not creating a total exemption for small public

accommodations is consistent with Title II of the Civil Rights Act of 1964, which covers all such public accommodations regardless of size. There, as here, it would defeat a major purpose of the Act to permit small restaurants, lunchrooms, theaters, service stations, etc., to continue to discriminate. If nondiscrimination is to have any real meaning, it is essential that local neighborhood businesses be prohibited from engaging in such discrimination.

Each of the major sections and requirements of the ADA takes into account the fact that some businesses are very small local enterprises that may have very limited resources. In each area, either the size and resources of establishments are explicitly required to be taken into account in determining what is required, or some amelioration for small businesses is built into the substantive requirement itself.

The following are some of the ways in which the public accommodations provisions of the ADA provide great deference for the characteristics and needs of small businesses:

* THE READILY ACHIEVABLE LIMITATION

As noted previously in my testimony, the ADA places a very modest requirement for removing architectural and communication barriers in existing public accommodations -- such barriers need not be removed unless doing so is "readily achievable," i.e., is "easily accomplishable and able to be carried out without much difficulty or expense." In determining whether an action is

readily achievable, the ADA lists as the first two factors to be considered: "the overall size of the covered entity with respect to number of employees, number and type of facilities, and the size of budget," and "the type of operation of the covered entity, including the composition and structure of the entity."

The House Substitute goes even further, allowing consideration of the resources of a single site of a large company. (Title III, Sec. 301 (5)(B)).

The size and budget of a business are, therefore, explicitly considered in determining what is readily achievable. A Mom-and-Pop store is clearly held to a much lower standard than is a highly financed, big national concern. A struggling small business will be required to do much less than a bigger, more well-to-do establishment. The readily achievable standard takes into account the particular physical and financial realities of each individual establishment and requires more of those realistically able to do more and less of those who are only able to do less. AND, only those actions which are "easily accomplishable and able to be carried out without much difficulty or expense" are required.

* UNDUE BURDEN LIMITATION REGARDING AUXILIARY AIDS AND SERVICES

The requirement that places of public accommodation make available "auxiliary aids and services" does not apply in circumstances where the provisions of such aids and services would "fundamentally alter" or would "result in undue burden."

The Senate Report notes that the term "undue burden" is analogous to the phrase "undue hardship" in the employment section of the ADA, and that "The determination of whether the provision of an auxiliary aid or service imposes an undue burden on a business will be made on a case-by-case basis, taking into account the same factors used to purposes of determining 'undue hardship.'" The factors to be taken into account are nearly identical to the factors I have discussed just above in connection with the readily achievable standard. In determining whether providing an auxiliary aid or service amounts to an undue burden, the size, budget, and circumstances of a business are expressly relevant. A struggling small business will be excused from providing an auxiliary aid or service in circumstances where a larger, more prosperous business might be required to provide it.

* THE ELEVATOR EXCEPTION FOR NEW CONSTRUCTION AND ALTERATIONS

As noted above, the inclusion of accessibility features in the design and construction of new facilities and in renovation projects can usually be accomplished at relatively little expense. To further protect small business, however, the Senate compromise bill incorporated a specific exception to accessibility requirements with regard to elevators in small buildings. While the previous version of the bill would have required elevators where necessary for accessibility of upper floors in new construction and certain major renovations, the Senate compromise specifically provides that elevators are not

required "for facilities that are less than three stories or that have less than 3,000 square feet per story." Arguably, elevators in such circumstances might make up only a small and manageable percentage of overall building and renovation costs, but to make absolutely sure that small building owners and builders would not be unduly burdened, the bill excepts small buildings from the elevator requirement -- the only potentially significantly costly accessibility feature.

CONCLUSION

The ADA must become the law of our nation if we are to continue our commitment to equal opportunity. Citizens with disabilities have been shut out long enough. The ADA opens the doors of America to the millions of men, women and children of all races and ethnicities who have disabilities and who have waited long enough to be extended the same rights we all take for granted. DREDF urges quick passage of the ADA -- the most important piece of disability civil rights legislation of our time.

Thank you.

STATEMENT

OF

JAMES P. TURNER
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CIVIL RIGHTS DIVISION
U.S. DEPARTMENT OF JUSTICE

BEFORE

THE

HOUSE COMMITTEE ON SMALL BUSINESS

CONCERNING

THE AMERICANS WITH DISABILITIES ACT

FEBRUARY 22, 1990

Mr. Chairman, distinguished members of the Committee, it is a pleasure for me to appear before you today to discuss the proposed Americans with Disabilities Act. On October 12, 1989, Attorney General Dick Thornburgh appeared before the Judiciary Committee and reiterated the Administration's support of the Americans with Disabilities Act as passed by the Senate. The Administration's endorsement of this bill reflects President Bush's longstanding commitment to bring persons with disabilities into the mainstream of American society. In his State of the Union address last month the President restated his personal commitment to the independence and productive involvement of persons with disabilities in our social and economic mainstream.

The Americans with Disabilities Act, as passed by the Senate on September 7, 1989, is fair, balanced legislation. It will ensure that persons with disabilities enjoy access to jobs, public accommodations, public services, public transportation, and telecommunications -- in other words, full participation in and access to virtually all aspects of society. The bill builds on an extensive body of civil rights precedent -- statutes, case law, and regulations -- to avoid unnecessary confusion; it allows maximum flexibility for compliance; and it does not place undue burdens on those who must comply.

The Administration's support for passage of the ADA by the House of Representatives remains strong. But I do not come before you today just to reiterate the Administration's support for the ADA. I appear before you today to address fears that have been raised by those in the American business community about the ADA. In the past several months considerable concern has been expressed about the financial impact of the ADA on businesses, particularly small enterprises. This concern is real and deeply felt. We believe, however, that these fears are misplaced. Too much of this concern has been fueled by supposition and erroneous information. It is the Administration's firm belief that these fears will be allayed as people come to understand what the ADA actually provides.

In addition, I will address a new concern of interest to the business community -- the view that the recently introduced Civil Rights Act of 1990 would radically alter the ADA and add new uncertainties about the meaning of the ADA for the business community. As I will explain in greater detail, the Administration's support for the ADA was and is premised on the agreement reached expressly with its sponsors that the remedies curently available under title VII of the Civil Rights Act of 1964 would be the remedies for Title I of the ADA. Fortunately, the ADA can easily be amended to clarify that understanding.

Much has been made of the "vague" and "undefined" terms used in the Americans with Disabilities Act. One of the major

strengths of the ADA is that it uses, whenever possible, concepts, phrases, and terms from existing civil rights law in the disability rights area. The bill freely adopts the standards of sections 503 and 504 of the Rehabilitation Act of 1973, as amended, the major civil rights statute addressing nondiscrimination on the basis of disability. Many of the ADA's employment and public accommodations provisions are drawn directly, and in many instances, even taken verbatim from the Federal regulations implementing section 504. This course of action is a particularly wise choice. The section 504 standards are already familiar to large segments of the private sector which receive Federal funds and are currently covered by the Rehabilitation Act. More importantly, over 15 years of experience in enforcing sections 503 and 504 have shown that these standards do not result in undue costs or excessive litigation.

The fears being raised now about the impact of the ADA are similar to those misgivings that were raised in the first few years following implementation of sections 503 and 504 by the Departments of Labor and Health, Education, and Welfare. There were predictions that those covered by the regulations would be bankrupted or forced to severely curtail or alter their services. These doomsday predictions were based on ignorance and myth and proved false. Similar misgivings in the area of race discrimination surfaced in 1965 and proved to be equally unfounded. The Administration believes that a similar fate

awaits the misapprehensions that have been raised about the ADA. The ADA gives sufficient latitude to employers, commercial establishments, and other entities covered by the bill to allow them the flexibility to achieve compliance without placing an undue burden on their operations.

If the concerns that have been raised by some private enterprises and their associations were directed at the version of the ADA that was first introduced in the Senate, these concerns would be understandable. When the Attorney General testified on the ADA before the Senate in June of last year, he relayed a number of serious misgivings on issues that needed to be addressed before the Administration could endorse the ADA. Last summer, representatives of the Administration engaged in prolonged negotiations with the Senate on these issues. These discussions led to significant revisions in the bill, revisions that made the Americans with Disabilities Act a practical, workable, credible piece of legislation.

Perhaps a brief look at what the ADA requires for enterprises that are public accommodations would be useful. The ADA does not impose unlimited requirements on public accommodations. In fact, the Act contains a series of limitations on the bill's reach, limitations that will significantly restrict costs for covered entities. The Act has minimal requirements for retrofitting existing facilities. A physical barrier need only be removed when its removal is

to do so. Examples of the types of modifications that would be "readily achievable" in most cases would include the simple ramping of a few steps, the installation of grab bars, the lowering of telephones, the installation of offset hinges, and similar modest adjustments. Even grab bars might not be required if their installation entailed not just reinforcement of a wall but actually rebuilding a wall to provide more support.

The ADA reserves its most rigorous accessibility requirements for new construction. Fortunately, when accessible features are incorporated into facilities before construction during the design phase, cost is minimized. In fact, the estimated increase of construction costs for accessibility has consistently been measured as less than one per cent of the cost of construction. The ADA even has limitations on new construction in an attempt to mitigate costs. The ADA contains an exception for placing elevators in new buildings, perhaps the most costly capital expense for making buildings accessible. Any building that has less than 3,000 square feet per story or that is three stories or less in height need not be constructed with an elevator. For these smaller structures, only multistory shopping malls, professional offices of health care providers, and other categories of buildings designated by the Attorney General would be required to have elevators.

Some in the business community have sought an exemption from the ADA's requirements for small business enterprises, that is,

for those public accommodations having fewer than fifteen employees. The Administration gave very serious consideration to this issue last year when it first began reviewing the Americans with Disabilities Act. However, because many retail firms in this country are small, the effect of excluding firms with few employees would seriously compromise the goal of the Act of opening up everyday American life to persons with disabilities. For example, the 15-employee exemption threshold would exclude almost all the physicians' and dentists' offices, hardware stores, barber shops, bars, and beauty parlors in the country. It would severely restrict access to service stations, laundries, and specialty food stores. Thus, the Administration agreed that the ADA would only be effective in the public accommodations area if there were no exemption for small public accommodations. However, the Administration agreed to mitigate the effect of this broad coverage by narrowly circumscribing what the ADA required. We believe that the ADA adopts a reasonable compromise that will give persons with disabilities access to everyday life and will allow American enterprises, including small businesses, adequate leeway to conduct their operations without a significant cost burden.

Some have attempted to inflame the business community with predictions that, in order to comply successfully with the ADA, businesses will be expected to know and prepare for "900 types of disabilities." While there are many medical conditions that cause disability, the functional manifestations of these

conditions are limited in number: indeed, the ADA defines disability in terms of impairment of "major life functions." The ADA does not contemplate that the American business community will become expert in the many conditions that cause disabling impairments. Instead, the ADA envisions that a business will analyze how it will be able to accommodate individuals with functional limitations and, as a result, modify policies, practices, and facilities where necessary and only within reason. In most cases, a business will be able to comply successfully with the ADA by examining how it will serve its clients with mobility impairments, those with visual or hearing impairments, and those with limited use of their arms.

The ADA's requirements on the issue of "anticipated discrimination" have been much misunderstood. Like the existing law on public accommodations in the race area, the public accommodations provisions will permit an individual to allege discrimination based on a disabled person's reasonable belief that he or she is about to be discriminated against. This provision would permit, for example, a challenge by a disabled person who uses a wheelchair to the planned construction of a new shopping mall that would not be accessible to wheelchair users. The resolution of such challenges prior to the construction of an inaccessible facility will enable any necessary remedial measures to be incorporated in the building at the planning stage, when such changes would be relatively inexpensive, rather than

requiring costly retrofitting after the initial construction is completed.

The ADA contains additional safeguards that should help allay the concerns of the business community. In an effort to ensure that business owners are acquainted with the ADA's requirements before they are held liable for compliance, the ADA provides that the employment provisions of the law will take effect two years after the date of enactment for employers of 25 or more employees, and four years after enactment for employers of 15-24 employees. The public accommodations requirements will take effect 18 months after enactment. During the time between the enactment and the effective date, several Federal agencies, including the Department of Justice, must issue regulations implementing the ADA and must develop and implement a plan for providing technical assistance to covered entities.

The Administration pledges to conduct an open and fair rulemaking process under ADA. We will provide ample opportunity for a full airing of all relevant issues. In order to ensure that all sides are heard on access to public accommodations, the Department of Justice, will hold a series of public hearings during its rulemaking process for public accommodations.

Further, the Administration recognizes that educating the public about its rights and responsibilities under the ADA is crucial to the Act's success. Thus, the Department of Justice

plans to mount a credible, government-wide technical assistance plan for the ADA. We are convinced that those entities covered by the ADA, once they are given information on how to comply with the bill, will do so voluntarily. The Department is examining the positive experience that the Federal government had with its technical assistance efforts for section 504 and intends to duplicate that experience for the ADA. A key aspect in the technical assistance program will be the use of grants and contracts to develop and disseminate materials on the Act to covered entities. As with section 504, we intend to use trade associations and other similar groups that have existing lines of communication and credibility with covered entities and persons with disabilities to ensure the success of the technical assistance effort.

The Administration remains firmly committed to the Americans with Disabilities Act and seeks its early enactment into law. A new impediment to the quick passage of the ADA has arisen and the Administration seeks to resolve affirmatively this difficulty. I speak, of course, of the remedies provisions of the recently introduced "Civil Rights Act of 1990." I want to reiterate this Administration's strong support for effective remedies in the ADA. The ADA, as endorsed by the Administration, contains a full panoply of remedies for civil rights violations: employment violations are to be rectified by injunctive relief, including back pay, reimbursement for out-of-pocket expenses, preventive relief, reinstatement, the provision of reasonable accommodation,

and other equitable relief; public accommodations violations are to be remedied by similar forms of injunctive relief, including court-ordered provision of auxiliary aids and making facilities accessible. In addition, the Attorney General will have the authority to seek civil penalties, in amounts up to $50,000 for initial violations and up to $100,000 for subsequent violations, when such penalties are necessary to vindicate the public interest, and may even request money damages for aggrieved persons.

Enactment of this proposed Civil Rights Act of 1990 would significantly expand the remedies available under the ADA to include compensatory and punitive damages. Donald Ayer, the Deputy Attorney General, testified two days ago before the House Committees on Education and Labor and the Judiciary that the Administration opposes such an expansion of remedies. In fact, the Administration agreed to support the ADA only after provisions providing compensatory and punitive damages were deleted from the earlier versions of the bill. During his appearance before the Senate Committee on Labor and Human Resources, the Attorney General made clear that the Administration was opposed to compensatory and punitive damages for the Americans with Disabilities Act.

The Administration has consistently opposed this relief. We expect that there will be considerable voluntary compliance with this new law. Such optimism is based on our experience with the

public accommodations provisions of the Civil Rights Act of 1964. The successful implementation of that law's prohibition against racial and religious discrimination in public accommodations rested in large part on the country's positive, voluntary response. Like the ADA, the 1964 Act provided injunctive and equitable relief, not a resort to jury trials and compensatory and punitive damages.

Further, inclusion of such extraordinary relief as punitive damages is simply unwarranted in a statutory scheme as new, bold, and complex as the provision of disability rights concepts to the American business community. We support the ADA's extensive technical assistance requirements precisely because the law's scope of coverage is so broad and the legal concepts are so complex. We need to foster an environment in which good faith compliance can take place, not one which encourages counterproductive adversarial relationships.

The Administration is not suggesting that the Americans with Disabilities Act should be held hostage to the proposed Civil Rights Act of 1990. Quite the contrary, the Administration continues to seek enactment of the ADA on an expedited basis. Fortunately, there is a relatively simple way to address the concern I have raised today. Section 107 of the ADA states that certain remedies and procedures of title VII are available for the ADA. If section 107 were modified to state what remedies were available for violations of the ADA, that is, injunctive

relief, reinstatement, the provision of reasonable accommodation, back pay and other make-whole relief, the impediment caused by the introduction of the Civil Rights Act of 1990 would be removed. We call upon all the sponsors and supporters of the ADA to work together to fashion such an amendment to the ADA as it is marked-up, perhaps in the House Judiciary Committee.

Mr. Chairman, I appreciate the time you have given to me to express the Administration's views on this very important matter. The Administration believes that the bill as now drafted carefully balances the right of people with disabilities to be free from discrimination with the legitimate needs of the business community and that, with the modification of section 107, together we can move to speed its enactment.

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STATEMENT

OF

JAMES P. TURNER
ACTING ASSISTANT ATTORNEY GENERAL
CIVIL RIGHTS DIVISION
U.S. DEPARTMENT OF JUSTICE

BEFORE

THE

HOUSE COMMITTEE ON SMALL BUSINESS

CONCERNING

THE AMERICANS WITH DISABILITIES ACT

FEBRUARY 22, 1990

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