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Experience *AudioLink*™ Enhanced Sound!

Introducing the *AudioLink*™ Personal Listening System—a new, nationwide service and product line from the National Captioning Institute. *AudioLink*™ lets you enjoy crystal clear, enhanced sound while watching television at home or enjoying public performances at compatible theaters, cinemas, places of worship and other public facilities across the country. Get back into the mainstream of hearing TV and public entertainment with *AudioLink*™!

Select from two exciting systems!

***AudioLink*™ PLS-100**—for enhanced sound at home and in public places. Features the *AudioLink*™ headset, transmitter/battery charger and two rechargeable batteries.

***AudioLink*™ PLS-110**—for enhanced sound at public places only. Features the *AudioLink*™ headset, battery charger and one rechargeable battery.

Features

- Superior audio quality
- Up to 124 dB S.P.L. (volume)
- World's lightest wireless audio headset (1.4 oz)
- Audio output jack for hearing aid accessories
- Compact transmitter connects to audio output jack on your TV, VCR or TeleCaption™ decoder in seconds
- Nationwide network of *AudioLink*™-compatible theaters, cinemas, places of worship and other public facilities

Specifically Designed for Hard-of-Hearing People.

The *AudioLink*™ headset features a unique built-in audio output jack for hearing aid accessories. There is also an optional *AudioLink*™ microphone for connection to televisions without audio output jacks.


Neck Loop


Binaural Silhouette


Binaural Direct Audio Input


Microphone

From TV at Home to Public Entertainment Around the Nation. . .The Difference Is *AudioLink*™!

Having a hearing loss doesn't have to mean missing out on the good things in life. Like watching TV with your family. . .going to see a movie at the neighborhood cinema. . .or enjoying a stage performance at your favorite theater. Because now there's the ***AudioLink*™ Personal Listening System** (PLS)—the nationwide wireless audio service and product line designed *specifically* for people with a hearing loss. With *AudioLink*™, you can enjoy clear, enhanced sound while watching TV at home or at specially equipped cinemas, theaters, places of worship and cultural centers across the country.

How *AudioLink*™ Works.

AudioLink™ relies on advanced wireless audio technology. Using invisible *infrared* light waves, sound is carried from a transmitter directly to a lightweight headset worn by the listener. The separate volume control on the headset enables you to adjust the volume (up to 124 dB) to your ideal level without affecting others around you. Just one listen, and you'll hear the difference.

At Home.

Enjoy *AudioLink*™ Enhanced Sound While Watching TV at Home.

No more having to turn the TV up to maximum volume. With *AudioLink*™, you'll enjoy crisp, clear sound while watching your favorite television programs, *without* distracting background noise. And because the volume control is located right on the headset, you can watch TV at your *optimum listening level*, while the rest of the family listens at normal volume. The entire family can watch TV together—in perfect harmony.

Enjoy *AudioLink*™ Enhanced Sound at Theaters, Cinemas, Places of Worship and Other Public Facilities.

No more having to miss out on critical dialogue in a story, or asking a companion what a character said. Now you can enjoy hit plays at the theater, blockbuster movies at the cinema, religious services and more with enhanced sound. NCI is building a **nationwide network** that will consist of *thousands* of *AudioLink*™-compatible public facilities all across the country. When you go out to any *AudioLink*™-compatible facility, all you have to do is slip on your headset. . .sit back. . .and enjoy the show.

At the Cinema.

Representational map of major AudioLink™*-compatible public facilities. Additional sites in Alaska and Hawaii.*

The World's Most Advanced Personal Listening System.

Blending state-of-the-art electronics with ingenious design, the *AudioLink*™ Personal Listening System is the world's most advanced, fully integrated wireless audio system. Each component has been developed specifically with the hard-of-hearing individual in mind.

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NCI is developing the first-ever standardized ***Nationwide Network of AudioLink™-Compatible Public Facilities,*** *which means you'll be able to use the same AudioLink™ headset to see a hit Broadway play in New York, a symphony in Dallas, a movie in San Francisco, Disney World in Florida, and your favorite TV shows at home—all with enhanced sound. To find out if a public facility is AudioLink™-compatible, just look for the service mark, ask the facility manager, or call NCI.*

AudioLink™ PLS-100 Components

***AudioLink*™ Headset**—Your *AudioLink*™ headset weighs only 1.4 oz; provides up to 124 dB S.P.L. (volume); and features separate *"balance"* and *"tone"* controls, so your hearing health care professional can customize it to accommodate your individual hearing loss.

***AudioLink*™ Transmitter/Battery Charger**—The compact *AudioLink*™ transmitter connects to the "audio output" jack of your TV, VCR or TeleCaption™ decoder, and can fill a 400 square-foot room with the *AudioLink*™ signal.

***AudioLink*™ Rechargeable Batteries**—*AudioLink*™ comes with two, environmentally-friendly rechargeable batteries, which saves on expensive battery replacements and inconvenience.

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PERSONAL LISTENING SYSTEM

DORGAN ASSOCIATES

KIMBERLY OLSON DORGAN

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SUITE 275
WASHINGTON, DC 20037
(202) 828-4432
FAX (202) 223-4803

The *AudioLink*™ Headset You Used to Hear the Performance Clearer...

Can Now Be Used at Home.

If you have a mild, moderate or severe hearing loss, now you can enjoy watching television at home with the crystal clear, ***enhanced sound*** you enjoyed here. With the *AudioLink* Personal Listening System for the home, you get your own personal headset, plus a compact transmitter that connects to your TV or VCR. So you can watch TV at your ***ideal volume level,*** while the rest of the household listens at normal volume.

And when you're not enjoying TV at home, you can bring your *personal* headset with you to this location, or any *AudioLink*-compatible public facility and enjoy clear, quality sound.

To learn where you can purchase an *AudioLink* Personal Listening System in your area, call the nonprofit National Captioning Institute today!

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If you like *AudioLink*™ at the theater, the movies or other public places . . .

you'll love it at home!

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Robert J. Dole Institute of Politics
REMOVAL NOTICE

Date: 3/23/2009 Legislative Subject Files
Removed from: Americans with Disabilities Act Folder 1

Accession: Box Number:

Removed to: (Circle one)		
	Oversized Photographs	Box ____
	Oversized Publications	Box ____
	Campaign Material	Box ____
	Oversized Newsprint	Box ____
	Personal Effects	Box ____
	Memorabilia	Box ME 15.09543
	Oversized Flats [Posters, Handbills, etc]	Box ____
	Political Cartoons	Box ____
	Textiles	Box ____
	Photograph Collection	Box ____

Size:
Format: AudioLink™ Personal Listening System
Description: Headset - Weeded
Date:
Subject Terms (if any):

Restrictions: none
Remarks:

Place one copy with removed item
Place one copy in original folder
File one copy in file

Excerpted from the Department of Justice's Regulations on Title III of the Americans with Disabilities Act.

within the seating area are provided. This will allow choice in viewing and price categories.

Building/life safety codes set minimum distances between rows of fixed seats with consideration of the number of seats in a row, the exit aisle width and arrangement, and the location of exit doors. "Continental" seating, with a greater number of seats per row and a commensurate increase in row spacing and exit doors, facilitates emergency egress for all people and increases ease of access to mid-row seats especially for people who walk with difficulty. Consideration of this positive attribute of "continental" seating should be included along with all other factors in the design of fixed seating areas.

Table A2. Summary of Assistive Listening Devices

System	Advantages	Disadvantages	Typical Applications
Induction Loop Transmitter: Transducer wired to induction loop around listening area. Receiver: Self-contained induction receiver or personal hearing aid with telecoil.	Cost-Effective Low Maintenance Easy to use Unobtrusive May be possible to integrate into existing public address system. Some hearing aids can function as receivers.	Signal spills over to adjacent rooms. Susceptible to electrical interference. Limited portability Inconsistent signal strength. Head position affects signal strength. Lack of standards for induction coil performance.	Meeting areas Theaters Churches and Temples Conference rooms Classrooms TV viewing
FM Transmitter: Flashlight-sized worn by speaker. Receiver: With personal hearing aid via DAI or induction neck-loop and telecoil; or self-contained with earphone(s).	Highly portable Different channels allow use by different groups within the same room. High user mobility Variable for large range of hearing losses.	High cost of receivers Equipment fragile Equipment obtrusive High maintenance Expensive to maintain Custom fitting to individual user may be required.	Classrooms Tour groups Meeting areas Outdoor events One-on-one
Infrared Transmitter: Emitter in line-of-sight with receiver. Receiver: Self-contained. Or with personal hearing aid via DAI or induction neckloop and telecoil.	Easy to use Insures privacy or confidentiality Moderate cost Can often be integrated into existing public address system.	Line-of-sight required between emitter and receiver. Ineffective outdoors Limited portability Requires installation	Theaters Churches and Temples Auditoriums Meetings requiring confidentiality TV viewing

Source: Rehab Brief, National Institute on Disability and Rehabilitation Research, Washington, DC, Vol. XII, No. 10, (1990).

Source: 56 Federal Register, p. 35689 (Department of Justice's Title III Regulations at Appendix A, Section A4.33.7).

AudioLink™ PLS-100

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Introducing What 22 Million Americans Have Been Waiting to Hear.

Wireless audio system for enhanced sound at home and in public places

- *Superior audio quality*
- *High volume*
- *World's lightest wireless audio headset*
- *Output jack for hearing aids*
- *Two rechargeable batteries*

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Give Your Hard-of-Hearing Customers the Advantage of *AudioLink*™ Enhanced Sound

NCI's new *AudioLink*™ PLS-100 Personal Listening System enables people with a hearing loss to enjoy television and public entertainment through ***enhanced sound***. With *AudioLink*™, hard-of-hearing people can listen to their favorite television shows, movies, theatrical performances and more with greater volume and clarity, and without distracting background noise.

At Home. *AudioLink™ lets the entire family enjoy TV together—and at a comfortable volume level.*

At the Theater. *By wearing AudioLink™ at specially equipped theaters, hard-of-hearing people will feel like they're right on stage—capturing every word.*

At the Cinema. *People with a hearing loss can enjoy today's most popular movies at AudioLink™-compatible cinemas.*

And at Hundreds of Places of Worship, Concert Halls and Cultural Centers Across the Country!

Features

Versatile—*AudioLink*™ can be used while watching TV, or at hundreds of specially equipped cinemas, theaters, places of worship and museums across the country.

Adaptable—*AudioLink*™ has a handy output jack for connection to hearing aid accessories such as a neck loop, induction coil plate or direct audio input (not provided).

Superior audio quality—clear, direct sound without distracting background noise.

High volume—up to 124 dB, S.P.L.

World's lightest wireless audio headset—weighs only 1.4 ounces.

Two rechargeable batteries—no replacement costs or inconvenience.

Easy operation—connects to the audio output jacks of VCRs, hi-fi equipment, the TeleCaption™ 4000 closed caption decoder, and most TVs.

Technical Specifications

	Headset H-100	Transmitter/Battery Charger T-100 *
Infrared wave length	950 nm	950 nm
Modulation	FM	FM
Carrier frequency	95 kHz	95 kHz
Output jack	2.5 mm micro jack	
Frequency response	30-18,000 Hz	30-18,000 Hz
Distortion	typ. 1%	typ. 1%
S/N ratio	typ. 65 dB(A)	typ. 65 dB(A)
Power consumption		3 VA
Battery operation time/per charge	approx. 10 hrs.	
Acoustic pressure (volume)	124 dB, S.P.L.	
Weight	1.4 oz	2.8 oz

*requires connection to 110 volt AC outlet

Contents

- *AudioLink*™ Headset H-100
- *AudioLink*™ Transmitter/Battery Charger T-100 (requires connection to a 110 volt AC outlet)
- *AudioLink*™ Rechargeable Batteries BA-90 (two)
- Audio Feed Cable (used between Transmitter/Battery Charger T-100 and your TV, VCR, and/or Telecaption 4000 closed caption decoder)
- RCA to 1/8″ Mono Adapter (for headphone jack on TV or audio accessories)
- Power Cable with plug for connection to 110 AC outlet
- Owner's Manual

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A DIRECTORY OF AUDIOLINK™-COMPATIBLE FACILITIES

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May, 1992

Universal Engraving, Inc.
9090 Nieman Road
Overland Park, Kansas 66214
1-800-221-9059

June 17, 1992

Maureen P. West
Suite SH-141
Hart Senate Office Building
Washington D.C. 20510

Dear Maureen:

Thank you for taking the time to meet with Nicole and myself. We appreciate your interest and support.

Several developments have taken place since we met with you so we need to bring you up to date. We returned to the American National Standards Institute (ANSI) A117 committee meeting and learned that the chairman had announced that ANSI had no funds for research, and therefore, had no interest in participating in any study regarding the needs of the visually disabled and the technology available from sign manufacturers.

As a result, of ANSI's action, it appears that the only way to accomplish any research effort with creditability is to have a research project conducted by one of the blind organizations with cooperation from other blind organizations and sign manufacturers. A major problem in this regard is that two of the ANSI members, The National Council of the Blind and The American Foundation for the Blind, have strongly opposing views on most issues pertinent to the visually impaired.

You could help on this research matter if you could suggest an organization for the visually impaired that might lead the research team. Also any sources of funding that you could suggest would be very helpful.

Another area of great concern is the ANSI A117 committee itself. After observing an additional two days of their actions, we do not feel that the ANSI A117 committee is capable or willing to function as a cohesive group. It is obvious that the core of ANSI A117 committee members (who represent building code related organizations) resent having to deal with members from organizations for the disabled.

The message to us was loud and clear. The only way the Americans with Disabilities Act (ADA) requirements will be implemented is through the Department of Justice (DOJ) and civil rights action.

Another negative development is that the proposed regulations that the DOJ will issue in August for comment are for Title II which pertains only to requirements for state and local governments. There is no assurance that the DOJ and the Architectural and Transportation Barriers Compliance Board (ATBCB) will act upon the responses to the proposed regulations by amending title III. However, the Assistant Attorney General did comment on this in his letter to the Engraver's Journal. A copy of the article published in the Journal is enclosed.

As a result of the situation described above, I believe that the intent of the Attorney General in issuing the letter to the editor of the Engraver's Journal is a very important issue. The Department of Justice technical manual (copy of excerpt enclosed) uses bathrooms, room numbers and exits as examples for permanent signs. The letter of John R. Dunne, Assistant Attorney General, states "the only signs subject to the raised letter requirement are men's and women's rooms, room numbers and exit signs". This interpretation simply can not be in the spirit of the intent of Congress in passing the ADA.

The staff attorney that Nicole and I met with last Wednesday stated that I would receive a response to my letter. Depending on their response, I may feel the need to write another letter to the Attorney General. If so, I will send you a copy and ask for your assistance at that time.

Again, thank you for your time and assistance.

Sincerely,

Dennis G Redd

Dennis G. Redd
Vice President

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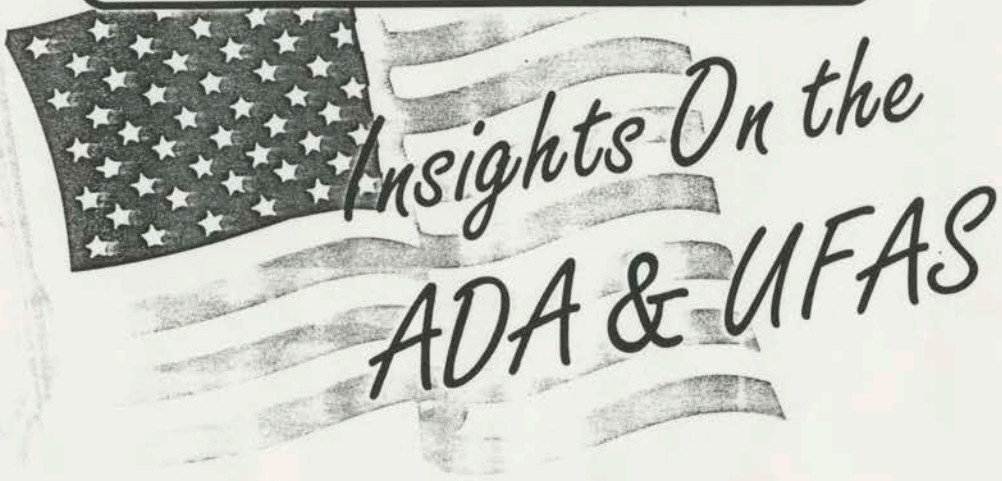

Insights On the ADA & UFAS

*On March 25, **The Engravers Journal** met and exchanged views with the Architectural & Transportation Barriers Compliance Board. Here's an account of the ADA and UFAS situation.*

Recently, **The Engravers Journal** was invited to meet with the Architectural & Transportation Barriers Compliance Board (ATBCB) and the Department of Justice to discuss "your industry's concerns about the ADA." We accepted the invitation and the meeting took place March 25, 1992, in the offices of the ATBCB in Washington. Present were 3 ATBCB Board members (all with different disabilities), 3 Justice Department representatives, and 4 ATBCB staff members.

Co-publisher of **The Engravers Journal**, Michael J. Davis, attended the meeting and he invited Bee Hodgkiss, owner of an engraving business in Minneapolis, to attend.

What makes Bee Hodgkiss eminently qualified to represent the engraving industry on this particular issue is that, in addition to owning an engraving business, she is congenitally blind (blind from birth). Bee is a member of the National Federation of the Blind and an outspoken proponent of the rights of the blind to have full accessibility and mobility throughout society. She has been making and selling "accessible signage" (including Grade 2 Braille) since long before passage of the ADA.

One of the reasons Bee was happy to meet with the ATBCB is that the kind of accessible signage she feels is the most tactually readable by the blind — signs with incised, engraved characters — has been outlawed by the ADA regulations. Bee also believes that the current ADA regulations do not go far enough in providing mobility for the visually impaired.

The early part of the meeting consisted of an exchange of ideas and information. The Board members had many questions about the industry, how it is structured, and the equipment and methods engravers use.

This was followed by the Board's explanation of how the ATBCB works, including some of the difficult conditions under which they operate. According to ATBCB General Counsel, Jim Raggio, one problem they face is that the ADA covers about 40 different areas, everything from building construction to telephones, shower stalls, and wheelchair lifts on buses. Signage is just one area they must oversee.

According to Jim Raggio, there are two primary areas where the ATBCB chronically falls short: technical ex-

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pertise and funding. Research is the key to solving many accessibility problems, and effective research requires having or finding both technical expertise and funding.

This year's ATBCB research budget is about $250,000 and in 1993, this will double to $500,000. "Still," says Raggio, "we have to sit down and make some very difficult decisions about which of the 40 areas of the ADA are the highest priority and where the research dollars will go."

The subject of raised-letter-only signage was also discussed. Bee Hodgkiss addressed the Board on the point that blind people have a preconceived bias against "incised" engraved characters, attributing this in part to braille, the language of the blind, being a raised medium. Therefore, some blind people think that lettering also must be raised, whereas she believes that incised lettering is as easy to read and a lot less expensive to produce.

Another point made by Bee was that there are three types of signs: 1) Signs which comply with the ADA, 2) Signs which are usable by the blind, and 3) Junk signs.

The ATBCB's Marsha Mazz, author of the ADA regulations, concurred with Bee that "There are a lot of 'junk' signs out there, and, from an accessibility standpoint, a junk sign is junk whether it has raised or incised characters," says Marsha Mazz.

The Engravers Journal's Mike Davis added that our industry as a whole must plead guilty to producing inaccessible signage: subsurface signs or signs engraved .005"-.010" deep that range from very difficult to impossible to read tactually.

Bee commented on a trend she saw developing at an ADA seminar in Las Vegas in February 1992, which she finds alarming to blind persons like herself. According to Bee, certain opportunists in the engraving industry are thumbing their nose at accessible signage by promoting multi-informational signs where the room number is raised to comply with the ADA and other information on the sign is engraved (incised). Unfortunately the incised lettering is reverse engraved (subsurface), making it impossible to read tactually, whereas properly engraved incised characters are very tactile.

"The trouble is," she says, "as long as incised lettering is not recognized by the ADA, you will have this type of signage. You can't sell a customer on the idea of low cost accessible signage if the regulations say blind people can't read it, even though the regulations are wrong!"

After hearing the discussion, the ATBCB's Jim Raggio agreed that the "incised lettering" issue deserves a second look and more research, particularly in view of the problems that have come to light with respect to the "Georgia Tech. study" on which the regulations were based.

UFAS & The ADA

The ADA situation continues to change, literally from month to month, and now has taken a new twist, centering around proposed changes to the

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Uniform Federal Accessibility Standard (UFAS). You will be hearing a lot more about UFAS this year because UFAS has its own set of "accessibility" regulations affecting state, city, county and federal agencies, including the U.S. Postal Service and the military.

The Title II (UFAS) sign regulations will be totally overhauled beginning this year. At the present time, there are two different UFAS signage standards and neither is in sync with the ADA regulations. For example, the Department of Defense, Department of Housing and Urban Development, and U.S. Postal Service do not require braille on signs and also recognize incised (engraved) characters as "tactile" (readable by touch) for purposes of providing accessibility to the blind. The General Services Administration (GSA) modified their standards in 1988 to require raised letters on signs identifying permanent rooms and spaces but does not require braille. **The Engravers Journal** will bring you more about UFAS later, but first, here is a status report on the ADA.

One of the biggest sources of confusion about the ADA regulations has been the vagueness of its language, i.e. "signs identifying permanent rooms and spaces" must contain raised letters and braille. The Department of Justice has finally released a fairly straightforward definition for "permanent rooms and spaces" which mandates raised letters and braille on only three types of signs: rest room signs, room numbers, and exit signs.

As explained in our article, *Clarifying the ADA Regulations* (Mar/Apr '92), the mechanics of putting the ADA regulations in force involved handing the regulations over to a committee of the American National Standards Institute (ANSI). ANSI is a private organization whose sole purpose is to create "standards" for almost anything. For example, an ANSI committee created the standard for the RS-232 computer interface, which allows you to buy a brand X computer and brand Y serial printer or modem and know that they are fully plug-compatible and will work properly together because the interface hardware is standardized.

The committee coordinating the ADA is the ANSI A117 committee. Their proposed standards were released in the form of a "public review draft" on January 24, 1992, which was followed by a 60-day comment period that ended on March 24.

One substantive change from the ADA regulations noted by **The Engravers Journal** is a notation that "Character heights shall be 5/8 in. (16 mm) minimum for building directories." This differs from the ADA regulations in that building directories were defined as "temporary" in the regulations and are specifically exempted from ADA mandates.

Another difference is that "Braille shall be placed a nominal 1/2 in. (13 mm) below the corresponding raised characters or symbols..." **The Journal** filed a written objection to this provision, reasoning that on a two-line sign, containing the word "FIRE" on line 1 and "EXIT" on line 2, for example, the ANSI document's language explicitly mandates that the

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drafted to closely parallel the ADA regulations or the ADA regulations must be modified to conform reasonably closely to whatever the UFAS standards are.

And in the election-year politics of 1992, President Bush may have overextended the federal budget by promising in his State of the Union address to provide federal funding for new federal mandates that must be paid for by state and local governments. Major changes in UFAS sign regulations could cost American taxpayers plenty, as every city hall, public school, county courthouse, college campus, V.A. hospital, public library, etc., replaces certain signs and sends the bill to Washington.

So where does this leave the blind and the accessibility that was promised to them by the spirit and intent of the ADA? The ADA has given the blind only the most rudimentary of accessibility: tactile rest room, room number, and exit signs. Picture yourself trying to find your way around a large building or airport wearing a blindfold, where all you could detect were the rest rooms, exits, and room numbers, if there were room numbers! It would appear that the blind have been shortchanged by the ADA!

Many mistakes have been made in the ADA. $1.3 million was spent on the "Georgia Tech. study" upon which the ADA regulations are based. This study and the problems associated therewith were detailed in **The Engravers Journal**'s article *What the ADA Means to Our Industry* (Nov/Dec '91).

The Justice Department's official comment about the study is that they will neither confirm nor deny any problems associated with it.

The existing language of the ADA regulations is also problematical, i.e. "signs identifying permanent rooms and spaces" and "signs which are temporary." The first part of the definition refers to the space and the second refers to the sign, concepts which cannot always be reconciled. Likewise, an exit sign does not identify a permanent room or space (it's really a directional sign that points the direction or path of egress from the building).

Perhaps the biggest mistake of all is that at every stage of the ADA's evolution, the sign producers have been totally excluded from the planning and discussions. All of the committees have been dominated by the handicapped. Indeed, virtually the entire sign industry found out about the ADA only after the regulations were finalized and the comment period was over. Had our industry been involved in the "Georgia Tech. study," the cost would have been 90% less and the study would have been done properly, and the blind would have had "accessible" signage years ago!

Had our industry had input into the ADA, we probably would have suggested orienting the requirements around the sign message, i.e. the type of information contained on the sign. The identification of permanent rooms and spaces is just one type of information. Safety warning messages are another. A third type of information specifies the means of egress (exits).

and a fourth might apply to directional information. Still another type of information pertains to instructions for operating "architectural equipment" such as automatic doors, elevators, and escalators. Only a tiny fraction of this vital information can be available to the blind under the current "permanent rooms and spaces" focus of the ADA. To continue using the current regulations, the Justice Department must badly contort the English language in such a way as to attempt to force-fit the information contained on a particular sign to match the ADA definition. For example, what "permanent room or space" is identified by an exit sign on an exterior door? Do the boundaries of this "permanent space" stop at the property line or extend onward to encompass the entire country?

Our industry is well experienced in producing all types of signs and you, our readers, know what is needed.

Our intention here is not to belabor past or current problems or "beat up" our officials in Washington. **The Engravers Journal**'s articles and your letters have caused 12 congressional inquiries into the ADA sign regulations and inquiries by President George Bush and Attorney General William P. Barr.

Enough "heat" has been generated and it's time now to take positive steps to make America accessible. Our industry, the government and the blind must start working together for a change.

In the near future, the ATBCB's General Counsel, Jim Raggio, will be issuing a "Notice for Proposed Rule Making" (NPRM) whereby new data or proposals to support changes in the UFAS regulations will be sought.

In turn, the Justice Department has agreed to evaluate any such proposals, and if they have merit, to change the ADA regulations to conform to the new UFAS regulations, as indicated in the Assistant Attorney General's letter shown in figure 1.

The greatest accomplishment of the ADA has been to give everyone a different perspective. If you have consulted with any visually impaired individuals or the organizations for the blind, for example in researching Grade 2 Braille, you have probably developed a heightened sensitivity toward their opinions and problems. Interestingly, the same thing has happened in reverse, whereby the blind have come to better understand many of the problems associated with producing the accessible signs they so badly need and deserve.

As a result of **The Engravers Journal**'s meeting with the Architectural and Transportation Barriers Compliance Board, we formulated a clearer picture of how government functions, and we believe that the ATBCB and Justice Department know where our industry stands.

It is imperative that our industry provide signage that is accessible to the blind. **The Engravers Journal** advocates this not because you, our readers, stand to profit by it, but because it's the right thing to do in a humanitarian sense! Profits are incidental. We have to start thinking about accessibility, not about compliance, and promoting this idea to

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our customers.

The existing ADA regulations are ill-founded and need to be changed. In time they need to be expanded to provide true accessibility to the handicapped, not just the bare-bones approach of rest rooms, room numbers, and exit signs.

The solution to the ADA problems cannot be solved by the government and cannot be solved by our industry alone. What's needed is a partnership, where the private and public sectors work together, rather than at cross purposes. The industry needs to mobilize.

Toward the common goal of "making America accessible," **The Engravers Journal** has kicked off a project called **Operation Accessible**. This is an industry-based task force that will be assisting the ATBCB in the area they are weakest: technical expertise. **Operation Accessible** will provide the "Access Board" with technical information and the type of meaningful data needed to assist them in making informed decisions. A number of other important educationally-oriented projects are also envisioned.

You, our readers, can do your part, too. We urge you to fill out and send in this issue's ADA survey. This survey is important for two reasons: 1) The pricing survey is the first ever to attempt to measure the economic cost of accessible signage, and 2) The opinion poll provides a valuable barometer of the industry's perception of the ADA. The results of this survey will be published in an upcoming issue and will be both interesting and of great value to the ATBCB.

Also voice your opinion today about the ADA/UFAS regulations and any changes you'd like to see made. We have included the address of Mr. Jim Raggio of the ATBCB at the end of this article. Note that the **Operation Accessible** task force would appreciate a copy of your letters to the ATBCB. Send or fax copies in care of **The Engravers Journal**.

Last but not least, be inventive. Go to work at creating new and innovative approaches for creating accessible signage. ■

Send your comments about ADA sign regulations to:

James J. Raggio, General Counsel
U.S. Architectural & Transportation
Barriers Compliance Board
1331 F Street, NW, Suite 1000
Washington, DC 20004-1111

Please send a copy of your correspondence to:

Operation Accessible
c/o **The Engravers Journal**
P.O. Box 318
Brighton, MI 48116
FAX 313-229-8320

required in buildings with supervised automatic sprinkler systems, nor are they required in alterations.

III-7.5140 Drinking fountains (ADAAG §4.1.3(10)). Where there is only one drinking fountain on a floor, it must be accessible both to individuals who use wheelchairs and to those who have difficulty bending or stooping (for example, by using a "hi-lo" fountain or a fountain and a water cooler). Where there is more than one fountain on a floor, 50 percent must be accessible to persons using wheelchairs.

III-7.5145 Bathrooms (ADAAG §§4.1.3(11); 4.22.4). Every public and common use bathroom must be accessible. Generally only one stall must be accessible (standard five-by-five feet). When there are six or more stalls, there must be one accessible stall and one stall that is three feet wide.

III-7.5150 Storage, shelving, and display units (ADAAG §4.1.3(12)). One of each type of storage facility must be accessible. Self-service shelves and displays must be on an accessible route but need not be lowered within reach ranges of individuals who use wheelchairs.

III-7.5155 Controls and operating mechanisms (ADAAG §4.1.3(13)). All controls in accessible areas must comply with reach requirements and must be operable with one hand without tight grasping, pinching, or twisting of the wrist.

III-7.5160 Alarms (ADAAG §4.1.3(14)). Both audible and visual alarms are required when emergency warning systems are provided. ADAAG has detailed requirements concerning features needed for visual alarms, including type of lamp, color, flash rate, and intensity.

III-7.5165 Signage (ADAAG §§4.1.3(16); 4.30.7). Different requirements apply to various types of signs:

1) Signs designating permanent rooms and spaces (*e.g.*, men's and women's rooms, room numbers, exit signs) must have raised and Brailled letters; must comply with finish and contrast standards; and must be mounted at a certain height and location.

2) Signs that provide direction to or information about functional spaces of a building (*e.g.*, "cafeteria this way;" "copy room") need not comply with requirements for raised and Brailled letters, but they must comply with requirements for character proportion, finish, and contrast. If suspended or projected overhead, they must also comply with character height requirements.

3) Building directories and other signs providing temporary information (such as current occupant's name) do not have to comply with any ADAAG requirements.

4) New symbols of accessibility identifying volume control telephones, text telephones, and assistive listening systems are required.

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THANK YOU. . .

. . .for the opportunity to formally introduce PROFESSIONAL TRAINING SYSTEMS INC., specializing in fair employment practices and employee/organizational communications.

We are an experienced and dedicated team of specialists, committed to providing the very best in training and consulting services.

We stand ready to assist you and your organization in meeting your internal and external challenges. . .

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7272 Cradlerock Way
Columbia, MD 21045

301/381-4233
301/381-4407

Professional Training Systems

KAREN L. REEVES

7272 Cradlerock Way
Columbia, MD 21045

410/381-4233
410/381-4407

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AMERICANS WITH DISABILITIES ACT (ADA)

ARE YOU IN COMPLIANCE?...

...CHECKLIST ENCLOSED!

AMERICANS WITH DISABILITIES ACT
PUBLIC ACCOMMODATIONS

ARE YOU IN COMPLIANCE?

Title III of the Americans with Disabilities Act (public accommodations and services by private entities) took effect January 26, 1992. Is your organization covered? If so, is it in compliance with the law?

Title III covers all public businesses affecting commerce regardless of size. It prohibits denying full and equal enjoyment of goods, services, facilities, privileges, advantages or accommodations to disabled individuals by any place open to the public. Penalties for non-compliance can be steep: up to $50,000 for a first violation and up to $100,000 for subsequent violations.

Here is a quick-look "Barriers Checklist" to help you determine if your organization's public facilities comply with the law. A "No" answer indicates an area of needed improvement.

BUILDING ACCESS

___ 1. Are 96"-wide parking spaces designed with a 60" access aisle?

___ 2. Are parking spaces near main building entrance?

___ 3. Is there a "drop off" zone at building entrance?

___ 4. Is the gradient from parking to building entrance 1:12 or less?

___ 5. Is the entrance door at least 32" wide?

___ 6. Is door handle easy to grasp?

___ 7. Is door easy to open (less than 8 pounds pressure)?

___ 8. Are other than revolving doors used?

BUILDING CORRIDORS

___ 1. Is path of travel free of obstruction and wide enough for a wheelchair?

___ 2. Is floor surface not slippery?

___ 3. Do obstacles (phones, fountains) protrude no more than four inches?

___ 4. Are elevator controls low enough (48") to be reached from a wheelchair?

___ 5. Are elevator markings in braille?

___ 6. Do elevators have audible signals?

___ 7. Does elevator interior provide a turning area of 51" for wheelchairs?

RESTROOMS

___ 1. Are restrooms near building entrance/personnel office?

___ 2. Do doors have lever handles?

___ 3. Are doors at least 32" wide?

___ 4. Is restroom large enough for wheelchair turnaround (51" minimum)?

___ 5. Are stall doors at least 32" wide?

___ 6. Are there grab bars in toilet stalls?

___ 7. Are sinks at least 30" high with room for a wheelchair to roll under?

___ 8. Are faucets easily reached and used?

___ 9. Are soap dispensers, towels no more than 48" from floor?

PERSONNEL OFFICE

___ 1. Are doors at least 32" wide?

___ 2. Are doors easy to open?

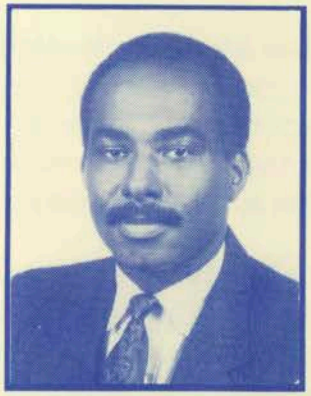
___ 3. Are thresholds 1/2" high or less?

___ 4. Is the path of travel between desks, tables wide enough for wheelchairs?

Compliments of The International Resource Network on Disabilities.

Don't get lost in the confusing array of new laws. Contact **PROFESSIONAL TRAINING SYSTEMS** today, specialists in fair employment practices and employee/organization development. . .**1-800-783-4407.**

Meet the Principals . . . .



Wesley P. Harvey is a successful business consultant and master trainer, with more than twenty years of experience with General Motors, Xerox and Learning International. His expertise has been successfully used in private industry and government agencies throughout the United States and Canada.

Daisy Saunders is a consultant and professional speaker with many years of experience in management, program administration, teaching, and training. She specializes in management/supervisory education and career and personal growth programs. Daisy has a Master's Degree in Business Administration.

For more information, contact:

Empowerment International
7188 Cradlerock Way
Suite 156
Columbia, Maryland 21045

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EMPOWERMENT INTERNATIONAL

STRESS • SUBSTANCE ABUSE • AIDS
• RETIREMENT • TRANSITION •

Specialists in
Employee Assistance Training Programs

Who We Are . . . .

Substance Abuse (alcohol and drugs) . . . AIDS . . . . Layoffs . . . . Retirement . . . . All affect performance and productivity; all pose a threat to an organization's functioning.

We believe that the answer to these frightening issues is early intervention through EDUCATION.

Our goal is to complement your efforts to meet the needs of your employees; to handle problems before they get too big.

Why E I . . . .

We provide:

- On-site workshops and seminars
- Educational materials emphasizing physical and mental health awareness, the preservation of life, and the quality of life.
- Programs designed to minimize the pressures and anxieties associated with layoffs.
- Training programs that will teach managers and supervisors to counsel and work with employees who have problems.
- Awareness and orientation programs for all levels of employees.
- Programs designed to help employees deal with stressors associated with trauma such as layoffs, early retirements, illness, and disease.

Major Programs . . . .

Substance Abuse In the Workplace – An educational program designed to show supervisors and employees how to work together to deal with abuse and suspected abuse in the workplace.

AIDS In The Workplace –A comprehensive education program designed to help organizations confront the AIDS issue head-on. It focuses on awareness, prevention, myths, and fears.

Career Transition and Job Search Strategies – A high-impact program designed to minimize some of the anxiety associated with career planning and the job search process. Participants will learn to assess, package, and market skills.

Retirement: New Beginning – This program is designed to help participants successfully prepare for and make a smooth transition from the working years to retirement.

Stress Management for Professionals– This informative one day program is designed to help participants gain an understanding of their susceptibility to stress and to learn to deal with stress-causing situations and attitudes.

AMERICANS WITH DISABILITIES ACT (ADA)... TRAINING AND CONSULTING SERVICES

Changes Sweep The Workplace As ADA Laws Take Effect. . .

On July 26, 1990, President George Bush signed into law the Americans with Disabilities Act. This act has been recognized by companies across the United States as the most sweeping civil rights legislation since the Civil Rights Act of 1964. Companies must prepare themselves for the legislation that becomes effective for employers with 25 or more employees on July 26, 1992 and employers with 15 or more employees on July 26, 1994.

The intent of the Americans with Disabilities Act (ADA) is to prevent discrimination in the areas of employment, public services, transportation, public accommodations, and telecommunication services against qualified people who have disabilities.

What the ADA means to companies and their managers is that they cannot screen out individuals with disabilities in the hiring process, nor can they discriminate in any area of employment, including compensation, promotions, benefits, or firing. Companies will no longer be able to conduct pre-employment medical screening, with the exception of drug screening, or make pre-employment inquiries into the nature of an applicant's disability. Companies must be aware of physical barriers in their work environment. All companies will also need to have an up-to-date, relevant job description for each position.

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DESCRIPTION

As organizations prepare for this important legislation, many are left with unanswered questions and concerns. In this informative, interactive workshop, participants learn who is covered, gain a clear understanding of the various provisions of the law, and get direct, thorough answers to those hard-to-answer questions. This workshop is sure to help you work through the "ADA Maze"!

OBJECTIVES

Through this workshop, participants will:

- Gain a basic understanding of ADA provisions;
- Understand how the provisions of the ADA affect their organizations;
- Gain an understanding of how ADA can work for their organizations;
- Learn how to access information and resources, and
- Learn about the rights of persons with disabilities.

A variety of specialized training and consulting services is also available through our certified ADA specialists to meet your specific needs and desired outcomes.

VALUING DIVERSITY IN THE WORKPLACE

Increasingly, the "landscape" of the American workforce is changing. Predictions are that by the year 2000, the majority of new entrants to the U.S. labor force will be women, American people of color, and immigrants. In order for employers to remain competitive and/or operate with maximum efficiency, it is imperative that employees from widely diverse backgrounds appreciate and respect their differences and be able to work together effectively in the job environment.

PURPOSE

The purpose of Professional Training Systems' diversity training is:

- To demonstrate to employees
  - that the demographics of the American workforce are rapidly and dramatically changing,
  - that the resulting need is for "cultural competence" in the workplace,
  - the advantages to all of acquiring (and the consequences of not acquiring) the knowledge and skills necessary to work effectively in a multi-cultural environment;
- To raise employer awareness of the ways in which individuals can be unconsciously and inadvertently culturally insensitive, and
- To have employees practice new behaviors to which they are introduced in the workshop.

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DESCRIPTION

In this workshop, the facilitator uses interactive adult learning techniques and experiential exercises to help participants achieve higher levels of self-awareness and skills in working in a diverse environment. The workshop includes use of adult learning techniques, including video, role play, simulations, small work group, large group discussion and lecturettes.

OBJECTIVES

At the end of the workshop, participants will be able to:

- Explain the concept of cultural diversity and its effects on the American labor force;
- Articulate the benefits of cultural competence on the work environment;
- Elucidate the adverse effects which cultural insensitivity has on both individuals and the work environment;
- Identify how their own cultural identity impacts their attitudes, assumptions and expectations during personal and professional interactions;
- More effectively identify potentially offensive speech and action before engaging in it;
- More effectively remove cultural barriers in culturally charged conflicts, and
- Work more consciously and sensitively with their colleagues who are different from themselves by race, ethnicity, gender, sexual orientation, age, and physical ability/disability.

PREVENTING SEXUAL HARASSMENT

Each year, American employers pay millions of dollars in jury awards and settlement agreements in sexual harassment cases. They also lose millions of dollars as a result of low productivity, low morale, employee tardiness, employee absenteeism and other effects of the presence of sexual harassment in the workplace. The best way to avoid having to pay large jury awards and/or settlement agreements in sexual harassment cases is to avoid the initial filing of complaints of sexual harassment.

PURPOSE

The purpose of Professional Training Systems' sexual harassment prevention training is:

- To empower employers when faced with sexual harassment in their work environment by teaching effective skills for responding to sexual harassment, and
- To inform employees of both the informal and formal mechanisms for addressing sexual harassment.

DESCRIPTION

"Preventing Sexual Harassment" focuses on improving the work environment by utilizing strategies for both preventing sexual harassment and diffusing potentially hostile situations involving sexual harassment. The workshop is designed to inform participants of the behaviors, rather than the attitudes, which meet the legal definition of sexual harassment. Interactive adult learning techniques, including role play, video, small work group, large group discussion and lecturette, are utilized.

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OBJECTIVES

At the end of the workshop, participants will be able to:

- Identify the range of behaviors which meet the legal definition of sexual harassment;
- Outline the basic facts regarding sexual harassment (e.g., What is sexual harassment? What are the two basic forms of sexual harassment? Who are the primary targets? Who are the primary harassers? What are the three types of sexual harassers? Why do sexual harassers harass? How does sexual harassment affect the harassed employee? How does it affect the work environment? How common is sexual harassment in the workplace?);
- Describe the legal consequences of sexual harassment for the harasser;
- Identify informal, personal "empowerment" actions employees can take to stop sexual harassment, either that the employee is receiving her/himself, or that the employee sees in the work environment;
- Outline the complaint process from within the organization to the Equal Employment Opportunity Commission, and
- Provide opportunity for questions regarding personal/organizational experiences with sexual harassment.

BASIC SKILLS CURRICULUM: EFFECTIVE COMMUNICATION

As the focus in the American workplace shifts from manufacturing to an information-based service economy, the need for a skilled workforce emerges as a national priority. Reports such as *Workforce 2000* project that over the next 15 years, the United States will face a growing mismatch between job skill requirements and the available pool of workers. These patterns suggest an urgent need for basic skills training. NEVER BEFORE HAS THE NEED BEEN GREATER!

PURPOSE

The purpose of Professional Training Systems' basic skills curriculum is to target the kind of basic reading, writing, listening and critical skills that workers require to satisfy immediate, specific goals and job-related tasks.

DESCRIPTION

The workshops offered in the Effective Communication Skills program are presented in a skill-driven, participative format, skillfully designed to systematically identify and correct the most common basic skills deficits. Workshops include:

- *Building a Powerful Memory,* stressing proven techniques to access the mind's filing cabinet;
- *Building a Powerful Vocabulary,* focusing on ways to become a more persuasive, convincing user of language;
- *Clear and Effective Writing,* targeting the necessary tools for personal and professional advancement;
- *Improving Reading Comprehension,* building efficient reading skills and techniques to develop patterns in clear thinking;
- *Proofreading for Business and Industry,* teaching participants to correct the most common errors in writing, using specific proofreading techniques;
- *Spelling,* stressing essential skills for intelligent written communication, and
- *Effective Listening,* focusing on the essentials of interpersonal communications.

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OBJECTIVES

Upon completion of the Effective Communication Skills Program, participants will, in addition to meeting the specific objectives for each workshop, be able to transfer specific basic skills to tasks embedded in real job tasks, and experience constructive skill development with lasting impact.

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SPECIALISTS IN FAIR EMPLOYMENT PRACTICES
EMPLOYEE AND ORGANIZATIONAL COMMUNICATIONS

Professional Training Systems Inc. is a consulting firm offering a systematic yet flexible approach to the development of your most valued resource. . .your employees.

PTS's mission is to provide each client with a custom-designed program to successfully address their needs. PTS achieves this objective by working closely with the client to develop and present training that will complement the desired work culture of their organization.

The key to our ongoing success has been our core of consultants who have extensive knowledge and experience in program development and implementation. Professional Training Systems is recognized for its development and delivery of training programs which are practical as opposed to theoretical, action-oriented as opposed to contemplative.

With Professional Training Systems' programs, you actually see immediate changes in your employees' behavior. The participants become more aware of their own behavior and the effect it has on others, while gaining essential skills to enhance their knowledge and increase their on-the-job effectiveness.

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OUR PHILOSOPHY...

Professional Training Systems' programs make a difference. We provide solutions through the delivery of quality products and innovative approaches.

At PTS we do not believe in training for the sake of training. We strongly believe in a development process that will change, develop and/or enhance the behavior of our participants.

We will...

Analyze Your Needs

- front-end needs analysis with the client
- consultation with leading experts to address the most current issues

Develop Solutions In The Form of Quality Training Designs

- clear, concise objectives
- a highly interactive program
- variety of media, flipcharts, slides, overheads, video, assessment questionnaires
- various instructional styles, mini-lectures, skill practice, role play, simulations/exercises, discussions, brainstorming, small and large group projects

Provide The Delivery To Ensure Success

- PTS trainers have extensive work experience in the discipline they deliver
- PTS trainers are members of key national organizations and keep abreast of current practices

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Obtain Positive Results

- training content is developed to address and support the objectives
- participants leave with an action plan
- client is provided feedback on group dynamics and suggestions for reinforcing training in the workplace
- participants evaluate the training program and the trainer

OUR APPROACH. . .

STEP 1: *TRAINING NEEDS ANALYSIS*

Purpose: Conduct an evaluation to obtain the necessary data to develop a curriculum that will be most beneficial to your organization and all its employees.

Option A: Meet with a designated person to provide necessary data to develop program curriculum.

Option B: Bring key individuals (6 to 8) together at a specified location for 2 to 3 hours to discuss training needs, issues, concerns and desired outcomes.

Option C: Develop a training assessment questionnaire to send to designated managers and supervisors for the purpose of providing information and securing their "buy-in" to the training program and entire development process.

STEP 2: Provide oral and written results of the training needs analysis to include feedback on issues, concerns, desired outcomes and recommendations.

STEP 3: Provide an outline/agenda of the proposed training curriculum.

STEP 4: Develop a program curriculum that will address the needs and desired outcomes of your organization.

STEP 5: Develop an implementation schedule with dates, times and the logistics necessary for successful program implementation and follow-up.

STEP 6: *Training Options*

Option A - Modular Implementation of Training

Option B - Successive Training Days

STEP 7: ***(Optional, but recommended):***

Provide ongoing reinforcement and follow-up training to ensure the success of this program and a return on investment in developing your employees.

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HOW LEARNING TAKES PLACE...

NEEDS ANALYSIS

Provides valuable data used to develop a customized training curriculum for your organization

CUSTOMIZED PROGRAM INSTRUCTION

Ensures a smooth transition of new skills and behavior

PENCIL AND PAPER PROGRAM INSTRUCTION

For efficient acquisition of the concepts and techniques

EXPERIENTIAL EXERCISES

Transfer of skills and techniques in a realistic setting

DISCUSSION SESSIONS

For feedback, team building, strategizing and planning

CASE STUDIES

Use skills, knowledge and abilities to work on real-world situations

JOB-RELATED ASSIGNMENTS

Used between training sessions to enhance the development process

ROLE PLAYS

To transfer learning and provide practice in a safe environment

OPTIONAL

Reinforcement and follow-up training

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CLIENT LIST...

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Comsis
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Custom Telemarketing Services
DCA/Crosstalk Communications
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Government Technology Services, Inc.
Insurance Society of Philadelphia
Maryland State Lottery
National Liberty Life Insurance Company
Performax International
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NON-PROFIT ORGANIZATIONS

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Inroads College Program
Maple Springs (MD) Baptist Church
Minority Business Enterprise Legal Defense and Education Fund, Inc.
Pennsylvania County and State Detectives Association
Philadelphia Community Remedial Center
Salem (PA) Baptist Church
Young Life/Philadelphia
Upward Bound Programs

SCHOOLS/SCHOOL SYSTEMS

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Philadelphia (PA) High Schools
Jeffers Hill (MD) Elementary School
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3/14/89

SUMMARY OF THE AMERICANS WITH DISABILITIES ACT OF 1989

FINDINGS AND PURPOSE

The purpose of the Act is to provide a clear and comprehensive national mandate to end discrimination against individuals with handicaps; provide protections parallel in scope of coverage to those enjoyed by minorities and others; and provide enforceable standards addressing discrimination against individuals with disabilities.

DEFINITIONS

The term "handicap" is defined to mean, with respect to an individual--a physical or mental impairment that substantially limits one or more of the major life activities of such individual, a record of such an impairment, or being regarded as having such an impairment. This is the same definition used for purposes of section 504 of the Rehabilitation Act of 1973 and the recent amendments to the Fair Housing Act.

TITLE I: GENERAL PROHIBITION AGAINST DISCRIMINATION

Title I sets out the general forms of discrimination prohibited by the Act. It is considered discriminatory to subject an individual, directly or indirectly, on the basis of handicap, to any of the following:

(1) denying the opportunity to participate in or benefit from an opportunity;

(2) affording an opportunity that is not equal to that afforded others;

(3) providing opportunities that are less effective than that provided to others;

(4) providing an individual with opportunities in a segregated setting;

(5) aiding or perpetuating discrimination by providing significant assistance to others that discriminate;

(6) denying an opportunity to participate as a member of a planning or advisory board; and

(7) otherwise limiting an individual with a handicap in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others.

For purposes of the Act, for an aid, benefit, or service to be equally effective, an entity must afford an individual with a handicap equal

opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement in the most integrated setting appropriate to the individual's needs.

Further, an entity may not directly or indirectly use criteria or methods of administration that have the effect of subjecting an individual to discrimination on the basis of handicap or perpetuate discrimination by others who are subject to common administrative control or are agencies of the same State. Nor can an entity discriminate against an individual because of the association of that individual with another individual with a handicap.

Title I also sets out several defenses to allegations of discrimination. It is not considered discrimination to exclude or deny opportunities to an individual with a handicap for reasons entirely unrelated to his or handicap. Further, it is not discrimination to exclude or deny opportunities to an individual with a handicap based on the application of qualification standards or other criteria that are shown by a covered entity to be both necessary and substantially related to the ability of the individual to perform or participate or take advantage of an opportunity and such participation cannot be accomplished by applicable reasonable accommodations, modifications, or the provision of auxilairy aids or services.

Qualification standards may include requiring that the current use of alcohol or drugs by an alcohol or drug abuser not pose a direct threat to property or the safety of others in the workplace or program; and requiring that an individual with a currently contagious disease or infection not pose a direct threat to the health or safety of other individuals in the workplace or program. These defenses are comparable to the defenses currently applicable to section 504 of the Rehabilitation Act of 1973.

TITLE II: EMPLOYMENT

The provisions in title II of the Act use or incorporate by reference many of the definitions in title VII of the Civil Rights Act of 1964 (employee, employer, Commission, labor organization, employment agency, joint, labor-management committee, commerce, industry affecting commerce). The scope of the bill is identical i.e., only employers who have 15 or more employees are covered.

A "qualified individual with a handicap" means an individual with a handicap who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. This definition is comparable to the definition used for purposes of section 504.

Using the section 504 legal framework as the model, the bill specifies that no entity covered by the Act shall discriminate against any qualified individual with a handicap because of such individual's handicap in regard to application procedures, the hiring or discharge of employees and all terms, conditions and privileges of employment.

Thus, discrimination includes, for example, the failure by a covered entity to make reasonable accommodations to the known limitations of a qualified individual with a handicap unless such entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business. Discrimination also includes the denial of employment opportunities because a qualified individual with a handicap needs a reasonable accommodation. The definition of the term "reasonable accommodation" included in the bill is comparable to the definition in the section 504 legal framework.

Discrimination also includes the imposition or application of qualification standards and other criteria that identify or limit a qualified individual with a handicap unless such standards or criteria can be shown by such entity to be necessary and substantially related to the ability of the individual to perform the essential components of the particular employment position.

The bill incorporates by reference the remedies and procedures set out in section 706 and section 707 of title VII of the Civil Rights Act of 1964 and the remedies and procedures available under section 1981 of the Civil Rights Act of 1870.

TITLE III: PUBLIC SERVICES

Section 504 only applies to entities receiving federal financial assistance. Title III of the bill makes all activities of State and local governments subject to the types of standards included in section 504 (nondiscrimination) and section 505 (the enforcement procedures).

Title III also specifies the actions applicable to mass transportation (not including air travel) provided by public entities that are considered discriminatory.

1. New buses and trains for which a solicitation is made later than 30 days after the date of enactment must be readily accessible to and usable by individuals with handicaps. No retrofitting of existing vehicles is required.

2. Used buses purchased or leased after the date of enactment need not be accessible but a good faith effort to locate a used accessible bus must be made.

3. Communities that do not have a fixed route bus system but instead have a demand responsive system for the general public (nonhandicapped and handicapped) must purchase new buses for which a solicitation is made 30 days after the date of enactment of the Act that are accessible unless the system can demonstrate that it is and will remain, when viewed in its entirety, readily accessible for individuals with handicaps; in which case all newly purchased buses need not be accessible.

4. In those communities with fixed route buses, there must also be a paratransit system to serve those individuals with handicaps who cannot use the fixed route buses.

5. All new facilities must be readily accessible to and usable by individuals with handicaps.

6. When alterations are made to existing facilities one year after the date of enactment that affect or could affect the usability of the facility, the renovations, the path of travel to the altered area, the bathrooms, telephones, and drinking fountains serving the remodeled area must be, to the maximum extent feasible, readily accessible to and usable by individuals with handicaps.

7. A mass transportation program or activity, when viewed in its entirety, must be readily accessible to and usable by individuals with handicaps. Key stations in rapid rail, commuter rail and light rail systems must be made accessible within 20 years.

8. Intercity, light rail, and rapid rail systems must have at least one car per train that is accessible within 10 years and commuter rail systems within 5 years.

TITLE IV: PUBLIC ACCOMMODATIONS AND SERVICES OPERATED BY PRIVATE ENTITIES

Title IV specifies that no individual shall be discriminated against in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, on the basis of handicap.

The term "public accommodation" means privately operated establishments that are used by the general public as customers, clients, or visitors or that are potential places of employment and whose operations affect commerce. Examples of public accommodations include: auditoriums, theaters, restaurants, shopping centers, hotels, terminals used for mass transportation, office buildings and recreation facilities.

Examples of discrimination include:

-the imposition or application of eligibility criteria that identify or limit an individual with a handicap;

-a refusal to make reasonable modifications in rules and policies and procedures when necessary to afford meaningful opportunity unless the entity can demonstrate that the modifications would fundamentally alter the nature of the program;

-a refusal to provide auxiliary aids and services unless the entity can demonstrate that such services would result in undue burden;

-a refusal to remove architectural and communication barriers that are structural in existing facilities and transportation barriers in existing vehicles where such removal is readily achievable; and, where the entity can demonstrate that such removal is not readily achievable, a refusal to provide alternative methods;

-with respect to a facility that is altered one year after the effective date of the Act, the failure to make the alterations in a manner that, to the maximum extent feasible, the altered portion, the path of travel to the altered area, and the bathrooms, telephones, and drinking fountains serving the remodeled area are readily accessible to and usable by individuals with handicaps;

-a refusal to make facilities designed and constructed later than 30 months after the date of enactment readily accessible to and usable by individuals with handicaps except where an entity can demonstrate that it is structurally impracticable to do so;

-a refusal to make vehicles that carry in excess of 12 passengers, which are used by public accommodations, for which solicitations are made later than two years after the date of enactment readily accessible to and usable by individuals with handicaps;

The bill also includes a specific section prohibiting discrimination in mass transportation services (other than air travel) provided by private entities. In general, no individual shall be discriminated against on the basis of handicap in the full and equal enjoyment of mass transportation services provided by a privately operated entity that is primarily engaged in the business of transporting people (but not in the principal business of providing air transportation) and whose operations affect commerce.

Examples of discrimination include:

-the imposition or application of eligibility criteria that identify or limit an individual with a handicap;

-a refusal to make reasonable modifications to criteria, provide auxiliary aids and services, and remove barriers consistent with the standards set out above;

- new vehicles (other than automobiles) purchased 30 days after the date of enactment must be made accessible. Because there is no requirement that cars be made accessible, new taxicabs are not required to be made accessible. Taxicab companies are liable, however, if their drivers refuse to pick up an individual with a handicap.

The bill incorporates by reference the provisions in the Fair Housing Act, as recently amended, authorizing enforcement by private persons in court (section 813) and enforcement by the Attorney General (section 814(a)).

TITLE V: COMMUNICATIONS

Title V specifies that it is considered discrimination for a common carrier that offers telephone services to the general public to refuse to provide, within one year after the date of enactment of this Act, interstate and intrastate telecommunication relay services so that such services provide opportunities for communications for individuals who are not able to use voice telephone services (e.g.. persons who use telecommunicatons for the Deaf) that are equal to those provided to persons able to use voice telephone services. Nothing in this title is to be construed to discourage or impair the development of improved or future technology designed to improve access to telecommunications services for individuals with handicaps.

The Federal Communications Commission is directed to issue regulations establishing minimum standards and guidelines for telecommunications relay services. With respect to enforcement, the bill incorporates by reference the provisions in the Fair Housing Act, as recently amended, authorizing enforcement by private persons in court (section 813) and enforcement by the Attorney General (section 814(a)). Further, the Federal Communications Commission is authorized to use enforcement provisions generally applicable to it vor remedying violations of the Communications Act of 1934.

TITLE VI: MISCELLANEOUS PROVISIONS

Title VI explains the relationship between section 504 and this Act; this Act and State laws that provide greater protections; and the relationship among the various titles of the Act. Title VI also includes an anti-retaliation provision; directs the Architectural and Transportation

SUMMARY OF DIFFERENCES BETWEEN TRANSPORTATION SECTIONS IN REVISED AND ORIGINAL ADA

REVISED	ORIGINAL
PUBLIC TRANSIT AUTHORITIES	
1. New buses and trains purchased 30 days after date of enactment must be readily accessible. No retrofitting of existing vehicles.	1. Similar re new buses. Retrofitting required if 50% of fleet not accessible within 7 years.
2. Used buses purchased after the date of enactment need not be accessible but a good faith effort to locate a used accessible bus must be made.	2. No comparable provision. All buses purchased after a date specified in the Act must be accessible.
3. Communities that do not have a fixed route bus system but instead have a demand responsive system for the general public (nonhandicapped and handicapped) must purchase new buses that are accessible <u>unless</u> the system can demonstrate that it can meet the needs of disabled community with less than 100% of the buses made accessible.	3. No comparable provision. All new buses must be accessible.
4. In those communities with fixed route buses, there must also be a paratransit system to serve those individuals with disabilities who cannot use the fixed route buses.	4. Same.
5. All new facilities must be accessible.	5. Same
6. When alterations are made to <u>existing</u> facilities that affect or could affect accessibility the	6. All existing facilities must be retrofitted within 2-5 years to make them fully

alterations must ensure accessibility to the maximum extent feasible to the altered portion and the path of travel to the altered area, and the bathrooms, telephones, and drinking fountains serving the remodeled area must be accessible. Programs and activities in existing facilities, when viewed in their entirety, must be accessible.	accessible.
7. Rapid rail and commuter rail systems must have at least one car per train that is accessible within 10 and 5 years, respectively.	7. Seven years to have 50% of rolling stock fully accessible.
8. Key stations in subways must be made accessible within 20 years.	8. All stations within 10 years.
PRIVATE COMPANIES ENGAGED IN MASS TRANSPORTATION	
1. Terminals (e.g., Greyhound) designed and constructed 30 months after the date of enactment must be accessible.	1. Comparable.
2. Where an entity makes alterations 1 year after the date of enactment that affects or could affect accessibility, the alterations must, to the maximum extent feasible, include accessiblity features and the path of travel to the altered area, the bathrooms, telephones, and drinking fountains serving the accessible area must be accessible.	2. Must retrofit all existing building within 2-5 years.
3. New vehicles purchased by public accommodations that carry in excess of 12 passengers must be accessible. Companies in the principal business of transporting people purchasing	3. All new vehicles, including taxis must be accessible.

new vehicles, other than cars, must ensure that the new vehicles are accessible. Thus, taxicabs need not be made accessible.
refuse to pick up a disabled person.)

4. Airplanes not covered.

4. Airplanes covered.

COMPARISON OF HATCH AND HARKIN - MAJOR DIFFERENCES

Harkin:	Hatch:
Findings Clause:	
1. Contains language seeking to undermine Supreme Court decision (Cleburne) which held that disabled persons are not a "suspect" class under the Equal Protection Clause.	1. Does not contain such language.
Definitions:	
1. "Handicap" defined as in Section 504.	1. Same.
2. a) Term "individual with handicaps" is not defined.	2. a) Definition is used.
b) In section on general prohibition against discrimination, allows covered entity to: set a qualification standard that current users of alcohol or drugs not pose a direct threat to property or safety (but says nothing about ability to perform the job); and to require that contagious persons not present a direct threat to health or safety (but says nothing about ability to perform the job).	b) Definition outright excludes drug addicts; current alcohol and drug users who cannot perform the job or program requirements or who pose direct threat to safety or property; uses Humphrey-Harkin language on contagious diseases; excludes transvestites, drug convicts, and expressly does not include sexual orientation.
GENERAL PROHIBITION ON DISCRIMINATION	
1. Four pages of highly prescriptive, specific prohibitions and defenses, some of which are drawn from Section 504 regulations, including use of discriminatory effects standard. Some standards are harsher - covered entities' defense of qualification standards, selection criteria, performance criteria must be "both necessary and substantially related to the ability of the individual to perform or	1. No comparable section - individual sections ban discrimination against otherwise qualified handicapped individual, and section-by-section analysis and floor statement say that we mean to use Section 504 standards, derived from recent regulations and caselaw. Agency to promulgate regulations.

participate..." rather than a reasonable relationship to the qualifications of the job or program.

Employment:

1. Does not cover employers with less than 15 employees.

2. Ban on discrimination pertaining to "any qualified individual with a handicap because of such individual's handicap."

3. Defines discrimination generally consistent with Section 504, except for onerous requirements to justify qualification standards, tests, selection criteria or eligibility.

4. Defines "reasonable accommodation".

5. Incorporates Title VII relief (back pay limited to two years) and Section 1981 relief, which includes unlimited availability of back pay, compensatory damages, jury trial. Plus, Section 1981 is available only for intentional discrimination, this provision also bans effects discrimination.

1. Does not cover employers with less than 25 employees.

2. Uses the term, from Section 504, "otherwise qualified individual with handicaps solely because of ...handicap."

3. Does not define discrimination. Section-by-Section analysis makes clear Section 504 standards are intended. Agency to promulgate regulations.

4. No definition. Section-by-Section analysis makes clear Section 504 standards are intended. Agency to promulgate regulations.

5. Incorporates Title VII relief.

STATE/LOCAL GOVERNMENT

1. Covers state and local government agencies.

2. Relief includes (via Section 505 of the Rehabilitation Act), agency conciliation, private right of action, plus attorney's fees.

1. Virtually same.

2. Federal agencies to conciliate complaints and may refer unresolved complaints to DOJ which may then sue for injunctive relief. Private right of action for injunctive relief only, plus attorney's fees.

STATE/LOCAL GOVERNMENT TRANSPORTATION

1. While described as applicable only to publicly owned transit, the bill is unclear -- refers to a covered "individual or entity."

2. New buses and trains purchased 30 days after date of enactment must be readily accessible. No retrofitting of existing vehicles.

3. Used buses purchased after the date of enactment need not be accessible but a good faith effort to locate a used accessible bus must be made.

4. Communities that do not have a fixed route bus system but instead have a demand responsive system for the general public (nonhandicapped and handicapped) must purchase new buses that are accessible unless the system can demonstrate that it can meet the needs of disabled community with less than 100% of the buses made accessible.

5. In those communities with fixed route buses, there must also be a paratransit system to serve those individuals with disabilities who cannot use the fixed route buses.

6. All new facilities must be accessible.

7. When alterations are made to existing facilities that affect or could affect accessibility the alterations must ensure accessibility to the maximum extent feasible to the altered portion and the path of travel to the altered area, and the bathrooms, telephones, and drinking fountains serving the remodeled area must be accessible.

1. Covers only state and local government transportation offered to the public.

2. Bans discrimination against otherwise qualified individual with handicaps; legislative history makes clear paratransit is acceptable means of providing transportation; current Section 504 regulations and caselaw to be followed.

Programs and activities, when viewed in their entirety, must be accessible.

8. Rapid rail and commuter rail systems must have at least one car per train that is accessible within 10 and 5 years, respectively.

9. Key stations in subways must be made accessible within 20 years.

10. Relief includes (via Section 505 of the Rehabilitation Act), agency conciliation, private right of action, plus attorney's fees.

10. Federal agencies to conciliate complaints and may refer unresolved complaints to DOJ which may then sue for injunctive relief. Private right of action for injunctive relief only, plus attorney's fees.

PRIVATE TRANSPORTATION

1. Terminals (e.g., Greyhound) designed and constructed 30 months after the date of enactment must be accessible.

1. No coverage.

2. Where an entity makes alterations one year after the date of enactment that affects or could affect accessibility, the alterations must, to the maximum extent feasible, include accessibility features and the path of travel to the altered are, the bathrooms, telephones, and drinking fountains serving the accessible area must be accessible.

3. New vehicles purchased by public accommodations that carry in excess of 12 passengers must be accessible. Companies in the principal business of transporting people and which purchase new vehicles, other than cars, must ensure that the new vehicles are accessible. Thus, taxicabs need not be made accessible, but may not refuse to pick up a disabled person. NOTE: it is not clear

taxis need not be accessible.

4. Airplanes not covered.

5. Relief in DOJ actions includes civil penalties and compensatory damages; actual and punitive damages in private action.

PUBLIC ACCOMMODATIONS

1. Covers all private entities that either "are used by the general public as customers, clients, or visitors" or "are potential places of employment" and "whose operations affect commerce." This includes not just entities covered by Title II of the 1964 Civil Rights Act, but also shopping centers, offices of doctors, dentists, all other businesses such as grocery stores, bakers, tailors, candlestick makers, private schools etc., et. al.

1. Same coverage as Title II of the 1964 Civil Rights Act, includes hotels, inns, movie theatres, restaurants, bars.

2. Four pages of prescriptions, including many exceeding Section 504: e.g. bans eligibility criteria that tend to identify or limit an individual with a handicap from "fully and equally enjoying any goods, services, etc." -- no matter how justified the criteria.

2-6. See earlier descriptions of ban on discrimination, legislative history reliance on Section 504, agency to promulgate regulations. Coverage of renovations and new construction would be like Section 504, but again, this is left to regulation.

3. Does not incorporate fully Section 504's standards on liability.

4. Must remove "architectural and communications barriers that are structural in existing facilities, and transportation barriers in existing vehicles... where such removal is readily achievable." This standard appears much more burdensome than Section 504 which does not require undue burdens.

TALKING POINTS

I APPRECIATE THE NEW DEFINITION OF "HANDICAP" AND THE EFFORT TO MAKE THE STANDARDS AND BURDENS CONFORM BETTER TO SECTION 504 THAN THE ORIGINAL BILL, ALTHOUGH I THINK MORE WORK NEEDS TO BE DONE ON THIS.

I AM STILL VERY DISAPPOINTED IN MANY ASPECTS OF THE 3/14 DRAFT, RANGING FROM SOME SMALLER MATTERS TO MUCH LARGER ONES.

1. FOR EXAMPLE, THE EXPANSION OF THE CONCEPT OF PUBLIC ACCOMMODATIONS TO INCLUDE EVERYTHING USED BY THE GENERAL PUBLIC AS CUSTOMERS, CLIENTS OR VISITORS OR THAT ARE POTENTIAL PLACES OF EMPLOYMENT, GOES WELL BEYOND EXISTING FEDERAL LAW (TITLE II OF THE 1964 CIVIL RIGHTS ACT) TO COVER VIRTUALLY EVERYTHING IN THE PRIVATE SECTOR BUT PRIVATE HOMES. IT INCLUDES NOT JUST PLACES OF ENTERTAINMENT AND FOOD AND DRINK, BUT EVERY PRIVATE BUSINESS IN THE COUNTRY. THE ANALOGY TO SECTION 1981, DEALING WITH THE CONTRACTUAL RIGHTS OF MINORITIES, IS INAPPROPRIATE AS A MODEL, TITLE II IS THE OBVIOUS PARALELL. THERE IS NO GOVERNMENT ENFORCEMENT OF SECTION 1981 -- IF YOU WANT TO PARALLEL SEC. 1981, DROP IN A BILL TO AMEND IT. I AM PREPARED TO EXTEND TITLE II'S COVERAGE TO HANDICAP, BUT I RECOGNIZE THERE ARE COSTS INVOLVED AND TO IMPOSE THEM THROUGHOUT THE ENTIRE PRIVATE SECTOR IS UNREASONABLE. PLUS, THIS OVERBROAD PROVISION WILL ELICIT OPPOSITION WE DON'T NEED.

2. RELIEF. MOREOVER, UNDER TITLE II, RELIEF IS WHOLLY PREVENTIVE AND EQUITABLE. NEITHER PRIVATE PARTIES NOR THE GOVERNMENT CAN OBTAIN DAMAGES. THIS BILL APPLIES THE NEW FAIR HOUSING ACT REMEDIES TO PUBLIC ACCOMMODATIONS AND OTHER AREAS. THESE REMEDIES INCLUDE CIVIL PENALTIES AND COMPENSATORY DAMAGES IN ATTNY. GEN. ACTIONS AND ACTUAL AND PUNITIVE DAMAGES IN A PRIVATE ACTION.

THE USE OF SECTION 1981 REMEDIES IN EMPLOYMENT, IN ADDITION TO TITLE 7 REMEDIES, IS AN EXPANSION OF CURRENT FEDERAL LAW. UNDER TITLE VII, THERE IS A TWO YEAR LIMIT ON BACKPAY; YOU GET THE NEXT AVAILABLE JOB AND RETROACTIVE SENIORITY. UNDER SECTION 1981, YOU GET UNLIMITED BACKPAY, COMPENSATORY DAMAGES, AND A RIGHT TO A JURY TRIAL. PLUS, SECTION 1981 ONLY BANS INTENTIONAL DISCRIMINATION, WHEREAS THIS BILL BANS EFFECTS DISCRIMINATION, SO THESE HARSHER REMEDIES APPLY TO MORE CONDUCT THAN EVEN SEC. 1981 DOES.

WE SHOULD NOT BE PUNITIVE HERE. EXCEPT FOR EMPLOYMENT, WHERE I AM PREPARED TO USE THE TITLE VII REMEDIES, WHY NOT PROVIDE FOR INJUNCTIVE RELIEF, IN BOTH FEDERAL GOVERNMENT AND PRIVATE LAWSUITS, PLUS ATTORNEY'S FEES IN PRIVATE LAWSUITS.

3. TRANSPORTATION. THERE IS NO LOCAL OPTION FOR PARATRANSIT IN THE TRANSPORTATION SECTION. WHILE I AM PREPARED TO LISTEN

TO THE CASE FOR YOUR TRANSPORTATION SECTION, I HAVE SERIOUS CONCERNS ABOUT THE BURDENS IMPOSED HERE. MANY OF THESE REQUIREMENTS SEEM TO REFLECT PORTIONS OF A REGULATION THAT EVEN JUDGE MIKVA THREW OUT IN A 1981 D.C. COURT OF APPEALS DECISION. CASELAW IS SPLIT ON WHETHER ALL NEW BUSES AND SUBWAYS MUST BE ACCESSIBLE--I THINK ONLY ONE OF 3 OR 4 DECISIONS CALLS FOR THIS.

PLUS, WHY ARE WE OPENING UP THE PANDORA'S BOX OF AMENDING SECTION 504 IN THIS AREA? THIS SEEMS TO BE AN ACKNOWLEDGEMENT THAT THIS SECTION GOES BEYOND SECTION 504. IF YOU OPEN UP SECTION 504, I MAY WANT TO REVISIT PARTS OF SECTION 504 THAT I MAY HAVE PROBLEMS WITH. FOR EXAMPLE, I HAVE PREVIOUSLY BOUGHT OFF ON THE CONTAGIOUS DISEASE PROVISION, BUT ITS NOT IDEAL. IF I DONT' TRY TO ADDRESS IT, SOMEONE ELSE WILL.

4. THE BILL IS FAR TOO PRESCRIPTIVE, INCORPORATING PAGES OF MATERIAL BETTER LEFT TO AGENCY RULE-MAKING. PORTIONS OF THE BILL ARE MORE STRINGENT THAN SECTION 504. QUALIFICATION STANDARDS, SELECTION CRITERIA, PERFORMANCE CRITERIA MUST BE "BOTH NECESSARY AND SUBSTANTIALLY RELATED TO THE ABILITY OF THE INDIVIDUAL TO PERFORM OR PARTICIPATE" RATHER THAN A REASONABLE RELATIONSHIP.

IN THE PUBLIC ACCOMMODATIONS SECTION, THE DRAFT BANS ELEGIBILITY CRITERIA THAT TEND TO IDENTIFY OR LIMIT AN INDIVIDUAL WITH A HANDICAP FROM "FULLY AND EQUALLY ENJOYING ANY GOODS, SERVICES," ETC., NO MATTER HOW JUSTIFIED THE CRITERIA. THIS SECTION DOES NOT FULLY AND CLEARLY INCORPORATE THE SECTION 504 LIMITATION ON LIABILITY, THAT THERE IS NO NEED FOR A COVERED ENTITY TO UNDERTAKE AN UNDUE BURDEN OR FUNDAMENTAL ALTERATION. YOU'VE NOT USED BOTH CONCEPTS WHERE THEY ARE NEEDED.

THE REQUIREMENT THAT A COVERED PUBLIC ACCOMMODATION MUST REMOVE "ARCHITECTUAL AND COMMUNICATIONS BARRIERS THAT ARE STRUCTURAL IN EXISTING FACILITIES, AND TRANSPORTATION BARRIERS IN EXISTING VEHICLES...WHERE SUCH REMOVAL IS READILY ACHIEVABLE" SOUNDS LIKE IT GOES BEYOND SECTION 504. SECTION 504 DOES NOT REQUIRE UNDERTAKING UNDUE BURDENS OR FUNDAMENTAL ALTERATIONS, "READILY ACHIEVABLE" MAY REQUIRE MORE OF A COVERED ENTITY.

5. EXCEPT FOR EMPLOYMENT WHERE THE 3/14 DRAFT HAS A 15 PERSON LIMIT, THERE IS NO SMALL PROVIDER EXCEPTION. WE SEEK AN EXCEPTION ACROSS-THE-BOARD FOR ENTITIES OF LESS THAN 25 EMPLOYEES.

6. THE DRAFT DOES NOT OUTRIGHT EXCLUDE ALCOHOLICS AND DRUG ABUSERS, ONLY ALLOWS A COVERED ENTITY TO SET QUALIFICATION STANDARDS WHICH EXCLUDE THEM; NO EXCLUSION OF DRUG ADDICTS OR HOMOSEXUALS.

7. THE FINDINGS CLAUSES STILL ATTEMPT TO CREATE A "SUSPECT" CLASS UNDER THE 14TH AMENDMENT, IN THE FACE OF SUPREME COURT PRECEDENT, CLEBURNE, THAT DISABLED PERSONS ARE NOT A SUSPECT CLASS. IF HANDICAPPED PERSONS ARE REGARDED AS SUSPECT CLASS, NO DISTINCTION BETWEEN HANDICAPPED AND NONHANDICAPPED WOULD SURVIVE STRICT SCRUTINY.

8. COMMUNICATIONS. I PREFER TO MAKE TELEVISION BROADCASTERS TELEVISE THEIR VIDEOTAPES WITH CLOSED CAPTIONS. YOU HAVE A PROVISION REQUIRING TELEPHONE COMPANIES TO HAVE A TELECOMMUNICATIONS RELAY SYSTEM. THIS WOULD ALLOW A DEAF PERSON WITH A TDD TO CALL A PERSON WITHOUT A TDD. I'LL KEEP AN OPEN MIND ON THIS, AND I'LL WANT TO HEAR TESTIMONY FROM THE PHONE COMPANIES AS WELL AS DEAF PERSONS ON THIS.

I WANT FAIR AND BALANCED HEARINGS ON ALL OF THE CATEGORIES COVERED BY THE BILL.

HATCH 5 057

3/24/89

DRAFT

SECTION-BY-SECTION ANALYSIS

Section 1. This section provides that the Act may be referred to as the Equal Opportunity Act of 1989.

Section 2. Congressional Findings and Purpose. This section sets forth findings concerning discrimination against individuals with handicaps and the purpose of eliminating such discrimination in certain activities.

Section 3. General Definitions. This section defines terms generally applicable throughout the Act. Subsection (1) defines the term "individual with handicaps" in a manner similar to the definition applicable to section 504 of the Rehabilitation Act of 1973. 29 U.S.C. 706(8)(B). One difference between the two definitions is that in this Act's definition, the exclusion of alcoholics and persons who are addicted to, or dependent on, lawfully prescribed drugs is applicable not only to employment, as under Section 504, when such persons' current use of alcohol or drugs prevents them from performing the job in question or constitutes a direct threat to the property or safety of others, but also to participation in programs. There is no sound reason for excluding from coverage a person unable to

perform a job or who threatens the property or safety of others as an employee because of alcoholism or drug dependency, and not to exclude the same person who is unable to perform the requirements necessary to participate in a program or whose participation threatens the property and safety of others, for the same reason. This makes explicit in the Act itself the way the Act would likely operate in these latter situations through agency and judicial interpretation of the term "qualified individual with handicaps," i.e. a person who is unable to participate in a program or who threatens the property or safety of others due to alcoholism or drug dependency is not "otherwise qualified" to participate. The definition also takes into account how the term is used in the Civil Rights Restoration Act of 1988 (CRRA), Pub. L. No. 100-259, and the Fair Housing Amendments Act of 1988 (FHA), Pub. L. No. 100-430.

Subsection (2)(A) provides that "qualified individual with handicaps" means, with respect to employment, a person who is able to perform the essential functions of the job in question in spite of his or her handicap, or who could do so if reasonable accommodation were made for the handicap. Subsection (2)(B) provides that, with respect to all other activities covered by this Act, a "qualified individual with handicaps" means a person who can meet the essential eligibility requirements for participation in, or receipt of benefits from, such activities, or who could do so if reasonable accommodation

were made for the handicap. Many social activities have no eligibility criteria that requires performance or have merely nominal criteria and subsection (2)(B) refers to them as well. For example, many places of public accommodation have no criteria for entry, or impose nominal ones such as a cover charge or a dress requirement. An individual with a handicap who can afford the cover charge or meets the dress requirement, and who can gain access to the facility with or without reasonable accommodation, is otherwise qualified to patronize that place of public accommodation.

In short, both of these terms are generally used in the same manner as current Section 504 regulations such as the defintions contained in the Department of Justice's regulation applicable to its own activities, 39 CFR 103, with the broadened exclusion of alcoholics and drug dependents and the additional exclusions based on the CRRA and the FHA.

"Reasonable accommodation" is used in the same way it is used in interpretations of Section 504 of the Rehabilitation Act of 1973. An employer must undertake a reasonable accomodation to the known physical or mental limitations of a person with handicaps if doing so is necessary to permit the person to perform the essential functions of the job, but need not make fundamental alterations in the nature of the program or undertake undue financial and administrative burdens, or, in

other words used in regulations with respect to employment, incur an undue hardship. Similarly, an entity operating any other activity covered by this Act must make reasonable accommodation to the handicapping condition of a person if doing so enables the person to participate in the covered program, subject to the limitation that the entity need not fundamentally alter its program or undertake an undue financial and administrative burden. Southeastern Community College v. Davis, 442 U.S. 397 (1979); see Alexander v. Choate, 469 U.S. 287, 300 (1985); Dopico v. Goldschmidt, 687 F.2d 644 (2d Cir. 1982); American Public Transit Association v. Lewis, 655 F.2d 1272(D.C. Cir. 1981); Rhode Island Handicapped Action Committee v. Rhode Island Public Transit Authority, 718 F.2d 490 (1st Cir. 1983); Nelson v. Thornburgh, 567 F. Supp. 369 (E.D. Pa. 1983).

The inclusion of the reasonable accommodation concept is to ensure that the substantive standard applicable under the Act, i.e. the standard for determining liability, is that which exists under Section 504, as generally construed under recent federal agency regulatory provisions and Section 504 caselaw. In effect, this Act extends the protections of Section 504 to the activities to which it applies. In applying Davis, courts have recognized that the determination that an accommodation is "reasonable" must be based on the specific circumstances of each case, but that the entity operating the covered activity may be required to incur more than minimal expense as long as

the requested accommodation does not constitute an undue burden. The reasonable accommodation requirement under this Act, therefore, requires more on the part of an employer than the reasonable accommodation requirement with respect to religion in Title VII of the Civil Rights Act of 1964. The latter provision has been construed to require that an employer undertake no more than de minimis cost. Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977). In the employment context, the Equal Employment Opportunity Commission's definition provides guidance, 29 CFR 1613.704. In the other contexts covered by this Act, regulations such as the Department of Justice's regulation covering its own activities, e.g. 39 CFR 39.150; id. .151; id. .160, provide general guidance. Each agency which must promulgate regulations to implement this Act may adapt the general guidance provided by these regulations and relevant caselaw to the specific type of activity covered.

Section 4. Construction. Subsection (a) makes clear that this Act does not disturb the enforcement of the nondiscrimination provisions of title V of the Rehabilitation Act of 1973 or the rights, remedies, and substantive standards thereunder.

Subsection (b) makes clear that nothing in this Act bars conduct against a person either (1) because the person has been

convicted of the illegal manufacture or distribution of drugs or (2) because of the person's sexual orientation.

Subsection (c) provides that this Act shall not apply to programs or activities covered by Sections 503 or 504 of the Rehabilitation Act of 1973 or to any air carrier subject to the Air Carrier Access Act of 1986.

Subsection (d) provides that the Act does not apply to any entity merely because that entity is licensed or regulated by a state or local government agency or department or because it receives any assistance from such agency or department. If a state or subdivision of a state passes along federal financial assistance, as part of a federal aid program, to any entity, of course, the entity is subject to Section 504 according to Section 504's terms.

Subsection (e) provides that this Act does not invalidate or limit any other federal, state, or local law providing greater protection than this Act.

Section 5. Exclusion from coverage. This provision creates a blanket exclusion from coverage under the Act of any otherwise covered entity if it does not employ at least 25 employees for each working day in each of twenty or more calendar weeks in the current or preceeding calendar year.

Section 6. Prohibition against retaliation. This section bars those entities covered by the Act from retaliating against any person for opposing any act or practice made illegal under the Act, or because such person made a charge, testified, assisted, or participated in an investigation, proceeding, or hearing under this Act.

Section 7. Prohibition of discrimination in employment.

Subsection (a)(1) defines Commission to mean the Equal Employment Opportunity Commission.

Subsection (a)(2) defines the term "employer" to include any person engaged in a business affecting interstate commerce who employs 25 or more persons. The definition excludes the United States Government, bona fide private clubs, and Indian tribes. These exclusions conform to those in Section 701 of the Civil Rights Act of 1964, except that, consistent with section 5 of this Act, it excludes employers with 25 or more, rather than 15 or more, employees. Employees of the District of Columbia, who are not included within the scope of Section 701, are included within subsection (a) of this bill.

Subsection (a)(3) establishes that the terms "labor organization," "employment agency," "employee," "commerce," "industry affecting commerce," and "State" shall have the same

meaning as they have in title VII of the Civil Rights Act of 1964.

Subsection (b) provides that employers and other entities covered by this section shall not discriminate against otherwise qualified individuals with handicaps solely because of such handicap in any aspect of employment. The bill uses the word "solely" as it is used in Section 504 of the Rehabilitation Act of 1973.

Subsection (c). Enforcement. This subsection provides that the same procedures that are used to enforce title VII of the Civil Rights Act of 1964 will be used to enforce this section.

Subsection (d). Regulations. This section provides that the EEOC shall issue final regulations, no later than 10 months after enactment of the Act, that it deems necessary and appropriate to carry out its responsibilities under this Section and the anti-retaliation section of the Act.

Subsection (e) Posting notices. This subsection provides that entities covered by this section post appropriate notices of the requirements of this Section, as prepared or approved by the EEOC and for a penalty for willful violation of the subsection.

Subsection (f) this subsection provides that an entity whose principal purpose is assisting a particular class of individuals with handicaps will not violate the provisions of this bill if it has a publicly announced policy of extending a hiring preference to members of the class or persons whom the entity assists. Since the exemption is only for hiring, the discrimination prohibitions in the bill would continue to apply to all other aspects of employment, such as compensation.

Subsection (g) provides that the Section does not apply to an employer with respect to the employment of aliens outside of any state.

Section 8. Prohibition against discrimination in public accommodations.

Subsection (a)(1) provides that the operations of an establishment "affect commerce" if the establishment meets the criteria in Section 201(c) of the Civil Rights Act of 1964, 42 U.S.C. Section 2000a(c).

Subsection (a)(2) defines "a place of public accommodation" to include those listed in Sections 201(b)(1)-(4), and excluding those listed in Section 201(e) of the Civil Rights Act of 1964 (42 U.S.C. Section 2000a(b)(1)-(4) and (e).

Subsection (b) bans discrimination against an otherwise qualified individual with handicaps, solely on the basis of handicap, in any place of public accommodations whose operations affect commerce.

Subsection (c)(1) gives the Attorney General the same enforcement authority, and right of intervention, he or she has under Sections 206 and 204(a) of the Civil Rights Act of 1964, 42 U.S.C. Sections 2000a-5 and 2000a-3(a).

Subsection (c)(2) establishes a private right of action by providing that the remedies and procedures of Section 204 of the Civil Rights Act of 1964, 42 U.S.C. 2000a-3, shall be available to a person aggrieved under this section.

Subsection (c)(3) provides that the District Courts of the United States shall have jurisdiction over proceedings under this section and that aggrieved parties need not exhaust any administrative or other remedies.

Subsection (d) authorizes the Attorney General to issue final regulations, no later than 10 months after enactment of this Act, he or she deems necessary to implement his or her responsibilities under this section and the bill's anti-retaliation provision.

Section 9. Prohibitions against discrimination in state and local government. Subsection (a) prohibits discrimination against otherwise qualified individuals with handicaps, solely on the basis of his or her handicap, by any agency or department of a state or subdivision of a state.

Subsection (b)(1) requires the President, consistent with other provisions of the Act, to designate federal agencies to promulgate regulations to cover state and local government agencies and departments. The purpose of this section is to be sure that a federal agency is responsible for regulating each type of covered state and local agency and department, such as the Department of Health and Human Services for state and local health departments, the Environmental Protection Agency for state and local environmental agencies, and similar designations, and for processing complaints about violations of this section committed by such state and local agencies. These agencies may refer unresolved complaints to the Department of Justice. It is intended that overlap and duplication will be avoided by centralizing the designation process with the President. No agency may be designated if it does not have a Section 504 regulation in place. It is likely, given the purpose of this Act to apply generally the principles and standards of Section 504 to the areas covered by this Act, that designated agencies will be able to use their existing

regulations as a model for employer activity under this section or even to extend their current regulations to newly covered activities under this Act.

Subsection (b)(2) requires that final regulations described in the preceding paragraph be issued no later than 10 months after the date of enactment.

Subsection (b)(3) authorizes the Attorney General to seek injunctive and other equitable relief in a civil action, upon referral of an unresolved complaint from a federal agency.

Subsection (b)(4) establishes a private right of action, pursuant to the procedures and remedies available under Sections 204(a) and (b) of the Civil Rights Act of 1964, 42 U.S.C. 2000a-3(a) and (b). These sections authorize a court to grant preventive relief and attorneys' fees. A private party need not, as under Sections 204(c) and (d) of the Civil Rights Act of 1964, provide notice to any state or local government agency before initiating suit, nor await the referral of the complaint to the Department of Justice's Community Relations Service.

Subsection (b)(5) provides that the District Courts shall have jurisdiction over proceedings under this section.

Section 10. Prohibition against discrimination in transportation services.

Subsection (a) provides that no otherwise qualified individual with handicaps shall be discriminated against in any services offered to the public for the transportation of persons by any state or local government agency. Accessibility under this provision can be provided in one of three ways without incurring an undue financial and administrative burden: (1) taking steps to make accessible the mainline bus on subway systems; (2) providing paratransit services which are similar in route, time of service, and fare as the mainline system; or (3) a combination of mainline accessibility on some routes and paratransit services on others.

Subsection (b)(1) provides that the Department of Transportation shall investigate and seek to conciliate complaints of violations of this section, and may refer unresolved complaints to the Department of Justice.

Subsection (b)(2) authorizes the Attorney General to seek injunctive and other equitable relief in a civil action, upon referral of an unresolved complaint from the the Department of Transportation.

Subsection (b)(3) provides for a private right of action identical to that established in Section 9 (b)(3).

Subsection (b)(4) provides that the District Courts of the United States shall have jurisdiction over proceedings under this section.

Subsection (c) authorizes the Secretary of Transportation to issue final regulations, no later than 10 months after enactment, he or she deems necessary to implement this section and section 6 as it applies to entities covered by this section.

Section 11. Television broadcasters.

Subsection (a) provides that television stations which broadcast videotape programming or advertising shall do so with closed captions, provided that no television station need undertake an undue financial and administrative burden. This subsection is intended to impose the substantive requirements of Section 504 to a television station's broadcast of videotapes even when it does not receive federal financial assistance.

Subsection (b) creates enforcement machinery parallel to that created in Section 10(b).

Subsection (c) authorizes the Department of Commerce to issue regulations to implement this section and the anti-retaliation provision, Section 6, as it relates to entities covered by this section. Like other agencies promulgating regulations under this Act, such regulations must reflect the undue financial and administrative burden limitation on the requirement to accommodate qualified individuals with handicaps. Particular factors that must be considered in determining whether undue financial and administrative burden in a specific case exists under this section, include the need for a television broadcaster to broadcast a videotape at a particular time, the cost of closed captioning, and the marketplace's capacity to close caption the volume of videotapes that are likely to fall within the requirements of this section. It is expected, however, that every television station will make significant and steady progress in close captioning the videotapes it uses over the shortest time feasible under the terms of this section.

Section 12. Authorization of appropriations. This section authorizes appropriations to carry out the Act.

Section 13. Effective date. This section provides that, except where otherwise spefically designated, the Act shall become effective one year after the date of its enactment.

HATCH

3/24/89

S.

TO ESTABLISH A CLEAR AND COMPREHENSIVE PROHIBITION OF DISCRIMINATION ON THE BASIS OF HANDICAP

Section 1. Short Title

This Act may be cited as the "Equal Opportunity Act of 1989."

Section 2. Findings and Purposes

(a) Findings. -- Congress finds that --

(1) some 36,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;

(2) the Nation's proper goal regarding persons with disabilities is to assure equality of opportunity; and

(3) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis, to pursue those opportunities available to others in our free society, and imposes significant costs on the United States in unnecessary expenses resulting from dependency and nonproductivity.

(b) Purpose. -

It is the purpose of this Act to provide a prohibition of discrimination against persons with disabilities in employment, public accommodations, state and local

government agencies, certain transportation services; and the broadcast of television videotapes.

Section 3. Definitions.

As used in this Act. -

(1) "Individual with handicaps." -

(A) In General. - The term "individual with handicaps" includes any individual who -

(i) has a physical or mental impairment which substantially limits one or more of such person's major life activities;

(ii) has a record of such an impairment; or

(iii) is regarded as having such an impairment.

(B) The term "individual with handicaps" does not include-

(i) an individual who currently, illegally uses or is addicted to a controlled substance as defined in section 102 of the Controlled Substances Act, 21 U.S.C. Section 802.

(ii) an individual who is an alcoholic or who is addicted to or dependent upon lawfully prescribed drugs if such individual's current use of alcohol or drugs prevents such individual from performing the duties of the job in question or

performing the requirements of the program or activity in question, or whose employment or participation in the program or activity, by reason of such current alcohol or drug use, would constitute a direct threat to the property or the safety of others.

(iii) an individual who has a currently contagious disease or infection, and who, by reason of such disease or infection, would constitute a direct threat to the health or safety of other individuals or who, by reason of the currently contagious disease or infection, is unable to perform the duties of the job or perform the requirements of the program or activity; and

(iv) an individual solely because that individual is a transvestite.

(2) "Qualified individual with handicaps." - The term "qualified individual with handicaps" means -

(A) with respect to employment, individuals with handicaps who, with or without reasonable accommodation, can perform the essential functions of the particular job in question; and

(B) with respect to any other program or activity, an individual with handicaps who, with or without reasonable accommodation, meets the essential eligibility

requirements for participation in, or receipt of benefits from, that program or activity.-

Section 4. Construction

(a) Nondiscrimination Provisions. - Nothing in this Act shall be construed to affect or change the nondiscrimination provisions contained in title V of the Rehabilitation Act of 1973 (29 U.S.C. 790 et seq.), and any right, remedy, obligation, or responsibility under such Act, or to affect or change regulations issued by Federal agencies pursuant to title V of such Act.

(b) Controlled Substances. - Nothing in this Act prohibits any conduct against an individual because -

(1) such individual has been convicted by any court of competent jurisdiction for the illegal manufacture or distribution of a controlled substance as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802); or

(2) of the sexual orientation of such individual.

(c) Rehabilitation Act or Air Carriers. - Nothing in this Act shall be construed to apply to -

(1) any program or activity that is subject to sections 503 or 504 of the Rehabilitation Act of 1973 (29 U.S.C. 793 and 794); or

(2) to any air carrier that is subject to the Air Carrier Access Act of 1986 (49 U.S.C. 1374(c)).

(d) Government Limitation. - Nothing in this Act shall be construed to apply to any entity solely because it is licensed

or regulated by, or receives assistance from, any agency or department of any State or subdivision of any State.

(e) Coexistence With Other Laws. - Nothing in this Act shall be construed to invalidate or limit any other Federal Law or any law of a State or political subdivision of a State or jurisdiction that provides greater protection of rights for individuals with handicaps.

Section 5. Exclusion From Coverage

The provisions of this Act shall not apply to any public or private entity otherwise covered by this Act that does not employ 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year.

Section 6. Prohibition Against Retaliation

No employer, employment agency, labor organization, joint labor-management committee, place of public accommodation, state or local government agency, entity engaged in providing transportation services, or broadcaster of videotapes covered by this Act shall discriminate against any individual because--

(1) such individual has opposed any act or practice made unlawful by this Act; or

(2) such individual has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this Act.

Section 7. Prohibition of Discrimination in Employment.

(a) Definitions. - As used in this section -

(1) Commission. - The term "commission" means the Equal Employment Opportunity Commission established by section 705 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-4).

(2) Employer. -

(A) In General. - The term "employer" means a individual engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such an individual.

(B) Limitation. - Such term does not include -

(i) the United States, or a corporation wholly owned by the Government of the United States;

(ii) an Indian tribe; or

(iii) a bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of the Internal Revenue Code of 1986.

(3) Labor Organization. - The terms "labor organization," "employment agency," "employee," "commerce," "industry affecting commerce," and "State" shall have the same meaning as they have in section 701 of the Civil Rights Act of 1964 (42 U.S.C. 2000e).

(b) Prohibition Against Discrimination. - No employer, labor organization, employment agency or joint labor-management

committee shall discriminate against any otherwise qualified individual with handicaps, solely because of his or her handicap, with respect to -

(1) hiring,

(2) discharge,

(3) compensation, or

(4) the terms, conditions, or privileges of employment.

(c) Enforcement. -

(1) Aggrieved individual. - The remedies and procedures set forth in sections 706, 709, and 710 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5, 2000e-8, and 2000e-9) shall be available to any individual aggrieved for any violation of this Act.

(2) Enforcement of Act. - The remedies and procedures of sections 706 and 707 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5 and 2000e-6) shall be available to the Attorney General or to the Commission as prescribed by law to enforce the provisions of this Act.

(d) Regulations. -

(1) Issuance of Regulations. - The Commission shall issue such rules, regulations, orders, and instructions as the Commission considers necessary and appropriate to carry out its responsibilities under this section, and section 6 as it applies to entities covered by this section.

(2) Issuance Date. - Final regulations described under paragraph (1) shall be issued no later than 10 months after the date of enactment of this Act.

H(e) Posting Notices. -

(1) Posting Requirement. - Every employer, employment agency, and labor organization shall post and keep posted, in conspicuous places upon its premises where notices to employees, applicants for employment, and members are customarily posted, a notice to be prepared or approved by the Commission setting forth excerpts from, or summaries of, the pertinent provisions of this section and information pertinent to the filing of a complaint.

(2) Fine. - A willful violation of this section shall be punishable by a fine of not more than $100 for each separate offense.

(f) Exemption. - Nothing in this Act shall be construed to prohibit an entity, with a principal purpose of assisting a particular class of individuals with handicaps from establishing a publicly announced policy of giving preference in hiring to individuals who are members of that class.

(g) Aliens outside of State. - This section shall not apply to any employer with respect to the employment of aliens outside of any State.

Section 8. Prohibition Against Discrimination in Public Accommodations.

(a) Definitions. - As used in this Section -

(1) Affect Commerce. - The operations of an establishment "affect commerce" if the establishment meets the criteria in section 201(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000a(c)).

(2) Place of Public Accommodation. - The term "place of public accommodation" means those establishments listed in sections 201(b)(1)-(4) and excludes those listed in section 201(e) of the Civil Rights Act of 1964 (42 U.S.C. 2000a(b)(1)-(4) and (e)).

(b) Prohibition on Discrimination. - No otherwise qualified individual with handicaps shall be subject to discrimination, solely on the basis of his or her handicaps, in any place of public accommodation whose operations affect commerce.

(c) Enforcement. -

(1) Attorney General. - The remedies and procedures of sections 206 and 204(a) of the Civil Rights Act of 1964, (42 U.S.C. 2000a-5 and 2000a-3(a)), shall be available to the Attorney General to enforce the provisions of this section.

(2) Aggrieved Individual. - The remedies and procedures of section 204 of the Civil Rights Act of 1964, (42 U.S.C. 2000a-3), shall be available to a individual aggrieved under this section.

(3) District Courts. - The district courts of the Untied States shall have jurisdiction of proceedings instituted pursuant to this section and shall exercise the same without

regard to whether the aggrieved party shall have exhausted any administrative or other remedies that may be provided by law.

(d) Regulations. -

(1) Issuance of Regulations. - The Attorney General shall issue such regulations as the Attorney General considers necessary to effectuate this section, and section 6 as it applies to entities covered by this section.

(2) Issuance Date. - Final regulations described in paragraph (1) shall be issued no later than 10 months after the date of enactment of this Act.

Section 9. Prohibition Against Discrimination in State and Local Government.

(a) In General. - No otherwise qualified individual with handicaps shall be subject to discrimination, solely on the basis of his or her handicap, by any agency or department of any State or subdivision of any State.

(b) Regulations and Enforcement. -

(1) Designation of Agencies. - Consistent with this Act, the President shall designate Federal agencies, that have a regulation issued under section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), to issue regulations applicable to State and local government agencies or departments to effectuate this section, including procedures for the receipt of complaints of violations of this section, and section 6 as it applies to entities covered by this section, the

conciliation of such complaints, and the referral of these complaints in which conciliation fails to the Attorney General.

(2) Issuance Date. - The final regulations described in paragraph (1) shall be issued no later than 10 months after the date of enactment of this Act.

(3) Equitable Relief. - The Attorney General may, on referral of a complaint from a Federal agency, initiate a civil action for injunctive and other appropriate equitable relief.

(4) Enforcement Provisions. - The remedies and procedures of section 204(a) and (b) of the Civil Rights Act of 1964 (42 U.S.C. 2000a-3(a) and (b)), shall be available to -

(A) a individual aggrieved under this section; and,

(B) to the Attorney General with respect to intervention in a civil action initiated under this subsection.

(5) Jurisdiction. - The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section, and shall exercise such jurisdiction without regard to whether the aggrieved party shall have exhausted any administrative or other remedies that may be provided by law.

Section 10. Prohibition Against Discrimination in Transportation Services.

(a) In General. - No otherwise qualified individual with handicaps shall be subject to discrimination, solely on the basis of his or her handicap, in any services offered to the

public for the transportation of individuals by any agency or department of any State or subdivision of any State.

(b) Enforcement. -

(1) Secretary of Transportation. - The Secretary of transportation -

(A) shall investigate complaints of violations of this section;

(B) shall seek conciliation of such complaints; and

(C) may refer complaints in which such conciliation fails to the Attorney General.

(2) Attorney General. - The Attorney General may, on referral of complaint from the Secretary of Transportation, initiate a civil action for injunctive and other appropriate equitable relief.

(3) Remedies and Procedures. - The remedies and procedures of section 204(a) and (b) of the Civil Rights Act of 1964, (42 U.S.C. 2000a-3 (a) and (b)), shall be available to -

(A) an individual aggrieved under this section; and

(B) the Attorney General with respect to his or her intervention in a civil action initiated under this subsection.

(4) District Court. - The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section and shall exercise such authority

without regard to whether the aggrieved party shall have exhausted any administrative or other remedies that may be provided by law.

(c) Regulations. -

(1) Issuance of Regulations. - The Secretary of Transportation shall issue such regulations as the Secretary considers necessary to effectuate this section, and section 6 as it applies to entities covered by this section.

(2) Issuance Date. - The final regulations described under paragraph (1) shall be issued no later than 10 months after the date of enactment of this Act.

Section 11. Television Broadcasters.

(a) Closed Captions. - Television stations that broadcast videotape programming or advertising shall do so with closed captions, provided that no television station need undertake an undue financial and administrative burden to do so.

(b) Enforcement. -

(1) Secretary of Commerce. - The Secretary of Commerce shall -

(A) investigate complaints of violations of this section;

(B) shall seek conciliation of such complaints; and

(C) may refer complaints in which conciliation fails to the Attorney General.

(2) Attorney General. - The Attorney General may, on referral of a complaint, initiate a civil action for injunctive and other appropriate equitable relief.

(3) Remedies and Procedures. - The remedies and procedures of section 204(a) and (b) of the Civil Rights Act of 1964 (42 U.S.C. 2000a-3(a) and (b)), shall be available to -

(A) an individual aggrieved under this section; and

(B) the Attorney General with respect to intervention in a civil action initiated under this subsection.

(4) District Courts. - The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section, and shall exercise such jurisdiction without regard to whether the aggrieved party shall have exhausted any administrative or other remedies that may be provided by law.

(c) Regulations. -

(1) Issuance of Regulations. - The Secretary of Commerce shall issue regulations to effectuate this section, and section 6 as it applies to entities covered by this section.

(2) Issuance Date. - The final regulations described under paragraph (1) shall be issued no later than 10 months after the date of enactment of this Act.

Section 12. Authorization of Appropriations.

There are authorized to be appropriated such sums as may be necessary to carry out the provisions of this Act.

Section 13. Effective Date.

Except as otherwise specified, this Act shall become effective 1 year after the date of its enactment.

QUESTIONS FOR PUBLIC ACCOMMODATIONS PANEL

INDUSTRY

1. Title II of the 1964 Civil Rights Act (42 U.S.C. Section 2000a) defines public accommodations to include inns, hotels, motels and other establishments providing lodging to transient guests; restaurants and other businesses selling food for consumption on the premises; gas stations, and places of exhibition or entertainment such as movie theatres, theatres, concert halls, sports arenas and the like.

§ 1997j. Disclaimer respecting private litigation

The provisions of this subchapter shall in no way expand or restrict the authority of parties other than the United States to enforce the legal rights which they may have pursuant to existing law with regard to institutionalized persons. In this regard, the fact that the Attorney General may be conducting an investigation or contemplating litigation pursuant to this subchapter shall not be grounds for delay of or prejudice to any litigation on behalf of parties other than the United States.

Pub.L. 96–247, § 12, May 23, 1980, 94 Stat. 354.

Historical Note

Legislative History. For legislative history and purpose of Pub.L. 96-247, see 1980 U.S.Code Cong. and Adm.News, p. 787.

Notes of Decisions

1. Amicus curiae

There is no need for legislative grants of standing to appear as an amicus curiae pursuant to this subchapter. DeVonish v. Garza, D.C.Tex.1981, 510 F. Supp. 658.

The intent of Congress in passing this subchapter was not to impose the procedural requirements contained therein upon the United States when it appears in an existing civil action as an amicus curiae at the invitation of the court. Id.

SUBCHAPTER II—PUBLIC ACCOMMODATIONS

§ 2000a. Prohibition against discrimination or segregation in places of public accommodation

Equal access

(a) All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.

Establishments affecting interstate commerce or supported in their activities by State action as places of public accommodation; lodgings; facilities principally engaged in selling food for consumption on the premises; gasoline stations; places of exhibition or entertainment; other covered establishments

(b) Each of the following establishments which serves the public is a place of public accommodation within the meaning of this subchapter if its operations affect commerce, or if discrimination or segregation by it is supported by State action:

(1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five

rooms for rent or hire and which is actually occupied the proprietor of such establishment as his residence;

(2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;

(3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and

(4) any establishment (A)(i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment.

Operations affecting commerce; criteria; "commerce" defined

(c) The operations of an establishment affect commerce within the meaning of this subchapter if (1) it is one of the establishments described in paragraph (1) of subsection (b) of this section; (2) in the case of an establishment described in paragraph (2) of subsection (b) of this section, it serves or offers to serve interstate travelers or a substantial portion of the food which it serves, or gasoline or other products which it sells, has moved in commerce; (3) in the case of an establishment described in paragraph (3) of subsection (b) of this section, it customarily presents films, performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce; and (4) in the case of an establishment described in paragraph (4) of subsection (b) of this section, it is physically located within the premises of, or there is physically located within its premises, an establishment the operations of which affect commerce within the meaning of this subsection. For purposes of this section, "commerce" means travel, trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia and any State, or between any foreign country or any territory or possession and any State or the District of Columbia, or between points in the same State but through any other State or the District of Columbia or a foreign country.

Support by State action

(d) Discrimination or segregation by an establishment is supported by State action within the meaning of this subchapter if such discrimination or segregation (1) is carried on under color of any law, statute, ordinance, or regulation; or (2) is carried on under color of any custom or usage required or enforced by officials of the

State or political subdivision thereof, or (3) is required by action of the State or political subdivision thereof.

Private establishments

(e) The provisions of this subchapter shall not apply to a private club or other establishment not in fact open to the public, except to the extent that the facilities of such establishment are made available to the customers or patrons of an establishment within the scope of subsection (b) of this section.

Pub.L. 88–352, Title II, § 201, July 2, 1964, 78 Stat. 243.

Historical Note

Short Title of 1972 Amendment. Pub.L. 92–261, § 1, Mar. 24, 1972, 86 Stat. 103, provided: "That this Act [which enacted sections 2000e–16 and 2000e–17 of this title, amended sections 5108 and 5314 to 5316 of Title 5, Government Organization and Employees, and sections 2000e to 2000e–6, 2000e–8, 2000e–9, 2000e–13, and 2000e–14 of this title, and enacted provisions set out as a note under section 2000e–5 of this title] may be cited as the 'Equal Employment Opportunity Act of 1972'."

Short Title. Section 1 of Pub.L. 88–352 provided: "That this Act [which enacted subchapters II to IX of this chapter, amended sections 2204 and 2205 of former Title 5, Executive Departments and Government Officers and Employees, section 14'7(d) of Title 28, Judiciary and Judicial Procedure, and sections 1971 and 1975a to 1975d of this title, and enacted provisions set out as a note under section 2000e of this title] may be cited as the 'Civil Rights Act of 1964'."

Legislative History. For legislative history and purpose of Pub.L. 88–352, see 1964 U.S.Code Cong. and Adm.News, p. 2355.

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I. GENERALLY

Subdivision Index

1. Constitutionality—Generally

Congress exercised constitutional power in enacting this subchapter. Hamm v. City of Rock Hill, Ark. & S.C.1964, 85 S. Ct. 384, 379 U.S. 306, 13 L.Ed.2d 300, rehearing denied 85 S.Ct. 698, 379 U.S. 995, 13 L.Ed.2d 614.

This subchapter is constitutional. Kyles v. Paul, D.C.Ark.1967, 263 F.Supp. 412, affirmed 395 F.2d 118, reversed on other grounds 89 S.Ct. 1697, 395 U.S. 298, 23 L.Ed.2d 318.

tion concerning their interstate status, was sufficient to require finding that defendant offered to serve interstate travelers so as to bring him within coverage of this subchapter. Wooten v. Moore, C.A.N.C.1968, 400 F.2d 239, certiorari denied 89 S.Ct. 866, 393 U.S. 1083, 21 L.Ed.2d 776.

Drive-in restaurant located three blocks from federal highway and on street which was extension of highway was engaged in offering to serve interstate travelers within this section prohibiting discrimination or segregation supported by state action in restaurant engaged in offering to serve interstate travelers. Gregory v. Meyer, C.A.Ga.1967, 376 F.2d 509.

Standard of this section that operations of an establishment affect commerce if it serves or offers to serve interstate travelers is satisfied by minimal evidence. Adams v. Fazzio Real Estate Co., D.C.La. 1967, 288 F.Supp. 630, affirmed 396 F.2d 146.

Evidence including showing that all five of defendant's drive-ins were located upon much traveled interstate and federal highways with large signs at and about each location advertising its products, that defendant also advertised for business in daily newspapers and over the radio and employed no reasonably effective means of determining whether its customers were interstate or intrastate travelers established that defendant served or offered to serve interstate travelers within this section. Newman v. Piggie Park Enterprises, Inc., D.C.S.C. 1966, 256 F.Supp. 941, reversed on other grounds 377 F.2d 433, affirmed 88 S.Ct. 964, 390 U.S. 400, 19 L.Ed.2d 1263.

No proof that discrimination by restaurant substantially affects interstate commerce is necessary in action under this subchapter as to restaurant serving or offering to serve interstate travelers. Willis v. Pickrick Restaurant, D.C.Ga. 1964, 234 F.Supp. 179.

Restaurant is not within applicable provisions of this section, unless it either serves or offers to serve interstate travelers or a substantial portion of food which it serves or other products which it sells has moved in interstate commerce. Willis v. Pickrick Restaurant, D.C.Ga. 1964, 231 F.Supp. 396, appeal dismissed 86 S.Ct. 72, 382 U.S. 18, 15 L.Ed.2d 13, rehearing denied 86 S.Ct. 286, 382 U.S. 922, 15 L.Ed.2d 237.

105. Sources of entertainment moving in commerce

Where recreational facility for swimming, boating, miniature golfing and dancing leased 15 paddle boats on royalty basis from company in another state, facility had purchased boat from the same company, and facility's juke box was manufactured in another state and played records manufactured outside the state, recreational facility's operations "affected commerce" within meaning of this section. Daniel v. Paul, Ark.1969, 89 S.Ct. 1697, 395 U.S. 298, 23 L.Ed.2d 318.

Patrons coming to privately owned recreational facility in Virginia from out of state and entertaining other patrons by their activity were "sources of entertainment which move in commerce" and so were canoes and umbrellas purchased out of state for use in such facility, and such facility was within ambit of this section. Scott v. Young, C.A.Va.1970, 421 F.2d 143. Certiorari denied 90 S.Ct. 1820, 398 U.S. 929, 26 L.Ed.2d 91.

Sources of entertainment at amusement park including ice skating facility and rides that were operated permanently at one location did "move in commerce" within subsec. (b)(3) of this section. Miller v. Amusement Enterprises, Inc., C.A.La.1968, 394 F.2d 342.

Football equipment which was provided by association which operated youth football program and which was purchased outside the state constituted a "source of entertainment" and moved in commerce within provision requiring that operations in a place of entertainment affect commerce before an establishment is covered by this subchapter. U. S. v. Slidell Youth Football Ass'n, D.C.La.1974, 387 F.Supp. 474.

Where alcoholic beverages served by Florida bar originated outside state and piano, juke box and television set provided for use of customers were manufactured outside state, operation of bar "affected commerce" within this section prohibiting discrimination or segregation by establishment, which provides source of entertainment, if its operations affect commerce. U. S. v. Deetjen, D.C.Fla.1973, 356 F.Supp. 688.

Operations and activities of a bar affected commerce within meaning of this section where amusement devices provided by the bar originated outside of the state. U. S. v. Vizena, D.C.La.1972, 342 F.Supp. 553.

Operations and activities conducted and sponsored by corporate recreational complex, which offered for use of patrons a swimming area, a picnic area, dancing area, snack bar, four pool tables, jukebox, and coin gun machine, affected commerce within meaning of this section. U. S. v. Johnson Lake Inc., D.C.Ala.1970, 312 F.Supp. 1376.

Bar or nightclub, which presented no entertainment five nights a week and which presented during the other nights small band and singing group made up primarily of residents of city who were not paid by bar but who performed there in interest of rehearsing together and who accepted donations, was not customarily presenting sources of entertainment which moved in commerce within provisions of this section relating to places of entertainment presenting sources of entertainment which moved in commerce. Robertson v. Johnston, D.C.La.1966, 249 F.Supp. 618, reversed on other grounds 376 F.2d 43.

Films exhibited by a motion picture theatre "moved in commerce" within this section where such films were all produced out of the state and shipped into the state for distribution, even though the theatre received the films from a local distributor which processed films and mounted them on shipping reels. Twitty v. Vogue Theatre Corp., D.C.Fla.1965, 242 F.Supp. 281.

§ 2000a-1. Prohibition against discrimination or segregation required by any law, statute, ordinance, regulation, rule or order of a State or State agency

All persons shall be entitled to be free, at any establishment or place, from discrimination or segregation of any kind on the ground of race, color, religion, or national origin, if such discrimination or segregation is or purports to be required by any law, statute, ordinance, regulation, rule, or order of a State or any agency or political subdivision thereof.

Pub.L. 88-352, Title II, § 202, July 2, 1964, 78 Stat. 244.

Historical Note

Legislative History. For legislative history and purpose of Pub.L. 88-352, see 1964 U.S.Code Cong. and Adm.News, p. 2355.

Library References

Civil Rights ⇐4 to 8.2.

Notes of Decisions

Custom or usage 3
Laws or statutes 1
Ordinances 2

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1. Laws or statutes

This subchapter prohibits application of state laws in a way that would deprive any person of rights guaranteed under this subchapter. Hamm v. City of Rock Hill, Ark. & S.C.1964, 85 S.Ct. 384, 379 U.S. 306, 13 L.Ed.2d 300, rehearing denied 85 S.Ct. 698, 379 U.S. 995, 13 L.Ed.2d 614.

No state statute may be used to deny any citizen peaceful exercise of rights of equal accommodation guaranteed by this subchapter. Walker v. State of Ga., C.A.Ga.1969, 417 F.2d 5.

2. Ordinances

Ordinance prohibiting operators of bars and cocktail lounges from admitting or serving any military personnel in uniform, enacted for purpose of aiding racial discrimination by frustrating efforts of military authorities to bring about desegregation in communities adjoining military installations, was unconstitutional. U. S. v. Cantrell D.C.La.1969, 307 F.Supp. 259.

Fact that ordinance enacted with racially discriminatory motive did not explicitly mention race in its text proper was immaterial in determining its validity. Id.

Racial segregation within bar as result of ordinance prohibiting operators of bars and cocktail lounges from serving

servicemen in uniform violated this section. Id.

3. Custom or usage

Complaint alleging that arrest of plaintiff, a white woman, for vagrancy while she was sitting in nightclub had been made in order to enforce custom or [illegible] of city forbidding or discouraging white women from frequenting places that are predominantly Negro stated cause of action under this section. Robertson v. Johnston, C.A.La.1967, 376 F.2d 43.

§ 2000a–2. Prohibition against deprivation of, interference with, and punishment for exercising rights and privileges secured by section 2000a or 2000a–1 of this title

No person shall (a) withhold, deny, or attempt to withhold or deny, or deprive or attempt to deprive, any person of any right or privilege secured by section 2000a or 2000a–1 of this title, or (b) intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person with the purpose of interfering with any right or privilege secured by section 2000a or 2000a–1 of this title, or (c) punish or attempt to punish any person for exercising or attempting to exercise any right or privilege secured by section 2000a or 2000a–1 of this title.

Pub.L. 88–352, Title II, § 203, July 2, 1964, 78 Stat. 244.

Historical Note

Legislative History. For legislative history and purpose of Pub.L. 88–352, see 1964 U.S.Code Cong. and Adm.News, p. 2355.

Library References

Civil Rights ⟸4 to 8.2.

Notes of Decisions

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1. Constitutionality

Congress in enacting this subchapter, had power to extend immunity to pending prosecutions based on peaceful at-

Persons aggrieved; intervention by Attorney General; legal representation; commencement of action without payment of fees, costs, or security

(a) Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice prohibited by section 2000a–2 of this title, a civil action for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order, may be instituted by the person aggrieved and, upon timely application, the court may, in its discretion, permit the Attorney General to intervene in such civil action if he certifies that the case is of general public importance. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the civil action without the payment of fees, costs, or security.

Attorney's fees; liability of United States for costs

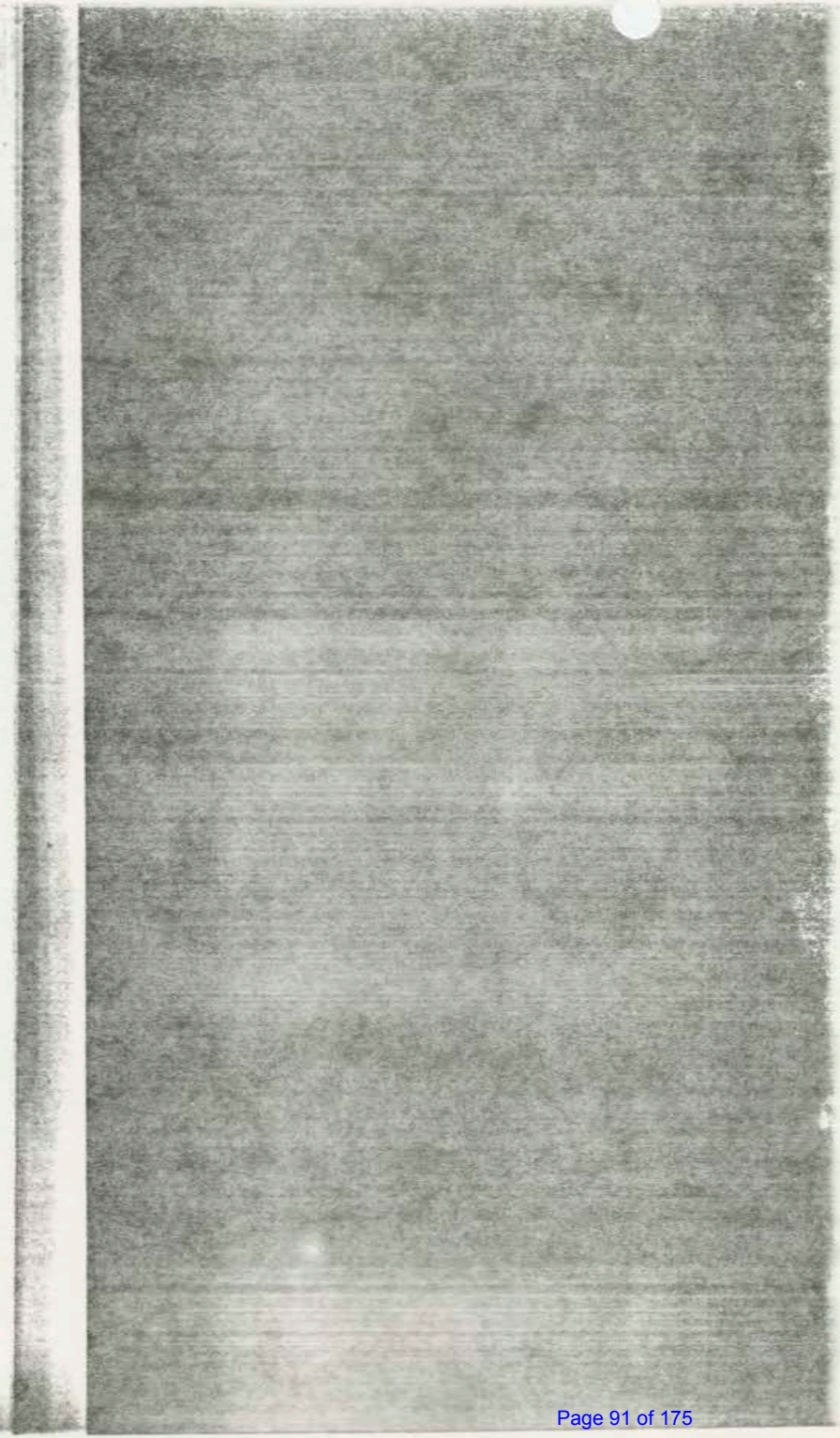
(b) In any action commenced pursuant to this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, and the United States shall be liable for costs the same as a private person.

State or local enforcement proceedings; notification of State or local authority; stay of Federal proceedings

(c) In the case of an alleged act or practice prohibited by this subchapter which occurs in a State, or political subdivision of a State, which has a State or local law prohibiting such act or practice and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no civil action may be brought under subsection (a) of this section before the expiration of thirty days after written notice of such alleged act or practice has been given to the appropriate State or local authority by registered mail or in person, provided that the court may stay proceedings in such civil action pending the termination of State or local enforcement proceedings.

References to Community Relations Service to obtain voluntary compliance; duration of reference; extension of period

(d) In the case of an alleged act or practice prohibited by this subchapter which occurs in a State, or political subdivision of a State, which has no State or local law prohibiting such act or practice, a civil action may be brought under subsection (a) of this section: *Provided*, That the court may refer the matter to the Commu-



nity Relations Service established by subchapter VIII of this chapter for as long as the court believes there is a reasonable possibility of obaining voluntary compliance, but for not more than sixty days: *Provided further*, That upon expiration of such sixty-day period, the court may extend such period for an additional period, not to exceed a cumulative total of one hundred and twenty days, if it believes there then exists a reasonable possibility of securing voluntary compliance.

Pub.L. 88–352, Title II, § 204, July 2, 1964, 78 Stat. 244.

Historical Note

Legislative History. For legislative history and purpose of Pub.L. 88–352, see 1964 U.S.Code Cong. and Adm.News, p. 2355.

Library References

Civil Rights ⟸13.2(1) et seq. C.J.S. Civil Rights § 94 et seq.

West's Federal Forms

Affidavit to sue in forma pauperis, see §§ 1715, 4646, 4647.
Allegations of jurisdiction, see §§ 1057, 1060.
Complaint, see §§ 1849 to 1850.5.
Intervention by United States, see §§ 3122, 3123.
Preliminary injunctions and temporary restraining orders, matters pertaining to, see § 5271 et seq.
Taxation of costs, see §§ 4612 to 4632.

Code of Federal Regulations

Civil Rights Division, Department of Justice, functions, see 28 CFR 0.50 to 0.52.
Director of Community Relations Service, functions, see 28 CFR 0.30 to 0.32.

Notes of Decisions

ers ...ack v. Bonds, D.C.Ala.1969, 308 F. Supp. 774.

Although a reasonable attorney's fee for services rendered in obtaining injunctive relief against racial discrimination by a movie theatre would be $500, in view of fact occasion giving rise to suit occurred just one month after this subchapter became law and at a time when there was doubt as to its constitutionality, and in view of lack of reason to assume that defendant acted for any reason other than because of good faith belief in the unconstitutionality of this subchapter as applied to their operation, only $100 of the attorney's fee would be taxed as costs. Twitty v. Vogue Theatre Corp., D.C.Fla.1965, 242 F.Supp. 281.

31. Review

Where district court and the parties to action under this subchapter did not have benefit of judicial opinion which laid down the principle that the factors upon which the size of an attorney's fee in civil rights suit is based must be elucidated, the award of attorney's fees would be vacated and cause remanded for further consideration in light of the guidelines set forth in that decision. Evans v. Seaman, C.A.Miss.1974, 496 F.2d 1318.

...the compliance therewith by the ... owner, issues involved in appeal from order of district court remanding cafeteria owner's action to enjoin protest demonstrations of defendants against racial discrimination became moot, and appeal would be dismissed but order of district court, based on a procedural question, would not be vacated nor would matters passed upon therein be adjudicated. Morrison Cafeteria Co. of Nashville, Inc. v. Johnson, C.A.Tenn.1965, 344 F.2d 690.

32. Certiorari to Supreme Court

Supreme Court granted certiorari to decide whether the subjective standard promulgated by court of appeals in awarding counsel fee in class action instituted under this subchapter to enjoin racial discrimination in drive-in restaurants and sandwich shop only to extent that respondents' defenses had been advanced for purposes of delay and not in good faith properly effectuated purposes of counsel fee provision of this section. Newman v. Piggie Park Enterprises Inc., S.C.1968, 88 S.Ct. 964, 390 U.S. 400, 19 L. Ed.2d 1263.

§ 2000a–4. Community Relations Service; investigations and hearings; executive session; release of testimony; duty to bring about voluntary settlements

The Service is authorized to make a full investigation of any complaint referred to it by the court under section 2000a–3(d) of this title and may hold such hearings with respect thereto as may be necessary. The Service shall conduct any hearings with respect to any such complaint in executive session, and shall not release any testimony given therein except by agreement of all parties involved in the complaint with the permission of the court, and the Service shall endeavor to bring about a voluntary settlement between the parties.

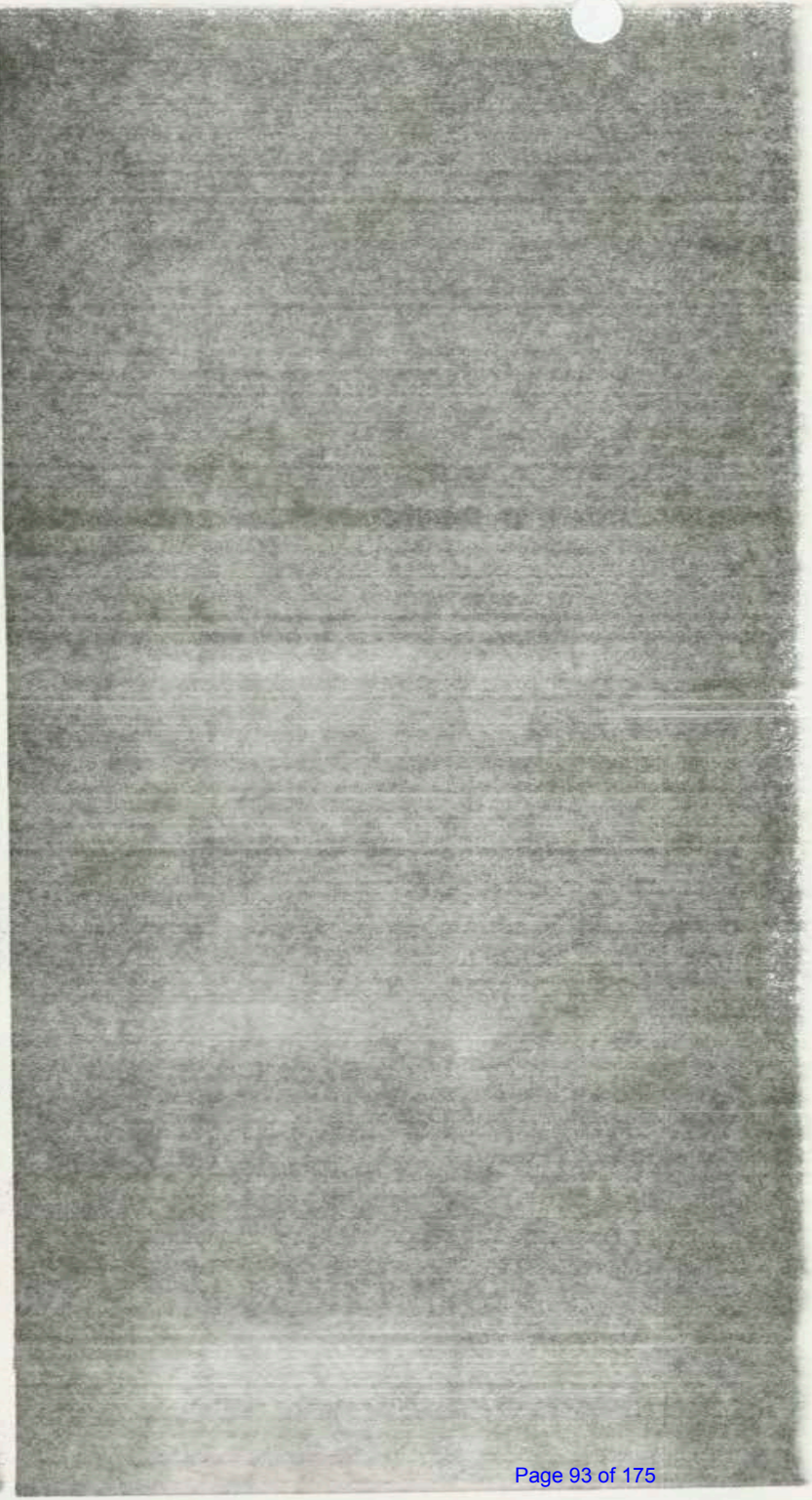
Pub.L. 88–352, Title II, § 205, July 2, 1964, 78 Stat. 244.

Historical Note

Legislative History. For legislative history and purpose of Pub.L. 88–352, see 1964 U.S.Code Cong. and Adm.News, p. 2355.

Library References

Civil Rights ⇐12.4.



OCT - 6 1988

Washington, D.C. 20530

Office of the
Assistant Attorney General

In response to the AIDS Commission, the White House Counsel requested an opinion from the Department of Justice, Office of Legal Counsel on the scope of the existing anti-discrimination provisions in the federal Rehabilitation Act. We have prepared the opinion and delivered it to the White House Counsel. In light of the controversial nature and complexity of legal issues raised by the AIDS virus, the White House Counsel has directed us to release this opinion and to be responsive to questions you may have about it.

I should also note at the outset that our legal opinion is consistent with the President's policy statement of last August, namely that federal employers should treat HIV-infected individuals on a case by case basis so they do not pose health and safety dangers or performance problems. Otherwise, they should be treated like any other employee. In particular, our opinion focuses on two issues: (1) whether persons with AIDS are protected by the Rehabilitation Act as an "individual with handicaps," even though AIDS is a contagious disease, and (2) whether so-called "asymptomatic" HIV-infected persons are also "individuals with handicaps" for purposes of the Act.

We answer both questions in the affirmative. We believe the first question was largely answered by the Supreme Court's decision in School Board of Nassau County, Fla. v. Arline (1987). While Arline concerned tuberculosis rather than AIDS, it clearly held that "[a]llowing discrimination based on the contagious effects of a physical impairment would be inconsistent with the basic purpose of [the Rehabilitation Act]."

As to asymptomatic HIV-infected individuals, our legal conclusions have been largely guided by recent medical clarification from the Surgeon General that even these individuals are, from a medical standpoint, physically impaired. The Surgeon General advises us that the impairment of HIV infection cannot be meaningfully separated from clinical AIDS, and that it is medically "inappropriate to think of this disease as composed of discrete conditions." Given this medical information that HIV infection is a physical impairment, the only legal issue remaining to us was to determine whether a court could in a given case determine that such a person is substantially limited in a major life activity. Because HIV infection may limit the likelihood of bearing a healthy child and may adversely affect intimate sexual relations, we believe that an individual proving these facts to a court could fairly be found to be an individual with handicaps for purposes of the Act.

The Supreme Court has also indicated in Arline that if a person is perceived by others as having a handicapping condition that substantially limits a major life activity -- that in itself could bring the person within the terms of the Act. We believe that, as a factual matter, many HIV-infected individuals would likely be included within the Act on this basis as well.

As both our opinion and the Supreme Court's opinion indicate, however, saying that it is possible for HIV-infected individuals to be found within the terms of the Act does not mean that federal employers or federally-conducted or financed programs and activities cannot in individual circumstances exclude an HIV-infected individual from the workplace or such program. If that individual poses a threat to the health or safety of others or is unable to perform the job or satisfy the requirements of the program, that individual can be excluded if there is no reasonable way to accommodate these health and safety and performance concerns.

In short, so long as HIV-infected individuals do not on a case-by-case basis pose these health and safety dangers or performance problems, they should be treated in the federal workforce and in federally-conducted or financed programs and activities like everyone else.

I will be happy to try to answer any questions you may have.

Douglas W. Kmiec

Office of the
Assistant Attorney General

Washington, D.C. 20530

SEP 27 1988

Memorandum for Arthur B. Culvahouse, Jr.
Counsel to the President

Re: Application of Section 504 of the Rehabilitation Act to HIV-Infected Individuals

Introduction and Summary

This memorandum responds to your request for an opinion on the application of section 504 of the Rehabilitation Act of 1973 (Act), 29 U.S.C. 794, to individuals who are infected with the Human Immunodeficiency Virus ("HIV" or "AIDS virus"). You specifically asked us to consider this subject in light of School Board of Nassau County v. Arline, 107 S. Ct. 1123 (1987) (Arline). Congress has also sought to clarify the law in this area by amending the Rehabilitation Act to address directly the situation of contagious diseases and infections in the employment context. See Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, sec. 9, 102 Stat. 28, 31 (1988) (Civil Rights Restoration Act). Although your opinion request was limited to the application of section 504 in the employment context, we have also considered the non-employment context because the President has directed the Department of Justice to review all existing federal anti-discrimination law applicable in the HIV infection context and to make recommendations with respect to possible new legislation.[1] See Memorandum for the Attorney General from President Ronald Reagan (Aug. 5, 1988).

For the reasons stated below, we have concluded, with respect to the non-employment context, that section 504 protects symptomatic and asymptomatic HIV-infected individuals[2] against

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[1] We defer to others in the Department to make the policy determinations necessary to recommend legislation, and, in keeping with the tradition of this Office, confine our analysis to matters of legal interpretation.

[2] In this opinion, individuals who are infected with the AIDS virus and have developed the clinical symptoms known as Acquired Immune Deficiency Syndrome ("AIDS") or AIDS-Related Complex ("ARC") will sometimes be referred to as "symptomatic HIV-infected individuals." Individuals who are infected with the

(continued...)

discrimination in any covered program or activity on the basis of any actual, past or perceived effect of HIV infection that substantially limits any major life activity[3] -- so long as the HIV-infected individual is "otherwise qualified" to participate in the program or activity, as determined under the "otherwise qualified" standard set forth in Arline. We have further concluded that section 504 is similarly applicable in the employment context, except for the fact that the Civil Rights Restoration Act replaced the Arline "otherwise qualified" standard with a slightly different statutory formulation. We believe this formulation leads to a result substantively identical to that reached in the non-employment context: namely, that an HIV-infected individual is only protected against discrimination if he or she is able to perform the duties of the job and does not constitute a direct threat to the health or safety of others.[4]

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[2](...continued)
AIDS virus but do not have AIDS or ARC will sometimes be referred to as "asymptomatic HIV-infected individuals." References to AIDS should be understood to include ARC, except where a distinction between the two is expressly drawn. Finally, where we intend to refer to all HIV-infected individuals, whether symptomatic or not, we either refer to "HIV-infected individuals" or to "HIV infection" (without any "symptomatic" or "asymptomatic" modifier) or clearly indicate in the text that the discussion refers to both categories.

[3] The medical information available to us indicates that HIV infection is a physical impairment which in a given case may substantially limit a person's major life activities. See infra at 6-11. In addition, others may regard an HIV-infected person as being so impaired. See infra at 12-13. Either element in a given case, we believe, would be sufficient for a court to conclude that an HIV-infected person is an "individual with handicaps" within the terms of the Act. By virtue of the fact that the handicap here, HIV infection, gives rise both to disabling physical symptoms and to contagiousness, it is unnecessary to resolve with respect to any other infection or condition which gives rise to contagiousness alone whether that singular fact could render a person handicapped. In other words, the medical information available to us undermines the accuracy of the assumption or contention referenced in Arline that carriers of the AIDS virus are without physical impairment. 107 S. Ct. at 1128 n.7.

[4] These conclusions differ from, and supersede to the extent of the difference, a June 20, 1986 opinion from Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel, for Ronald E. Robertson, General Counsel, Department of Health and
(continued...)

I. Statutory Framework Under Section 504

Section 504 was intended to proscribe discrimination against the handicapped in programs or activities that are conducted by federal agencies or that receive federal funds. In relevant part, the statute provides:

> No otherwise qualified individual with handicaps in the United States, as defined in section 706(8) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

29 U.S.C. 794.[5]

There are two definitions of "individual with handicaps," one or both of which may be applicable to HIV-infected

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[4](...continued)
Human Services (Cooper Opinion). The conclusions herein incorporate subsequent legal developments (the Supreme Court's decision in Arline and Congress' passage of the Civil Rights Restoration Act) and subsequent medical clarification (see July 29, 1988 letter from C. Everett Koop, M.D., Surgeon General, to Douglas W. Kmiec, Acting Assistant Attorney General, Office of Legal Counsel (Koop Letter) (attached).

[5] Section 504 thus has five elements. First, an individual claiming discriminatory treatment must be an "individual with handicaps," as defined in the Act. Second, the individual must be "otherwise qualified" for the benefit or program participation being sought. Third, the individual must be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under a covered program or activity. Fourth, the contested treatment must be "solely by reason of . . . handicap." And fifth, the discrimination must occur in a program or activity conducted or funded by the federal government.

The definition of "program or activity" is set forth in a new section 504(b), which was added by section 4 of the Civil Rights Restoration Act. In general, the term is to be given an institution-wide scope rather than the program- or activity-specific scope called for by Grove City College v. Bell, 465 U.S. 555 (1984). Grove City was superseded by the Civil Rights Restoration Act. See sec. 2, Pub. L. No. 100-259.

individuals depending upon the context in which the discrimination occurs. The generally-applicable definition is "any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment." 29 U.S.C. 706(8)(B). Thus, an individual can qualify as handicapped under the general definition if he actually suffers from a disabling impairment, has recovered from a previous such condition, was previously misclassified as having such a condition, or is regarded as having such a condition, whether or not he actually has it.

The Civil Rights Restoration Act amended the definitions section of the Rehabilitation Act to provide, in the employment context, a qualification of the definition of an "individual with handicaps" with respect to contagious diseases and infections. This provision qualifies rather than supplants the general definition of "individual with handicaps".[6] The amendment provides as follows:

> For the purpose of sections 503 and 504, as such sections relate to employment, [the term "individual with handicaps"] does not include an individual who has a currently contagious disease or infection and who, by reason of such disease or infection, would constitute a direct threat to the health or safety of other individuals or who, by reason of the currently contagious disease or infection, is unable to perform the duties of the job.

Pub. L. No. 100-259, sec. 9, 102 Stat. 28, 31-32 (1988).

II. Application of Section 504 in Contexts Other Than Employment

Section 504, as interpreted by the Supreme Court in Arline, has two primary elements: the definition of "individual with

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[6] The Civil Rights Restoration Act amended 29 U.S.C. 706(8) to add the qualification as a new subparagraph (C), to follow subparagraph (B), which contains the generally-applicable definition of "individual with handicaps." The new subparagraph thus constitutes a specific qualification of the preceding general definition. The qualification operates in the same way as the qualification Congress enacted in 1978 with respect to alcohol and drug abuse, on which the contagious disease provision was modeled. See note 19, infra, and accompanying text. Both provisions are structured as exclusions from the general definition. The natural implication of both statutory exclusions is that persons who do not fall within the specified grounds for exclusion are covered by section 504 to the extent that they meet the general requirements of that section.

handicaps" and the "otherwise qualified" requirement. We will first determine whether in the non-employment context an HIV-infected individual, whether symptomatic or asymptomatic, is an "individual with handicaps," and then discuss the application of the "otherwise qualified" requirement to such an individual.[7]

A. Symptomatic HIV-Infected Individuals

As discussed below, Arline requires the conclusion that persons with AIDS (i.e., symptomatic HIV-infected individuals) are within the section 504 definition of handicapped individual notwithstanding their contagiousness. Contagiousness, by itself, does not obviate the existence of a handicap for purposes of section 504. Arline, 107 U.S. at 1128.

Arline involved an elementary school teacher who had been discharged after suffering a third relapse of tuberculosis within two years. All parties conceded, and the Court found, that the plaintiff was handicapped because her tuberculosis had adversely affected her respiratory system, requiring hospitalization. Id. at 1127-1128. Plaintiff's respiratory ailment thus was a physical impairment that substantially limited one of her major life activities. Id. The Court concluded that the defendant's action came within the coverage of section 504, notwithstanding the fact that Ms. Arline was dismissed not because of any disabling effects of her tuberculosis but because of her employer's fear that her contagiousness threatened the health of her students. The Court concluded that "the fact that a person with a record of physical impairment is also contagious does not suffice to remove that person from coverage under § 504." Id. at 1130 (emphasis added).

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[7] Arline was also concerned with a third element: namely, whether the contagiousness of a handicapped individual covered by the Act could be used as a justification for discrimination against that individual. Subject to the "otherwise qualified" limitation, the Court held that contagiousness cannot be used for this purpose. The Court stated: "We do not agree with petitioners that, in defining a handicapped individual under § 504, the contagious effects of a disease can be meaningfully distinguished from the disease's physical effects on a claimant. . . . It would be unfair to allow an employer to seize upon the distinction between the effects of a disease on others and the effects of a disease on a patient and use that distinction to justify discriminatory treatment." Arline, 107 S. Ct. at 1128. In light of the Court's holding, we conclude that the contagiousness of an HIV-infected individual cannot be relied upon to remove that individual from the coverage of the Act. Contra Cooper Opinion at 27 and n.70.

We believe that symptomatic HIV-infected individuals are handicapped under section 504. For these individuals, the disease has progressed to the point where the immune system has been sufficiently weakened that a disease such as cancer or pneumonia has developed, and as a result, the individual is diagnosed as having clinical AIDS. Because of the substantial limiting effects these clinical symptoms have on major life activities, such a person is an "individual with handicaps" for purposes of section 504. This same conclusion should also apply to a person with ARC, who also has serious disabling physical effects caused by HIV infection, although the physical symptoms are not the particular diseases that the Centers for Disease Control have included in its list of the clinical symptoms that constitute AIDS. As with the tuberculosis that afflicted Ms. Arline, AIDS (or ARC) is often "serious enough to require hospitalization, a fact more than sufficient [in itself] to establish that one or more . . . major life activities [are] substantially limited . . . ." Id. at 1127. Therefore, assuming they are otherwise qualified, contagiousness does not excuse or justify discrimination against individuals handicapped by symptomatic HIV infection. As will be seen, the consideration of the "otherwise qualified" standard allows for a reasonable determination of whether contagiousness threatens the health or safety of others or job performance, and in those events, permits the exclusion of the individual from the covered program or activity.

B. Asymptomatic HIV-Infected Individuals

Arline did not resolve the application of section 504 to asymptomatic HIV-infected individuals.[8] The Court left open the

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[8] Since the plaintiff had disabling physical symptoms and thus was clearly a handicapped individual under section 504, the Court declined to reach the question of whether a person without such an impairment could be considered handicapped by virtue of a communicable disease alone. As the Court stated, "[t]his case does not present, and we therefore do not reach, the questions whether a carrier of a contagious disease such as AIDS [who suffers no physical impairment] could be considered to have a physical impairment, or whether such a person could be considered, solely on the basis of contagiousness, a handicapped person as defined by the Act." Id. at 1128 n.7. Subsequent to Arline, the Surgeon General informed this Office that even an asymptomatic HIV-infected individual is physically impaired, stating that "from a purely scientific perspective, persons with HIV infection are clearly impaired. They are not comparable to an immune carrier of a contagious disease such as Hepatitis B." Koop Letter at 2. In light of Dr. Koop's letter, this Office has no occasion to determine whether a contagious, but not impaired

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question of whether such individuals are "individuals with handicaps" under section 504, a question which turns on whether an asymptomatic HIV-infected individual "(i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such impairment, or (iii) is regarded as having such an impairment." 29 U.S.C. 706(8)(B). These determinations primarily focus upon: (1) whether HIV infection by itself is a physical or mental impairment; and (2) whether the impairment substantially limits a major life activity (i.e., whether it has a disabling effect); or (3) whether someone with HIV infection could be regarded as having an impairment which substantially limits a major life activity.

1. Asymptomatic HIV-Infected Individuals Are Physically Impaired

The Department of Health and Human Services regulations implementing section 504 define "physical impairment" as:

> [A]ny physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine.

45 C.F.R. 84.3(j)(2)(i) (1987). In addition, an appendix to the regulations provides an illustrative (but not exhaustive) list of diseases and conditions that are "physical impairments" for purposes of section 504: "such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, [and] emotional illness, and . . . drug addiction and alcoholism." 45 C.F.R. Pt. 84, App. A, p. 344 (1987).

The first question is whether an asymptomatic HIV-infected individual is physically impaired for purposes of section 504. For this factual determination we necessarily must rely heavily on the views of the Public Health Service of the United States. In this respect, Dr. C. Everett Koop, the Surgeon General of the Public Health Service, has indicated that it is

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[8](...continued)
individual, such as a Hepatitis B carrier, would be protected by the Act. See note 3, supra. Cf., Kohl by Kohl v. Woodhaven Learning Center, 672 F. Supp. 1226, 1236 (W.D. Mo. 1987) (finding a Hepatitis B carrier to be within the Act).

> inappropriate to think of [HIV infection] as composed of discrete conditions such as ARC or "full blown" AIDS. HIV infection is the starting point of a single disease which progresses through a variable range of stages. In addition to an acute flu-like illness, early stages of the disease may involve subclinical manifestations i.e., impairments and no visible signs of illness. The overwhelming majority of infected persons exhibit detectable abnormalities of the immune system.

Koop Letter at 1-2. On the basis of these facts, the Surgeon General concluded that

> from a purely scientific perspective, persons with HIV infection are clearly impaired. They are not comparable to an immune carrier of a contagious disease such as Hepatitis B. Like a person in the early stages of cancer, they may appear outwardly healthy but are in fact seriously ill.

Id. at 2.

In our view, the type of impairment described in the Surgeon General's letter fits the HHS definition of "physical impairment" because it is a "physiological disorder or condition" affecting the "hemic and lymphatic" systems.[9] We therefore

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[9] Moreover, it would also appear that the impairment affects the brain and central nervous system as well. Medical evidence indicates that the AIDS virus, apart from any effect it has on the immune system, also attacks the central nervous system and may result in some form of mental deficiency or brain dysfunction in a significant percentage of persons infected with the virus. "Mental disease (dementia) will occur in some patients who have the AIDS virus before they have any other manifestation such as ARC or classic AIDS." U.S. Department of Health Services, Surgeon General's Report on Acquired Immune Deficiency Syndrome 32 (1986) (Surgeon General's Report). See also id. at 12 ("The AIDS virus may also attack the nervous system and cause delayed damage to the brain. This damage may take years to develop and the symptoms may show up as memory loss, indifference, loss of coordination, partial paralysis, or mental disorder. These symptoms may occur alone, or with other symptoms mentioned earlier.").

In addition, as discussed below with respect to the effects of HIV infection on major life activities, infection with the virus affects the reproductive system because of the significant danger that the virus will be transmitted to a baby during

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believe that, in light of the Surgeon General's medical assessment, asymptomatic HIV-infected individuals, like their symptomatic counterparts, have a physical impairment.

2. Asymptomatic HIV-Infected Individuals and Limits on Major Life Activities

The second question, therefore, is whether the physical impairment of HIV infection substantially limits any major life activities.

Under the HHS regulations implementing section 504, "'major life activities' means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 45 C.F.R. 84.3(j)(2)(ii) (1987) (emphasis added). Although the definition is illustrative and not exhaustive, it does provide a helpful starting point for our analysis. We would expect that courts will resolve the factual question of whether the impairment of HIV infection limits a major life activity by reviewing this list for guidance in ascertaining whether a particular activity constitutes a basic function of life comparable to those on the list.

As indicated earlier, the disabling effects of HIV infection are readily apparent in the case of symptomatic HIV infection. The salient point with respect to symptomatic HIV-infected individuals is not that they have AIDS or ARC but rather that their impairment has manifest disabling effects. Again, as noted above, we believe that the courts will find that such individuals are limited in a number of major activities. Due to the weakness of their immune system and depending on the nature of the particular disease afflicting symptomatic HIV-infected individuals, any and perhaps all of the life activities listed in the HHS regulations could be substantially limited.

The question with respect to asymptomatic HIV-infected individuals is more difficult because such individuals would not appear at first glance to have disabling physical effects from their infection that substantially affect the type of life activities listed in the HHS regulations. Their ability, for example, to work, to care for themselves, to perform manual tasks, or to use their senses are usually not directly affected.

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[9](...continued)
pregnancy. Also bearing on whether HIV infection is a physical impairment under the HHS regulations is the Surgeon General's statement in his letter that HIV infection in its early stages is comparable to cancer -- a disease that is listed in the HHS regulations as a physical impairment -- in that infected individuals "may appear outwardly healthy but are in fact seriously ill." Koop Letter at 2.

Nevertheless, we believe it is likely that the courts will conclude that asymptomatic HIV-infected individuals have an impairment that substantially limits certain major life activities. While the Supreme Court explicitly refrained from answering this precise question in Arline, because HIV infection was not before it and perhaps in the mistaken understanding that asymptomatic HIV infection was not accompanied by an impairment,[10] the logic of the decision cannot fairly be said to lead to a different conclusion. This conclusion, we believe, may be based either on the effect that the knowledge of infection will have on the individual or the effect that knowledge of the infection will have on others. With respect to the latter basis, the Court observed, "[i]t would be unfair to allow an employer to seize upon the distinction between the effects of a disease on others and the effects of a disease on a patient and use this distinction to justify discriminatory treatment." Arline, 107 S. Ct. at 1128.

a. Limitation of Life Activities Traceable to Knowledge of Infection by Asymptomatic HIV-Infected Individual

Turning first to the effect knowledge of infection may have on the asymptomatic individual, it can certainly be argued that asymptomatic HIV infection does not directly affect any major life activity listed in the HHS regulations. 45 C.F.R. 84.3(j)(2)(ii) (1987). However, since the regulatory list was not intended as an exhaustive one, we believe at least some courts would find a number of other equally important matters to be directly affected. Perhaps the most important such activities are procreation and intimate personal relations.

Based on the medical knowledge available to us, we believe that it is reasonable to conclude that the life activity of procreation -- the fulfillment of the desire to conceive and bear healthy children -- is substantially limited for an asymptomatic HIV-infected individual. In light of the significant risk that the AIDS virus may be transmitted to a baby during pregnancy,[11] HIV-infected individuals cannot, whether they are male or female, engage in the act of procreation with the normal expectation of bringing forth a healthy child. Because of the infection in their system, they will be unable to fulfill this basic human desire. There is little doubt that procreation is a major life

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[10] Compare Arline, 107 S. Ct. at 1128 n.7 (suggesting that HIV infection is a disease without physical impairment) with Koop Letter at 2 (HIV infection is a physical impairment).

[11] Surgeon General's Report at 20-21 ("Approximately one third of the babies born to AIDS-infected mothers will also be infected with the AIDS virus.").

activity and that the physical ability to engage in normal procreation -- procreation free from the fear of what the infection will do to one's child -- is substantially limited once an individual is infected with the AIDS virus.

This limitation -- the physical inability to bear healthy children -- is separate and apart from the fact that asymptomatic HIV-infected individuals will choose not to attempt procreation. The secondary decision to forego having children is just one of many major life decisions that we assume infected individuals will make differently as a result of their awareness of their infection. Similarly, some courts can be expected to find a limitation of a major life activity in the fact that an asymptomatic HIV-infected individual's intimate relations are also likely to be affected by HIV infection. The life activity of engaging in sexual relations is threatened and probably substantially limited by the contagiousness of the virus.[12]

Finding limitations of life activities on the basis of the asymptomatic individual's responses to the knowledge of infection might be assailed as not fully persuasive since it depends upon the conscience and good sense of the person infected. The causal nexus, it would be argued, is not between the physical effect of the infection (as specified in the Koop Letter) and life activities, but between the conscience or normative judgment of the particular infected person and life activities. Thus, it might be asserted that there is nothing inherent in the infection which actually prevents either procreation or intimate relations.[13]

It is undoubtedly true that some HIV-infected individuals have not or will not change their behavior after learning they are infected, thereby exhibiting disregard for the health of their offspring or sexual partners. Nonetheless, in any case where the evidence indicates that the plaintiff HIV-infected individual has in fact changed his or her behavior -- as, for example, where the plaintiff represents that procreation has been foregone -- the court might well find a limitation of major life activity. Moreover, courts may choose to pass over such factual questions since the Supreme Court has stated an alternative rationale for finding a life activity limitation based on the reaction of others to the infection. We turn to that rationale next.

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[12] Id. at 14-18.

[13] As indicated in the text, we think this argument is disingenuous at least insofar as infection physically precludes the normal procreation of healthy children.

b. Limitation of Life Activities Traceable to Reaction of Others to Asymptomatic HIV Infection

The Arline Court relied on the express terms of the statute for the proposition that a handicapped individual includes someone who is regarded by others as having a limitation of major life activities whether they do or not. 29 U.S.C. 706(8)(B)(iii). This provision was added by Congress in 1974. The Court cited the legislative history accompanying this textual expansion to show that an impaired person could be protected even if the impairment "in fact does not substantially limit that person's functioning," S. Rep. No. 1297, 93rd Cong., 2d Sess. 64 (1974), and observed that such an impairment "could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment." 107 S. Ct. at 1129.

This construction by the Court of the statutory definition of the term "handicapped individual" has particular significance for the application of section 504 to asymptomatic HIV-infected individuals. The Court found that in order "[t]o combat the effects of erroneous but nevertheless prevalent perceptions about the handicapped," id. at 1126, Congress intended by its 1974 amendment to expand the section's scope to include persons who are regarded as handicapped, but who "may at present have no actual incapacity at all." Id. at 1126-1127 (quoting Southeastern Community College v. Davis, 442 U.S. 397, 405-406 n.6 (1979)). Stressing this point, the Court repeated later in the opinion that the amended definition covers persons "who, as a result [of being incorrectly regarded as handicapped], are substantially limited in a major life activity." Id. at 1129. The effect of this interpretation is that the perceived impairment need not directly result in a limitation of a major life activity, so long as it has the indirect effect, due to the misperceptions of others, of limiting a life activity (in Arline, the activity of working).[14] Thus, at least one district court

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[14] The Arline Court appears not to accept the distinction between being perceived as having an impairment that itself limits a major life activity (the literal meaning of the statutory language) and having a condition the misperception of which results in limitation of a life activity. This may have been the distinction the Solicitor General was attempting to draw by suggesting there was a difference between being perceived as having a handicap that precludes work and being perceived as contagious, which does not physically preclude work, except that because of the perception, no work is offered. As recited by the Court, the Solicitor General stated at oral argument "that to argue that a condition that impaired only the ability to work was a handicapping condition was to make 'a totally circular argument

(continued...)

following Arline has held that if an individual or organization limits an HIV-infected individual's participation in a section 504 covered activity because of fear of contagion, a major life activity of the individual is substantially limited.[15]

C. Application of the "Otherwise Qualified" Requirement

The Supreme Court's opinion in Arline concluded by remanding the case for consideration by the district court of whether the plaintiff was "otherwise qualified." The Court indicated more generally that section 504 cases involving persons with contagious diseases should turn on the "otherwise qualified" issue, that such individuals must "have the opportunity to have their condition evaluated in light of medical evidence and a determination made as to whether they were 'otherwise quali-

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[14](...continued)
which lifts itself by its bootstraps.' [Citation omitted] The argument is not circular, however, but direct. Congress plainly intended the Act to cover persons with a physical or mental impairment (whether actual, past, or perceived) that substantially limited one's ability to work." Id. at 1129 n.10. This last statement, of course, returned the Court to the statute's literal meaning. The only justification for departing from that meaning occurs not in footnote 10 of Arline, but in footnote 9, where the Court relied on legislative history which does indicate that at least some members of Congress believed that the perception of a physical disability by others does not have to include the belief that the perceived condition results in a limitation of major life activities, but simply that the perception of the condition by others in itself has that effect. Id. at 1128 n.9 (physically repulsive aspects of cerebral palsy, arthritis, and facial deformities).

[15] Doe v. Centinela Hospital, Civ. 87-2514 (C.D. Cal. June 30, 1988) (holding HIV-infected individual to be "individual with handicaps" because he was perceived as such by the defendant). The district court wrote that a person is an individual with handicaps if he "has a physiological disorder or condition affecting a body system that substantially limits a 'function' only as a result of the attitudes of others toward the disorder or condition; . . ." Slip op. at 12. The HHS regulations are in accord with this view. 45 C.F.R. section 84.3(j)(2)(iv)(B) (1987). Although as indicated in the previous footnote we think this aspect of the Supreme Court's reasoning departs from the literal meaning of the statutory text in favor of legislative history, we do not question that the district court in Centinela Hospital fairly reads Arline to support a finding that the reaction of others to the contagiousness of an HIV-infected individual in itself may constitute a limitation on a major life activity.

fied.'" 107 S. Ct. at 1130. The Court stressed that before making this determination the trial court must

> conduct an individualized inquiry and make appropriate findings of fact. Such an inquiry is essential if § 504 is to achieve its goal of protecting handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to such legitimate concerns of grantees as avoiding exposing others to significant health and safety risks . . . . In the context of the employment of a person handicapped with a contagious disease . . . this inquiry should include "[findings of] facts, based on reasonable medical judgments given the state of medical knowledge, about (a) the nature of the risk (how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious), (c) the severity of the risk (what is the potential harm to third parties) and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm." (Quoting Brief for American Medical Association as Amicus Curiae 19.) In making these findings, courts normally should defer to the reasonable medical judgments of public health officials. The next step in the "otherwise-qualified" inquiry is for the court to evaluate, in light of these medical findings, whether the employer could reasonably accommodate the employee under the established standards for that inquiry.

Id. at 1131 (footnotes omitted).

It is important to emphasize that the Court recognized that "[a] person who poses a significant risk of communicating an infectious disease to others in the workplace will not be otherwise qualified for his or her job if reasonable accommodation will not eliminate that risk." Id. at 1131 n.16. The Court has thus made it clear that persons infected with the AIDS virus will not be "otherwise qualified" to perform jobs that involve a significant risk of transmitting the virus to others. In addition, an "otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap." Southeastern Community College v. Davis, 442 U.S. 397, 406 (1979).[16]

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[16] In ascertaining whether a person is otherwise qualified, the court considers "whether any 'reasonable accommodation' by the employer would enable the handicapped person to perform those functions. Accommodation is not reasonable if it either imposes 'undue financial and administrative burdens' on a grantee, . . ., or requires 'a fundamental alteration in the

(continued...)

Based on current medical knowledge, it would seem that in most situations the probability that the AIDS virus will be transmitted is slight, and therefore as a matter of health and safety there will often be little, if any, justification for treating infected individuals differently from others.[17] Similarly, mere HIV infection involving only "subclinical manifestations" will generally also not render an individual unqualified to participate in a covered program or activity on the basis of inability to perform. As the disease progresses, however, and conditions such as ARC or "full blown" AIDS affect the physical or mental capacity of the individual, it may well be that an "individualized inquiry" will reveal that such person is not otherwise qualified to participate.

In addition, current medical knowledge does suggest the possibility of specialized contexts where, even with respect to a person in the early stages of the disease, a court might find an individual to be not otherwise qualified. These situations are very likely to involve individuals who have responsibility for health or safety, such as health care professionals or air traffic controllers. In these and similar situations where there is a greater possibility that the AIDS virus could be transmitted (see generally, Surgeon General's Report), or the consequences of a dementia attack could be especially dangerous (see note 9, supra), we believe a court could find, within the scope of "otherwise qualified" standard, a justification for treating HIV-infected individuals differently from uninfected individuals.

In brief, whether HIV-infected individuals will be found after the individualized inquiry required by Arline to be otherwise qualified will often depend on how far the disease has progressed. At the early stages of the disease, it is likely that neither health and safety nor performance will provide a justification for excluding an HIV-infected person. Moreover, while current medical knowledge suggests that safety should not be a concern in most contexts even as the disease progresses, an individualized assessment of performance may result in those with AIDS or ARC being found not otherwise qualified. Finally, courts may find in certain specialized contexts that an HIV-infected individual is not otherwise qualified at any stage of the disease because infection in itself presents an especially serious health or safety risk to others because of the nature of

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16(...continued)
nature of [the] program.'" 107 S. Ct. at 1131 n.17 (citations omitted).

17 See Surgeon General's Report at 13 ("No Risk from Casual Contact").

the position. The inquiry in each case will be a factual one, and because of that, we are unable to speculate further.

III. Application of Section 504 in the Employment Context

A. Introduction and Summary

The Civil Rights Restoration Act included a provision, the Harkin-Humphrey amendment,[18] which amended the definitions section of the Rehabilitation Act to provide, with respect to employment, a specific qualification of the definition of an "individual with handicaps" in the context of contagious diseases and infections:

> For the purpose of sections 503 and 504, as such sections relate to employment, [the term "individual with handicaps"] does not include an individual who has a currently contagious disease or infection and who, by reason of such disease or infection, would constitute a direct threat to the health or safety of other individuals or who, by reason of the currently contagious disease or infection, is unable to perform the duties of the job.

As discussed below, application of the Harkin-Humphrey amendment in the employment context should result in substantially the same conclusions as result from application in the non-employment context of section 504 as interpreted in Arline. Specifically, we conclude that Harkin-Humphrey provides that HIV-infected individuals (regardless of whether or not they are symptomatic) are protected against discrimination in the employment context so long as they fall within the general section 504 requirements defining an "individual with handicaps" and do not contravene the specific qualification to the general requirements that the amendment provides: namely, that they do not "constitute a direct threat to the health or safety of other individuals" and they can "perform the duties of the job." In our judgment, this qualification merely codifies the "otherwise qualified" standard discussed by the Court in Arline and discussed above in this memorandum, including the provision of a means of reasonable accommodation that can eliminate the health or safety threat or enable the employee to perform the duties of the job, if it is provided for under the employer's existing personnel policies and does not impose an undue financial or administrative burden.

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[18] Pub. L. No. 100-259, sec. 9, 102 Stat. 28, 31-32 (1988). Since this amendment to section 504 was jointly sponsored by Senators Harkin and Humphrey, we will refer to the amendment in this opinion as "Harkin-Humphrey."

Because Harkin-Humphrey was a floor amendment that was not developed by a committee, there is no committee report explaining it. The only explanatory statement that accompanied its introduction was a one-sentence statement of purpose -- "Purpose: To provide a clarification for otherwise qualified individuals with handicaps in the employment context", 134 Cong. Rec. S256 (daily ed. Jan. 28, 1988) -- and a brief colloquy between the two sponsors. Id. at S256-257.

The sponsors' colloquy made three basic points. First, the amendment was designed to do in the contagious disease and infection context what the comparably phrased 1978 amendment to section 504 did in the context of alcohol and drug abuse[19] -- "assure employers that they are not required to retain or hire individuals with a contagious disease or infection when such individuals pose a direct threat to the health or safety of other individuals, or cannot perform the essential duties of a job." Id. at S256-57. Second, the amendment "does nothing to change the current laws regarding reasonable accommodation as it applies to individuals with handicaps." Id. at S257. Finally, "as we stated in 1978 with respect to alcohol and drug abusers, . . . the two-step process in section 504 applies in the situation under which it was first determined that a person was handicapped and then it is determined that a person is otherwise qualified." Id.

With that description of Harkin-Humphrey's principal legislative history as background, we now discuss the amendment's impact on two aspects of the application of section 504 to HIV infection cases in the employment context: (1) whether section 504 applies to both asymptomatic and symptomatic HIV-infected individuals; and (2) the manner in which the section's "otherwise qualified" requirement is to be applied, including whether employers must provide "reasonable accommodation" to infected individuals.

B. Coverage of All HIV-Infected Individuals (Subject to the Stated Limitations)

We have no difficulty concluding that the Harkin-Humphrey amendment, and thus section 504 in the employment context,

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19 "For purposes of sections 503 and 504 as such sections relate to employment, [the term "handicapped individual"] does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others." Pub. L. No. 95-602, sec. 122(a), 92 Stat. 2955, 2985 (1978), codified at 29 U.S.C. 706(8)(B).

includes within its coverage both asymptomatic and symptomatic HIV-infected individuals. The amendment's language draws no distinction between asymptomatic and symptomatic individuals and, notably, applies to a "contagious disease or infection." It therefore applies to all HIV-infected individuals, whether or not they are symptomatic. It is true that the amendment is phrased in the negative in that it says who is not handicapped, rather than defining who is handicapped. Nevertheless, we believe the natural implication of this statutory exclusion is that persons who do not fall within the specified grounds for exclusion are covered by section 504 to the extent that they meet the general requirements of that section. Accordingly, in light of our previous discussion of the application of the general provisions of section 504 to HIV-infected persons, we conclude that all HIV-infected individuals who are not a direct threat to the health or safety of others and are able to perform the duties of their job are covered by section 504.

Harkin-Humphrey's legislative history reinforces this reading of the amendment.[20] There was no disagreement expressed concerning the amendment's applicability to asymptomatic HIV-infected individuals, and a number of legislators expressly stated that such persons were covered. Senator Harkin described the purpose of the amendment in a letter, dated February 26, 1988, to Representatives Hawkins and Edwards. Senator Harkin explained that

> [t]he objective of the amendment is to expressly state in the statute the current standards of section 504 so as to reassure employers that they are not required to hire or retain individuals with contagious diseases or infections who pose a direct threat to the health or safety of others or who cannot perform the duties of a job.
>
> The basic manner in which an individual with a contagious disease or infection can present a direct threat to the health or safety of others is when the individual poses a significant risk of transmitting the contagious disease or infection to other individuals. The Supreme Court in Arline explicitly recognized this necessary limitation in the protections of section 504. The amendment is consistent with this standard.

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[20] Moreover, the model for the Harkin-Humphrey amendment -- the 1978 amendment to section 504 concerning drug addicts and alcoholics -- was intended to include within section 504 those covered persons not possessing the deficiencies identified in the statute. See generally, 124 Cong. Rec. 30322-30325 (1978) (statements of Senators Cannon, Williams, and Hathaway).

134 Cong. Rec. H1065 (daily ed. Mar. 22, 1988) (emphasis in original).[21]

During the subsequent debate in the House of Representatives, the Representatives who commented on the amendment indicated their understanding that persons with contagious diseases or infections were covered. For example, referring to the dissenting opinion in Arline, see 107 S. Ct. at 1132-1134, Representative Weiss observed:

> [Chief] Justice Rehnquist stated that Congress should have stated explicitly that individuals with contagious diseases were intended to be covered under section 504. Congress has done so now with this amendment, stating clearly that individuals with contagious diseases or infections are protected under the statute as long as they meet the "otherwise qualified" standard. This clarity is particularly important with regard to infections because individuals who are suffering from a contagious infection -- such as carriers of the AIDS virus or carriers of the hepatitis B virus -- can also be discriminated against on the basis of their infection and are also individuals with handicaps under the statute.

134 Cong. Rec. H573 (daily ed. Mar. 2, 1988). Representative Coelho stated that the amendment

> provides that individuals with contagious diseases or infections are protected under the statute unless they pose a direct threat to the health or safety of others or cannot perform the duties of the job.
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> * * * * *
>
> People with contagious diseases and infections, such as people with AIDS or people infected with the AIDS virus, can be subject to intense and irrational discrimination. I am pleased that this amendment makes clear that such individuals are covered under the protections of the Rehabilitation Act.

Id. at H560-61. Representative Owens commented:

> I am glad to see that [the amendment] refers to individuals with contagious infections, thus clarifying

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[21] See also 134 Cong. Rec. S1739 (daily ed. Mar. 2, 1988) ("The purpose of the amendment was to clarify for employers the applicability of section 504 of the Rehabilitation Act of 1973 to persons who have a currently contagious disease or infection.") (statement of Sen. Harkin).

that such infections can constitute a handicapping condition under the Act.

Id. at H574. The record is replete with similar comments.[22]

In summary, we believe that under the Harkin-Humphrey amendment, section 504 applies in the employment context to all HIV-infected individuals, which necessarily includes both asymptomatic and symptomatic HIV-infected individuals. This parallels our conclusions with respect to HIV-infected individuals, both symptomatic and asymptomatic, outside the employment context. The difference between the employment and non-employment contexts because of the Harkin-Humphrey amendment is thus more apparent than real. Specifically, it is our view that the Harkin-Humphrey amendment merely collapses the "otherwise qualified" inquiry applicable outside the employment context into the definition of "individual with handicaps" in the employment text. Thus, whether outside the employment context a particular infected person is deemed to be handicapped but ultimately receives no protection under the statute because that person poses a danger to others and is thereby not "otherwise qualified" or whether that same person is not deemed to be handicapped under the Harkin-Humphrey amendment in the employment context for the same reason is of only semantic significance. In either case, if the infection is a direct threat to the health or safety of others or renders the individual unable to perform the duties of the job, the grantee or employer is not required to include that person in the covered program or activity or retain or hire him in a job. Indeed, the legislative history suggests that the principal purpose of the Harkin-Humphrey amendment was the codification of the "otherwise qualified" limitation as discussed in Arline.[23]

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22 See, e.g., 134 Cong. Rec. H584 (daily ed. Mar. 2, 1988) (statement of Rep. Edwards) ("I commend the Members of the Senate for fashioning this amendment in such a way that the courts will continue to adjudicate cases involving AIDS, HIV infection and other communicable conditions on a case by case basis."); id. at E487 (statement of Rep. Hoyer) (referring to "people with AIDS and people infected with the AIDS virus" as equally subject to the amendment); id. at H580 (statement of Rep. Dannemeyer) (opposing amendment because it covers "asymptomatic carriers").

23 "Purpose: To provide a clarification for otherwise qualified individuals with handicaps in the employment context." 134 Cong. Rec. S256 (daily ed. Jan. 28, 1988). See also the sponsors' colloquy, discussed supra in the text, as well as the comments of individual members. E.g., 134 Cong. Rec. H584 (daily ed. Mar. 2, 1988) (statement of Rep. Edwards) ("This amendment . . . codif[ies] the 'otherwise qualified' framework

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C. Is There a "Reasonable Accommodation" Requirement Under Harkin-Humphrey?

The Department of Health and Human Services (HHS) regulations implementing section 504, first issued in 1977, reflect HHS' determination that a "reasonable accommodation" requirement is implicit in the "otherwise qualified" element of section 504. 42 Fed. Reg. 22676, 22678 (May 4, 1977). Then, as now, the regulations provided the following statement of the "otherwise qualified" requirement: "'Qualified handicapped person' means . . . [w]ith respect to employment, a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question."[24] In Arline, the Supreme Court endorsed the "reasonable accommodation" requirement of the regulations, explaining that when a handicapped person is not able to perform the essential functions of the job, and is therefore not "otherwise qualified," "the court must also consider whether any 'reasonable accommodation' by the employer would enable the handicapped person to perform those functions."[25]

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[23](...continued)
for courts to utilize in these cases."); id. at H573 (statement of Rep. Weiss) ("In such circumstances [significant risk of communicating a contagious disease], the individual is not 'otherwise qualified' to remain in that particular position. The Supreme Court in Arline explicitly recognized this necessary limitation in the protections of section 504. The Senate amendment places that standard in statutory language . . . ."); id. at E487 (statement of Rep. Hoyer) ("[T]his amendment essentially codifies the existing standard of otherwise qualified in section 504, as explicated by the Supreme Court in Arline.").

[24] 45 C.F.R. 84.3(k)(1) (1987) (emphasis added). See also 45 C.F.R. 84.12 (1987) (setting forth the "reasonable accommodation" requirements).

[25] Arline, 107 S. Ct. at 1131 n.17. The Court suggested that two factors, originally employed by the Court in Davis, should be used to ascertain the reasonableness of an employer's refusal to accommodate a handicapped individual: "Accommodation is not reasonable if it either imposes 'undue financial and administrative burdens' on a grantee, Southeastern Community College v. Davis, supra, at 412, 99 S. Ct. at 2370, or requires a 'fundamental alteration in the nature of [the] program' id. at 410. See 45 C.F.R. § 84.12(c) (1985) (listing factors to consider in determining whether accommodation would cause undue hardship) . . . ." Id.

As noted above, the Harkin-Humphrey amendment includes within it the "otherwise qualified" standard. We must determine whether a "reasonable accommodation" requirement is implicit in Harkin-Humphrey's special section 504 formulation, just as HHS and the Supreme Court found such a requirement to be implicit in section 504 prior to this amendment. More specifically, was Harkin-Humphrey intended to require reasonable accommodation of a contagious individual who, absent such accommodation, poses a "direct threat to the health or safety of other individuals or . . . is unable to perform the duties of the job?" The amendment's legislative history convinces us that Congress intended that consideration of "reasonable accommodation" should be factored into an employer's determination of whether an infected employee poses a direct threat or can perform the job.

The legislative history of the Harkin-Humphrey amendment indicates that Congress was quite aware that administrative and judicial interpretation had added the "reasonable accommodation" gloss to section 504, and Congress understood and intended that such a gloss would be put on Harkin-Humphrey. The first evidence of this is found in the colloquy between Senators Harkin and Humphrey upon the introduction of the amendment. The colloquy stressed that the amendment "does nothing to change the current laws regarding reasonable accommodation as it applies to individuals with handicaps." 134 Cong. Rec. S257 (daily ed. Jan. 28, 1988). More expansively, Senator Harkin subsequently stated that

> the amendment does nothing to change the requirements in the regulations regarding providing reasonable accommodations for persons with handicaps, as such provisions apply to persons with contagious diseases and infections. Thus, if a reasonable accommodation would eliminate the existence of a direct threat to the health or safety of others or eliminate the inability of an individual with a contagious disease or infection to perform the essential duties of a job, the individual is qualified to remain in his or her position.

134 Cong. Rec. S1740 (daily ed. Mar. 2, 1988).

Senator Harkin's statement cannot be given dispositive weight because it was not joined by his co-sponsor, Senator Humphrey, and it was not made before the Senate voted on the amendment. However, Senator Humphrey never directly challenged this statement, or said that reasonable accommodation was not intended, and unchallenged statements to the same effect were made by members of the House speaking in favor of and against the amendment prior to the House vote on the amendment and by members of the Senate speaking in favor of and against the amendment

prior to the vote to override the President's veto of the Civil Rights Restoration Act.

Prior to the House vote, for example, Representative Weiss remarked that

> [a]s the Senate amendment now restates in statutory terms, [individuals with contagious diseases or infections] are also not otherwise qualified if, without reasonable accommodation, they would pose a direct threat to the health or safety of others or could not perform the essential functions of a job.

Id. at H573. Representative Waxman said the same thing:

> the Court went on to say [in Arline] that if [persons with contagious diseases] pose a significant risk of transmitting their diseases in the workplace, and if that risk cannot be eliminated by reasonable accommodation, then they cannot be considered to be "otherwise qualified" for the job. The amendment added by the Senate to this bill places that standard in law.

Id. at H575 (emphasis added). Many other Representatives supporting the amendment agreed.[26] Opposing the amendment, Representative Dannemeyer stated that "[i]f this bill is passed as presently written, employers will be required to accommodate

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[26] E.g., 134 Cong. Rec. E501 (daily ed. Mar. 3, 1988) (statement of Rep. Miller) ("[T]he new language added by the Senate changes nothing with respect to current law and is not intended to displace the . . . reasonable accommodations requirement under section 504."); 134 Cong. Rec. H584 (daily ed. Mar. 2, 1988) (statement of Rep. Edwards) ("The colloquy in the Senate between the two cosponsors of the amendment clarifies that it is the intent of Congress that the amendment result in no change in the substantive law with regard to assessing whether persons with this kind of handicapping condition are 'otherwise qualified' for the job in question or whether employers must provide 'reasonable accommodations' for such individuals."); id. at H561 (statement of Rep. Coehlo) ("[I]ndividuals with contagious diseases and infections are not otherwise qualified -- and thus are not protected in a particular position -- if, without reasonable accommodation, they would pose a direct threat to the health or safety of others or cannot perform the duties of the job."); id. at E487 (statement of Rep. Hoyer) (not "otherwise qualified" if risk of communicating contagious disease "cannot be eliminated by reasonable accommodation"); id. at H571 (statement of Rep. Jeffords) (same); id. at H574 (statement of Rep. Owens) (same).

victims of this fatal disease despite potential health threats to other employees." Id. at H580.

Prior to the Senate vote to override the President's veto of the Civil Rights Restoration Act, Senator Harkin reiterated his intent and understanding that reasonable accommodation was required:

> I say to this body this bill does not I repeat does not require an employer to hire or retain in employment all persons with contagious diseases. An employer is free to refuse to hire or fire any employee who poses a direct threat to the health or safety of others who cannot perform the essential functions of the job if no reasonable accommodation can remove the threat to the safety of others or enable the person to perform the essential functions of the job. This determination must be made on an individualized basis and be based on facts and sound medical judgment.

134 Cong. Rec. S2435 (daily ed. Mar. 17, 1988) (emphasis added). Moreover, in arguing that the President's veto should be sustained, a number of Senators stated their understanding that Harkin-Humphrey would require reasonable accommodation. Senator Hatch included in his list of objectionable features of the Civil Rights Restoration Act "the requirement to attempt to accommodate persons with infectious diseases, such as tuberculosis and AIDS." Id. at S2403. Senator Symms made the same point, arguing that "[t]he equality-of-result rather than equality-of-opportunity standards [in the Civil Rights Restoration Act] can lead to . . . the need to attempt to accommodate infectious persons . . . ." Id. at S2410.

Moreover, in addition to this direct evidence of congressional intent concerning the Harkin-Humphrey amendment, we also find illuminating the evidence that the 1978 drug and alcohol abuse amendment, on which Harkin-Humphrey is modeled,[27] was intended to require reasonable accommodation. During the Senate debate on Harkin-Humphrey, Senator Cranston observed that the drug and alcohol abuse amendment

> did not result in any basic change in the process under section 504 by which it is determined whether the individual claiming unlawful discrimination is handicapped and whether that individual is "otherwise qualified," taking into account -- as in the case of all other handicapped persons -- any reasonable accommodations

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27 See sponsors' colloquy, 134 Cong. Rec. S256-57 (daily ed. Jan. 28, 1988).

that should be made to enable him or her to perform the job satisfactorily.

134 Cong. Rec. S724 (daily ed. Feb. 4, 1988) (emphasis added).

The legislative history of the drug and alcohol abuse amendment supports Senator Cranston's assertion that "reasonable accommodation" was required under that amendment. That legislative history is clear that the amendment was designed to codify the existing "otherwise qualified" standard, as interpreted by the Attorney General and the Secretary of HEW, which included the "reasonable accommodation" requirement.[28] In explaining the amendment, one of its sponsors specifically cited the "reasonable accommodation" requirement:

> Regulations implementing sections 503 and 504 already address [the concerns of employers and others seeking the amendment]. They make clear that the protections of sections 503 and 504 only apply to otherwise qualified individuals. That means . . . that distinction on the basis of qualification is perfectly justifiable. Regulations implementing section 503 define "qualified handicapped individual" as a handicapped person who is capable of performing a particular job with reasonable accommodation to his or her handicap.[29]

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[28] 43 Op. Atty' Gen. No. 12, at 2 (1977) (section 504 does not "require unrealistic accommodations" for drug addicts or alcoholics); 42 Fed. Reg. 22676, 22678 (May 4, 1977) (promulgating "otherwise qualified" definition, which is identical to current definition and thus includes reasonable accommodation).

[29] 124 Cong. Rec. 30324 (1978) (statement of Sen. Hathaway) (emphasis added). The sponsors of the amendment believed that it "simply [made] explicit what prior interpret[ations] of the act -- including those of the Attorney General and the Secretary of Health, Education, and Welfare -- have found . . . ." Id. at 37510 (statement of Sen. Williams). They did not believe that a change in law was necessary, but they were willing to provide a clarification in order to "reassure employers that it is not the intent of Congress to require any employer to hire a person who is not qualified for the position or who cannot perform competently in his or her job." Id. at 30323. The amendment used an "otherwise qualified" formulation to clarify how existing law applied to drug and alcohol abusers. As explained by Senator Williams, "while the legislative history of the 1973 act, as authoritatively interpreted by the Attorney General, made clear that qualified individuals with conditions or histories of alcoholism or drug addiction were protected from discrimination by covered employers, this amendment codifies that intent." Id.

(continued...)

Our final reason for believing that Congress intended the Harkin-Humphrey amendment to preserve the "reasonable accommodation" requirement of existing law is that a contrary conclusion would entail overruling a specific holding of Arline. After holding that the plaintiff in Arline was a "handicapped individual," the Supreme Court remanded the case to the district court for the "otherwise qualified" determination, which the Court said should include "evaluat[ing], in light of [a series of medical findings], whether the employer could reasonably accommodate the employee under the established standards for that inquiry." 107 S. Ct. at 1131.

Any reading of the Harkin-Humphrey amendment that precluded reasonable accommodation would be inconsistent with that Arline holding. Applying Harkin-Humphrey without reasonable accommoda-

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29(...continued)
at 37509.

Senator Williams' reference to the Attorney General was to an opinion Attorney General Bell provided to HEW Secretary Califano a month before HEW's promulgation (on May 4, 1977) of its regulations implementing section 504. 43 Op. Att'y Gen. No. 12 (1977). While concluding that drug and alcohol abusers were "handicapped individuals" subject to the same protections under section 504 as were all other handicapped individuals, the Attorney General stressed the applicability of the "otherwise qualified" requirement:

> [O]ur conclusion that alcoholics and drug addicts are "handicapped individuals" for purposes of section 504 does not mean that such a person must be hired or permitted to participate in a federally assisted program if the manifestations of his condition prevent him from effectively performing the job in question or from participating adequately in the program. A person's behavior manifestations of a disability may also be such that his employment or participation would be unduly disruptive to others, and section 504 presumably would not require unrealistic accommodations in such a situation.

Id. at 2 (emphasis added). As Senator Williams noted (124 Cong. Rec. 30324 (1978)), Secretary Califano's statement accompanying issuance of the regulations agreed with the Attorney General's interpretation and his emphasis on the "otherwise qualified" requirement. 42 Fed. Reg. 22676, 22686 (May 4, 1977). The regulations issued by Secretary Califano included the "otherwise qualified" regulation requiring reasonable accommodation. Id. at 22678.

tion to an individual like the plaintiff in Arline would probably result in a finding that the individual is a direct threat to the health and safety of her students without any meaningful consideration of non-burdensome ways to alleviate the danger. Thus, under that reading, an individual with tuberculosis (or an HIV-infected individual) would receive less individualized scrutiny under the amendment than under Arline. However, it is clear that Congress did not intend to overrule Arline. Indeed, supporters of Harkin-Humphrey repeatedly and unequivocally spoke of codifying Arline and acting consistently with Arline, including specifically Arline's approach to "otherwise qualified" and "reasonable accommodation."[30] Only a single statement by Senator Humphrey is arguably somewhat to the contrary, and even this remark does not undermine our conclusion, or the overwhelming evidence of legislative intent on which it is based.[31] Senator Humphrey merely stated that the amendment must result in some change or it would have been "pointless." However, codifying a Supreme Court holding in a manner designed to reassure those infected with a contagious disease of the law's protection and employers of the law's limits has a point.

For the foregoing reasons, we conclude that implicit in Harkin-Humphrey's statement of the "otherwise qualified" standard for the contagious disease context is a "reasonable accommodation" requirement.[32] Accordingly, before determining that an HIV-infected employee is not an "individual with

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[30] E.g., 134 Cong. Rec. S2435 (daily ed. Mar. 17, 1988) (statement of Sen. Harkin); 134 Cong. Rec. S1739 (daily ed. Mar. 2, 1988) (statement of Sen. Harkin, concurred in by Sen. Kennedy and Sen. Weicker); 134 Cong. Rec. S725 (daily ed. Feb. 4, 1988) (statement of Sen. Cranston); 134 Cong. Rec. H560-61 (daily ed. Mar. 2, 1988) (statement of Rep. Coelho); id. at H567 (statement of Rep. Hawkins); id. at H571 (statement of Rep. Jeffords); id. at H574 (statement of Rep. Owens); id. at H575 (statement of Rep. Waxman); id. at H584 (statement of Rep. Edwards).

[31] 134 Cong. Rec. S970 (daily ed. Feb. 18, 1988) (statement of Sen. Humphrey) ("If the Humphrey-Harkin amendment had not resulted in some substantive change in the law, it would have been a pointless exercise. . . . [The amendment was not] intended merely to codify the status quo in this area. The language of these measures is quite clear, and post facto interpretations should not be construed to alter their actual intent or effect.").

[32] The American Law Division of the Library of Congress' Congressional Research Service has reached the same conclusion. CRS Report for Congress, Legal Implications of the Contagious Disease or Infections Amendment to the Civil Rights Restoration Act, S. 557 18-23 (March 14, 1988).

handicaps," an employer must first consider whether, consistent with the employer's existing personnel policies for the job in question, a reasonable accommodation would eliminate the health or safety threat or enable the employee to perform the duties of the job.

Arline's discussion of the HHS regulations' "reasonable accommodation" requirement presents a useful point of reference for considering what "reasonable accommodation" should be provided for HIV-infected individuals in the employment context. As noted by the Court, the HHS regulations provide that "[e]mployers have an affirmative obligation to make a reasonable accommodation for a handicapped employee. Although they are not required to find another job for an employee who is not qualified for the job he or she was doing, they cannot deny an employee alternative employment opportunities reasonably available under the employer's existing policies." 107 S. Ct. at 1131 n.19. However, "where reasonable accommodation does not overcome the effects of a person's handicap, or where reasonable accommodation causes undue hardship to the employer, failure to hire or promote the handicapped person will not be considered discrimination." 45 C.F.R., Part 84, App. A., p. 350 (1987).

While reasonable accommodation is part of the individualized factual inquiry and therefore difficult to discuss in the abstract, it clearly does not require allowing an HIV-infected individual to continue in a position where the infection poses a threat to others. This would appear to be the case with infected health care workers who are involved in invasive surgical procedures, and it may also be the case with respect to other infected health care workers or individuals employed in jobs that entail responsibility for the safety of others. Limited accommodations might be required if alternative employment is reasonably available under the employer's existing policies. For example, a surgeon in a teaching hospital might be restricted to teaching or other medical duties that do not involve participation in invasive surgical procedures, or a policeman might be reassigned to duties that do not involve a significant risk of a physical injury that would involve bloodshed. In contrast, given the evolving and uncertain state of knowledge concerning the effects of the AIDS virus on the central nervous system, it may not be possible, at least if the disease has sufficiently progressed, to make reasonable accommodation for positions, such as bus driver, airline pilot, or air traffic controller, that may allow very little flexibility in possible job assignment and where the risk of injury is great if the employer guesses wrongly and the infected person is not able to perform the duties of the job.

Conclusion

We have concluded, with respect to the non-employment context, that section 504 protects symptomatic and asymptomatic HIV-infected individuals against discrimination in any covered program or activity on the basis of any actual, past or perceived effect of HIV infection that substantially limits any major life activity -- so long as the HIV-infected individual is "otherwise qualified" to participate in the program or activity, as determined under the "otherwise qualified" standard set forth in Arline. We have further concluded that section 504 applies in substance in the same way in the employment context, since the statutory qualification set forth in the Civil Rights Restoration Act merely incorporates the Arline "otherwise qualified" standard for those individuals who are handicapped under the general provisions of section 504 by reason of a currently contagious disease or infection. The result is the same: subject to an employer making reasonable accommodation within the terms of his existing personnel policies, the symptomatic or asymptomatic HIV-infected individual is protected against discrimination if he or she is able to perform the duties of the job and does not constitute a direct threat to the health or safety of others.

Douglas W. Kmiec
Acting Assistant Attorney General
Office of Legal Counsel

Attachment

July 29, 1988

The Surgeon General of the
Public Health Service
Washington DC 20201

Douglas Kamiec, Esq.
Acting Assistant Attorney General
Office of Legal Counsel
Department of Justice
Washington, D.C.

Dear Mr. Kamiec:

I was pleased to be able to convey to you, at our meeting of July 20, 1988, our medical and public health concerns regarding discrimination and the current HIV epidemic. These concerns will be greatly affected by the extent to which HIV infected individuals understand themselves to be protected from discrimination on account of their infection.

Protection of persons with HIV infection from discrimination is an extremely critical public health necessity because of our limited tools in the fight against AIDS. At this time, we have no vaccine to protect against HIV infection and only one treatment which appears to extend the lives of some persons with AIDS but does not cure the disease. Consequently, the primary public health strategy is prevention of HIV transmission.

This strategy requires extensive counseling and testing for HIV infection. If counseling and testing are to work most effectively, individuals must have confidence that they will be protected fully from HIV related discrimination.

During our meeting you and members of your staff raised a number of perceptive questions concerning the nature of HIV infection including the pathogenesis of the virus and its modes of transmission. Your interest in the scientific aspects of HIV infection is welcome, since it is our belief that any legal opinion regarding HIV infection should accurately reflect scientific reality. As I sought to emphasize during our meeting, much has been learned about HIV infection that makes it inappropriate to think of it as composed of discrete conditions such as ARC or "full blown" AIDS. HIV infection is the starting point of a single disease which progresses through a variable range of stages. In addition to an acute flu-like illness, early stages of the disease may involve subclinical manifestations i.e., impairments and no visible signs of illness. The overwhelming

majority of infected persons exhibit detectable abnormalities of the immune system. Almost all, HIV infected persons will go on to develop more serious manifestations of the disease and our present knowledge suggests that all will die of HIV infection barring premature death from other causes.

Accordingly, from a purely scientific perspective, persons with HIV infection are clearly impaired. They are not comparable to an immune carrier of a contagious disease such as Hepatitis B. Like a person in the early stages of cancer, they may appear outwardly healthy but are in fact seriously ill. Regrettably, given the absence of any curative therapy for AIDS, a person with cancer currently has a much better chance of survival than an HIV infected individual.

Please do not hesitate to contact me if I can be of any further assistance to you in this matter.

Sincerely,

C. Everett Koop, M.D.
Surgeon General

BILL McCOLLUM
5TH DISTRICT, FLORIDA

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Congress of the United States
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Washington, DC 20515

1507 LONGWORTH HOUSE OFFICE BUILDING
WASHINGTON, DC 20515
(202) 225-2176

DISTRICT OFFICE:
SUITE 301
1801 LEE ROAD
WINTER PARK, FL 32789
(407) 645-3100

FROM LAKE COUNTY, TOLL FREE:
383-8541

To: Senate Republican Legislative Directors

From: Representative Bill McCollum

Re: A brief analysis of the Senate Committee draft report on the Americans with Disabilities Act of 1989.

The following is a synopsis of some of the critical issues of concern regarding the Senate report on the Americans with Disabilities Act of 1989.

DEFINITION

Under the report covering the ADA definition of disability, the term disability is held to include drug addiction and alcoholism. This could be a source of confusion as the bill states that an individual suffering from these conditions may still be held to the qualification standards of other employees.

On a more positive note, the report states that companies are not obliged to provide drug and alcohol rehabilitation programs under the ADA as part of making "reasonable accommodation," although companies are encouraged to do so.

Further, the report states that homosexuality is not to be considered a disability, thereby implying, though not explicitly stating, that other such sexual orientations - pedophilia - are not protected.

Another problem with the report language dealing with the definition of disability is that it is not clear whether voluntary conditions, i.e. obesity from overeating, would be covered under this bill.

EMPLOYMENT

Under the language dealing with employment, the phrase "essential functions" of the job remains undefined, beyond a statement saying that the tasks are "fundamental and not marginal." It is not clear what that means, nor is it clear who will decide what functions are essential. The employer, the employee, the courts? This needs to be clarified.

The report also states that the determination of when an individual with a disability represents a "direct threat" to the workplace must be determined on a case by case basis. Who will make such a determination?

The report goes on to say that the "employer must identify specific behavior on the part of an individual with a disability that would constitute an anticipated direct threat." Taken together with the bill, it is not clear if the employer need anticipate a direct threat or that a direct threat must be present.

Furthermore, the report states that the employer must demonstrate that the "person poses a significant risk to the safety of others or to property". A "significant risk" criterion is not the same as "direct threat" criterion. Which one is to apply? Do they mean the same thing in the context of this bill? This needs to be clarified. Additionally the report adds that an employer may not deny employment on the basis of his fears about the safety of the employee or higher rates of absenteeism. This would seem to contradict the "significant risk" language of the report and should be clarified.

The report includes the following: "The Committee wishes to make it clear that non-job related personal use items such as hearing aids and eyeglasses are not included in this provision." The use of the double negative in this statement is peculiar and should be clarified.

The report states that employers are obligated to make "reasonable accommodation" only for the known physical or mental limitations of a qualified individual. Therefore the obligation to accommodate would be triggered by a request on the part of the employee. However, the report then states that if an employee with a known disability is having difficulty on the job it would be "appropriate" for the employer to discuss accommodation with the employee. It is not clear if the employer is obligated to do so. Further, it seems that there is a possible "catch 22" situation for the employer since, under the bill, he is not permitted to inquire about disabilities.

Finally, the report states that when an employer has two equally well qualified applicants for a job, but one of them has a

disability, the employer is obliged to hire the individual with the disability. This does not take account of more subjective qualifications such as personality which may be important in determining eligibility for the job. If it is supposed to, this part of the report needs to be clarified. If not, this part of the bill is overly restrictive.

One last note: The report language on the defenses under this part of the bill needs to be clarified to make explicit the employers power to limit illegal drug use during non-working hours.

Also, the report in this section re-incorporates "anticipatory discrimination" language back into the bill, stating that such that the right to pursue litigation on that basis is available under the 1964 Civil Rights Act. It is not clear, however, that the Supreme Court case cited for this interpretation of the Civil Rights Act is applicable in cases involving disabilities. This needs to be more closely studied. Furthermore, an explanation of how anticipatory discrimination language would work in an employment context should be provided.

Public Accommodation by Private Entities

The report states that restaurant and theater owners may not oblige individuals in wheelchairs to be chaperoned as this would impose "additional requirements" on the individual with a disability. However, the report does not make it clear whether or not the terms of the ADA would be violated if a theater owner compelled persons in wheelchairs to sit close to fire exits for safety reasons.

The report states that entities need not make modifications that would "fundamentally alter" the nature of privileges, advantages and accommodations. The term "fundamentally alter" is never defined.

The report states that " filmmakers are encouraged to produce and distribute open captioned versions of films and theaters should have at least some pre-announced screenings of a captioned version of feature films." The "should" language suggests that theaters are obliged to offer such screenings, which would seem to be an "undue burden," while the "encouraged" language that precedes it seems to suggest that such presentations are optional. The report needs to clarify this problem.

The term "readily achievable" is used to define those circumstances in which a reasonable accommodation is obligatory. In other words only those reasonable accommodations that are "readily achievable" must be made. However, the report language then states that the "readily achievable standard only requires physical access that can be achieved without extensive restructuring or burdensome expense." This definition is far too broad and suggests that any cost short of bankruptcy is permissible.

The report uses the term "potential places of employment" in describing a place of public accommodation. However, unlike the bill, the report limits this only to new construction. This needs to be clarified.

The report states that if it is structurally impracticable to achieve full compliance with accessibility requirements under the ADA, other accommodations still should be made. It is not clear why an employer, if he cannot widen the door frames in his office to accommodate individuals in wheelchairs, must still make other accommodations that such individuals will not be able to get inside to use in any case.

Again, the report inserts back into the bill the right to sue if an individual believes that he or she is about to be discriminated against in contexts other than that of injunctive relief for new construction. This was to have been corrected under the Senate mark-up of the ADA.

Finally, the report fails to allow that money damages be granted only when discrimination has been determined to be willful and egregious. This should be corrected so that injunctive relief is made available but money damages are confined to specific circumstances.

* This report is designed only to cover some of the highlights of the Senate Committee report on the Americans with Disabilities Act in the areas of definitions, employment, and public accommodation by private entities. If you have questions about other aspects of the report or the Senate bill, please contact Mr. Donald Morrissey or Mr. James E. Geoffrey II of my office at 225-2176.

MEMO July 19, 1989

TO: Concerned Parties

FROM: Jill Ross Meltzer and Mark Buse

RE: Amendment to Section 5 or the American Disabilities Act, S.933, relating to Telecommunications Service for the Hearing Impaired

Attached you will find a copy of the draft amendment of Sen. McCain and Sen. Harkin to the telecommunications section of S.933, the American Disabilities Act. The proposal amends the Communications Act of 1934 to require telecommunications services be made available to individuals with hearing and speech impairments.

Please call Jill Ross Meltzer at 4-2235 with any comments as soon as possible.

DRAFT July 19,1989

S.933
AMENDMENT intended to be proposed by Mr. McCain

Viz: Strike Title V and insert in Lieu thereof the following:

TITLE V---TELECOMMUNICATIONS SERVICES

SEC.501 TELECOMMUNICATIONS SERVICES

Title II of the Communications Act of 1934(47 U.S.C. 201 et seq.) is amended by adding at the end thereof the following new section:

Sec.225 TELECOMMUNICATIONS SERVICES FOR HEARING AND SPEECH IMPAIRED INDIVIDUALS

(A) General Provisions --

(1) In order to increase the utility of the Nation's telephone system, the Commission shall ensure that communications services are available, so far as possible and in the most efficient manner, to hearing and speech impaired individuals in the United States.

(2) The remedies, procedures, rights and obligations set forth in this Act shall apply to this section, except that any reference to "common carrier" or "carrier" in the Act shall be considered a reference to a carrier covered by this section.

(B) Definitions--As used in this section:

(1) The term "common carrier" or "carrier" includes those carriers engaged in interstate communications as defined in section 3(h) and those carriers engaged in intrastate communications as referred to in this Act and defined by the Commission.

(2) The term "Telecommunications Relay Services" means services that provide the ability to communicate by wire or radio between persons who have a hearing or speech impairment and other persons, in a manner that is functionally equivalent to the ability of nonhearing and speech impaired persons to communicate using voicee communications services by wire or radio, including services that enable two-way communications between an individual who uses a TDD or other nonvoice terminal device and an individual who does not use such a device.

(3) The term "TDD" means a Telecommunications Device for the Deaf, a machine that employs graphic communications in the transmission of coded signals through a telecommunications system.

(C) Obligations of Interstate and Intraste Carriers---

(1) It shall be the duty of every common carrier engaged in interstate or intrastate communication by wire or radio, as part of its common carrier obligation, to provide individually or through designees or in concert with other carriers, not later than two years after the date of enactment of this section, interstate or intrastate telecommunications relay services.

(D) Regulations---

(1) The Commission shall, not later than one year after the enactment of this section, issue regulations pursuant to this section that---

(a) establish functional requirements, guidelines and operations procedures for telecommunications relay services;

(b) set forth standards establishing guidelines for functional equivalency with respect to telecommunications relay services as defined in section 225 (b)(2);

(c) require that telecommunications relay services shall operate 24 hours per day on each day of the year;

(d) require that hearing and speech impaired users of such services pay rates no greater than those rates paid for functionally equivalent voice communications services with respect to time and distance;

(e) require that relay operators not refuse or limit the length of calls;

(f) prohibit the disclosure of the content of any relayed conversation and the keeping of records of the content of such conversations beyond the duration of the conversation;

(g) prohibit the intentional alteration of a relayed conversation.

(2) The Commission shall ensure that regulations adopted to implement this section encourage the use of currently available technology and do not discourage or impair the development of improved technology.

(3) The Commission shall issue regulations governing the jurisdictional separation of costs for the services provided pursuant to this section. Any rules issued by the Commission shall generally provide that costs caused by interstate telecommunications relay services shall be recovered from the interstate jurisdiction and costs caused by intrastate telecommunications relay services shall be recovered form the intrastate jurisdiciton. To the extent interstate and intrastate carriers provide telecommunications relay services jointly, the procedures established in Section 410 shall be followed, as applicable.

(4) Where the Commission finds that full compliance with the requirements of this section would unduly burden a particular carrier or carriers, the Commission may extend the date for full compliance by the particular carrier or carriers for a period not to exceed one additional year.

(E) Enforcement---

(1) The Commission shall enforce the provisions of this section provided, however, that nothing in this section shall be construed to give the Commission jurisdiction over intrastate telecommunications relay services in any case where a State Commission , as defined in Section 3(t), has been certified by the Commission that it has implemented a program that makes available to hearing or speech impaired individuals either directly, or through designees or through regulation of intrastate carriers, intrastate telecommunications relay services in that State in a manner which meets the requlatory standards established by the Commission in section 225(d).

(2) The Commission may suspend or revoke such certification if, after notice and opportunity for hearing, the Commission determines that certification is no longer warranted.

(3) The Commission shall resolve , by final order, complaints alleging a violation of this section within 60 days, from date of filing.

(4) Referral for State proceedings---

(a) Whenever a complaint alleges a violation of this section with respect to intrastate service and---

(1) the State Commission has certified to the Commission that it has implemented a program as described in section 225(e)(1) above;

the Commission shall refer such complaint to that certified State Commission.

(b) The Commission, after that referral is made, shall take no further action with respect to such complaint unless---

(1) the certified State Commission has failed to take final action on such complaint--

(a) with in 60 days after the complaint is filed with the State , or

(b) within the applicable period prescribed for such final action in such rules and regulations of the State, if the prescribed period does not extend beyond 90 days after the filing of such complaint; or

(2) the Commission determines that the certified State Commission no longer qualifies for certification under this section.

(f) Committee---insert language on establishing a committee which will include individuals with hearing and speech impairments whose function will be to advise the Commission.

(f) Conforming Amendment---Section2(b) of the Communications Act of 1934 (47 U.S.C. 152(b) as amended, is amended by striking "section 224" and inserting in lieu thereof "sections 224 and 225".

BILL McCOLLUM
5TH DISTRICT, FLORIDA

VICE CHAIRMAN
REPUBLICAN CONFERENCE

COMMITTEE ON
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Congress of the United States
House of Representatives
Washington, DC 20515

1507 LONGWORTH HOUSE OFFICE BUILDING
WASHINGTON, DC 20515
(202) 225-2176

DISTRICT OFFICE:
SUITE 301
1801 LEE ROAD
WINTER PARK, FL 32789
(407) 645-3100

FROM LAKE COUNTY, TOLL FREE:
383-8541

MEMO
To: Legislative Directors
From: Bill McCollum, Vice Chairman, Republican Conference
Re: Americans with Disabilities Act,S. 933

1. This bill is on a fast track in the Senate. The Subcommittee on the Handicapped was supposed to mark the bill last week, but postponed the mark by two week pending negotiations with the White House.

2. The negotiations are being conducted on behalf of the White House by Bill Roper (456-6515). While this bill covers a wide range of issues and has been referred to four committees on the House side, only one committee has jurisdiction in the Senate. Consequently, the negotiations on this bill are being conducted with only a few Senators, despite the fact that the bill covers issues of much broader substance than is covered by the Committee of jurisdiction.

3. The enclosed kit contains an action kit that has been distributed to all Members of the House Republican Conference, a copy of a proposed but not introduced substitute by Senator Hatch, two excellent summaries of the bill's problems by the Disability Rights Working Group, several letters by business organizations on this bill, and a description of a substitute package that will be introduced in the House.

S.

TO ESTABLISH A CLEAR AND COMPREHENSIVE PROHIBITION OF DISCRIMINATION ON THE BASIS OF HANDICAP

- Sen. Hatch

Section 1. Short Title

This Act may be cited as the "Equal Opportunity Act of 1989."

Section 2. Findings and Purposes

(a) Findings. -- Congress finds that --

(1) some 36,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;

(2) the Nation's proper goal regarding persons with disabilities is to assure equality of opportunity; and

(3) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis, to pursue those opportunities available to others in our free society, and imposes significant costs on the United States in unnecessary expenses resulting from dependency and nonproductivity.

(b) Purpose. -

It is the purpose of this Act to provide a prohibition of discrimination against persons with disabilities in employment, public accommodations, state and local

government agencies, certain transportation services; and the broadcast of television videotapes.

Section 3. Definitions.

As used in this Act. -

(1) "Individual with handicaps." -

(A) In General. - The term "individual with handicaps" includes any individual who -

(i) has a physical or mental impairment which substantially limits one or more of such person's major life activities;

(ii) has a record of such an impairment; or

(iii) is regarded as having such an impairment.

(B) The term "individual with handicaps" does not include-

(i) an individual who currently, illegally uses or is addicted to a controlled substance as defined in section 102 of the Controlled Substances Act, 21 U.S.C. Section 802.

(ii) an individual who is an alcoholic or who is addicted to or dependent upon lawfully prescribed drugs if such individual's current use of alcohol or drugs prevents such individual from performing the duties of the job in question or

performing the requirements of the program or activity in question, or whose employment or participation in the program or activity, by reason of such current alcohol or drug use, would constitute a direct threat to the property or the safety of others.

(iii) an individual who has a currently contagious disease or infection, and who, by reason of such disease or infection, would constitute a direct threat to the health or safety of other individuals or who, by reason of the currently contagious disease or infection, is unable to perform the duties of the job or perform the requirements of the program or activity; and

(iv) an individual solely because that individual is a transvestite.

(2) "Qualified individual with handicaps." - The term "qualified individual with handicaps" means -

(A) with respect to employment, individuals with handicaps who, with or without reasonable accommodation, can perform the essential functions of the particular job in question; and

(B) with respect to any other program or activity, an individual with handicaps who, with or without reasonable accommodation, meets the essential eligibility

requirements for participation in, or receipt of benefits from, that program or activity.

Section 4. Construction

(a) Nondiscrimination Provisions. - Nothing in this Act shall be construed to affect or change the nondiscrimination provisions contained in title V of the Rehabilitation Act of 1973 (29 U.S.C. 790 et seq.), and any right, remedy, obligation, or responsibility under such Act, or to affect or change regulations issued by Federal agencies pursuant to title V of such Act.

(b) Controlled Substances. - Nothing in this Act prohibits any conduct against an individual because -

(1) such individual has been convicted by any court of competent jurisdiction for the illegal manufacture or distribution of a controlled substance as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802); or

(2) of the sexual orientation of such individual.

(c) Rehabilitation Act or Air Carriers. - Nothing in this Act shall be construed to apply to -

(1) any program or activity that is subject to sections 503 or 504 of the Rehabilitation Act of 1973 (29 U.S.C. 793 and 794); or

(2) to any air carrier that is subject to the Air Carrier Access Act of 1986 (49 U.S.C. 1374(c)).

(d) Government Limitation. - Nothing in this Act shall be construed to apply to any entity solely because it is licensed

or regulated by, or receives assistance from, any agency or department of any State or subdivision of any State.

(e) Coexistence With Other Laws. - Nothing in this Act shall be construed to invalidate or limit any other Federal Law or any law of a State or political subdivision of a State or jurisdiction that provides greater protection of rights for individuals with handicaps.

Section 5. Exclusion From Coverage

The provisions of this Act shall not apply to any public or private entity otherwise covered by this Act that does not employ 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year.

Section 6. Prohibition Against Retaliation

No employer, employment agency, labor organization, joint labor-management committee, place of public accommodation, state or local government agency, entity engaged in providing transportation services, or broadcaster of videotapes covered by this Act shall discriminate against any individual because--

(1) such individual has opposed any act or practice made unlawful by this Act; or

(2) such individual has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this Act.

Section 7. Prohibition of Discrimination in Employment.

(a) Definitions. - As used in this section -

(1) Commission. - The term "commission" means the Employment Opportunity Commission established by section f the Civil Rights Act of 1964 (42 U.S.C. 2000e-4).

(2) Employer. -

(A) In General. - The term "employer" means a .dual engaged in an industry affecting commerce who has 25 :e employees for each working day in each of 20 or more lar weeks in the current or preceding calendar year, and ;ent of such an individual.

(B) Limitation. - Such term does not include -

(i) the United States, or a corporation wholly owned by the Government of the United States;

(ii) an Indian tribe; or

(iii) a bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of the Internal Revenue Code of 1986.

(3) Labor Organization. - The terms "labor :ation," "employment agency," "employee," "commerce," :ry affecting commerce," and "State" shall have the same ; as they have in section 701 of the Civil Rights Act of 2 U.S.C. 2000e).

) Prohibition Against Discrimination. - No employer, rganization, employment agency or joint labor-management

committee shall discriminate against any otherwise qualified individual with handicaps, solely because of his or her handicap, with respect to -

(1) hiring,

(2) discharge,

(3) compensation, or

(4) the terms, conditions, or privileges of employment.

(c) Enforcement. -

(1) Aggrieved individual. - The remedies and procedures set forth in sections 706, 709, and 710 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5, 2000e-8, and 2000e-9) shall be available to any individual aggrieved for any violation of this Act.

(2) Enforcement of Act. - The remedies and procedures of sections 706 and 707 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5 and 2000e-6) shall be available to the Attorney General or to the Commission as prescribed by law to enforce the provisions of this Act.

(d) Regulations. -

(1) Issuance of Regulations. - The Commission shall issue such rules, regulations, orders, and instructions as the Commission considers necessary and appropriate to carry out its responsibilities under this section, and section 6 as it applies to entities covered by this section.

(2) Issuance Date. - Final regulations described under paragraph (1) shall be issued no later than 10 months after the date of enactment of this Act.

H(e) Posting Notices. -

(1) Posting Requirement. - Every employer, employment agency, and labor organization shall post and keep posted, in conspicuous places upon its premises where notices to employees, applicants for employment, and members are customarily posted, a notice to be prepared or approved by the Commission setting forth excerpts from, or summaries of, the pertinent provisions of this section and information pertinent to the filing of a complaint.

(2) Fine. - A willful violation of this section shall be punishable by a fine of not more than $100 for each separate offense.

(f) Exemption. - Nothing in this Act shall be construed to prohibit an entity, with a principal purpose of assisting a particular class of individuals with handicaps from establishing a publicly announced policy of giving preference in hiring to individuals who are members of that class.

(g) Aliens outside of State. - This section shall not apply to any employer with respect to the employment of aliens outside of any State.

Section 8. Prohibition Against Discrimination in Public Accommodations.

(a) Definitions. - As used in this Section -

(1) Affect Commerce. - The operations of an establishment "affect commerce" if the establishment meets the criteria in section 201(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000a(c)).

(2) Place of Public Accommodation. - The term "place of public accommodation" means those establishments listed in sections 201(b)(1)-(4) and excludes those listed in section 201(e) of the Civil Rights Act of 1964 (42 U.S.C. 2000a(b)(1)-(4) and (e)).

(b) Prohibition on Discrimination. - No otherwise qualified individual with handicaps shall be subject to discrimination, solely on the basis of his or her handicaps, in any place of public accommodation whose operations affect commerce.

(c) Enforcement. -

(1) Attorney General. - The remedies and procedures of sections 206 and 204(a) of the Civil Rights Act of 1964, (42 U.S.C. 2000a-5 and 2000a-3(a)), shall be available to the Attorney General to enforce the provisions of this section.

(2) Aggrieved Individual. - The remedies and procedures of section 204 of the Civil Rights Act of 1964, (42 U.S.C. 2000a-3), shall be available to a individual aggrieved under this section.

(3) District Courts. - The district courts of the Untied States shall have jurisdiction of proceedings instituted pursuant to this section and shall exercise the same without

regard to whether the aggrieved party shall have exhausted any administrative or other remedies that may be provided by law.

(d) Regulations. -

(1) Issuance of Regulations. - The Attorney General shall issue such regulations as the Attorney General considers necessary to effectuate this section, and section 6 as it applies to entities covered by this section.

(2) Issuance Date. - Final regulations described in paragraph (1) shall be issued no later than 10 months after the date of enactment of this Act.

Section 9. Prohibition Against Discrimination in State and Local Government.

(a) In General. - No otherwise qualified individual with handicaps shall be subject to discrimination, solely on the basis of his or her handicap, by any agency or department of any State or subdivision of any State.

(b) Regulations and Enforcement. -

(1) Designation of Agencies. - Consistent with this Act, the President shall designate Federal agencies, that have a regulation issued under section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), to issue regulations applicable to State and local government agencies or departments to effectuate this section, including procedures for the receipt of complaints of violations of this section, and section 6 as it applies to entities covered by this section, the

conciliation of such complaints, and the referral of these complaints in which conciliation fails to the Attorney General.

(2) Issuance Date. - The final regulations described in paragraph (1) shall be issued no later than 10 months after the date of enactment of this Act.

(3) Equitable Relief. - The Attorney General may, on referral of a complaint from a Federal agency, initiate a civil action for injunctive and other appropriate equitable relief.

(4) Enforcement Provisions. - The remedies and procedures of section 204(a) and (b) of the Civil Rights Act of 1964 (42 U.S.C. 2000a-3(a) and (b)), shall be available to -

(A) a individual aggrieved under this section; and,

(B) to the Attorney General with respect to intervention in a civil action initiated under this subsection.

(5) Jurisdiction. - The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section, and shall exercise such jurisdiction without regard to whether the aggrieved party shall have exhausted any administrative or other remedies that may be provided by law.

Section 10. Prohibition Against Discrimination in Transportation Services.

(a) In General. - No otherwise qualified individual with handicaps shall be subject to discrimination, solely on the basis of his or her handicap, in any services offered to the

public for the transportation of individuals by any agency or department of any State or subdivision of any State.

(b) Enforcement. -

(1) Secretary of Transportation. - The Secretary of transportation -

(A) shall investigate complaints of violations of this section;

(B) shall seek conciliation of such complaints; and

(C) may refer complaints in which such conciliation fails to the Attorney General.

(2) Attorney General. - The Attorney General may, on referral of complaint from the Secretary of Transportation, initiate a civil action for injunctive and other appropriate equitable relief.

(3) Remedies and Procedures. - The remedies and procedures of section 204(a) and (b) of the Civil Rights Act of 1964, (42 U.S.C. 2000a-3 (a) and (b)), shall be available to -

(A) an individual aggrieved under this section; and

(B) the Attorney General with respect to his or her intervention in a civil action initiated under this subsection.

(4) District Court. - The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section and shall exercise such authority

without regard to whether the aggrieved party shall have exhausted any administrative or other remedies that may be provided by law.

(c) Regulations. -

(1) Issuance of Regulations. - The Secretary of Transportation shall issue such regulations as the Secretary considers necessary to effectuate this section, and section 6 as it applies to entities covered by this section.

(2) Issuance Date. - The final regulations described under paragraph (1) shall be issued no later than 10 months after the date of enactment of this Act.

Section 11. Television Broadcasters.

(a) Closed Captions. - Television stations that broadcast videotape programming or advertising shall do so with closed captions, provided that no television station need undertake an undue financial and administrative burden to do so.

(b) Enforcement. -

(1) Secretary of Commerce. - The Secretary of Commerce shall -

(A) investigate complaints of violations of this section;

(B) shall seek conciliation of such complaints; and

(C) may refer complaints in which conciliation fails to the Attorney General.

(2) Attorney General. - The Attorney General may, on referral of a complaint, initiate a civil action for injunctive and other appropriate equitable relief.

(3) Remedies and Procedures. - The remedies and procedures of section 204(a) and (b) of the Civil Rights Act of 1964 (42 U.S.C. 2000a-3(a) and (b)), shall be available to -

(A) an individual aggrieved under this section; and

(B) the Attorney General with respect to intervention in a civil action initiated under this subsection.

(4) District Courts. - The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section, and shall exercise such jurisdiction without regard to whether the aggrieved party shall have exhausted any administrative or other remedies that may be provided by law.

(c) Regulations. -

(1) Issuance of Regulations. - The Secretary of Commerce shall issue regulations to effectuate this section, and section 6 as it applies to entities covered by this section.

(2) Issuance Date. - The final regulations described under paragraph (1) shall be issued no later than 10 months after the date of enactment of this Act.

Section 12. Authorization of Appropriations.

There are authorized to be appropriated such sums as may be necessary to carry out the provisions of this Act.

Section 13. Effective Date.

Except as otherwise specified, this Act shall become effective 1 year after the date of its enactment.

National Association
of Manufacturers

ALEXANDER B. TROWBRIDGE
President

July 5, 1989

Honorable Bill McCollum
U.S. House of Representatives
1507 LHOB
Washington, DC 20515

Dear Mr. McCollum:

The National Association of Manufacturers supports many of the concepts underlying H.R. 2273, the Americans with Disabilities Act (ADA), but strongly opposes the legislation as introduced May 9. As a result, NAM and others are actively involved in discussions with representatives of the disability community to fashion legislation that all can embrace.

On the basis of policy adopted by our board of directors, NAM joins the Administration and sponsors of H.R. 2273 in seeking to eliminate discrimination against those with disabilities. We recognize there are gaps in current law and, as a matter of equity, the protections afforded to other protected groups should be extended to the disabled. As a matter of economic reality — demographic trends and shrinking labor markets — barriers that limit their full participation in mainstream American life also deny the nation the valuable contributions their talents can offer.

The ADA, however, is not a simple extension of current civil rights law but a complex set of requirements lifted from various statutes and regulations that are sometimes undefined, frequently ambiguous and, in some instances, in conflict with other requirements, e.g., for drug-free workplaces. The multiple remedies provided, including direct access to jury trials and punitive and compensatory damages, are in excess of those afforded to other protected classes. This would appear to encourage increased litigation rather than conciliation. Employers and providers of services would face numerous uncertainties in attempts to accommodate the disabled and be liable not only for alleged acts of discrimination, but also for anticipated discrimination — whether or not intentional.

NAM and a coalition of associations and companies will continue to work with Congressional leadership, the Administration and representatives of the disability community. Our objective is meaningful, workable legislation that responds to the legitimate needs of the disabled without imposing unreasonable burdens on the economy. NAM is committed to that end. However, absent some accommodation to our concerns, particularly concerning remedies, we are equally committed to seeking defeat of H.R. 2273. That is not a course of action we would relish, but as currently drafted, the bill is totally unacceptable.

Sincerely,

ABT

1331 Pennsylvania Avenue, NW
Suite 1500 - North Lobby
Washington, DC 20004-1703
(202) 637-3012
FAX: (202) 637-3182

The Access 2000 Proposal

Among the options and alternatives available to the Americans with Disabilities Act of 1989 (ADA, S.933) is a proposal currently being drafted by Representative Bill McCollum (R-FL5) called Access 2000.

This proposal would, in effect, allow the grassroots business groups and organizations representing individuals with disabilities to directly affect the nature and composition of "reasonable accommodation" regulations on a state by state basis. In so doing this proposal would effectively cut out of the process those groups that have no direct vested interest in disabilities rights legislation, groups that have, in fact, become intimately involved in the drafting of the ADA.

Under Access 2000, the Secretary of Health and Human Services would be directed to draw up guidelines for the states to follow in creating their own "reasonable accommodation" regulations. After the gudelines are published, each state would be expected to submit to HHS its own proposed regulations, implementation of which would have to be accomplished by the year 2000 at the latest. States that fail to submit a plan for approval, or that submit a plan that does not meet HHS guidelines, would have certain Federal funds witheld untill such time as an acceptable plan has been submitted. After that, each state would be held responsible for implementing their plan, and for assuring that such a plan is in fact implemented by the year 2000.

Needless to say, this plan not only allows interested groups to participate almost directly in the drafting and implementation process, but it also allows the states to draft regulations that meet the specific needs of their disabled communities in ways that would be the least costly to their business communities.

DISABILITY RIGHTS WORKING GROUP

Working Paper #1

Concerns with the Americans With Disabilities Act

INTRODUCTION

The Americans with Disabilities Act, introduced on May 9, 1989, is comprehensive legislation whose expressed objective is to extend the same protections against discrimination enjoyed by other protected groups to those with disabilities.

Though supportive of many of the concepts embodied in the ADA, the Disability Rights Working Group -- a coalition of businesses and trade associations -- is opposed to the ADA in its present form. Discussions have been held with representatives of the disability community, Congress and the Administration in an effort to fashion legislation we can all embrace. However, unless changes are made, particularly in the area of remedies, the Group will seek to defeat S. 933/H.R. 2273.

CONCERNS WITH LEGISLATION

Listed below are summaries highlighting some of the Group's concerns with the ADA, all of which have been communicated to the parties. There are two levels of concern with the legislation: first, the issues relating to enforcement and remedies; and second, all others. We have made it clear that resolution of the former is absolutely essential to further negotiation, without which the Group will seek defeat of the bills. That should not, however, be interpreted to mean that resolving the threshold concerns alone would be acceptable.

THRESHOLD ISSUES

Enforcement/Remedies. In addition to the remedies, administrative procedures and defenses available under Title VII of the Civil Rights Act of 1964 -- for which there is an extensive body of law and successful experience regarding cases alleging discrimination based on race, sex, religion and national origin -- the ADA, in §205, provides a second, separate track of enforcement that would permit a jury trial, and punitive and compensatory damages, *i.e.*, pain and suffering. The second track must eliminated.

Anticipatory Discrimination. Section 205 of the ADA would also provide relief to individuals who believe they "are about to be" discriminated against. Such speculative complaints and attendant litigation are not permitted in any other civil rights in employment legislation and should be eliminated from the ADA.

GENERIC ISSUES

Enforcement Duplication/Consistency with Rehabilitation Act. A significant number of employers are currently subject to Sections 503 and/or 504 of the Rehabilitation Act of 1973, as amended, that prohibit discrimination against persons with disabilities. The ADA would impose additional, in some cases, conflicting obligations on these employers. The ADA is silent as to situations where employers are faced with inconsistent standards and duplicative enforcement by various federal agencies. Compliance with Section 503 or 504 standards should be deemed to be in compliance with the ADA.

Failure versus Refusal to Act. The lack of distinction between intentional and unintentional discrimination will penalize employers for inadvertent errors in their attempts to abide by new, affirmative obligations imposed by the ADA. Discrimination should be defined as "refusal" or "willful failure" to act.

Reasonable Accommodation and Undue Burden. As defined in §1, there is no limitation on the lengths to which one must go to provide reasonable accommodation, though it is limited in §101 (b) (Defenses) as not requiring an "undue burden," which itself is undefined. In the absence of the definition, does this connote that "undue burden" means anything that threatens a firm's existence? Further, under §202(b)(2), it would be discriminatory not to hire an individual on the basis of the need for reasonable accommodation, not limited in this context by a defense of "undue burden." Thus, an employer could not offer the defense of undue burden in response to an allegation of refusal of hire because on the need for reasonable accommodation. In order

that employers and others understand the bounds of their obligations, reasonable accommodation should be defined not to require fundamental alterations or result in undue financial or administrative burdens and include a definition of "undue burden." Codification of relevant Section 504 regulations and additional information regarding obligations would provide needed guidance.

Incentives. While it is argued that, as a civil rights law, the costs attendant to compliance with the ADA are irrelevant, no other civil rights statute requires a private employer, who is not a federal contractor or grantee, to expend substantial resources on affirmatively accommodating a protected class. In some instances, the costs will be significant and burdensome, particularly on smaller businesses. As introduced, the ADA contains no incentive to encourage and assist employers to make expenditures to increase opportunities for individuals with disabilities. The tax deduction of $35,000/year permitted under §190 of the Internal Revenue Code for removal of achitectural barriers should be increased and expanded to defray the costs incurred in providing reasonable accommodation or auxiliary aids and services that would be required by the ADA.

TITLE I – GENERAL PROHIBITIONS

Drug/Alcohol Abuse. The bill, in §101(b)(2)(A), appears to limit an employer's ability to adopt and implement a drug-free workplace policy by protecting current abusers of alcohol/illegal substances except where it can be demonstrated that such use consitutes a direct threat to property and/or safety. In view of federal and Congressional policy on drug-free workplaces, this provision should be revised to eliminate current contradictions, to clarify that nothing in the ADA is intended to protect current abusers, and to protect the right of employers to implement "zero-tolerance" policies concerning substance abuse.

Overlap Between Titles I and II. It is unclear what additional burdens are imposed on employers in Title I which are not included in Title II which governs the employment relationship. As currently constructed, drafters of the ADA have lifted regulations implementing Section 504 (which are targeted to federal grant recpients) and simply added the term "job" so that they now would apply to employment. In doing so, new, broad and ambiguous terms are used that have no historical interpretation. When, for example, is one job considered "as effective as" another? The term "job" should be deleted wherever it appears in Title I and it should be made clear that employment discrimination is controlled exclusively by Title II.

Discrimination by Assistance. The ADA would hold an employer or other entity liable if the recipient of its charity or assistance discriminates on the basis of disability, whether or not there is knowledge of such discrimination. Section 101(a)(1)(E) should be amended to reflect that such act is illegal only where the provider knows of the discrimination.

Discrimination Based on Association. The ADA would make it illegal to discriminate against an individual because of the "relationship to, or association of, that individual or entity with another individual with a disability." This is unparalled in civil rights law and will invite frivolous lawsuits requiring employers to prove a negative, *i.e.*, that they weren't aware of the associaiton. Section 101(a)(5) should be deleted.

Discrimination in Benefits. As drafted, Title I creates incredible new liabilities for employers if they provide disabled persons with a benefit which is "less effective than" or "is different or separate" from that provided to others (*e.g.*, §101(a)(1)(C) & (D)). Group health insurance benefits, which are offered under the same terms and conditions to all employees, may still be "less effective" or "separate or different" for a person with disabilities. Employers should only be obligated to offer the same benefits package to all employees, whether or not they are disabled. To require otherwise, *e.g.*, provide specific medical coverage or purchase medical insurance with pre-existing condition waivers, would be prohibitively expensive and result in insurance companies being unable to provide and/or underwrite group health policies.

Good Faith Efforts. Despite their good faith efforts, employers will be placed in a "Catch 22" position by the conflicting requirements of §101(a)(1)(d) -- provide "different or separate" programs/activities that are "as effective as [those] provided to others" -- and §101(a)(3) -- a disabled person "shall not be denied the opportunity to participate in such programs or activities that are not separate or different." There should be recognition in the ADA of employer good faith efforts to make accommodations to those with disabilities. It is a well recognized concept under current civil rights law and should be incorporated in the ADA.

Consistency with Existing Law. Section 101(a)(4) seems to adopt the adverse impact theory for proving discrimination against persons with disabilities. It is not clear whether the authors intend to follow or overturn *Alexander v. Choate* as it relates to application of the adverse impact theory of discrimination. The Committee Report should indicate the intent of authors to follow *Choate*, in which Supreme Court Justice Marshall discussed the appropriate application of adverse impact theory.

Defenses. The inclusion in Title I of defenses would seem to limit the defenses that would otherwise be available under the Act. There is a adequate body of law under the Civil Rights and Rehabilitation Acts concerning the defenses available to an employer in cases of discrimination and §101(b)(1) should be deleted. Title II should be amended to provide that the defenses, as well as the procedures and remedies, of the Civil Rights Act of 1964 apply in actions brought under the ADA.

TITLE II – EMPLOYMENT

Coverage. The ADA imposes substantial new burdens on employers, particularly for smaller employers. Coverage under Title II should be phased-in, as it was with the Civil Rights Act of 1964, over a five-year period with the threshold starting at 100 employees the first year and dropping each year. This same approach should be employed with regard to Title IV to provide a reasonable time to make changes to physical and procedural barriers.

Discrimination. The definition of discrimination in §202(a) is inconsistent with that in Section 504. To conform the ADA, an employment action is not discriminatory against an "otherwise" qualified individual unless it is "solely" based on an individual's disability. The term "solely" appears in Section 504 itself. Its absence in the ADA will be interpreted by the courts as a deliberate change in the law.

Job Applications. Section 202(a) uses a new term, "job application procedures," which differs from the language found in regulations issued under Section 504 concerning the application process, "processing applications for employment." Absent some specific reason for changing the language of Section 504 regulations, this raises questions about whether it will require something other than the Rehabilitation Act. This is particularly important because under Section 503, employers are required to follow certain procedures that permit an applicant with a disability to identify themself to the employer and to discuss the possible need for an accommodation. The new wording suggests that the ADA might prohibit or limit these same procedures.

Selection Criteria. Section 202(b) goes beyond Section 504 regulations by limiting an employer's use of qualification standards, tests, etc., that "identify" individuals with disabilities, such as physicals, even if the identification doesn't lead to an adverse employment decision. The word "identify" must be deleted. Use existing Section 504 language to permit use of selection criteria but insure that the criteria don't discriminate against individuals solely on the basis of their disability unless the criteria are job-related.

Notice. Section 203 requires notices to be "posted." This is somewhat problematic, for example, for a vision impaired person. The requirement that notice be provided in accessible formats would allow flexibility to use the best means available.

TITLE IV – PUBLIC ACCOMMODATIONS AND SERVICES OPERATED BY PRIVATE ENTERPRISES

Public Accommodations. As defined in §401(1)(A)(II), a public accommodation includes "potential places of employment." Since there is no limitation based on employment size in Title IV, the definition would extend almost universal coverage to the requirement of accessibility. As with Title II, the scope should be phased-in consistent with the scope of the Civil Rights Act and the ADA as introduced in the 100th Congress.

Readily Achievable. Section 402(b)(4)(A) & (B) introduces a new and undefined term not found in existing law, "readily achievable." A definition of readily achievable should be added to §401.

Retrofitting Existing Structures. Under §402(b)(5), there is no threshold as to when an existing structure must be retrofitted, a process -- limited only by structural impractability -- that is prohibitively expensive

(202) 225-2176

Donald J. Morrissey

Honorable Bill McCollom, (R-FL)
1507 Longworth HOB
Washington, D. C. 20515

IOWA ASSOCIATION OF BUSINESS AND INDUSTRY
431 E. LOCUST DES MOINES, IA 50309-1900 515/244-6149 • Iowa Watts 800/383-4224

FYI
DM
6/30

July 5, 1989

TO: ABI Human Rights and Employment Practices Committee

FROM: D. G. Hauser DM

United States Representative Bill McCollum (R-Florida) has called our attention to S.933/HR 2273, the so called Americans with Disabilities Act of 1989. United States Senator Tom Harkin (D-Iowa) and Congressman Tony Coehlo have introduced the bills in their respective chambers.

On the reverse side is a May 23 one-page summary of the major problems Congressmen McCollum sees with this proposal (I can provide you with a copy of this 30-page bill if desired).

After review of the major problem summary, I think you will agree there is cause for alarm. Among some of those causes for alarm is the possibility that the ADA actually would encourage individuals to pursue litigation. A number of the enforcement provisions of the bill, combined with the fact that the ADA's Title II dealing with employment permits an individual to bypass standard EEOC administrative procedures and go straight to litigation, could be overly harsh and might be an incentive to some individuals to pursue frivolous court action. These sections need reworking.

If you agree that this proposal would be damaging, perhaps you might wish to initiate a letter to Senator Harkin raising those concerns that you might have about the proposal.

Since Congressmen Bill McCollum is attempting to moderate the proposal, you also might wish to communicate with him expressing your concerns.

Senator Harkin's address is United States Senate, Washington DC, 20510. Representative McCollum's address is 1507 Longworth HOB, Washington, DC, 20515.

Call me if you have questions. Please provide me with a copy of any written communication you might initiate.

tc

Enclosure

(OVER)

May 23, 1989

AMERICANS WITH DISABILITIES ACT OF 1989
MAJOR PROBLEMS

1. Definition of disability --The ADA includes a provision which would allow an individual, "regarded as having an impairment," to be considered an individual with a disability. Although such a provision is contained in other legislation that prohibits discrimination on the basis of disability, it would appear to allow very expansive coverage of individuals and classes of individuals, such as those suspected of having AIDS.

2. Equal treatment standard — The ADA requires that equal and as effective means be offered to an individual with a disability so that such an individual may achieve the same result or outcome as other individuals. This appears to be a very rigorous standard that would not allow for a covered entity to offer a comparable treatment/service/opportunity for an individual to achieve a comparable, rather than the same, outcome. It is unclear how this standard would affect, and possibly restrict, efforts to provide reasonable accommodation.

3. Coverage of individuals who are alcohol and drug abusers and those with contagious diseases or infections — The ADA would prohibit discrimination against such individuals unless they posed a direct threat to the property and safety or health and safety, respectively, of others in the workplace. (This provision is contained only in title I which addresses general prohibitions.) The alcohol and drug provision would seem to potentially conflict with legislation requiring a drug free workplace. The provision pertaining to contagious disease or infection would extend coverage to individuals with AIDS or regarded as having AIDS.

4. Anticipated discrimination — The ADA would allow an individual to sue if he/she was discriminated against on the basis of disability or *believes he/she is about to be discriminated against on such a basis.* It is unclear how a case of *anticipated discrimination would be proved or disproved.*

5. Access to varied and multiple penalties--The ADA would allow an individual who successfully sues because of discrimination on the basis of disability, to obtain injunctive, and possibly compensatory, relief and attorney's fees, and/or compensatory and punitive damages, in employment cases and those involving public accommodations and services operated by private entities; to obtain injunctive relief and attorney's fees in cases involving public services (likely to be transportation cases); and to seek individual cause of action (injunctive relief and attorney's fees, and/or compensatory and punitive damages) or administrative action (which would include cease and desist orders and fines), in cases involving telecommunications relay services. Having such a range of penalties may lead to severe opposition to the legislation, and, if enacted, full employment for attorneys and inconsistency in interpretation of the law.

6. Allowance of suits in cases of both intentional and unintentional discrimination --Because of the phrase "fail to..." in the provisions which define discrimination (for example, fail to provide opportunity, access, reasonable accommodation etc.), it is likely that covered entities would be subject to suits involving either kind of discrimination. "Fail to" does not require conscious intent, it just requires that an action or the failure to act has the effect of discrimination. Other language in the ADA also appears to prohibit practices with an adverse impact, regardless of intent, on individuals with disabilities. It would seem appropriate to limit the right to sue in cases of unintentional discrimination to specific circumstances where covered entities have experience, knowledge, and resources that would allow them to avoid such discrimination.

7. Inclusion of section 504 references in ADA --Section 504 of the Rehabilitation Act prohibits discrimination on the basis of handicap by recipients of Federal financial assistance. The ADA includes references to section 504 in its provisions pertaining to transportation. The reason for such references is unclear. Do the references to section 504 in the ADA change standards related to transportation that now apply to recipients of Federal financial assistance covered by section 504?

8. Burden of proof -- The ADA appears unclear on where the burden of proof lies in most titles. Such lack of clarity needs to be resolved, especially in cases of unanticipated discrimination.

Northern Virginia Transportation Commission

Arlington Executive Building • 2009 North 14th Street • Suite 300 • Arlington, Virginia 22201 • (703) 524-3322

July 11, 1989

Honorable Bill McCollum
U.S. House of Representatives
Washington, D.C. 20515

Dear Representative McCollum:

The Americans With Disabilities Act has been introduced by Senator Harkin and former Representative Coelho (S 933/HR 2273). The Act has many admirable objectives, including increased independence for persons who are mobility-impaired. While the Northern Virginia Transportation Commission (NVTC) supports these worthwhile objectives, we wish to alert you to some of the problems with the existing bills.

NVTC, together with its neighbor, the Potomac and Rappahannock Transportation Commission (PRTC), is working to implement commuter rail service. While we have been forced to seek legislation to resolve Conrail's concern for indemnification before our service can begin, we are actively preparing to order rolling stock.

Our parking lots and platforms will all be accessible to persons in wheelchairs. We have investigated available wheelchair lift technology for access to our trains and found a lift that would seem to meet our needs and those of our mobility-impaired passengers. The lift is portable but sturdy, and can be operated by one crew member. It is easily moved along the platform to provide access to each car. One lift would serve each station.

The Americans With Disabilities Act, however, would mandate that each new railcar we purchase be accessible, which apparently means that lifts must be attached to each coach. Since this would be a prohibitively expensive prospect, we may be forced to restrict our railcar bidding to those firms able to offer level boarding for wheelchair passengers.

At present, we believe only one manufacturer has this capability. Consequently, we might not be able to rely on competition to produce a reasonable price for our railcars. Further, concern for clearance of these accessible coaches may force us to undertake expensive tunnel and signal improvements.

Thus, the unintended consequence of the Americans With Disabilities Act might be to force taxpayers to absorb millions of dollars of extra expense with no real gain in accessibility. That is why NVTC supports local option for providing accessibility. We insist that our stations and trains be accessible. But, we wish to provide accessibility in an efficient manner that is fair to all taxpayers, including persons with disabilities.

We would appreciate your careful consideration of the adverse consequences of certain portions of the Americans With Disabilities Act.

Thank you for the opportunity to comment.

Sincerely,

Lilla Richards

Lilla Richards
Chairman

DISABILITY RIGHTS WORKING GROUP

Issue Paper #2

THE ADA ENFORCEMENT PROCESS

The enforcement provision in the proposed ADA has been the subject of much criticism because of the manner in which claims of discrimination would be resolved. The focus of the criticism has been the fact that the ADA would incorporate, by reference, the "procedures and remedies" of Section 1981, a post-civil war act aimed at prohibiting and punishing race discrimination.

Unlike the equal employment opportunity laws passed during the past 25 years, Section 1981 was not specifically designed to deal with issues of employment discrimination. Incorporating the procedures and remedies of that statute into the enforcement section of the ADA would create a law which differs in three significant ways from modern EEO laws.

First, Section 1981 provides for litigation as the initial step in resolving a dispute. This is different from modern EEO laws which generally require a litigant to first proceed through an administrative process in an effort to promote voluntary resolution of the matter, with lawsuit being the avenue of last resort.

Second, Section 1981 provides for an award of damages which goes well beyond the back pay damages common to employment discrimination cases under modern laws such as Title VII of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, sex, national origin, and religion. This potential for *windfall damages* tends to discourage litigants from accepting reasonable settlement offers, and it encourages lawyers and their clients to take their chance at trial in the hope of winning a million dollar verdict.

Finally, once in court, Section 1981 provides the option for a ***jury trial***, unlike Title VII, which provides for trial before a judge in cases alleging employment discrimination.

THE COURT HOUSE IS THE FIRST STOP

By including section 1981 procedures in the ADA, the drafters provide individuals with a means of circumventing the administrative process which has been critical to the success of Title VII of the Civil Rights Act of 1964, believed by many to be the most effective employment discrimination law on the books. The "procedures" under Section 1981 are simple: A person needs only to walk into the court house and file a lawsuit. This approach is in sharp contrast to Title VII which requires litigants to at least give the administrative process a chance to resolve the dispute before it becomes a lawsuit. The Title VII procedures are built upon the practical notion that the primary intent of an EEO law is the creation of employment opportunities. Thus, under Title VII it is considered preferable to resolve disputes through a prompt, fair conciliation which leads to a job opportunity than to resolve matters through a lawsuit which, years after the incident, provides a windfall monetary verdict as a way of punishing the employer.

THE TRIAL AS A LOTTERY

Recent news reports have highlighted the fact that in certain states plaintiffs are now selling shares to those who wish to "invest" in the lawsuit in the hope of sharing in the plaintiff's verdict or settlement award. The ADA, by including Section 1981 procedures and remedies, would promote a similar "lottery" or "windfall" attitude with respect to litigation of disability discrimination claims.

The Section 1981 remedies would allow a litigant to win a full range of compensatory damages -- such as an award of money for pain and suffering -- as well as punitive damages, designed solely for the purpose of punishing the employer.

Typically, in awarding such damages, the attorney seeking a large damage award asks the jury to envision the injury the plaintiff has had to endure and to then try to calculate a sum that will adequately compensate

- Over -

the individual for that injury. The jury may then be asked to award punitive damages, based upon the defendant's overall net worth. The results can be staggering. In a well-publicized case several years ago in Colorado, a jury returned a $17 million verdict against a large retailer in an age discrimination case. That decision was subsequently overturned on appeal. But, nonetheless, it demonstrates the "sky is the limit" attitude which compensatory and punitive damages can bring to employment discrimination lawsuits.

The simple availablility of such damages, and the mere possibility of such a windfall award, is a significant factor long before the case reaches the trial stage. The potential for a windfall encourages the litigant and his or her attorney to reject reasonable settlement offers in favor of "taking a shot" at the brass ring and winning millions of dollars. This is in contrast to the Title VII approach which focuses on creating employment opportunities and providing back pay for an individual who was the victim of illegal discrimination.

SYMPATHY/PREJUDICE IN THE COURTROOM

Under Section 1981 procedures, the case may be decided, and the damages may be awarded by a jury, rather than a judge. While our society recognizes the value which a jury can bring to the process of deciding lawsuits, it is also recognized that in certain situations the facts before a jury can have an emotional impact so strong that it is likely to interfere with the jury's deliberations and prejudice one of the litigants. Clearly, in the area of disability cases, the potential for such prejudice is high. In this area of the law, plaintiffs obviously will be individuals with disabilities. Is it realistic to think that jurors will be able to decide the case without being affected one way of the other by the fact? The only sensible approach is the approach followed by Title VII. In those cases where the parties are unable to work out their differences through the administrative process and end up in court, such decisions are best left to judges who can better view the facts without any cloud of sympathy for or prejudice against the litigants.

July 1989

BILL McCOLLUM
5TH DISTRICT, FLORIDA

VICE CHAIRMAN
REPUBLICAN CONFERENCE
COMMITTEE ON
BANKING, FINANCE AND
URBAN AFFAIRS
COMMITTEE ON
THE JUDICIARY

1507 LONGWORTH HOUSE OFFICE BUILDING
WASHINGTON, DC 20515
(202) 225-2176

DISTRICT OFFICE:
SUITE 301
1801 LEE ROAD
WINTER PARK, FL 32789
(407) 645-3100
FROM LAKE COUNTY, TOLL FREE:
383-8541

Congress of the United States
House of Representatives
Washington, DC 20515

To: Members, House Republican Conference

From: Bill McCollum, Vice-Chairman

Re: Suggested Action Kit on Americans with Disabilities Act

Date: June 5, 1989

As you may be aware, the Americans with Disabilities Act of 1989 (ADA) has been introduced to both houses of the Congress and has been put on a fast track for passage by the Democratic leadership. This bill will impact on every business in your district, and could be the most sweeping civil rights legislation to come out of the Congress in the last 20 years.

I have therefore put together an action kit of materials for your use in discussing this controversial piece of legislation. This kit includes:

1) A memo, prepared by the minority staff of the Education and Labor Committee, giving a short breakdown of some of the ADA's more controversial aspects and problems.

2) A suggested letter from you to groups representing individuals with disabilities expressing your concerns about the ADA and your desire to work with them to discuss and resolve these concerns.

3) A list of suggested contacts regarding issues surrounding the ADA broken down by the bill's titles.

4) A suggested letter from you to local Chambers and NFIB members alerting them to your concerns about the bill and soliciting their input on the bill.

5) A copy of an op-ed piece on the ADA that recently appeared in <u>The Washington Times.</u>

This is an extremely complicated bill and the issues surrounding it are highly charged emotionally. However, I believe that if we take some time to familiarize ourselves with the ADA and to make contact with interested groups representing the business and disabled communities to solicit their views, it should be possible to forge a consensus on this bill that should be acceptable to everyone.

May 23, 1989

AMERICANS WITH DISABILITIES ACT OF 1989
MAJOR PROBLEMS

1. Definition of disability -- The ADA includes a provision which would allow an individual, "regarded as having an impairment," to be considered an individual with a disability. Although such a provision is contained in other legislation that prohibits discrimination on the basis of disability, it would appear to allow very expansive coverage of individuals and classes of individuals, such as those suspected of having AIDS.

2. Equal treatment standard -- The ADA requires that equal and as effective means be offered to an individual with a disability so that such an individual may achieve the same result or outcome as other individuals. This appears to be a very rigorous standard that would not allow for a covered entity to offer a comparable treatment/service/opportunity for an individual to achieve a comparable, rather than the same, outcome. It is unclear how this standard would affect, and possibly restrict, efforts to provide reasonable accommodation.

3. Coverage of individuals who are alcohol and drug abusers and those with contagious diseases or infections -- The ADA would prohibit discrimination against such individuals unless they posed a direct threat to the property and safety or health and safety, respectively, of others in the workplace. (This provision is contained only in title I which addresses general prohibitions.) The alcohol and drug provision would seem to potentially conflict with legislation requiring a drug free workplace. The provision pertaining to contagious disease or infection would extend coverage to individuals with AIDS or regarded as having AIDS.

4. Anticipated discrimination -- The ADA would allow an individual to sue if he/she was discriminated against on the basis of disability or ***believes he/she is about to be discriminated against on such a basis.*** It is unclear how a case of ***anticipated discrimination would be proved or disproved.***

5. Access to varied and multiple penalties -- The ADA would allow an individual who successfully sues because of discrimination on the basis of disability, to obtain injunctive, and possibly compensatory, relief and attorney's fees, and/or compensatory and punitive damages, in employment cases and those involving public accommodations and services operated by private entities; to obtain injunctive relief and attorney's fees in cases involving public services (likely to be transportation cases); and to seek individual cause of action (injunctive relief and attorney's fees, and/or compensatory and punitive damages) or administrative action (which would include cease and desist orders and fines), in cases involving telecommunications relay services. Having such a range of penalties may lead to severe opposition to the legislation, and, if enacted, full employment for attorneys and inconsistency in interpretation of the law.

6. Allowance of suits in cases of both intentional and unintentional discrimination -- Because of the phrase "fail to..." in the provisions which define discrimination (for example, fail to provide opportunity, access, reasonable accommodation etc.), it is likely that covered entities would be subject to suits involving either kind of discrimination. "Fail to" does not require conscious intent, it just requires that an action or the failure to act has the effect of discrimination. Other language in the ADA also appears to prohibit practices with an adverse impact, regardless of intent, on idividuals with disabilities. It would seem appropriate to limit the right to sue in cases of unintentional discrimination to specific circumstances where covered entities have experience, knowledge, and resources that would allow them to avoid such discrimination.

7. Inclusion of section 504 references in ADA -- Section 504 of the Rehabilitation Act prohibits discrimination on the basis of handicap by recipients of Federal financial assistance. The ADA includes references to section 504 in its provisions pertaining to transportation. The reason for such references is unclear. Do the references to section 504 in the ADA change standards related to transportation that now apply to recipients of Federal financial assistance covered by section 504?

8. Burden of proof -- The ADA appears unclear on where the burden of proof lies in most titles. Such lack of clarity needs to be resolved, especially in cases of unanticipated discrimination.

SUGGESTED LETTER TO CONGRESSIONAL DISTRICT GROUPS REPRESENTING INDIVIDUALS WITH DISABILITIES

(Suggest that you initiate contact with local Disabled Veterans of America organizations.)

Dear _____,

As you may be aware, a bill called the Americans with Disabilities Act of 1989 (ADA) was recently introduced to the Congress. This bill, which was introduced by my colleagues, Congressman Tony Coehlo in the House and Senator Tom Harkin in the Senate (HR2273 and S933, respectively), is a comprehensive effort to protect individuals with disabilities from discrimination. While I wholeheartedly support the goals of this bill, I am concerned with a number of its provisions and would like to work with you in addressing these concerns.

Of particular interest to me is the bill's broad definition of the term "individuals with disabilities." Under the ADA, individuals "who are regarded" as having a disability are protected. I understand that this would include include alcoholics, drug addicts and persons with contagious diseases such as AIDS. This could jeopardize the nation's efforts to insure a "drug free" workplace and although the bill does state that such persons who pose a "direct threat" to the workplace need not be accommodated, I am concerned that the term "direct threat" is too vague.

Another provision of interest, particularly as it might affect smaller businesses, is the fact that while the ADA exempts companies of under 15 employees from coverage, it does so only under the bill's employment provisions. I am concerned that this may be financially burdensome to smaller businesses, especially since the language stating that accommodation need not be made if it would cause "undue hardship" is not precise.

I am also concerned about the ADA provisons that allow individuals to pursue a right of action if they believe that they are about to be discriminated against. These provisions could lead to a flood of litigation, and of course open the question of how a redress of injury can be made when the injury has not yet occurred. Of course, if all that is contemplated is injuctive relief under existing court procedures, this may be fine, but if a broader relief is contemplated, this could be a big problem.

In a related matter, I believe that the ADA actually would encourage individuals to pursue litigation. I am concerned that a number of the enforcement provisions of this bill, combined with the fact that the ADA's Title II dealing with employment permits an individual to bypass standard EEOC administrative procedures and go straight to litigation, could be overly harsh and might be an incentive to some individuals to pursue frivilous

court actions. Needless to say, I would like to see a reworking of these provisions so that they retain their effectiveness, but do so without turning the bill into pork barrel package for the legal community.

Due to the very complex nature of this legislation, I have additional concerns of a more technical nature, suffice it to say that because I am genuinely committed to bringing individuals with disabilities not only into the workplace, but into the mainstream of American society as a whole, I would like to sit down with you to get your help in resolving these issues.

I hope that you will take the opportunity to contact me at your earliest convenience to discuss this matter.

Sincerely,

SUGGESTED LETTER FROM MEMBERS TO LOCAL CHAMBER OF COMMERCE/NFIB AND OTHER INTERESTED BUSINESS GROUP MEMBERS.

Dear_____,

As you may be aware, a bill called the Americans with Disabilities Act of 1989 (ADA) was recently introduced to the Congress. This bill, which was introduced by my colleagues, Congressman Coehlo in the House and Senator Tom Harkin in the Senate (HR2273 and S933, respectively), is a comprehensive effort to protect individuals with disabilities from discrimination. While I wholeheartedly support the goals of this bill, I am concerned with a number of its provisions and believe that you should be made aware of this bill's potential impact on your businesses.

Of particular concern is the bill's broad definition of the term "individual with disabilities." Under the ADA, individuals "who are regarded" as having a disability are protected. I understand that this would include alcoholics, drug addicts and persons with contagious diseases such as AIDS. This could put your members in the position of violating your obligations under existing "drug free" workplace legislation. Although the bill does state that such persons who pose a "direct threat" to the workplace need not be accomodated, I am concerned that the term "direct threat" is too vague.

Another provision of interest, particularly as it may affect your smaller members, is the fact that while the ADA exempts companies of under 15 employees from coverage, it does so only in the bill's employment provisions. I am very concerned that this may be financially burdensome to smaller businesses, especially since the language stating that accomodation need not be made if it would cause "undue hardship" is not precise.

I am also concerned about the ADA provisions that allow individuals to pursue a right of action if they believe that they are about to be discriminated against. These provisions could lead to a flood of litigation, and of course open the question of how a redress of injury can be made when it has not yet occurred. Of course, if all that is contemplated is injunctive relief under existing court procedures, this may be fine, but if a broader relief is contemplated this could be a big problem.

In a related matter, I believe that the ADA may actually encourage individuals to pursue litigation against your members. I believe that a number of the bill's enforcement provisions, combined with the fact that the ADA's Title II dealing with employment permits an individual to bypass standard EEOC

administrative procedures and go straight to litigation, could be overly harsh and might be an incentive to some individuals to pursue frivilous and expensive court actions. Needless to say, I would like to see a reworking of these provisions so that they retain their effectiveness, but so that they provide somewhat greater protection to employers.

Finally, it is my belief that the ADA takes a punitive approach to the business community and that such an approach is unwarranted. This bill makes no distinction between intentional and unintentional discrimination as far as penalties are concerned. Businesses that are found to be in violation of this bill will be liable not only for restitution of damages, but also punitive damages and lawyer's fees. This represents a tremendous leap from principles in existing civil rights legislation.

Due to the very complex nature of this bill, I have additional concerns of a more technical nature, suffice it to say that I would like to take the opportunity to meet with you and to hear your views regarding this legislation to help me in resolving these issues.

I hope that you will take the opportunity to contact me at your earliest convenience.

Sincerely,

SUGGESTED CONTACTS BY TITLE OF ADA BILL

ADA Preamble

Pat Morrissey	Ed. and Labor Committee	225-7101
Lincoln Oliphant	Senate GOP Policy Comm.	224-2946
Lisa Morin	Republican Research	225-0871
Mike Franc	Rep. Dannemeyer	225-4111
Mark Disler	Sen. Hatch/Judiciary	224-7703

Title I

Nancy Fulco	Chamber of Comerce	463-5503
Sue Messinger	ASPA	548-3440
Mary Reed	NFIB	554-9000
James Gaffigan	Amer Hotel/Motel Assoc.	298-3120
Tristan Carter	NAB	429-5301
Bob Morgan	AT & T	457-3670

Title II

Nancy Fulco	Chamber of Commerce	463-5503
Sue Messinger	ASPA	548-3440
Marcel Dubois	Department of Labor	523-6141
Sally Douglas	NFIB	554-9000
Deanna Hodge	ASPA	548-3440
Barney Singer	SBA/Advocacy	634-6115
John Tyse	McGuiness & Williams	789-8600
or Larry Kessler	McGuiness & Williams	789-8600
Diane Sawaya-Barnes	J.C. Penney	862-4824

Title III

Bob Bergman	House Public Works	225-9446
Edward Rosen	OST-DOT	366-9655
Chris Bertram	Secretary of Transport.	366-9667
Pete Lunni	Natl. Assoc. of Mfg.	637-3133
Christie Cullinan	Parks/Rec Assoc.	820-4940
Susan Perry	American Bus Assoc.	842-1645

Title IV

Betty Whittelton	Natl. Assoc. Theater	296-5680
Jim Gaffigan	Amer. Hotel/Motel Assoc.	298-3120
A. Phillip Nelan	Natnl. Restaraunt Assoc.	331-5988
Christie Cullinan	Parks/Rec Assoc.	820-4940
Pete Lunni	Natl. Assoc. of Mfg.	637-3133
Susan Perry	American Bus Assoc.	842-1645
Kathy Mance	American Retail Fed.	783-7971
Diane Sawaya-Barnes	J.C. Penney	862-4824

Title V

Bob Morgan	AT & T	457-3838
Ron Stamey	Bell South	463-4168
Edwin Hall	MCI	872-1600
Colleen Kiko	Const./Cvl. Rts. Sub.	225-7195
Barney Singer	SBA/Advocacy	634-6115
Chris Wydler (optional)	House Science Comm.	225-6684

Title VI

No recommendations as of yet.

SUGGESTED CONTACTS OF INDIVIDUALS REPRESENTING THE DISABLED COMMUNITY.

Robert Burgdorf	Easter Seals	659-2229
David Capozzi	Paralyzed Vets/ America	872-1300
Rick Dudley	GSA	566-1516
Karen Franklin	United Cerebal Palsy	842-1266
Bob Funk	President's Comm.	653-5044
Dr. David Grey	HIS	496-1385
Dr. I. King Jordan	Gallaudet University	651-5373
Evan Kemp	EEOC	634-6711
Christine Koyanagi	Natnl. Alli. Mentally Ill	684-7722
Bill Malleris	SE Center Ind. Living	(507)285-1815
Paul Manchand	Asso. Mentally Retarted	785-3338
Scott Marshall	Am. Found. for the Blind	457-1487
Liz Savage	Epilepsy Found.	459-3700
Larry Scadin	Elect. Ind. Assist. Devices	955-5823
or Jennifer Eckel		955-9818
Harold Snider	Natl. Fed. for Blind	632-4141
Jay Rochlin	Pres. Comm. on Empl. Dis.	653-5044
or Howard Moses or Philip Calkins		
David Williams	Gov. Comm. Advocacy Dis.	(614)466-9956

Contacts for technical assistance on "reasonable accommodations" provisions.

Dr. Margaret Giannini	VA Rehab.R/D program	373-5177
or Chet Basil or Barry Romich		
Judy Gilliom	Handicp. Program/ DOD	697-8661
Dr. Jim Grissett	Med. Sciences Navy Aero.	(904)452-4457
Dr. Art Koblasz	GA Institute Tech	(404)894-2756
Ray Whitten	NASA Med. Transf. Programs	453-1890
Alan Zelman	Natl. Science Found.	357-7962

COMMENTARY

BILL McCOLLUM

A cannon to kill a butterfly

If the last 25 years demonstrate anything, it is the ability of the nation to move forward in the area of civil rights. It is in that tradition that a bill called the Americans with Disabilities Act of 1989 (ADA) was recently introduced to the Congress. The ADA is the most sweeping effort yet to extend civil rights protections to individuals with disabilities. Unfortunately, the problem with the ADA is that it was conceived with the noblest of intentions and with correspondingly little appreciation of the complex problems it must address.

It is obvious at the outset that the intent of the bill must be preserved. However, when discussion turns to the specifics of the ADA, it becomes apparent that the bill's authors are using a cannon to kill a butterfly, and in the process are making a rather dreadful mess.

It has been said that a small error made at the beginning of a problem will lead to a larger problem in the end. The ADA's authors did not waste any time with small errors, they started with a giant one. The ADA defines the disabled to include individuals "being regarded" as having a disability. That language is not unknown in other legislation, but in this context it covers individuals with contagious diseases, alcoholics and drug addicts. That definition would make it illegal for an employer to discriminate against such persons unless they represent a "direct threat" to their fellow workers or the property of the workplace.

Disregard for the moment defining what the term "direct threat" means and focus on this irony: Even as the federal government is laying down guidelines and exhorting employers to provide a "drug free" workplace, this bill would, in effect, make it impossible for employers to exclude drug addicts as a legitimate part of their applicant pool.

Once past that contradiction, the question of defining "direct threat" emerges. One can almost hear the stampede of lawyers into courtrooms as dockets are cluttered with cases that attempt to define a "direct threat." That said, it is tempting to think of this bill as a lawyer's benefits package instead of as a protective measure for individuals with real disabilities.

Having rather broadly defined what constitutes disability, the ADA then permits individuals to seek redress of injustices that have not yet been committed. Under the ADA, an individual with a disability may take legal action not only if he has been discriminated against, but also if he believes that he will be discriminated against.

The ADA is a step away from a sensible and intelligent approach to the unique problems of the disabled community.

Believe? The ADA breaks new ground in making an individual's intuition the basis for litigation. Where the lines will be drawn and how a court will determine when the "belief" that one is "about" to be discriminated against is well-founded should cause fits of vertigo in sensible minds.

In fact, the ADA is laced with ambiguities. Companies would be exempt from having to provide "reasonable accommodation" to their employees with disabilities if they can prove that doing so would cause them "undue hardship." Reasonable accommodation is a term that is not

unknown in the law, though its definition is less concrete than the authors of the ADA might suggest. As to the term "undue hardship," about the only thing that is clear in that phrase is that it means anything short of bankruptcy.

In essence, the fundamental flaw of the ADA is an attempt to define in simple terms that which by its very nature is not easily defined. Unlike racial or religious minorities which are easily categorized, individuals with disabilities do not constitute a homogeneous group. It does no disservice to the disabled community to point out the obvious fact that the needs of the blind are not necessarily related to the needs of the deaf when it comes to the question of bringing both groups into the mainstream of American life from which many have been excluded.

Nevertheless, it is flinching from the obvious that has turned the ADA into a bill of sweeping generalities. The ADA's authors argue that the bill's broad scope is the only way of assuring that individuals in the disabled community are protected and accommodated across the board.

However, it clearly renders no service to those with disabilities to make their employment a matter of endless litigation, as this bill would almost certainly guarantee. Defenders of the ADA contend that this is the price that may have to be paid for a more equitable society. Clearly though, that is a price that will be paid disproportionately by the disabled community when it becomes apparent that a law designed to ensure their civil rights has become a law that has made their incorporation into the workplace an expensive, hazardous undertaking that is best avoided if at all possible.

Talk about cost in relation to the ADA bill and its proponents will sniff huffily and say, "Costs, when we are talking about fundamental civil rights, should not be a matter of paramount concern."

Perhaps, but as Jared Elliot once said, "Facts are stubborn things," and the stubborn fact is that the ADA's wholesale approach to the problem of rights for the disabled community is needlessly expensive and open to endless court battles as terms like "direct threat" and "undue hardship" are defined and redefined for each new situation that arises. Furthermore, costs, whether ADA proponents like it or not, are something employers must take into account when they make hiring decisions.

No one opposes the objectives of the ADA bill. However, virtuous goals without a sufficient appreciation of the real problems that must be faced in reaching those goals are fated never to be realized.

For that reason, the ADA is not so much a step forward for the rights of individuals with disabilities as it is a step away from a sensible and intelligent approach to the unique problems of the disabled community.

Bill McCollum is a Republican member of the House of Representatives from Florida.