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FOREWORD TO THE SYMPOSIUM ISSUE ON EMPLOYMENT RIGHTS OF THE HANDICAPPED

*Senator Birch Bayh**

Individuals with handicaps are too often excluded from schools and educational programs, barred from employment or are underemployed because of archaic attitudes and laws, deprived access to transportation, buildings and housing because of architectural barriers and lack of planning, and are discriminated against by public laws which frequently exclude individuals with handicaps or fail to establish appropriate enforcement mechanisms.¹

The right to work is one of the most basic of all our cherished rights. Work gives an individual not only economic self-sufficiency, but also a sense of dignity, self worth, and the satisfaction of making a contribution to our society. Over the past decade, this nation has witnessed a growing awareness of the employment rights of many disadvantaged groups in our society. Women and minorities, under the protection of the Civil Rights Act of 1964,² have begun to make substantial inroads into the labor market. Until the past few years, however, we have largely ignored the employment rights of another disadvantaged group, our nation's handicapped.

The federal government has made a commitment to end this "unconscionable discrimination"³ against our nation's handicapped. Beginning in 1948 with the congressional enactment of Public Law 87-614, which prohibited the Federal Civil Service from discriminating against a person due to physical handicap,⁴ and ending with the signing of the final regulations implementing Section 504 of the Rehabilitation Act of 1973 on April 28, 1977,⁵ the federal government

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1. Senate Committee on Labor and Public Welfare, Rehabilitation Act Amendments of 1974, S. Rep. No. 1139, 93d Cong., 2d Sess. 32.

2. 42 U.S.C. §§ 2000 to 2000h-6 (Supp. V 1975).

3. "For decades, handicapped Americans have been an oppressed and, all too often, a hidden minority, subjected to unconscionable discrimination, beset by demoralizing indignities, detoured out of the mainstream of American life, and unable to secure their rightful role as full and independent citizens." Remarks of Joseph Califano, Secretary of HEW (April 29, 1977) upon signing the regulations implementing Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. (1970).

4. 1948 Amendment to the Civil Service Act, 5 U.S.C. § 7153 (1976).

5. 45 C.F.R. § 84 (1977).

has established the legal framework with which to end employment discrimination for a majority of handicapped Americans.

The federal government accepted this commitment on the grounds of both simple social justice as well as economic considerations. To the extent that the skills of the approximately nineteen million handicapped Americans go untapped, our basic economy suffers.⁶ Regrettably, the unemployment of handicapped individuals impairs not only their opportunity for self-sufficiency, but frequently has ramifications for the nation, as these families frequently turn to welfare.

Why does this condition exist? There are several reasons for the high unemployment rate of the handicapped among them the difficulty of transportation and physical barriers at the worksite. However, the most crucial deterrent to employment seems to be the attitudes of employers. Acting upon stereotypes, many employers fear that the handicapped person will be unable to perform assigned tasks. This attitude exists despite studies showing that a handicapped worker, when assigned to an appropriate position, performs as well or better than his non-handicapped co-workers.⁷

The number of cases brought under federal or state law prohibiting discrimination against the handicapped indicates that this problem arises in more contexts than is normally realized. For example, in New York, a practical nurse was denied a job in a city hospital because she had high blood pressure. In California, a man was denied a job as a bread truck driver because he stuttered. In New Jersey, a computer operator was dismissed from his job at a refining company after his employers learned he was an epileptic. A young woman in Massachusetts was suddenly told there was no job opening when her prospective employer, a Massachusetts shoe company, realized that her address was a half-way house for persons recovering from mental illness.⁸ Such cases prompted Congress to enact the employment discrimination provisions of the Vocational Rehabilitation Act of 1973.

THE REHABILITATION ACT OF 1973

Congressional enactment of the Rehabilitation Act of 1973⁹ may be one of the most important pieces of legislation in our nation's history.

6. An estimated fourteen million physically handicapped persons face employment discrimination in the United States. Approximately five million mentally retarded persons could work if given proper training and rehabilitation. 118 CONG. REC. 3320 (1972) (remarks of Sen. Williams). See generally, I. KOVARSKY, *DISCRIMINATION IN EMPLOYMENT* (1976).

7. See 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, 818 n.18 (1977).

8. New York Times, May 3, 1975, at 14.

9. 29 U.S.C. §§ 701-94 (Supp. V 1975).

Its civil rights provisions have the potential to elicit fundamental changes in many facets of American life. The greatest impact for handicapped citizens lies within three sections of Title V which was passed with very little controversy or debate by the Congress. These sections include Section 501,¹⁰ mandating non-discrimination by the federal government in its own hiring practices; Section 503,¹¹ prohibiting discrimination and requiring affirmative action on the part of federal contractors who receive more than \$2,500 in contracts; and finally, Section 504¹² prohibiting discrimination against handicapped individuals in any federally funded program or activity. According to the National Center for Law and the Handicapped, these provisions "established that because a man is blind or deaf or without legs, he is not less a citizen, that his rights of citizenship are not revoked or diminished because he is disabled."¹³

Defining Handicapped

Ever since Woodrow Wilson signed legislation aimed at rehabilitating disabled World War I veterans,¹⁴ Congress has been expanding the definition of handicapped persons who are eligible for various forms of governmental assistance.¹⁵ For the purpose of the Rehabilitation Act of 1973, the definition of a handicapped individual with respect to employment is "any person who has a physical or mental impairment which substantially 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 impairment."¹⁶ Congress intended this definition to be broad¹⁷ and the regulations reflect this intent. Physical or mental impairment is defined to include a broad spectrum of disabilities ranging from the anatomical loss of limbs to a history of heart disease or cancer. The Attorney General, in a memorandum to Secretary Califano, confirmed that the congressional intent includes those suffering from either drug addiction or alcoholism.¹⁸

10. 29 U.S.C. § 791 (Supp. V 1975).

11. 29 U.S.C. § 793 (Supp. V 1975).

12. 29 U.S.C. § 794 (Supp. V 1975).

13. *Oversight Hearings on Rehabilitation of the Handicapped Program and the Implementation of the Same by Agencies under the Rehabilitation Act of 1973 before the Subcommittee on the Handicapped of the Senate Comm. on Labor & Public Welfare*, 94 Cong., 2d Sess. 490 (1976).

14. The Smith-Fees Act of 1920, Pub. L. No. 66-236, 41 Stat. 219, *codified at* 29 U.S.C. §§ 31-42 (1970), provided limited services for both veteran and civilian physically handicapped.

15. 29 U.S.C. § 32 (1970). The statute which was enacted in 1943 expanded the scope of services and extended them to mentally ill and mentally retarded individuals.

16. 29 U.S.C. § 706(6) (Supp. V 1975).

17. *See* S. REP. NO. 93-1139, 93rd Cong., 2d Sess. 23 (1974).

18. Letter from Attorney General Griffin Bell to Secretary of Health, Education and Welfare Joseph Califano (April 12, 1977).

The protection afforded the handicapped under the various sections of Title V is limited, however, by the restriction on application of these sections to "qualified" handicapped individuals. The term "qualified" handicapped individual is defined under the implementing regulations as a person who, with reasonable accommodation, can perform the essential functions of the job in question.¹⁹

Coverage

Title V of the Rehabilitation Act affords a great deal of protection for the handicapped in employment. Section 501 applies to the employment practices of the federal government itself, requiring affirmative action on the part of the federal government in all its hiring practices. Section 503 applies to all government procurement contracts and sub-contracts for \$2,500 or more. It typically applies to defense contractors, space program contractors, construction companies, and firms which might sell equipment or supplies to the federal government. Section 504, on the other hand, applies to all recipients of federal financial assistance, including school districts, colleges and universities, day care centers, hospitals, nursing homes or public welfare offices.

The various sections of Title V are similar with respect to the specific employment activities covered. Discrimination against the qualified handicapped individual is prohibited in: "(1) [r]ecruitment, advertising, and the processing of applications for employment; (2) [h]iring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff and rehiring; (3) [r]ates of pay or any other form of compensation; (4) [j]ob assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists; (5) [l]eaves of absence, sick leave, or any other leave; (6) [f]ringe benefits available by virtue of employment, whether or not administered by the recipient; (7) [s]election and financial support for training, including apprenticeship, professional meetings, conferences, and other related activities, and selection for leaves of absence to pursue training; (8) [e]mployer sponsored activities, including social or recreational programs; and (9) [a]ny other term, condition or privilege of employment."²⁰

19. 41 C.F.R. § 60-741.2 (1977).

20. 45 C.F.R. § 84.11(b). *See also* 41 C.F.R. § 60-741.6 (1977).

Regulatory Differences Between 503 and 504

While Sections 503 and 504 are equally concerned with eliminating discrimination for both federal contractors and recipients of financial assistance, the regulatory approaches taken under these two provisions contain some important differences. The major difference between Section 503 and 504 is that Section 503 requires affirmative action on the part of any federal contractor or subcontractor for contracts over \$2,500. Affirmative action under Section 503 includes appropriate outreach and positive recruiting on the part of the contractor, as well as reasonable accommodation to the needs of the handicapped worker. Such accommodations include access to the worksite, restrooms and lunch area. It might also include job restructuring to conform to the potentials of the handicapped worker. Affirmative action under Section 503 does not include a requirement of goals and timetables. It does, however, require a "good faith" effort on the part of an employer to establish a program in which handicapped individuals will be given a fair opportunity to fill an existing vacancy. Written affirmative action plans are required only of those contractors with fifty or more employees and a contract of over \$50,000.²¹

In contrast to Section 503, Section 504 recipients are not required to maintain affirmative action plans. Instead, they must insure non-discriminatory action for the handicapped by undertaking a self-evaluation. Such evaluation must involve consultation with the interested person, including handicapped persons or organizations representing the handicapped, in order to determine how to eliminate past discriminatory policies or practices. Recipients that employ fifteen or more persons must maintain on file for three years a list of those organizations or individuals consulted and a description of the modifications to be made.²²

One of the major problems for the handicapped worker has been the stereotypical images held by prospective employers.²³ In order to mitigate this problem, both Sections 503 and 504 prohibit the establishment of criteria which eliminate handicapped applicants unless it can be shown that a business necessity dictates such a result.²⁴ The two sections vary with respect to the way in which the employer

21. 41 C.F.R. § 60-741.5(a) (1977). See Note, *Affirmative Action Toward Hiring Qualified Handicapped Individuals*, 49 S.CAL. L. REV. 785 (1976).

22. 45 C.F.R. § 84.6(c) (2) (1977).

23. See notes 7 & 8 and accompanying text *supra*.

24. See note 8 *supra*.

must comply with this requirement.²⁵ For example, the requirements for pre-employment inquiries,²⁶ and medical examinations are different for the two types of employers.

Under the Section 503 regulations, employers are required to review all physical and mental job requirements to ensure that they do not eliminate qualified handicapped individuals.²⁷ If job requirements screen out handicapped applicants, they must be "job related"²⁸ and must be consistent with "business necessity and the safe performance of the job."²⁹ For instance, if the job opening is for an operator of heavy construction equipment, questions may be asked by the employer as to any visual impairment suffered by the applicant. The employer, however, retains the burden of proof that all such inquiries are specifically relevant to the job in question.³⁰

The Section 504 regulations contain a much broader prohibition on pre-employment inquiries. Pre-employment inquiries relating to the existence of handicaps or questions concerning the nature or severity of the handicap are not permitted.³¹ Under the Section 504 regulations, an employer may ask an applicant questions which concern only the individual's talents and abilities. Thus, for instance, an employer may inquire as to whether the applicant has a valid driver's license if the job requires the operation of a motor vehicle.

Sections 503 and 504 differ with respect to pre-employment medical examinations. Though both regulations permit such examinations, Section 504 would permit them only if such medical examinations were given to all applicants or employees, regardless of handicap.³²

Central to both sets of regulations is the requirement that employers must make reasonable accommodation to the handicapped employee. The specific nature of the reasonable accommodation will vary, depending upon the facts of individual situations. Section 504 specifically indicates that reasonable accommodations may include making facilities accessible to the handicapped, job restructuring, modified work schedules, or the provision of the readers or interpreters.³³

25. See Brown, *Handicappers' Rights in Private Arbitration*, 27 DEPAUL L. REV. 1089 (1978).

26. See note 31 and accompanying text *infra*.

27. 41 C.F.R. § 60-741.6(c) (1977).

28. *Id.* at § 60-741.6(c) (1).

29. *Id.*

30. *Id.* at § 60-741.6(c) (2).

31. 45 C.F.R. § 84-14 (1977).

32. *Id.*

33. 45 C.F.R. § 84.12(b) (1977).

Employers may be exempted from the requirements of reasonable accommodation only under certain restricted instances. Under Section 503, if an employer can demonstrate that accommodation will impose an undue hardship on the operation of business, he may be exempted. This hardship must be established on grounds of (1) business necessity and (2) financial cost and expenses.³⁴ Similarly, Section 504 permits an exemption depending upon the following factors: (1) the overall size of the recipient's program with respect to number of employees, number and type of facilities, and size of budget; (2) the nature of the recipient's operation, including the composition and structure of the recipient's workforce; and (3) the nature and cost of the accommodations needed.³⁵

In general, these regulations represent the Congressional intent to integrate the handicapped into the mainstream of American work life. The regulations, to paraphrase Attorney General Griffin Bell, do not require the impossible.³⁶ Neither do they unrealistically ignore fiscal restraints or other problems that might arise in achieving reasonable accommodation of our nation's handicapped workers.

ENFORCEMENT OF THE FEDERAL REHABILITATION ACT

Even though various provisions of the Rehabilitation Act have been subject to only limited testing in the courts, some of the initial early cases brought on the basis of Section 501, 503, or 504 are encouraging.³⁷ Others, however, have shown an unfortunate misunderstanding of both the obligations imposed by the law and the regulations, as well as Congressional intent in formulating the laws.³⁸

It is particularly important to emphasize the desire of the Congress to make the Rehabilitation Act a sweeping guarantee of civil rights of the handicapped, particularly their employment rights. Congress clearly intended that Section 504 offer the same broad protection to the handicapped as provided to minorities by Section 601 of the Civil Rights Act of 1964³⁹ and to women by Section 901 of the

34. 41 C.F.R. § 60-741.6(d) (1977).

35. 45 C.F.R. § 84.12(c) (1977).

36. See note 21 *supra*.

37. Lloyd v. Regional Transp. Authority, 548 F.2d 1277 (7th Cir. 1977); Hairston v. Drosick, 423 F. Supp. 180 (S.D. W. Va. 1976); Sites v. McKenzie, 423 F. Supp. 1190 (N.D. W. Va. 1976).

38. Wood v. Diamond State Telephone Co., 440 F. Supp. 1003 (D. Del. 1977); Coleman v. Darden, 13 Empl. Prac. Dec. 6788 (D. Colo. 1977); Rogers v. Frito-Lay, Inc. 433 F. Supp. 200 (N.D. Tex. 1977).

39. 42 U.S.C. § 2000d (Supp. V 1975).

Education Amendments of 1972.⁴⁰ Indeed, the Senate Committee on Labor and Public Welfare stated in its report on the Rehabilitation Act of 1973 that Section 504:

was patterned after, and is almost identical to, the anti-discrimination language of section 601 of the Civil Rights Act of 1964, 42 U.S.C. 200d-1 (relating to race, color and national origin) and 42 U.S.C. 1683 (relating to sex). The section therefore constitutes the establishment of a broad government policy that programs receiving Federal financial assistance shall be operated without discrimination on the basis of handicap. . .

The language of section 504, in following the above-cited Acts, further envisions the implementation of a compliance program which is similar to those Acts. . . .⁴¹

The committee goes on to point out that the genesis of Section 504 was in legislation introduced by Congressman Vanik and Senator Humphrey as an amendment to Title VI of the 1964 Civil Rights Act.⁴² Similarly, Congress intends Section 503 to maintain the same basic standards regarding affirmative action for the handicapped by federal contractors as was required under Executive Order 11246 for minorities. Again, according to the Senate report:

It should be noted, however, that the contractor's obligation cannot be fulfilled by the expediency of hiring persons marginally or previously handicapped, persons "regarded as" handicapped. Rather, an acceptable affirmative action program must be aimed at the entire class of employable handicapped persons, with particular attention to the severely handicapped. This standard parallels the obligation of a Federal contractor under Executive Order No. 11246 to employ persons who might be discriminated against on the basis of national origin: the obligation extends to all ethnic groups within the available pool and cannot be fulfilled selectively by hiring from only one ethnic group.⁴³

The intention of the Congress to pattern the scope and remedies under Section 504 after Title VI of the Civil Rights Act takes on a particular significance in the growing dispute over whether there is a private cause of action. Having established that Congress purposely interposed the language of Title VI of the Civil Rights Act of 1964 in Section 504, it is useful to note that there are ample precedents for private cause of action under this statute. In *Lau v. Nichols*,⁴⁴ the

40. 20 U.S.C. § 1681 (Supp. V 1975).

41. S. REP. NO. 93-1139, 93d Cong., 2d Sess. 24 (1973).

42. 119 CONG. REC. 7114 (1973).

43. S. REP. NO. 93-1139, *supra* note 41, at 25.

44. 414 U.S. 563 (1974).

Supreme Court held that Section 601 provided a private cause of action. In ordering the San Francisco School District to comply with the Title VI requirements for its Chinese-American students, the Court made it clear that there was the right to a private cause of action under the Civil Rights Act. This right was also upheld in several lower federal cases.⁴⁵

A statement by the Senate Labor Committee and Public Welfare report reinforces the intent to create a private right of action:

This approach to implementation of Section 504 which closely follows the models of the above-cited anti-discrimination provisions would insure administrative due process (right to hearings, right to review), provide for administrative consistency within the Federal government as well as relative ease of implementation, *and permit judicial remedy through a private action.*⁴⁶

While there is no definitive legislative history providing an explicit statement creating a private cause of action under Section 503, the reasoning of the federal district court in *Drennon v. Philadelphia General Hospital* is persuasive.⁴⁷ The court held that the absence of legislative history did not negate a private cause of action under the Rehabilitation Act. The court cited Mr. Justice Brennan's holding in *Cort v. Ash* that:⁴⁸ "[I]n situations in which it is clear that federal law has granted a class of persons certain rights, it is not necessary to show an intention to *create* a private cause of action, although an explicit purpose to *deny* such cause of action would be controlling."⁴⁹

Agency enforcement of the various sections under Title V of the Rehabilitation Act resides within different offices and departments of the Federal Government. Section 501, prohibiting discrimination in the Federal Government's own hiring practices, is enforced by the Civil Service Commission.⁵⁰ Section 503, dealing with federal con-

45. *Bossier Parish School Board v. Lemon*, 370 F.2d 847 (5th Cir. 1967); *Alvarado v. El Paso Independent School Dist.*, 326 F. Supp. 674 (W.D. Tex. 1971), *rev'd on other grounds*, 445 F.2d 1011 (5th Cir. 1971); *Kelly v. Altheimer, Arkansas Pub. School Dist. No. 22*, 297 F. Supp. 753 (E.D. Ark. 1969), *rev'd on other grounds*, 378 F.2d 483 (8th Cir. 1967).

46. S. REP. NO. 93-1139, *supra* note 41, at 25. (emphasis added).

47. *Drennon v. Philadelphia General Hospital*, 428 F. Supp. 809 (E.D. Pa. 1977).

48. 422 U.S. 66 (1975).

49. *Id.* at 82. (emphasis in the original). The Court stated four factors were relevant in determination of whether a private right of remedy is implicit in a statute which does not expressly provide such remedy. These factors are 1) whether the plaintiff is one of the class for whose special benefit the statute was enacted; 2) whether there is any indication of legislative intent, explicit or implicit, to create or to deny such a remedy; 3) whether such remedy is consistent with the underlying purposes of the legislative scheme; and 4) whether it would be inappropriate to infer a cause of action based solely on federal law because such cause of action would be within an area traditionally relegated to state law. *Id.* at 78.

50. 29 U.S.C. § 791 (Supp. V 1975).

tractors, is enforced by the Department of Labor.⁵¹ Section 504, dealing with discrimination in any federally assisted program or activity is enforced by the Office for Civil Rights at the Department of Health, Education and Welfare.⁵² It is important to note that the regulations implementing Section 504 have only been issued to date by the Department of Health, Education and Welfare. All other federal departments and agencies will be expected to issue similar regulations,⁵³ although enforcement of Section 504 will remain within the Office for Civil Rights.

Moreover, enforcement by all these agencies has been painfully slow. It took the Department of Health, Education and Welfare nearly four years to draft implementing regulations for Section 504. The Office for Civil Rights is still struggling with a backlog of over 3000 civil rights cases. This administrative muddle has made court enforcement of the statute all the more important.

There have been indications, however, that changes may be imminent. Secretary Califano has indicated that he expects to nearly double the number of those persons within the Office for Civil Rights who are charged with enforcing Section 504 regulations.⁵⁴ Those of us in the Congress who have maintained our interest in helping the handicapped will be ready to assist the Secretary in any way possible to make sure that the Office for Civil Rights has both the staff and resources necessary to fulfill the promise made by the Congress to our nation's handicapped citizens.

CONCLUSION

Congress and the federal government have extended to handicapped Americans the promise of a meaningful life. To quote from the long time champion of this nation's disadvantaged, Senator Hubert Humphrey, "We can no longer live with the hypocrisy that the promise of America should have one major exception—millions of children, youth and adults with mental or physical handicaps."⁵⁵ It is the responsibility of the federal government to fulfill its promise to the nation's handicapped by vigorous enforcement of the law.

51. 29 U.S.C. § 793 (Supp. V 1975).

52. Exec. Order No. 11,914, 3 C.F.R. 117, directs HEW to coordinate all federal programs and activities relating to enforcement of Section 504.

53. President Ford delegated this duty to the Secretary of Health, Education & Welfare. Exec. Order No. 11,914, Fed. Reg. 17871 (1976).

54. The consent order which settled *Adams v. Califano*, No. 3095-70 (D.C.D.C. Dec. 29, 1977) notes that HEW is seeking, with the approval of the Office of Management and Budget, 898 additional positions in the Office of Civil Rights. HEW also agreed to try to increase efficiency in processing complaints.

55. 119 CONG. REC. at 635.