University of Dayton Law Review

Volume 3 | Number 2 Article 8

5-1-1978

Nondiscrimination under Federal Grants - Striving toward Equal Employment Opportunities for Handicapped Individuals

Garry W. O'Donnell
University of Dayton

Nondiscrimination Under Federal Grants—Striving Toward Equal Employment Opportunities for Handicapped Individuals

An assumption underlying the concept of prejudice toward the disabled is that where two persons apply for a job, and are equal in all characteristics except for the presence of a disability of one of them, the nondisabled person will be hired in preference to the disabled.[1]

I. The Rehabilitation Act of 1973

History is replete with manifestations of discrimination against handicapped individuals.[2] Employment opportunity is one major aspect of society in which the handicapped individual is often the target of discriminatory practices.[3] Such treatment is premised upon the erroneous assumption that employing handicapped persons will hinder production and escalate workmen's compensation rates.[4]

Congress, in recognition of the approximately thirty-five million Americans with mental and physical disabilities, has expressed its intent to assure that handicapped persons gain independence and dignity through initiating policies which will extend equal employment opportunities to those individuals.[5] Notwithstanding this

---

1. Rickard, Triandis, & Patterson, *Indices of Employer Prejudice Toward Disabled Applicants*, 47 J. Applied Psych 52 (1963).

This study focuses on the results of a survey which empirically supported the assumption that the disabled are rejected more strongly than the nondisabled in employment opportunities. Furthermore, the strength of the prejudice was found to vary among different types of disabilities. "Employers are more prejudiced toward the epiletic and persons discharged from prison than toward the person discharged from a turberculosis sanatorium. Persons discharged from a mental hospital, the deaf, and persons confined to a wheelchair fall in between." *Id.* at 54.

2. *See* Burgdorf & Burgdorf, *A History of Unequal Treatment: The Qualifications of Handicapped Persons As A "Suspect Class" Under The Equal Protection Clause*, 15 Santa Clara Law. 855, 861-70 (1975). "Individuals with handicaps are all too often . . . barred from employment or are underemployed because of archaic attitudes and laws." S. Rep. No. 1297, 93rd Cong., 2d Sess. 50, *reprinted in* [1974] U.S. Code Cong. & Ad. News 6373, 6400.

3. "The disabled face three problems in finding employment: outright refusal by employers to hire them; self-doubts created by prejudice; and rigid physical examinations, the validity of which is accepted by employers without question." Note, *Equal Employment and the Disabled: A Proposal*, 10 Colum. J.L. & Soc. Prob. 457, 457-58 (1974) (footnotes omitted) [hereinafter cited as *Equal Employment*].

4. *See, e.g., Equal Employment, supra* note 3, at 458; Note, *Potluck Protections for Handicapped Discriminatees: The Need to Amend Title VII to Prohibit Discrimination on the Basis of Disability*, 8 Loy. Chi. L.J. 814, 816-25 (1977) [hereinafter cited as *Potluck Protections*].

5. *See* White House Conference on Handicapped Individuals Act § 301, 29 U.S.C. § 701

expression of congressional concern, proposals to amend Title VII of the Civil Rights Act of 1964[6] to include the handicapped as a class protected from discrimination in private employment have never gained sufficient support for passage.[7]

(Supp. V 1975) [hereinafter cited as White House Conference].

> The Congress finds that-
>
> "(1) the United States has achieved great and satisfying success in making possible a better quality of life for a large and increasing percentage of our population;
>
> "(2) the benefits and fundamental rights of this society are often denied those individuals with mental and physical handicaps;
>
> "(3) there are seven million children and at least twenty-eight million adults with mental or physical handicaps;
>
> "(4) it is of critical importance to this Nation that equality of opportunity, equal access to all aspects of society and equal rights guaranteed by the Constitution of the United States be provided to all individuals with handicaps;
>
> "(5) the primary responsibility for meeting the challenge and problems of individuals with handicaps has often fallen on the individual or his family;
>
> "(6) it is essential that recommendations be made to assure that all individuals with handicaps are able to live their lives independently and with dignity, and that the complete integration of all individuals with handicaps into normal community living, working, and service pattterns be held as the final objective; and
>
> "(7) all levels of Government must necessarily share responsibility for developing opportunities for individuals with handicaps;
>
> and it is therefore the policy of the Congress that the Federal Government work jointly with the States and their citizens to develop recommendations and plans for action in solving the multifold problems facing individuals with handicaps.

Id. Cf. 119 Cong. Rec. 24442 (1973) (remarks of Sen. Javits) (present estimates ranging from 28 million to over 50 million).

"No one knows exactly how many handicapped citizens there are in the United States. Estimates range from all low as 11 million to more than 50 million, depending on the definition of 'handicapped' and the age limits." Hamer, *Rights of the Handicapped*, in EDITORIAL RESEARCH REPORTS 885, 887 (1974). "The difficulty in obtaining accurate and meaningful statistics is attributable to the inability of statisticians to measure the effect of a defined handicap on the capacity of the handicapped to function normally in society." Note, *Abroad In The Land: Legal Strategies To Effectuate The Rights Of The Physically Disabled*, 61 GEO. L.J. 1501, 1501 n.2 (1973).

6. 42 U.S.C. § 2000e to 2000e-15, *as amended*, 42 U.S.C. § 2000e to 2000e-17 (Supp. IV 1974).

7. For an exhaustive list of the proposed amendments to Title VII to cover handicapped individuals, *see* Wright, *Equal Treatment Of The Handicapped By Federal Contractors*, 26 EMORY L.J. 65, 65 n.2 (1977); *Potluck Protections, supra* note 4, at 835 n.133.

One possible explanation for the failure of these proposed amendments to muster sufficient support for passage is an attitude shaped by callous economic philosophy.

> If we are not prepared to put to work every person who is willing and able to work, then I don't think we will ever put to work those who may, for some reason or another, appear to have some type of handicap. . . .
>
> The basic question is that we don't seem to want to employ people, we want to restrict the contributions of people on the theory that we cannot expand too fast, that it is inflationary, that it is too costly, et cetera.
>
> With that type of policy or attitude, it just worries me how are we ever going to get around to ending discrimination in all of its manifestations, on the theory that there are not enough jobs.

Title VII and the equal protection clause of the fourteenth amendment[8] guarantee equal employment opportunities and treatment to minorities and women. At present, however, both Title VII and the equal protection clause inexorably deny the expansion of similar protections to handicapped individuals. Title VII attacks only private employment practices and treatment which discriminates on the basis of an "individual's race, color, religion, sex, or national origin."[9] Handicapped individuals are excluded as a class from Title VII's statutory protections prohibiting discrimination in private employment.

With respect to the equal protection clause, unless the alleged unequal treatment impinges upon a fundamental interest or is based on a suspect classification, such discriminatory treatment must only withstand a "rational relationship" test, as opposed to the more stringent "compelling state interest" test.[10] Classifications

---

Oversight Hearings on Federal Enforcement of Equal Employment Opportunity Laws Before the Sunbcomm. on Equal Opportunities of the House Comm. on Education and Labor, 94th Cong., 1st Sess. 74 (1975) (remarks of Rep. Hawkins).

Another possible reason why the proposed amendments were never enacted is reflected by the view that handicapped persons require individual and distinct treatment in order to be afforded equal opportunity in employment.

> Section 504, however, differs conceptually from both title VI and IX. The premise of both title VI and title IX is that there are no inherent differences or inequalities between the general public and the persons protected by these statutes and, therefore, there should be no differential treatment in the administration of Federal programs. The concept of section 504, on the other hand, is far more complex. Handicapped persons may require different treatment in order to be afforded equal access to federally assisted programs and activities, and identical treatment may, in fact, constitute discrimination. The problem of establishing general rules as to when different treatment is prohibited or required is compounded by the diversity of existing handicaps and the differing degree to which particular persons may be affected. Thus, under section 504, questions arise as to when different treatment of handicapped persons should be considered improper and when it should be required.

41 Fed. Reg. 20,296 (1976) (letter from former HEW Secretary Mathews (May 11, 1976)).

> Race and sex are generally discernible factors unrelated to job qualifications. Physical and mental disabilities, however, are frequently undiscernible and their degree is relevant to whether or not an applicant may be employable and in what capacity. Therefore, compliance activities under this statute and these Regulations, including the conduct of complaint investigations, must be individualized to a far greater degree than in a program where the sole factor limiting the complainant's employability may be something as irrelevant as race or gender.

[1974] U.S. CODE CONG. & AD. NEWS 6431, 6434 (letter from Richard F.Schubert for Secretary of Labor to the Honorable Harrison A. Williams, Chairman, Senate Committee on Labor and Public Welfare (Sept. 24, 1974)).

8. U.S. CONST. amend. XIV, § 1, provides in relevant portion that: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

9. 42 U.S.C. § 2000e-2(a) (Supp. IV 1974).

10. *See* Note, *Developments in the Law-Equal Protection*, 82 HARV. L. REV. 1065 (1969) [hereinafter cited as *Equal Protection*].

A third level of analysis has recently emerged out of the Court's traditional two-tiered

based on mental or physical disabilities are unlikely to be viewed with the degree of suspectedness which has traditionally triggered strict scrutiny requiring a demonstration of some "compelling state interest."[11] Although the Court has previously viewed the right to employment as an economic touchstone for all fundamental interests,[12] it has analyzed employment discrimination on the basis of the "rational relationship" standard absent a showing of discrimination against a suspect class.[13] Since the handicapped are not viewed as a suspect class, governmental employment classifications which discriminate on the basis of mental or physical disabilities are likely to be judicially analyzed under the "rational relationship" standard.[14] Unequal treatment has easily withstood the "rational relationship" test where the classification is based "upon a state of facts that reasonably can be conceived to constitute a distinction, or difference in state policy."[15] Insofar as mental or physical disabilities

---

equal protection methodology. For an incisive discussion of this third level of equal protection analysis, or what has been termed "intermediate scrutiny," *see* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-31 (1978).

11. In Gurmankin v. Costanzo, 411 F. Supp. 982 (E.D. Pa. 1976), *aff'd on other grounds*, 556 F. 2d 184 (3rd Cir. 1977), the district court stated in dicta that:

> [T]he plaintiff's claim that the blind constitute a "suspect classification" is insupportable. Even admitting that the blind are a small, politically weak minority that has been subjected to varying forms of prejudice and discrimination, the limitations placed on a person's ability by a handicap such as blindness cannot be ignored. Unlike distinctions based on race or religion, classifications based on blindness often can be justified by the different abilities of the blind and the sighted.

Id. at 992 n.8.

In Frontiero v. Richardson, 411 U.S. 677, 686 (1973), the plurality implicitly distinguished handicaps from sex as grounds for unequal treatment in employment: "[W]hat differentiates sex from such nonsuspect statuses as intelligence or physical disability, aligns it with the recognized suspect criteria, is that sex characteristic frequently bears no relation to ability to perform or contribute to society."

12. "In so far as a man is deprived of the right to labor his liberty is restricted, his capacity to earn wages and acquire property is lessened, and he is denied the protection which the law affords those who are permitted to work." Smith v. Texas, 233 U.S. 630, 636 (1914). *But see* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976). "This Court's decisions give no support to the proposition that a right of governmental employment per se is fundamental." *Id.* at 313.

13. Schware v. Board of Bar Examiners, 353 U.S. 232 (1957).

However, intermediate scrutiny may be triggered where: (1) important, though not necessarily fundamental, interests are at stake, or (2) sensitive, though not necessarily suspect, classifications are constructed. *See* L. TRIBE, *supra* note 10, at § 16-31.

14. *See Equal Protection, supra* note 10.

15. Allied Stores v. Bowers, 358 U.S. 522, 530 (1959). The Court on occasion may even hypothesize some legitimate state interest the legislators may have had in mind. In Goesaret v. Cleary, 335 U.S. 464, 466 (1948), the Court hypothesized that a Michigan law forbidding any female to act as a bartender, unless she was the wife or the daughter of the male owner, may have been legislated out of the belief that "oversight assured through ownership of a bar by a barmaid's husband or father minimizes hazards that may confront a barmaid." Furthermore, under the rational relationship test, the state's classification is presumed to be constitutional. McDonald v. Board of Election, 394 U.S. 802, 809 (1969).

may directly affect one's capability to perform a certain job, unequal treatment premised on the facts of such disabilities may easily be held to reasonably constitute distinctions or differences in state policy.

Thus, the handicapped individual's constitutional claim to obtain redress for unequal treatment in governmental state policies is tenuous at best[16] and the exclusion of handicapped individuals from the language of Title VII precludes any extention of similar statutory equal employment protections afforded minorities and women under that Title.[17]

The Rehabilitation Act of 1973[18] was enacted into law on September 26, 1973 for the declared purpose of providing vocational rehabilitation services to handicapped individuals and promoting and expanding employment opportunities for such individuals in the public and private sectors.[19] The Act replaced the Vocational

16. This is not to say that a strong equal protection argument attacking discriminatory employment policies directed against handicapped individuals cannot be constructed. *See Mental Illness: A Suspect Classification*, 83 YALE L. REV. 1239 (1974). Furthermore, state policies which discriminate against handicapped individuals may be challenged on the grounds that they create an irrebuttable presumption and violate the due process clause. *See* note 53 *infra*.

17. There are, however, many states that have legislated fair employment laws prohibiting discrimination against handicapped individuals. *See Potluck Protections, supra* note 4 at 835-36. "Thirty-five states, the District of Columbia, and New York City now prohibit discrimination against the handicapped." Wright, *supra* note 7, at 65 n.1.

The scope of these state statutory protections is severly restricted insofar as many contain exceptions focusing on disability as a classification to justify discrimination. To the extent that the focus is on disability, as opposed to capacity, these exceptions reflect the type of prejudice which the disabled are often faced with and must combat. *See Equal Employment, supra* note 3, at 462.

18. Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified at 29 U.S.C. §§ 701-794 (Supp. V. 1975)).

19. The purpose of this chapter is to provide a statutory basis for the Rehabilitation Services Administration, and to authorize programs to-

(1) develop and implement comprehensive and continuing State plans for meeting the current and future needs for providing vocational rehabilitation services to handicapped individuals and to provide such services for the benefit of such individuals, serving first those with the most severe handicaps, so that they may prepare for and engage in gainful employment;

. . . .

(8) promote and expand employment opportunities in the public and private sectors for handicapped individuals and to place such individuals in employment;

29 U.S.C. §§ 701(1) & 701(8) (Supp. V 1975).

Further reference to the congressional intent behind the Rehabilitation Act may be found in S. REP. No. 318, 93 Cong., 2d Sess. 18-19, *reprinted in* [1973] U.S. CODE CONG. & AD. NEWS 2076, 2092.

> The key to the intent of the Committee's belief that the basic vocational rehabilitation program must not only continue to serve more individuals, but must place more emphasis on rehabilitating individuals with more severe handicaps. It is the bill's intent to be more responsive to the needs of the handicapped individual by providing

Rehabilitation Act[20] despite such obstacles as a presidential pocket veto and the inability of the Senate to override a subsequent veto.[21] In light of the inadequacies of the equal protection clause and Title VII, the Rehabilitation Act is a long awaited legislative enactment guaranteeing equal opportunity to handicapped individuals seeking employment with federal contractors[22] or in programs or activities receiving federal financial assistance.[23] Although the Rehabilitation Act's protections against employment discrimination restrict only those employers under federal contract or receiving federal financial assistance, it is estimated that the Act will affect more than 275,000 companies and institutions employing over one-third of the country's work force.[24]

Section 504 of the Rehabilitation Act[25] prohibits discriminatory treatment of otherwise qualified handicapped individuals in any program or activity receiving federal financial assistance. This comment will focus on the probable impact of section 504 on the discriminatory employment practices facing handicapped individuals.[26] Although the import of the Rehabilitation Act's general thrust to develop and provide vocational rehabilitational services to handicapped individuals[27] cannot be overestimated, this comment will operate upon the assumption that the Act's effectiveness in assuring "that all individuals with handicaps are able to live their lives independently and with dignity"[28] stands in a direct relationship with the handicapped individual's success in attaining equal employment opportunity under the nondiscrimination mandate contained in section 504.[29] Indeed, if there exists a situation more distressing

---

a better basic program of service as well as an emphasis within special project authority for target populations whose needs are not now being met within the basic program. Additionally, the Committee has added provisions designed to focus research and training activities on making employment and participation in society more feasible for handicapped individuals.

Id.

20. 29 U.S.C. §§ 31-42 (Supp. III 1973). *See* S. REP. No. 1297, 93rd Cong., 2d Sess. 25, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 6373, 6376.

21. S. REP. No. 318, 93rd Cong., 1st Sess. 13-16, *reprinted in* [1973] U.S. CODE CONG. & AD. NEWS 2076, 2087-90.

22. 29 U.S.C. § 793 (Supp. V 1975).

23. 29 U.S.C. § 794 (Supp. V 1975).

24. Lublin, *Lowering Barriers,* Wall St. J., Jan. 27, 1976, at 1, col. 1.

25. 29 U.S.C. § 794 (Supp. V 1975).

26. *See* notes 2-4 and accompanying text *supra.*

27. *See* note 19 *supra.*

28. White House Conference, *supra* note 5, § 301(6).

29. "The ultimate goal of most handicapped persons is to take an equal place in society. This means winning the right to full employment and to equitable pay alongside their able-bodied peers." Hamer, *supra* note 5, at 893.

than an individual burdened with a mental or physical handicap, it is the plight of a person who has been vocationally rehabilitated, or whose disabilities are unrelated to a specific job description, and is nonetheless discriminated against in an employment opportunity for which he is otherwise qualified.

II. ENDING EMPLOYMENT DISCRIMINATION AGAINST HANDICAPPED INDIVIDUALS

Section 504 of the Rehabilitation Act of 1973[30] "is the first Federal civil rights law protecting the rights of handicapped persons and reflects a national commitment to end discrimination on the basis of handicap."[31] Thus, section 504 "breaks new legislative ground"[32] by providing that:

> No otherwise qualified handicapped individual in the United States, as defined in section 706(6) of this title, shall, solely by reason of his handicap, be subjected to discrimination under any program or activity receiving Federal financial assistance.[33]

Comparative employment data demonstrates not only that section 504 "breaks new legislative ground," but that it is also a drastically needed statutory protection affording equal employment opportunities to handicapped persons. Only forty-two percent of this country's handicapped individuals, as opposed to fifty-nine percent of the total population, are gainfully employed.[34] This disparity is magnified by the fact that more than half of those handicapped persons who are employed earned less than $2,000 in 1969.[35] Unless the handicapped are given the opportunity to rebut presumptions of inferiority with respect to the job they are otherwise capable of performing, the stigma of inferiority will certainly continue and become self-perpetuating.[36] The regulations implementing section 504, consistent with the expressed intent of Congress,[37] define and prohibit acts of discrimination against qualified handicapped indi-

30. 29 U.S.C. § 794 (Supp. V 1975).

31. 42 Fed. Reg. 22,676 (1977) (letter from Joseph A. Califano, Jr., Secretary, Dept. of Health, Education, and Welfare (April 28, 1977)).

32. 41 Fed. Reg. 20,296 (1977) (letter from former HEW Secretary Mathews (May 11, 1976)).

33. 29 U.S.C. § 794 (Supp. V 1975).

34. Hamer, *supra* note 5, at 888.

35. *Id.*

36. "If one who can perform does not receive an opportunity to do so and kill the stereotype, the image becomes self-perpetuating." Note, *Developments in the Law-Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1179-1180 (1971) [hereinafter cited as *Developments-Title* VII].

37. *See* note 5 and accompanying text *supra*.

viduals in employment opportunities.[38] Section 504 provides a statutory vehicle through which the handicapped individual can rise to a higher degree of visibility in society, educate the nation, and erode the presumption of inferiority.[39]

There are three issues central to the handicapped individual's success in attaining equal employment opportunity through section 504: (1) who may claim protection under that section; (2) the existence of an affirmative duty and the availability of a private right of action; and (3) the standard which will be applied to test for discriminatory employment practices.

III. Claiming Protection Under Section 504

Initially, section 7(6) of the Rehabilitation Act defined the term "handicapped individual" as any individual who "(A) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and (B) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services provided pursuant to titles I and III of this Act."[40] Congress anticipated that this definition might erro-

38. HEW Nondiscrimination On The Basis Of Handicap In Programs Or Activities Receiving Or Benefiting From Federal Financial Assistance, 42 Fed. Reg. 22,676 (1977) (to be codified in 42 C.F.R. § 84). These regulations were promulgated in compliance with Exec. Order No. 11,914 § 2, 3 C.F.R. 117, 118 (1977). "The regulation defines and forbids acts of discrimination against qualified handicapped persons in employment. . . . As employers, recipients must make reasonable accommodation to the handicaps of applicants and employers unless the accommodation would cause the employer undue hardship." 42 Fed. Reg. 22,676 (1977) (summary).

The Secretary of HEW is directecd to "establish standards for determining who are handicapped individuals and guidelines for determining what are discriminatory practices, within the meaning of section 504." Exec. Order No. 11,914 § 1, 3 C.F.R. 117 (1977). Furthermore, "[t]he Secretary of Health, Education, and Welfare shall coordinate the implementation of section 504 . . . by all Federal departments and agencies." *Id.* In compliance with this executive order HEW has promulgated a coordinating regulation requiring that the regulations promulgated by each agency to implement section 504 be consistent with the guidelines contained therein. HEW Implementation of Executive Order 11914, Nondiscrimination on the Basis of Handicap in Federally Assisted Programs, 42 Fed. Reg. 2,132 (1978) (to be codified in 45 C.F.R. § 85).

39. *See* Hamer, *supra* note 5, at 901.

> ALMOST EVERY AMERICAN knows someone who is handicapped, whether friend, relative or acquaintance, and few people oppose the concept of equal rights for the disabled. But general indifference and unthinking discrimination are the rule. However, there are indications that matters are changing, primarily as a result of the higher visibility of handicapped citizens throughout the nation. "We've found that most of the problems resulted from ignorance," said Eric Gentille of the Civic Presence Group. "Once people are aware, they are glad to make the necessary changes. It's an educational problem, not a revolutionary one."

Id.

40. 29 U.S.C. § 706(6) (Supp. III 1973), *amended* 29 U.S.C. § 706(6) (Supp. V 1975).

neously indicate that the test of discrimination should focus on whether the individual could reasonably be expected to benefit from vocational rehabilitation services in terms of employment, or whether the individual's disability is a handicap to employment.[41] Accordingly, the definition was altered by the Rehabilitation Act Amendments of 1974[42] because "[s]ection 504 was enacted to prevent discrimination against all handicapped persons, regardless of their need for, or ability to benefit from, vocational rehabilitation

41. Section 7(6) of the Rehabilitation Act of 1973 defines "handicapped individual." That definition has proven to be troublesome in its application to provisions of the Act such as sections 503 and 504 because of its orientation toward employment and its relation to vocational rehabilitation services. It was clearly the intent of the Congress in adopting section 503 (affirmative action) and section 504 (nondiscrimination) that the term "handicapped individual" in those sections was not to be narrowly limited to employment (in the case of section 504) nor to the individual's potential benefit from vocational rehabilitation services under titles I and III (in the case of both sections 503 and 504) of the Act.

Thus, it was not intended that an employer-government contractor should condition its hiring of handicapped individuals under an affirmative action plan on such individuals' having benefited, or having a reasonable expectation of benefiting from vocational rehabilitation services. Similarly, a test of discrimination against a handicapped individual under section 504 should not be couched either in terms of whether such individual's disability is a handicap to employment, or whether such individual can reasonably be expected to benefit, in terms of employment from vocational rehabilitation services. Such a test is irrelevant to the many forms of potential discrimination covered by section 504.

Section 504 was enacted to prevent discrimination against all handicapped individuals, regardless of their need for, or ability to benefit from vocational rehabilitation services, in relation to Federal assistance in employment, housing, transportation, education, health services, or any other Federally-aided programs. Examples of handicapped individuals who may suffer discrimination in the receipt of Federally-assisted services but who may have been unintentionally excluded from the protection of section 504 by the references to enhanced employability in section 7(6) are as follows: physically or mentally handicapped children who may be denied admission to Federally-supported school systems on the basis of their handicap; handicapped persons who may be denied admission to Federally-assisted nursing homes on the basis of their handicap; those persons whose handicap is so severe that employment is not feasible but who may be denied the benefits of a wide range of Federal programs; and those persons whose vocational rehabilitation is complete but who may nevertheless be discriminated against in certain Federally-assisted activities.

In order to embody this underlying intent, section 111(a) of the Senate amendment to H.R. 14225 added a new definition of "handicapped individual."

S. REP. No. 1297, 93rd. Cong., 2d Sess. 37-38, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 6373, 6388-89.

42. Rehabilitation Act Amendments of 1974, Pub. L. No. 93-516, 87 Stat. 1617 (codified at 5 U.S.C. § 5108(c)(10) to 5108(c)(12) (Supp. V 1975); 20 U.S.C. § 107 note to 107e (Supp. V 1975); 29 U.S.C. §§ 701 note to 792(h) (Supp. V 1975)).

43. *See* note 41 *supra*. "With this amended definition, it became clear that section 504 was intended to forbid discrimination against all handicapped individuals, regardless of their need for or ability to benefit from vocational rehabilitation services." 42 Fed. Reg 22,676 (1977) (letter from Joseph A. Califano, Jr., Secretary, Dep't of Health, Education, and Welfare (April 28, 1977)).

services."[43] In order to statutorily clarify the purpose of section 504, the following sentence was added to the definition of handicapped individual:

> For the purposes of subchapters IV and V of this chapter, such term means any person who (A) has a physical or mental impairment which limits one or more of such person's major life activities, (B) has a record of such impairment, or (C) is regarded as having such an impairment.[44]

Unlike the attempt to carefully define the scope of handicapped individual,[45] neither the language of section 504 nor the legislative intent behind the Rehabilitation Act shed any light on the exact meaning which should be given to the term "otherwise qualified." In the context of employment, however, the regulations promulgated under section 504 define "qualified handicapped person" as "a handicapped person who, with reasonable accommodation, can perform the essential function in question."[46] This regulatory construction of "qualified" focuses on the capabilities of the handicapped person seeking employment, as measured against the demands of the specific position in question. The regulations also require that the employer take reasonable steps to accommodate the capabilities of the handicapped individual with respect to the demands of the position sought.[47]

Two recent district court decisions, both preceeding the effective date of the regulations promulgated under section 504,[48] construed "otherwise qualified" similarly to the definition announced in the regulations. In *Davis v. Southeastern Community College*[49]

---

44. 29 U.S.C. § 706(6) (Supp. V 1975). This definition has also been incorporated in the regulations promulgated under section 504. *See* 42 Fed. Reg. 22,678 (to be codified in 45 C.F.R. § 84.3(j)).

45. Although section 7(6) statutorily defines the term handicapped individual for purposes of the Rehabilitation Act, it is likely that the administrative agencies and courts will encounter the same difficulties in determining who is handicapped as have arisen in disability cases under the Social Security Act. *See* Wright, *supra* note 7, at 72; Liebman, *The Definition of Disability in Social Security and Supplemental Security Income: Drawing the Bounds of Social Welfare Estates*, 89 HARV. L. REV. 833 (1976). *See generally* Comment, *Defining the Handicapped: Section 504 of the Rehabilitation Act of 1973*, 3 U. DAY. L. REV. 391 (1978).

46. 42 Fed. Reg. 22,678 (1977) (to be codified in 42 C.F.R. § 84.3(k)(1)).

47. "A recipient shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program." 42 Fed. Reg. 22,680 (1977) (to be codified in 45 C.F.R. § 84.12(a)). *See* note 55 *infra* for illustrative examples of reasonable accommodation contained in the regulations.

48. The final HEW regulations promulgated under section 504 were effectuated on June 3, 1977.

49. 424 F. Supp. 1341 (E.D.N.C. 1976). The plaintiff argued that section 504 precludes Southeastern Community College from refusing her admission into a nursing program on the basis of a hearing disability. *Id.* at 1345. The court found no violation, however, as the

the court construed "otherwise qualified" as meaning "otherwise able to function in the position sought in spite of the handicap, if proper training and facilities are suitable and available."[50] As in the regulations, the *Davis* construction centers on the capability of the handicapped individual and the demands of the position sought.[51] Furthermore, the *Davis* court's references to the availability of suitable training and facilities parallels the "reasonable accommodation" requirement contained in the regulations.[52]

Likewise, the district court in *Gurmankin v. Costanzo*[53] advanced a similar construction of "otherwise qualified." The court, acknowledging that section 504 protects only "otherwise qualified" handicapped individuals, viewed that requisite condition as "clearly requir[ing] a nondiscriminatory evaluation of . . . competency."[54] The requirement of competency stressed by the *Gurmankin* court is consistent with the definition of "qualified handicapped person" provided in the regulations insofar as the question of competency necessitates an examination of the capabilities of the handicapped person and the demands of the position sought. The only substantive difference between the regulations and the *Gurmankin* decision is that the regulations require that reasonable accommodation be taken into account in examining the capabilities of the handicapped individual.[55]

---

plaintiff failed "to establish her ability to complete the program." *Id.* at 1346.

50. *Id.* at 1345. *See* note 46 and accompanying text *supra* for the regulation's definition and its similarity to the *Davis* construction.

51. In *Davis*, however, the court determined that the plaintiff's hearing disability affected her capability to perform in such a manner as to render her not otherwise qualified in light of the training and position she sought to enter. "The major problem with plaintiff's contention is that her handicap actually prevents her from safely performing in both her training program and her proposed profession." 424 F. Supp. at 1345.

52. 42 Fed. Reg. 22,680 (1977) (to be codified in 45 C.F.R. § 84.13(a)). *See* note 47 *supra* for text of that section of the regulations.

53. 411 F. Supp. 982 (E.D. Pa. 1976), *aff'd on other grounds*, 556 F.2d 184 (3d Cir. 1977). The plaintiff, a blind woman, alleged that the Philadelphia School District's hiring practices discriminated against visually handicapped persons and violated, *inter alia*, section 504 of the Rehabilitation Act. On appeal, the court held that "refusals by the District to permit her to take the examination violated due process by subjecting Ms. Gurmankin to an irrebuttable presumption that her blindness made her incompetent to teach sighted students." 556 F.2d at 187.

54. 411 F. Supp. at 992 (emphasis added). "In this regard the special problems encountered by blind teachers certainly must be considered, but the fact that several hundred blind persons are successful teachers indicates that . . . blindness does not automatically prevent . . . [one] from being 'otherwise qualified.' " *Id.*

55. *See* note 47 *supra*. Also, a "recipient may not deny any employment opportunity to a qualified handicapped employee or applicant if the basis for the denial is the need to make reasonable accommodation to the physical or mental limitations of the employee or

The regulations[56] and relevant case law[57] require a determination that the disability, given reasonable accommodations, does not prevent a handicapped individual who is otherwise qualified from performing in the position sought. If relief is to be obtained under section 504, the handicapped individual must demonstrate that he or she is able to perform, or would be able to perform if reasonable accommodations were provided, and, therefore, is otherwise as qualified as her or his able-bodied peers for the job in question.[58] The absence of proof of disqualification due to a physical or mental disability does not in itself establish a handicapped individual's qualification to function in the position sought,[59] nor is disability for one job necessarily a disability for another.[60]

Even where the claimant seeking relief under section 504 is an "otherwise qualified handicapped individual," an inquiry must be conducted to ascertain whether the employer is a recipient of federal financial assistance and therefore falls within the purview of that section. Section 504 does not prohibit discriminatory employment practices against all qualified handicapped individuals. It applies only to the employment practices of recipients of federal financial assistance.[61] Given the fact that section 504 is viewed as closely tracking section 601 of the Civil Rights Act of 1964,[62] the contention may be made that section 504 applies only to the employment practices of recipients of federal financial assistance where the primary objective of such assistance is to provide employment.[63] However,

---

applicant." 42 Fed. Reg. 22,680 (1977) (to be codified in 45 C.F.R. § 84.12(d)). The regulations illustrate that: "Reasonable accommodation may include: (1) making facilities used by employees readily accessible to and usable by handicapped persons, and (2) job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, the provision of readers or interpreters, and other similar actions." *Id.* (to be codified in 45 C.F.R. § 84.12(b)).

56. "No qualified handicapped person shall, on the basis of handicap, be subject to discrimination in employment. . . ." 42 Fed. Reg. 22,680 (1977) (to be codified in 45 C.F.R. § 84.11(a)). *See* note 55 *supra.*

57. *See* notes 50 & 54 and accompanying text *supra.*

58. Wright, *supra* note 7, at 71. For example, the *Davis* court concluded that plaintiff's hearing disability "actually prevented her from safely performing in both her training program and her proposed profession." 424 F. Supp. at 1345. *See* note 51 *supra.*

59. Wright, *supra* note 7, at 71.

60. *Id.* at 71 n.24.

61. 29 U.S.C. § 794 (Supp. IV 1974).

62. 42 U.S.C. § 2000d (Supp. IV 1974). In Lloyd v. Regional Transp. Auth. 548 F.2d 1277 (7th Cir. 1977), the court pointed out that section 504 "closely tracks" section 601 of the Civil Rights Act of 1964. *Id.* at 1280. *See* S. REP. No. 1297, 93d Cong., 2d Sess. 39, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 6373, 6390. "Section 504 was patterned after, and is almost identical to, the antidiscrimination language of section 601 of the Civil Rights Act of 1964. . . ." *Id.*

63. "Section 604 of Title VI stated clearly that the title was not intended to apply to the employment practices of the recipients of federal assistance except where the primary

the statutory language of the Rehabilitation Act,[64] legislative history,[65] regulations,[66] and judicial acquiescence,[67] establish that a more encompassing interpretation should be given to section 504. It is clear that section 504 applies to the employment practices of "any public or private agency, institution, organization, or other entity, or any other person to which federal financial assistance is extended directly or through another recipient,"[68] regardless of the purpose for which such assistance was made available.[69]

---

objective of the federal assistance was to provide employment." *Equal Employment, supra* note 3, at 467 (footnotes omitted). Since section 504 also "closely tracks" section 604 of the Civil Rights Act of 1964, it may be argued that section 504's applicability to employment practices should be similarly restricted.

64. Unlike Title VI of the Civil Rights Act of 1964, section 504 contains no language restricting its applicability to employment practices on the basis of the purpose for which the federal financial assistance was extended. *See Equal Employment, supra* note 3, at 467.

65. "Section 504 was enacted to prevent discrimination against all handicapped individuals . . . in relation to Federal assistance in employment, housing, transportation, education, health services, *or any other Federally funded programs.*" *See* note 41 *supra* (emphasis added).

66. The regulations provide that: "No qualified handicapped person shall, on the basis of handicap, be subjected to discrimination in employment under any program or activity. . . ." 42 Fed. Reg. 22,680 (1977) (to be codified in 45 C.F.R. § 84.11(a)). The regulations do not qualify the nondiscrimination mandate in employment practices on the basis of the purpose for which the federal financial assistance was received, or any other criteria.

67. One case, however, was dismissed on the grounds that the job category in which the plaintiff was allegedly discriminated against was not contained within a program or activity receiving federal financial assistance. Simon v. St. Louis County Police Dept., 14 EMPL. PRAC. DEC. (CCH) ¶ 7703 (E.D. Mo. May 2, 1977).

> In an attempt to bring the defendants within the coverage of the Act plaintiff has alleged that the Police Department is a recipient of federal aid. However, the complaint does not allege that plaintiff was denied all employment by the Department, but, rather, that defendants refused to rehire him to his position within the Department as a commissioned police officer "with reasonable accommodations for his paraplegia." In this situation plaintiff must allege that the particular job category in which he was allegedly discriminated against was a program or activity receiving federal financial assistance.

Id. at 5441 (footnote omitted). Acknowledging that the regulations under section 504 had recently been promulgated, the court qualified its holding by advising the parties to "ascertain the pertinency of the regulations." *Id.* at 5442 n.1. It is important to note that even the *Simon* court did not go so far as to hold that the purpose of the federal financial assistance must be to provide employment, if one is to successfully seek protection from discriminary employment practices under section 504. Section 504 claims, alleging discriminatory employment practices, have been judicially examined without concern for the purpose which the federal financial assistance was extended in the following cases: Duran v. City of Tampa, 430 F. Supp. 75 (M.D. Fla. 1977); Drennon v. Philadelphia Gen. Hosp., 428 F. Supp. 809 (E.D. Pa. 1977); Gurmankin v. Constanzo, 411 F. Supp. 982 (E.D. Pa. 1976), *aff'd on other grounds*, 556 F. 2d 184 (3d Cir. 1977); Silverstein v. Sisters of Charity of Leavenworth Health Services Corp., 13 Empl. Prac. Dec. (CCH) ¶ 11,500 (Colo. Ct. App. 1976).

68. 42 Fed. Reg. 22,678 (1977) (to be codified in 45 C.F.R. § 84.3(f)).

69. *See* note 65 *supra*. "In . . . defining federal financial assistance, a clarifying change has been made: procurement contracts are specifically excluded . . . The Department has never considered such contracts to be contracts of assistance; the explicit exemption has been

IV. Affirmative Duty And Private Right Of Action: *Lloyd v. Regional Transportation Authority*

The threshold determinants to the availability of relief under section 504 include status as an otherwise qualified handicapped individual and discriminatory treatment by a recipient of federal financial assistance.[70] No less crucial to the effectiveness of section 504 in ending employment discrimination against handicapped individuals is the establishment of an affirmative duty on the part of employers and a private right of action. One need only look to the number of companies and institutions affected by the Rehabilitation Act[71] and the disparity in terms of the rates of employment which exist between handicapped individuals and the rest of the country's population in general[72] to comprehend the importance of an affirmative duty and a private right of action. The private right of action is often viewed as the most effective tool in enforcing statutory prohibitions.[73] Affirmative duty, on the other hand, is a remedial tool utilized to end the competitive disadvantage minorities are often faced with in employment opportunities.[74] Achieving a nondiscrimination objective may in fact necessitate affirmative duty requirements.[75]

---

added only to avoid possible confusion." 42 Fed. Reg. 22,685 (1977) (to be codified at 45 C.F.R. § 84.3(h) (app. a)).

70. 29 U.S.C. § 794 (Supp. IV 1974). *See* notes 40-69 and accompanying text *supra*.

71. *See* note 24 and accompanying text *supra*.

72. *See* note 34 and accompanying text *supra*.

73. *See, e.g.*, J. I. Case Co. v. Borak, 377 U.S. 426, 432 (1964) (private enforcement of statutory prohibitions necessary supplement to administrative action).

74. "Affirmative action reflects a desire to avoid putting minority group members at a disadvantage because of characteristics that make them a minority." Note, *Affirmative Action Toward Hiring Handicapped Individuals*, 49 S. Cal. L. Rev. 785, 795 n.48 (1976) [hereinafter cited as *Affirmative Action*]. It "evolves from a purely remedial concept, though predominantly remedial but slightly continuing phase, into a full-fledged continuing-obligation concept." *Id.* at 803.

75. *See Affirmative Action*, note 74 *supra*, at 800 n.77.

> Once the boundaries of permissible job requirements are delineated, there remains the important question of how the employer can apply them. Is it enough for him to be a passive applier of fair requirements, or must he actively seek out minorities on whom to apply his standards? An employer can maintain a relatively segregated work force by means other than discriminatory selection criteria. He may target virtually all of his recruitment effort at whites. Or he may do no active recruiting, hiring exclusively on a walkin bias. This, also, can have a signficantly adverse impact on minority employment. After he has developed a consistent record for discrimination over a period of years, his reputation becomes known. Minorities spread word on the employer's basis. Other potential applicants, afraid of similar rebuffs, do not bother to apply. Consequently, the employer is left with a pool of applicants who have heard of vacancies by word of mouth from present . . . [able-bodied] workers. The question is whether the employer with a taste for discrimination can benignly rely on this inertia to maintain a predominantly . . . [able-bodied] work force.

Congressional intent and the regulations promulgated under section 504 endorse the requirement of an affirmative duty. The manifest intent behind section 504 is that it not only prohibits discrimination, but that it also includes a requirement of affirmative action.[76] Furthermore, the regulations state that aid, benefit, or services provided to handicapped persons must be as effective as those provided to others.[77] Employers are required to take positive steps to hire and advance in employment qualified handicapped persons in programs assisted under the Education for All Handicapped Children Act of 1975.[78] This is not to say, however, that the affirmative duty of an employer does not extend beyond programs receiving assistance under the Handicapped Children Act. The regulations further require that the recipient of federal financial assistance make "reasonable accommodation" for the limitations of a qualified handicapped applicant or employee.[79]

The Seventh and Eighth Circuit Courts of Appeals have judicially acknowledged an affirmative duty on the part of recipients of federal financial assistance. In *Lloyd v. Regional Transportation Authority*[80] the court held that "[s]ection 504 of the Rehabilitation Act, at least when considered with the regulations which now implement it, establishes affirmative rights."[81] In addition to the consideration given to section 504's companion regulations, the underlying rationale applied in the *Lloyd* decision relied extensively on the Supreme Court's holding in *Lau v. Nichols*.[82] In *Lau*, a unanimous Court held that the failure of a public school system to provide adequate language instruction to students of foreign ancestry vio-

---

Developments-Title VII, note 36 *supra*, at 1152-53. The specific scope of action required on the part of an employer under an affirmative duty is not well defined. Affirmative duty may be viewed as a fluid concept meaning "something different in each case according to the peculiar nature of the particular kind of discrimination." *Affirmative Action*, note 74 *supra*, at 801 n.81.

76. "Where applicable, section 504 is intended to include a requirement of affirmative action as well as a prohibition against discrimination." S. REP. No. 1297, 93d Cong., 2d Sess. 39, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 6373, 6390. *See* Letter of former HEW Secretary Mathews note 7 *supra*.

77. (1) A recipient, in providing any aid benefit, or service, may not, directly or through contractual, licensing or other arrangements, on the basis of handicap;

. . . .

(iii) Provide a qualified handicapped person with an aid, benefit, or service that is not as effective as that provided to others.

42 Fed. Reg. 22,678 (1977) (to be codified in 45 C.F.R. § 84.4(b) & (b) (iii)).

78. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (codified at 20 U.S.C. §§ 1232 to 1401 (Supp. V 1975)).

79. *See* notes 47 & 55 *supra*.

80. 548 F.2d 1277 (7th Cir. 1977).

81. 548 F.2d at 1281.

82. 414 U.S. 563 (1974).

lated section 601 of the Civil Rights Act of 1964.[83] The *Lloyd* court, observing that section 601 of the Civil Rights Act "closely tracks" section 504 of the Rehabilitation Act,[84] relied on *Lau* as dispositive as to the issue whether an affirmative duty exists under section 504.[85] The Eighth Circuit, in *United Handicapped Federation v. Andre,*[86] explicitly endorsed the *Lloyd* decision and held that section 504 creates an affirmative duty on the part of recipients of federal financial assistance.[87]

There are two arguments militating for a narrow reading of the *Lloyd* and *Andre* decisions with respect to the existence of affirmative duty under section 504. First, both *Lloyd* and *Andre*[88] rely on the *Lau* decision. In *Lau,* two Justices, expressing concern that the decision may be interpreted too broadly, concurred on the grounds of the number of plaintiffs adversely affected.[89] Therefore, it may be argued that the existence of an affirmative duty under section 504 is somehow dependent on the number of handicapped individuals who are being adversely affected by the alleged discriminatory employment practices. The strength of this argument is mitigated by the 504 regulations prohibiting any denial of equal employment opportunity based on the need to make reasonable accommodations.[90] Furthermore, not only does the legislative intent indicate that section 504 includes a requirement of affirmative duty,[91] but also the goal of equal employment opportunity for handicapped

83. "Under these state-imposed standards there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education." *Id.* at 566.

84. *See* note 62 and accompanying text *supra.*

85. "Because of the near identity of language in Section 504 of the Rehabilitation Act of 1973 and Section 601 of the Civil Rights Act of 1964, *Lau* is dispositive." 548 F.2d at 1281.

86. 558 F.2d 413 (8th Cir. 1977).

87. "We adhere to the reasoning . . . in the *Lloyd* appeal, and find that section 504 does create an affirmative duty. . ." *Id.* at 415.

88. Although the *Andre* decision does not specifically cite *Lau* as precedential support, the *Andre* court admittedly adhered to the analysis in *Lloyd. See* note 87 *supra.* The *Lloyd* decision relied extensively on the holding in *Lau. See* note 85 *supra.*

89. Against the possibility that the Court's judgement may be interpreted too broadly, I stress the fact that the children with whom we are concerned here number about 1,800. This is a very substantial group that is being deprived . . . .

I merely wish to make plain that when, in another case, we are concerned with a very few youngsters, or with just a single child . . . I would not regard today's decision, or the separate concurrence, as conclusive upon the issue whether the statute and the guidelines require . . . [affirmative action].

414 U.S. at 571-72 (concurring opinion of J. Blackmun with C.J. Burger joining).

90. 42 Fed. Reg. 22,680 (1977) (to be cited in 45 C.F.R. § 84.12(d)). For the text of this regulation *see* notes 47 & 55 *supra.*

91. *See* note 76 and accompanying text *supra.*

persons may in fact necessitate such a duty.[92] The concern expressed in *Lau* may more accurately be the extent of action required by affirmative duty,[93] as opposed to whether such a duty exists.

Second, insofar as the *Lloyd* and *Andre* decisions dealt with the inaccessibility of mass transportation systems to mobility-disabled persons, it may be argued that the finding of affirmative duty in these decisions should not be extended to equal employment opportunity. Such an argument, however, fails to take into account the rationale behind *Lau* and the regulations promulgated under section 504. The rationale applied in the *Lau* decision centered on the assumption that identical treatment does not always achieve equality of opportunity.[94] Likewise, the regulations acknowledge the fact that equal opportunity may require different or special treatment of handicapped persons[95] and that such different or special treatment manifests itself in the form of reasonable accommodation in the area of employment.[96] Both the *Lau* rationale and the regulations may be interpreted as necessitating the existence of an affirmative duty to remedy the alarming disparity in rates of employment and wages between handicapped individuals and their able-bodied peers.[97]

Although there is no explicit creation of a private right of action within the statutory language of the Rehabilitation Act, judicial interpretation has established its existence within the context of section 504.[98] In *Cort v. Ash*,[99] the Supreme Court has recently an-

---

92. *See* note 75 and accompanying text *supra*.

93. *See Affirmative Action*, note 75 *supra*.

94. 414 U.S. at 566. For pertinent section of the text *see* note 83 *supra*.

95. "In drafting a regulation to prohibit . . . discrimination, it became clear that different or special treatment of handicapped persons, because of their handicaps, may be necessary in a number of contexts in order to ensure equal opportunity." 42 Fed. Reg. 22,676 (1977) (letter from Joseph A. Califano, Jr., Secretary, Dept. of Health, Education, and Welfare (April 28, 1977)).

96. *See* notes 47 & 55 *supra*.

97. *See* notes 34 & 35 and accompanying text *supra*.

98. United Handicapped Fed'n v. Andre, 558 F.2d 413 (8th Cir. 1977); Lloyd v. Regional Transp. Auth. (7th Cir. 1977); Leary v. Crapsey, 566 F.2d 863 (2d Cir. 1977); Kampmeier v. Nyquist, 553 F.2d 296 (2d Cir. 1977); Barnes v. Converse College, 436 F. Supp. 635 (D.S.C. 1977); Bartel v. Biernat, 427 F. Supp. 226 (E.D. Wis. 1977); Drennon v. Philadelphia Gen. Hosp., 428 F. Supp. 809 (E.D. Pa. 1977); Duram v. City of Tampa, 430 F. Supp. 75 (M.D. Fla. 1977); Rogers v. Frito-Lay, Inc., 433 F. Supp. 200 (N.D. Tex. 1977); Kruse v. Campell, 431 F. Supp. 180 (E.D. Va. 1977); Sites v. McKenzie, 423 F. Supp. 1190 (N.D.W.Va. 1977); Davis v. Southeastern Community College, 424 F. Supp. 1341 (E.D.N.C. 1977); Vanko v. Finley, 440 F. Supp. 656 (N.D. Ohio 1977); Halerman et al. v. Pennhurst State School and Hospital et al., No. 74-1345 (E.D. Pa. Dec. 23, 1977); Hairston v. Drosick, 423 F. Supp. 180 (S.D.W. Va. 1976). *Contra*, Coleman v. Darden, 13 EMPL. PRAC. DEC. (CCH) ¶ 11,500 (D. Colo. 1977).

"Several comments urged that the regulations incorporate provision granting beneficiar-

nounced a four prong test for determining whether a statute may be properly construed as authorizing an implicit private right of action.

> In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First is the plaintiff "one of the class for whose especial benefit the statute was enacted,"—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?[100]

In *Lloyd*, the court applied the *Cort* test to the issue whether a private right of action was implicit in section 504 and concluded that "a private cause of action *must* be implied from Section 504."[101] The Eighth Circuit Court of Appeals and several district courts have also construed section 504 as "implicitly providing for a private right of action."[102]

The *Lloyd* court held that the mobility-handicapped persons impeded by transportation barriers "are among the class specially benefitted by the enactment of [section 504]" and that the first prong of the *Cort* test was satisfied.[103] This conclusion was based upon an examination of the legislative history behind the Rehabilitation Act Amendments of 1974.[104] The same legislative history also indicates that handicapped persons discriminated against in employment opportunities are among the class specifically benefited by section 504.[105]

---

ies a private right of action against recipients under section 504. To confer such a right is beyond the authority of the executive branch of government. There is, however, case law holding that such a right exists." 42 Fed. Reg. 22,687 (1977) (to be codified in 45 C.F.R. (app. a.8) (citations omitted).

99. 422 U.S. 66 (1975).

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

101. 548 F.2d at 1285 (emphasis added). *See* United Handicapped Fed'n v. Andre, 558 F.2d 413, 415 (8th Cir. 1977).

102. 548 F.2d at 1287. *See* note 98 *supra.*

103. 548 F.2d at 1285.

104. "Indeed one of the principal purposes of the 1974 Rehabilitation Act Amendments was to include within Section 504 individuals who may have been unintentionally excluded from its protection by the original definition of handicapped individuals which overemphasized employability." *Id.* at 1285 n.25. *See* note 41 *supra.* For the significance of subsequent enactments in establishing the intent of an earlier statute *see* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969). "Subsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory analysis." *Id.* at 380-81 (footnotes omitted).

105. *See* note 41 *supra.* In Drennon v. Philadelphia Gen. Hosp., 428 F. Supp. 809 (E.D.

Realizing that the "legislative history of Section 504 is bereft of much explanation," the court viewed the legislative history of the Rehabilitation Act Amendments as having cogent significance in construing the original congressional intent behind section 504 as required by the second prong of the *Cort* test.[106] The *Lloyd* court opined that the congressional intent behind section 504, as illuminated by the legislative history of the Rehabilitation Act Amendments, "contemplates judicial review of an administrative proceeding as contradistinct from an independent cause of action in federal courts."[107] The court went on, however, to clarify that "it is plain that the rights of the handicapped were meant to be enforced at some point through the vehicle of a private cause of action,"[108] and that "under the second prong of the *Cort* test, there is surely an indication of legislative intent to create such a remedy and none to deny it."[109] The distinction made by the *Lloyd* court between judicial review of an administrative proceeding and an independent cause of action may have arisen out of consideration for the doctrines of primary jurisdiction[110] and exhaustion of administrative remedies.[111] Notwithstanding the existence of a private right of ac-

---

Pa. 1977), a handicapped plaintiff instituted a cause of action alleging employment discrimination in violation of section 504. "That persons with epilepsy are considered handicapped," observed the court, "is too self-evident to be contested." *Id.* at 815.

106. 548 F.2d at 1285. *See* note 104 *supra.*

107. 548 F.2d at 1286. The legislative history of the Rehabilitation Act Amendments specifically acknowledges that the implementation of section 504 "permit[s] a judicial remedy through a private action." S. REP. No. 1297, 93rd. Cong., 2d Sess. 40, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 6373, 6391.

108. 548 F.2d 1285.

109. *Id. See* note 107 *supra.*

110. The doctrine of primary jurisdiction determines whether the court or the agency should make the initial decision.

> The precise function of the doctrine of primary jurisdiction is to guide a court in determining whether the court should refrain from exercising its jurisdiction until after an administrative agency has determined some aspect of some question arising in the proceeding before the court.
>
> . . . .
>
> A determination by a court that an agency has primary jurisdiction does not mean that the court will refrain from deciding the case before it; it may mean only that the court will postpone its action on the case before it until after the agency has made a designated determination.

3 K. DAVIS ADMINISTRATIVE LAW TREATISE § 19.01, at 2-3 (1958) (footnote omitted).

111. The exhaustion doctrine is concerned with the timing of judicial review of administrative action. It is clearly distinguishable from the doctrine of primary jurisdiction, which guides a court in determining whether a court or an agency should take initial action. When a court holds that it cannot grant the substantive relief sought because only an agency has jurisdiction to grant such relief, the court is applying the doctrine of primary jurisdiction. When a court determines at what stage of administrative action judicial review may be sought, the court is either applying the requirement of ripeness, the broad doctrine that governs the kinds of functions that courts may

tion, the doctrines of primary jurisdiction and exhaustion also affect the availability of the judicial forum for a claim for relief.[112]

In applying the third prong of the *Cort* test, the *Lloyd* court held that an implicit private right of action "is certainly consistent with the underlying purposes of the legislative scheme."[113] The court also determined that the fourth prong of the *Cort* test was satisfied as "[a]ffording a private remedy under Secton 504 . . . would not be the kind of suit traditionally relegated to state law in an area basically the concern of the States."[114]

The *Lloyd* holding that section 504 implicitly provides for a private right of action may arguably be viewed as a narrow one insofar as the court left "open as premature the question whether, after consolidated procedural enforcement regulations are issued to implement Section 504, the judicial remedy available must be limited to a post-administrative remedy."[115] More accurately, however, the *Lloyd* decision and application of the *Cort* test firmly establish an implicit private right of action[116] which is subject to: (1) a determination of whether the court or an agency should make the initial decision under the doctrine of primary jurisdiction,[117] and (2) the timing of the judicial action under the doctrine of exhaustion.[118]

V. Invidious Motive and Discriminatory Effect: Standards for Scrutinizing Unequal Treatment

The regulations extend section 504's nondiscrimination mandate to a wide range of employment activities[119] providing that: "No

---

perform, or the relatively narrow doctrine of exhaustion, which focuses not upon the functions of courts but merely upon the completion or lack of completion of administrative action.

Id. at § 20.01, at 57.

112. *See* notes 110 & 111 *supra.*

113. 548 F.2d at 1286.

114. *Id.*

115. *Id.* at 1286 n.29. The court went on in dicta to state that "assuming a meaningful administrative mechanism, the private cause of action under Section 504 should be limited to a posteriori judicial review." *Id.*

116. It is recognized in the appendix to the regulations promulgated under section 504 that the *Lloyd* decision holds that a private right of action does exist. *See* note 98 *supra.*

117. *See* note 110 *supra.*

118. *See* note 111 *supra.*

119. (b) Specific activities. The provisions of this subpart apply to:

(1) Recruitment, advertising, and the processing of applications for employment;

(2) Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff, and rehiring;

(3) Rates of pay or any other form of compensation and changes in compensation;

(4) Job assignments, job classifications, organizational structures, position descriptions, lines of progression, and changes in compensation;

(5) Leaves of absence, sick leave, or any other leave;

qualified handicapped person shall, on the basis of handicap, be subjected to discrimination in employment."[120] There are no exacting standards present in the 504 regulations or the Rehabilitation Act, however, from which specific employment practices can be scrutinized.[121] What the regulations do provide are general guiding principles mapping out the contours of discriminatory actions in violation of section 504. Aids, benefits, and services provided by recipients of federal financial assistance are not required to yield an identical level of achievement for handicapped persons and their able-bodied peers, but must provide handicapped persons an equal

---

(6) Fringe benefits available by virtue of employment, whether or not administered by the recipient;

(7) Selection and financial support for training, including apprenticeship, professional meetings, conferences, and other related activities, and selection for leaves of absence to pursue training;

(8) Employer sponsored activities, including social or recreational programs; and

(9) Any other term, condition, or privilege of employment.

42 Fed. Reg. 22,680 (1977) (to be codified in 45 C.F.R. § 84.11(b)-(b)(9)).

The Fair Labor Standards Act provides in part that:

Except as otherwise provided in paragraphs (2) and (3) of this subsection, the Secretary of Labor, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by regulation or order provide for the employment under special certificates of individuals (including individuals employed in agriculture) whose earning or productive capacity is impaired by age or physical or mental deficiency or injury, at wages which are lower than the minimum wage applicable under section 206 of this title but not less than 50 per centum of such wage and which are commensurate with those paid nonhandicapped workers in industry in the vicinity for essentially the same type, quality, and quantity of work.

29 U.S.C. § 214(c)(1) (Supp. IV 1974). This statute permits and encourages the payment of lower wages to handicapped workers and on its face appears to be in conflict with section 504 of the Rehabilitation Act and section 84.11(b)(3) of the regulations. It is argued that section 504 should be interpreted consistently with the Fair Labor Standards Act to "allow differential wages for handicapped workers." Wright, *supra* note 7, at 76.

The equal protection mandate of section 504 is triggered only by the handicapped individual who is otherwise qualified. *See* notes 45-58 and accompanying text *supra*. Where a handicapped individual is otherwise qualified for a particular job description, there is no sound reason why such an individual should not receive wages and compensation equal to his able-bodied peers. On the other hand, lower wages may be paid under the Fair Labor Standards Act where a handicapped person is not otherwise qualified and "whose *earning or productivity capacity is impaired* by . . . physical or mental deficiency." 29 U.S.C. § 214(c)(1) (Supp. IV 1974) (emphasis added). The applicability of section 504 and the Fair Labor Standards Act to wages and compensation are mutually exclusive; the former requires a handicapped individual to be otherwise qualified, while the latter requires impaired capacity as the result of some mental or physical deficiency. Therefore, neither is section 504 in conflict with the Fair Labor Standards Act, nor should section 504 be interpreted to allow discriminatory wage scales for otherwise qualified handicapped employees.

120. 42 Fed. Reg. 22,680 (1977) (to be codified in 45 C.F.R. § 84.11(a)).

121. In Gurmankin v. Costanzo, 411 F. Supp. 982, 989 (E.D. Pa. 1976), *aff'd on other grounds*, 556 F.2d 184 (3rd Cir. 1977), the court did view it "reasonably clear that a refusal to hire a blind person as a teacher is the kind of discrimination which . . . section [504] was meant to prohibit."

opportunity to secure the same result or level of achievement.[122] Within the context of employment practices, a "recipient may not participate in a contractual or other relationship that has the effect of subjecting qualified handicapped applicants or employees to discrimination."[123]

In general, one of three standards has traditionally been applied by the courts in discrimination cases.[124] Under the Court's current methodology, in cases arising under the equal protection clause, the plaintiff has the burden to establish that "invidious discriminatory purpose was a motivating factor"[125] behind the challenged conduct. The Title VII standard, in light of *Griggs v. Duke Power Co.*,[126] condemns conduct which produces discriminatory effects, regardless of motive.[127] The final standard is judicial review of administrative actions limited to determining "whether there is substantial evidence to support the . . . agency's decision."[128] This standard of review is applied where the administrative agency has made the initial determination which is then appealed through the courts.[129]

---

122. For purposes of this part, aids, benefits, and services, to be equally effective, are not required to produce the identical result or level of achievement for handicapped persons but must afford handicapped persons 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 person's needs.

42 Fed. Reg. 22,679 (1977) (to be codified in 45 C.F.R. § 84.4(b)(2)).

123. 42 Fed. Reg. 22,680 (1977) (to be codified in 45 C.F.R. § 84.11(a)(4)). "The relationships referred to in this subparagraph include relationships with employment and referral agencies, with labor unions, with organizations providing or administering fringe benefits to employees of the recipient, and with organizations providing training and apprenticeship programs." *Id.*

124. *See* Wright, *supra* note 7, at 72-74.

125. Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 266 (1977). *See* General Electric Co. v. Gilbert, 429 U.S. 125 (1976); Washington v. Davis, 426 U.S. 229 (1976).

126. 401 U.S. 424 (1971).

> The Supreme Court used the [Washington v. Davis] case to announce the proposition that under the Fourteenth Amendment and related statutes, the "effect test" of Griggs did not apply. This is not a surprising conclusion. It was one that could be drawn by looking at the opinions of Justice Burger the year that Griggs was decided. In contrast to the expansive interpretation of Title VII in Griggs was the careful and cautious interpretation of the Fourteenth Amendment. Certainly the processes of democracy are strengthened by the courts when they liberally construe a statute which has been recently passed and recently reconfirmed by the Congress instead of exercising their own judgment under the Constitution. Title VII rights are far stronger for being based on contemporary legislation than if they rested solely on the opinions of the Supreme Court.

Blumrosen, *Developments in Equal Opportunity Law*, 36 FED. B.J. 55, 63 (1977).

127. *See* Wright, *supra* note 7, at 73; Blumrosen, *supra* note 126, at 63.

128. Jones v. Mathews, 533 F.2d 308, 309 (5th Cir. 1976) (per curiam) (social security disability claim).

129. *See* Wright, *supra* note 7, at 74.

In a section 504 claim initially instituted before a court, the choice of standards for scrutinizing alleged discriminatory treatment centers on the equal protection motive test[130] and the Title VII effect test.[131] The motive test imposes a particularly harsh and unrealistic burden on the claimant.[132] If it cannot be shown that the employer's conduct was solely motivated by some discriminatory purpose, the burden of proof merely shifts to the employer to establish "that the same decision would have resulted even had the impermissible purpose not been considered."[133] Under this standard, cases of mixed motive will likely be resolved against the handicapped claimant.[134] The fact that most instances of discrimination against handicapped persons arise out of benign motives,[135] as opposed to the invidious discriminatory purpose which is a prerequisite for relief under the Court's current equal protection methodology,[136] demonstrates that the motive test is completely unsatisfactory in the context of achieving equal employment opportunity for otherwise qualified handicapped individuals.

While section 504 prohibits discrimination "solely by reason of . . . handicap,"[137] the regulations provide that: "No qualified handicapped person shall, on the basis of handicap, . . . be subject to discrimination."[138] The omission of the word "solely" from section 504's companion regulations is an occurrence ripe to spawn litigation. A cursory reading of section 504 may result in the conclusion that the use of the phrase "solely by reason of . . . handicap" compels an application of the motive test in employment discrimination claims arising under section 504.[139] At least superficially, the lan-

---

130. *See* note 125 *supra.*

131. *See* note 126 *supra.*

132. *See* Note, *Wright v. Rockefeller And Legislative Gerrymanders: The Desegregation Decisions Plus A Problem Of Proof,* 72 YALE L.J. 1041, 1059 (1963).

> The burden imposed on plaintiffs to show the kind of intent required by *Davis* is not met by proof of foreseeable consequences or effects. It is not even met by proof that the . . . [recipients] are aware of the disproportionale impact of their acts. Nothing short of a showing of deliberate, purposeful, systematic discrimination will justify a finding of a . . . violation.

Comment, *From Denver to Dayton: The Evolution of Constitutional Doctrine in Northern School Desegregation Litigation,* 3 U. DAY. L. REV. 115, 129 (1978). Furthermore, "the style of . . . [the *Arlington Heights*] decision was that it presented one with an almost impossible task of not only determining what was one's intent, but also what also was not one's intent." Crawford and Quinn, *In Re Intention,* THE ARISTOTELIAN SOCIETY 187, 188 (Supp. LI 1977).

133. 429 U.S. at 270 n.21.

134. *See* Wright *supra* note 7, at 81.

135. *See* Hamer, *supra* note 5, at 901.

136. *See* note 124 and accompanying text *supra.*

137. 29 U.S.C. § 794 (Supp. V 1975).

138. 42 Fed. Reg. 22,678 (1977) (to be codified at 45 C.F.R. § 84.4(a)).

139. 29 U.S.C. § 794 (Supp. V 1975). Such a reading would erroneously compel an

guage used in section 504 parallels the Court's current equal protection methodology.[140] A more incisive analysis of the Rehabilitation Act and the 504 regulations, however, conclusively establishes the Title VII effect test as the correct standard to apply in discrimination claims arising under section 504.

One of the declared congressional purposes behind the Rehabilitation Act is to "promote and expand employment opportunities in the public and private sectors for handicapped individuals."[141] Given the fact that discrimination against handicapped persons generally originates out of benign motives, requiring an application of the motive test in claims of employment discrimination would emasculate section 504's nondiscrimination mandate. The motive test would render section 504 useless verbiage in guaranteeing "that equality of opportunity . . . be provided to all individuals with handicaps,"[142] as it is unlikely that many handicapped claimants could meet the harsh and unrealistic burden imposed on them under that test.[143]

It is at least arguable that the phrase "solely on the basis of . . . handicap" was intended to accent the fact that unequal treatment based on an inability to perform due to a disability does not constitute discrimination.[144] That is to say the "solely" is descriptive not of the motive behind the recipient's conduct, but of the status of the handicapped individual. Specific support for this construction can be found in the regulations governing employment practices which provide that recipients "may not limit, segregate, or classify applicants or employees in any way that adversely affects their opportunities or *status because of handicap*."[145] For example, where a disability affects an individual's capability to perform in a specific job description to such an extent as to make that individual unqualified for the position, an employer's refusal to hire would not have been based "solely" on the individual's status as handicapped. The refusal to hire was the result of the handicapped individual's incapability of fulfilling the demands of the job in question.[146] On the other

application of the motive test in all discrimination claims arising under section 504.

140. *See* notes 125 & 133 and accompanying text *supra*.

141. 29 U.S.C. § 701(8) (Supp. V 1975). *See* note 21 and accompanying text *supra*.

142. White House Conference, *supra* note 5, at § 301(4).

143. *See* notes 132 & 133 and accompanying text *supra*.

144. The legislative history behind the Rehabilitation Act is bereft of any explicit explanation. *See* Lloyd v. Regional Transp. Auth., 548 F.2d 1277, 1285 (1977).

145. 42 Fed. Reg. 22,680 (1977) (to be codified in 45 C.F.R. § 84.11(a)(3)) (emphasis added).

146. For example, a blind person would certainly not be capable of fulfilling the demands of a job as a bus driver.

hand, where a disability is unrelated to the demands of the position sought,[147] an employer's refusal to hire may be argued as based "solely" on that individual's status as handicapped.

Construing the phrase "solely by reason of . . . handicap" as descriptive of *status* promotes the stated goals behind the Rehabilitation Act[148] and warrants an application of the Title VII effect test.[149] The effect test would require the otherwise qualified handicapped claimant to show only that the recipient's employment practices were discriminatory in effect and would relieve the claimant from the unrealistically harsh burden of proving invidious discriminatory purpose. Application of the effect test would also be consistent with the regulations insofar as they prohibit activities "that have the *effect* of subjecting qualified handicapped persons to discrimination on the basis of handicap."[150] Finally, the democratic processes are not eroded when the courts liberally construe a recently enacted statute, as opposed to judicially extending the protections of the equal protection clause.[151]

VI. Conclusion

To a large extent, the judicial process will determine whether the Rehabilitation Act's command to extend equality of opportunity in employment to the otherwise qualified handicapped individuals in our society will ring hollow or succeed in fully developing our nation's human resources. A liberal scope of application, the establishment of an affirmative duty and a private right of action, and adoption of the Title VII effect test to scrutinize unequal treatment are among the tools which can assure that handicapped individuals attain equal employment opportunity under the nondiscrimination mandate contained in section 504. There is perhaps nothing more fundamental to the goal of living independently and with dignity than the ability to secure equality of opportunity in employment; section 504 of the Rehabilitation Act is the first statutory enactment that can provide a legal avenue for handicapped individuals to create equal employment opportunities and to achieve that goal.

Much of the prejudice against handicapped persons in employ-

147. The relatedness of the particular disability must be determined along with any "reasonable accommodation" the employer may make. 42 Fed. Reg. 22,680 (1977) (to be codified in 45 C.F.R. § 84.12(a)).

148. *See* notes 5 & 19 *supra*.

149. *See* note 126 and accompanying text *supra*.

150. 42 Fed. Reg. 22,678 (1977) (to be codified in 45 C.F.R. § 84.4(6)(1)) (emphasis added).

151. *See* Blumrosen, *supra* note 126.

ment opportunities arises out of ignorance. The central problem, therefore, is one to be resolved through a process of education. Opening the judicial forum to handicapped claimants seeking relief under section 504 from discriminatory employment practices is perhaps the most direct means to sensitize our nation to the waste of human resources occurring in the employment sector of society. Judicially fostering an ascent to higher levels of visibility places the handicapped individual in a strong tactical position to educate the nation, erode the stigma and presumption of inferiority and end the plight of the vocationally rehabilitated and those with disabilities unrelated to a specific job description who are discriminated against in an employment opportunity for which they are otherwise qualified.

In the final analysis, it will be the federal courts that determine whether section 504 of the Rehabilitation Act is an evanescent statement of altruistic social policy or an efficacious statutory enactment guaranteeing the benefits and fundamental rights of this society to otherwise qualified handicapped individuals.

Garry W. O'Donnell