

THE AMERICANS WITH DISABILITIES ACT OF 1990: TITLE I AND ITS IMPACT ON EMPLOYMENT DECISIONS

Floyd D. Weatherspoon*

INTRODUCTION

The Americans with Disabilities Act (ADA), enacted on July 26, 1990,¹ has been described as the "Civil Rights Act" for Americans with mental or physical disabilities. Like the Civil Rights Act of 1964,² the ADA is a comprehensive anti-discrimination law encompassing almost every aspect of discrimination against individuals with disabilities.³

The ADA is expected to protect more than 43 million Americans with disabilities.⁴ However, courts and enforcement agencies, applying a liberal interpretation of the term "disability" under the ADA, may ultimately expand the Act's coverage to every American who has an illness or a medical condition affecting a major life activity.⁵

The ADA prohibits discrimination against individuals with a mental or physical disability in the areas of employment,⁶ public service,⁷ public accommodations,⁸ and telecommunications.⁹ This

* Assistant Professor of Law, Capital University Law School. B.A., 1974, North Carolina A & T State University; J.D., 1977, Howard University.

1. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990) [hereinafter Disabilities Act].

2. 42 U.S.C. §§ 1981-2000h-6 (1988).

3. The ADA does not prohibit discrimination in housing. The Fair Housing Act Amendments of 1988, however, prohibit discrimination in housing based on an individual's handicap. 42 U.S.C. § 3604 (1988).

4. Disabilities Act § 2(a).

5. For example, the United States Supreme Court has expanded the coverage of the Rehabilitation Act of 1973 by broadly interpreting the term "handicap." In *School Board of Nassau County v. Arline*, Congressional intent to expand the definition of the term "handicapped individual" opened the door for the Court's liberal interpretation of that term. *School Bd. of Nassau County v. Arline*, 480 U.S. 272, 278 n.3 (1987). Congress amended the Rehabilitation Act in 1974 because the definition of handicapped individual "was too narrow to deal with the range of discriminatory practices [against the handicapped]. *Id.* In addition, the Court was influenced by the Department of Health and Human Services' finding that "a broad definition, one not limited to so-called 'traditional handicaps,' is inherent in the statutory definition." *Id.* at n.5. In reaching its decision, the Court concluded that "the definition of 'handicapped individual' is broad, but only those individuals who are both handicapped and otherwise qualified are eligible for relief." *Id.* at 285.

6. Disabilities Act §§ 101-08.

7. *Id.* at §§ 201-46.

article focuses exclusively on Title I of the ADA, which prohibits employment discrimination against individuals with a disability. The primary purpose of this article is to provide some guidance to employers who are required to comply with the ADA. It will review each major section of Title I, including its legislative history, to determine an employer's legal responsibility under this title of the Act. Because the ADA mirrors the Rehabilitation Act of 1973¹⁰ and its supporting regulations,¹¹ this article will also review state and federal case law developed in the area of handicap discrimination under the Rehabilitation Act and corresponding state laws.

I. PURPOSE OF THE ACT

The purpose of the ADA is to ensure that Americans with disabilities gain social and economic status by eliminating all forms of discrimination that prohibit their full employment¹² and equal access to public accommodations, public service, and telecommunications.¹³ To meet this ambitious goal, Congress established both a national policy for eliminating discrimination against individuals with disabilities, and a federal law providing clear and concise standards for enforcing this policy. Congress articulated a similar purpose in support of the Rehabilitation Act, which prohibits dis-

8. *Id.* at §§ 301-10.

9. *Id.* at §§ 401-02.

10. 29 U.S.C. § 794 (1988). For a list of articles and government reports on the Rehabilitation Act, see F. WEATHERSPOON, *The Vocational Rehabilitation Act of 1973 and Handicap Discrimination*, in EQUAL EMPLOYMENT OPPORTUNITY AND AFFIRMATIVE ACTION: A SOURCEBOOK 102-22 (1985).

11. Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving or Benefiting From Federal Financial Assistance, 45 C.F.R. §§ 84.1-84.55 (1990).

12. See *Americans with Disabilities Act of 1989: Hearings on S. 933 Before the Senate Committee on Labor and Human Resources and the Subcommittee on the Handicapped*, 101st Cong., 1st Sess. 299, 306 (1989) [hereinafter *Hearings on S. 933*] (statement of Arlene B. Mayerson: "While 88% of working-age men and 69% of working-age women are employed, only 33% of disabled working-age Americans work . . ."). For a discussion of discrimination directed at handicapped individuals, see generally Ianacone, *Historical Overview: From Charity to Rights*, 50 TEMP. L.Q. 953 (1977); Burgdorf & Burgdorf, *A History of Unequal Treatment: The Qualifications of Handicapped Persons as a "Suspect Class" Under the Equal Protection Clause*, 15 SANTA CLARA L. REV. 855 (1975); tenBroek & Matson, *The Disabled and the Law of Welfare*, 54 CALIF. L. REV. 809, 814 (1966); see also *Hearings on S. 933*, *supra* at 223 (statement of Senator Ted Kennedy: "The Americans With Disabilities Act will end this American Apartheid. It will roll back the unthinking and unacceptable practices by which disabled Americans today are segregated, excluded, and fenced off from fair participation in our society by mindless biased attitudes and senseless physical barriers.").

13. Disabilities Act § 2(b)(1).

crimination on the basis of handicap by government contractors, and in federally funded programs and activities.¹⁴

For almost twenty years, federal laws and regulations¹⁵ have prohibited discrimination on the basis of handicap. Despite these efforts, employment discrimination against handicapped workers is still an everyday occurrence.¹⁶ This is not to suggest that no progress has been achieved to employ individuals with disabilities. As a result of the Rehabilitation Act, federal regulations, and state handicap discrimination laws,¹⁷ employers are more sensitive and

14. The purpose of the Rehabilitation Act was to provide a statutory basis for the Rehabilitation Services Administration, and to authorize programs to "promote and expand employment opportunities in the public and private sectors for handicapped individuals and to place such individuals in employment." Rehabilitation Act of 1973, § 2, 87 Stat. 355, 357 (1973) (current version at 29 U.S.C. § 701 (1988)).

The legislative history of the Rehabilitation Act also reflects the concern of Congress for "the lack of action in areas related to rehabilitation which limit a handicapped individual's ability to function in society, e.g., employment discrimination, lack of housing and transportation services and architectural and transportation barriers . . ." S. REP. NO. 93-318, 93d Cong., 2d Sess., reprinted in 1973 U.S. CODE CONG. & ADMIN. NEWS 2076, 2078 [hereinafter S. REP. 93-318].

15. Regulations for the enforcement of § 504 of the Rehabilitation Act of 1973 were not promulgated until 1978 by the United States Department of Health, Education and Welfare. Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving or Benefiting From Federal Financial Assistance, 45 C.F.R. §§ 84.1-84.55 (1990). For a comprehensive analysis of the effectiveness of Section 504 in achieving equality for handicap individuals, see Tucker, *Section 504 of the Rehabilitation Act After Ten Years of Enforcement: The Past and the Future*, 1989 U. ILL. L. REV. 845 (1989).

16. During Congressional hearings on the ADA, Congress reviewed and considered various reports which studied the nature and extent of discrimination against people with disabilities. See, e.g., NATIONAL COUNCIL ON THE HANDICAPPED, TOWARD INDEPENDENCE (1976); UNITED STATES COMMISSION ON CIVIL RIGHTS, ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES (1983). Congress concluded that these and other studies supported the following basic conclusions:

- (1) historically, individuals with disabilities have been isolated and subjected to discrimination and such isolation and discrimination is still pervasive in our society;
- (2) discrimination still persists in such critical areas as employment in the private sector, public accommodations, public services, transportation, and telecommunications;
- (3) current federal and state laws are inadequate to address the discrimination faced by people with disabilities in these critical areas;
- (4) people with disabilities as a group occupy an inferior status socially, economically, vocationally, and educationally; and
- (5) discrimination denies people with disabilities the opportunity to compete on an equal basis with others and costs the United States, state and local governments, and the private sector billions of dollars in unnecessary expenses resulting from dependency and non-productivity.

H.R. REP. NO. 101-485, 101st Cong., 2d Sess., pt. 2, at 28-29, reprinted in 1990 U.S. CONG. & ADMIN. NEWS 309-11 [hereinafter H.R. REP. 101-485, pt. 2].

17. For a summary of state laws prohibiting discrimination on the basis of handicap,

aware of the needs of individuals with disabilities. Accordingly, employers have established affirmative action programs¹⁸ to employ the "handicapped" and have developed and issued policies prohibiting handicap discrimination. Unfortunately, these efforts have not achieved widespread employment opportunities for most Americans with disabilities.¹⁹

A second purpose of the ADA is to ensure that the federal government has a central leadership role in enforcing the ADA, by establishing national policies and guidelines for eliminating discrimination against Americans with disabilities.²⁰ A third purpose is to officially invoke Congressional authority to eradicate discrimination on the basis of disabilities through the fourteenth amendment and the commerce power.²¹ Overall, Congress intended to protect individuals with disabilities from employment discrimination in the private sector, and to give the federal government the authority to set forth a national, comprehensive plan for full employment of Americans with disabilities, and to prohibit employment discrimination.²²

II. COVERAGE

Title I applies to employers, employment agencies, labor organizations, and joint labor-management committees.²³ The term "employer" includes any person "engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year."²⁴ This provision is identical to the definition of employer found in Title VII of the Civil Rights Act of 1964 (Title

see 3 Empl. Prac. Guide (CCH) (1987).

18. See generally UNITED STATES, OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, AFFIRMATIVE ACTION FOR THE HANDICAPPED: A HANDBOOK FOR EMPLOYMENT OPPORTUNITY SPECIALISTS OF THE OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS (1980).

19. Testimony during Congressional hearings on the ADA indicated that "[s]tate laws are inadequate to address the pervasive problems of discrimination that people with disabilities are facing Current Federal law is also inadequate." See H.R. REP. 101-485, pt. 2, *supra* note 16, at 47. Congress also indicated that more than "17 years of experience with Section 504 . . . [has] demonstrated the need for further legislative action in this area." See H.R. REP. NO. 101-485, 101st Cong., 2d Sess., pt. 4, at 24, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS 513 [hereinafter H.R. REP. 101-485, pt. 4].

20. Disabilities Act § 2(b)(3).

21. *Id.* § 2(b)(4).

22. *Id.* § 2(b).

23. *Id.* § 101(2).

24. Disabilities Act § 101(5)(A).

VII).²⁶ Moreover, states, including state agencies, are not immune from an action under this Act under the Eleventh Amendment.²⁶ The only entities excluded from coverage, in addition to those employers with fewer than 15 employees,²⁷ are the federal government, Indian tribes, and bona fide private membership clubs exempt from taxation under section 501(c) of the Internal Revenue Code of 1986.²⁸

The effective date for Title I of the ADA is July 26, 1992.²⁹ To allow very small employers extra time to comply with this section, for two years following the effective date it will apply only to employers with 25 or more workers.³⁰

III. DEFINITION OF DISABILITY

Section 3 of the Act defines the term "disability" with respect to an individual as:

- (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
- (B) a record of such an impairment; or
- (C) being regarded as having such an impairment.³¹

This definition of "disability" is essentially the same as the term "handicap" in the Rehabilitation Act.³² However, Congress used the term "disability" instead of "handicap" to reflect the current acceptable terminology.³³ The terms "handicapped person"

25. 42 U.S.C. § 2000e(b) (1988).

26. Disabilities Act § 502. The United States Supreme Court held in 1985 that the prior law protecting handicapped individuals, the Rehabilitation Act of 1973, did not abrogate the eleventh amendment bar to suits against states. *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985). In *Atascadero*, the Court held that Congress must express intent to abrogate the eleventh amendment in the statute itself. *Id.* The ADA provides such intent. Disabilities Act § 502.

27. Many state laws prohibiting handicap discrimination cover employers with fewer than 15 employees. See generally 3 Empl. Prac. Guide (CCH) (1987).

28. Disabilities Act § 101(5)(B).

29. *Id.* § 108.

30. *Id.* § 101(5)(A).

31. *Id.* § 3.

32. 29 U.S.C. § 706(8) (1988).

33. During Congressional hearings on the ADA it was further explained that the title "Americans" with Disabilities reflects Congress's intent "to underscore the fact that people with disabilities are part of the tradition and heritage of this great country, and have as much of a right to equal access and opportunity in this country as all other individuals." H.R. REP. 101-485, pt. 2, *supra* note 16, at 51. The Committee, however, emphasized that

and "handicapped" have negative connotations for individuals with disabilities and for the organizations that represent their interests.³⁴

The definition of disability is broad enough to include a wide spectrum of physical and mental conditions. Indeed, both state and federal courts have liberally interpreted the definition of handicap under state handicap laws and the Rehabilitation Act to include many medical conditions. These include AIDS,³⁵ diabetes,³⁶ high blood pressure,³⁷ heart diseases,³⁸ sensitivity to smoke,³⁹ back injuries,⁴⁰ epilepsy,⁴¹ arthritis,⁴² alcoholism,⁴³ and back problems.⁴⁴

The ADA does not specifically list every medical condition protected under the Act. Congress purposely avoided such a provision. During Congressional hearings on the Act, however, the following medical conditions were listed:

[O]rthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, infection with the Human Immunodeficiency Virus, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, drug addiction, and alcoholism.⁴⁵

"[t]he Act protects all individuals with disabilities who are in this country—regardless of their ethnic or national origin and regardless of their status." *Id.*

34. Congress also changed the name of the "National Council on the Handicapped" to the "National Council on Disability" in recognition of this negative connotation. Title II—Amendments to the Rehabilitation Act of 1973, Pub. L. No. 100-630, 102 Stat. 3303 (1989).

35. *Local 1812, Am. Fed'n of Gov't Employees v. United States Dep't of State*, 662 F. Supp. 50 (D.D.C. 1987).

36. *Brown v. County of Genesee*, 37 Fair Empl. Prac. Cas. (BNA) 1595 (E.D. Mich. 1985); *Bentivegna v. United States Dep't of Labor*, 694 F.2d 619 (9th Cir. 1982).

37. *Jurgella v. Danielson*, 46 Fair Empl. Prac. Cas. 1183 (Ariz. Ct. of App. 1988); *Bey v. Bolger*, 540 F. Supp. 910 (E.D. Pa. 1982).

38. *Treadwell v. Alexander*, 707 F.2d 473 (11th Cir. 1983).

39. *Vickers v. Veterans Admin.*, 549 F. Supp. 85 (W.D. Wash. 1982).

40. *Coffman v. West Virginia Bd. of Regents*, 386 S.E.2d 1 (W. Va. 1988); *Daubert v. United States Postal Service*, 733 F.2d 1367 (10th Cir. 1984); *E.E. Black, Ltd. v. Marshall*, 497 F. Supp. 1088 (D. Haw. 1980).

41. *Mantoletto v. Bolger*, 767 F.2d 1416 (9th Cir. 1985); *Reynolds v. Brock*, 815 F.2d 571 (9th Cir. 1987); *Drennon v. Philadelphia Gen. Hosp.*, 428 F. Supp. 809 (E.D. Pa. 1977).

42. *Coley v. Secretary of Army*, 45 Fair Empl. Prac. Cas. (BNA) 735 (D. Md. 1987).

43. *Ferguson v. United States Dep't of Commerce*, 680 F. Supp. 1514 (M.D. Fla. 1988), *vacated and withdrawn*, 694 F. Supp. 1541 (M.D. Fla. 1988); *Sexton v. Gulf Oil Corp.*, 809 F.2d 167 (1st Cir. 1987).

44. *Gloss v. General Motors Corp.*, 138 Mich. App. 281, 360 N.W.2d 596 (1984); *McAdam v. V&I, Inc.*, 84 Or. App. 329, 733 P.2d 945 (1987).

45. H.R. REP. 101-485, pt. 2, *supra* note 16, at 51. In determining whether an individual

Physical characteristics such as blue eyes, black hair, or environmental, cultural, or economic conditions are not considered a physical or mental impairment within the definition of "disability."⁴⁶ Courts have also excluded other physical characteristics, such as being left-handed,⁴⁷ height,⁴⁸ and varicose veins⁴⁹ from the definition of handicap.

To be protected by the ADA, the physical or mental impairment must substantially limit a major life activity, such as "caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, working, and participating in community activities."⁵⁰ A minor impairment, such as an infected finger, would not be considered a physical impairment that would substantially limit a major life activity.⁵¹

An individual having a record of a physical or mental impairment is also protected by the ADA, even if the individual has completely recovered from his or her disability.⁵² Individuals who have recovered from a mental or emotional illness, heart disease, or cancer are examples of individuals protected by the ADA.⁵³

Finally, the definition of disability includes individuals who are "perceived" as having a physical or mental impairment when in fact they do not. It also includes individuals having a physical or mental impairment that does not substantially limit a major life activity if the individual is treated as such.⁵⁴

The United States Supreme Court interpreted the term

is handicapped as defined by the Rehabilitation Act, the United States Supreme Court has indicated that "the regulations promulgated by the [United States] Department of Health and Human Services [HHS] are of significant assistance." *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 279-80 (1987). The regulations promulgated by HHS list the same medical conditions as the ADA. *Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving or Benefiting From Federal Financial Assistance*, 45 C.F.R. pt. 84, Appendix A (1990).

46. H.R. REP. 101-485, pt. 2, *supra* note 16, at 51.

47. *De la Torres v. Bolger*, 781 F.2d 1134 (5th Cir. 1986).

48. *American Motors Corp. v. Labor and Indus. Comm'n*, 47 Fair Empl. Prac. Cas. (BNA) 1325 (Wisc. 1984).

49. *Oesterling v. Walters*, 760 F.2d 859 (8th Cir. 1985).

50. H.R. REP. 101-485, pt. 2, *supra* note 16, at 52.

51. *Id.*

52. *Disabilities Act* § 3(2)(B); H.R. REP. 101-485, pt. 2, *supra* note 16, at 52.

53. H.R. REP. 101-485, pt. 2, *supra* note 16, at 52-53.

54. *See, e.g., School Bd. of Nassau County v. Arline*, 480 U.S. 273, 284-86 (1987); *Southeastern Community College v. Davis*, 442 U.S. 397, 405-06 (1979). Both cases held that individuals perceived as handicapped are covered by the Rehabilitation Act.

"handicapped" broadly in *School Board of Nassau County v. Arline*.⁵⁵ The Court's decisions in *Arline* was repeatedly cited by Congress to support various provisions of the ADA.⁵⁶ It has also become the leading opinion cited in handicap discrimination cases brought in state and federal courts. In *Arline*, the Supreme Court determined that an individual afflicted with a contagious disease was a "handicapped individual" within the meaning of the Rehabilitation Act of 1973. The plaintiff in *Arline* was an elementary school teacher in Nassau County, Florida, who was discharged after suffering a repeated relapse of tuberculosis.⁵⁷ Arline had taught in the county school system for more than 13 years.⁵⁸ The school board, after a hearing, indicated that Arline was being discharged "not because she had done anything wrong," but because of the "continued reoccurrence [*sic*] of tuberculosis."⁵⁹

Arline filed an administrative complaint with the state, which was denied, as was her request for relief from the U.S. District Court.⁶⁰ The District Court concluded that Arline's illness was not a handicap as defined by the statute.⁶¹ The District Court further indicated that it was "difficult . . . to conceive Congress intended contagious diseases to be included within the definition of a handicapped person"⁶² The District Court decision was reversed by the Eleventh Circuit Court of Appeals, which held that "persons with contagious diseases are within the coverage of section 504 [of the Rehabilitation Act]."⁶³ The Court of Appeals remanded the case to the District Court to determine

whether the risk of infection precluded Mrs. Arline from being 'otherwise qualified' for her job, and if so, whether it was possible to make some reasonable accommodation for her in that teaching position, in another position teaching less susceptible individuals, or in some other kind of position in the school system.⁶⁴

55. 480 U.S. 273 (1987).

56. See, e.g., H.R. REP. 101-485, pt. 2, *supra* note 16, at 53, 57; S. REP. NO. 101-116, 101st Cong., 1st Sess. at 7, 23, 24 (1989) [hereinafter S. REP. 101-116].

57. *Id.* at 276.

58. *Id.*

59. *Id.*

60. *Arline v. School Bd. of Nassau County*, 772 F.2d 759, 760-61 (1985).

61. *Id.*

62. *Id.* at 763.

63. *Id.* at 764.

64. *Arline v. School Bd. of Nassau County*, 772 F.2d 759, 765 (1985).

On certiorari, the United States Supreme Court affirmed.⁶⁵ The Court interpreted the Rehabilitation Act as protecting individuals who were regarded as having a physical or mental impairment. The Court also indicated that the legislative history of the Rehabilitation Act clearly supported such a finding.⁶⁶

IV. PROHIBITED FORMS OF DISCRIMINATION

Section 102 of the ADA, paralleling the broad language used in Title VII of the Civil Rights Act, prohibits employment discrimination in job application procedures, hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.⁶⁷

The Congressional Committee Report indicates that the ADA was drafted to affect a wide range of employment activities. Specifically referring to employment practice regulations promulgated by the Department of Health and Human Services,⁶⁸ the Report states that "the aspects of the employment process covered by the nondiscrimination mandate [are to] be construed in a manner consistent with the regulations implementing Section 504 of the Rehabilitation Act."⁶⁹ Generally, those sections include employment practices ranging from recruitment and hiring to fringe benefits and employer sponsored activities.⁷⁰

65. 480 U.S. 273 (1987).

66. *Id.* at 284-86.

67. Disabilities Act § 102.

68. Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving or Benefiting From Federal Financial Assistance, 45 C.F.R. § 84.11(b) (1990).

69. H.R. REP. 101-485, 101st Cong., 2d Sess., pt. 3, at 35, reprinted in 1990 U.S. CODE CONG. & ADMIN. NEWS 458 [hereinafter H.R. REP. 101-485, pt. 3].

70. Specifically, the regulation includes the following employment-related activities:

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

A. *Limiting, Segregating, and Adversely Classifying
Individuals with Disabilities*

Section 102(b)(1) of Title I prohibits employers from limiting, segregating or classifying individuals with disabilities in a manner that would adversely impact their advancement in the organization or their status.⁷¹ Typically, employers place individuals with disabilities in the lower level, dead-end, support positions in the organization, the "ghetto positions."⁷² Employers are prohibited under Title I from prejudging an individual with a disability based on stereotypes and misconceptions about his or her abilities and limitations. Employers who make employment decisions based on such biased attitudes will be easy targets for discrimination suits under the ADA.

In addition to prohibiting assignment of disabled individuals to dead-end positions, the ADA requires employers to integrate individuals with disabilities into the mainstream of non-work activities, and to ensure accessibility to available activities. The Congressional Committee Report cites, for example, that lunch rooms and break rooms should be accessible, and that individuals with disabilities should have the opportunity to take breaks and eat lunch with co-workers.⁷³

Congress also intended Title I to discourage employers from denying employment opportunities based on the misconception that disabilities prevent regular attendance or cause safety hazards to either the employee or co-workers. The Committee Reports cited a study conducted by E. I. du Pont de Nemours and Company in which it was found that disabled workers perform just as well as non-disabled workers, if not better, and also have better attendance.⁷⁴ Frequently, employers raise the issues of safety and absenteeism as justifications for denying an individual with a disability employment opportunities. Rarely does an employer under-

and

(9) Any other term, condition, or privilege of employment. Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving or Benefiting From Federal Financial Assistance, 45 C.F.R. § 84.11(b) (1990).

71. Disabilities Act § 102(b)(1).

72. The term "ghetto positions" describes positions predominantly held by minorities in organizations. As a result of employment discrimination, these individuals normally find it difficult to progress upward into nontraditional or line positions in the organization.

73. H.R. REP. 101-485, pt. 2, *supra* note 16, at 58.

74. *Id.* at 58-59.

take a legitimate assessment of the individual's abilities, limitations, and potential need for accommodations. The ADA prohibits such practices by requiring that employers give individuals with disabilities assessments of their ability to perform a job with or without reasonable accommodation.

Courts, in enforcing state handicap laws modeled after the Rehabilitation Act, have repeatedly rejected employers' safety arguments.⁷⁵ For example, in *Jenks v. Avco*,⁷⁶ the court toured the employer's facility and determined that use of a hydraulic cart by a disabled employee was neither "disruptive and unsafe," nor hazardous to the safety of co-workers.⁷⁷ Courts will probably reject similar arguments made by employers under Title I, unless it is clearly demonstrated that an actual safety hazard would exist if the individual with the disability was employed, despite an accommodation.

B. Impact on Contracting Services

Section 102(b)(2) of the ADA further prevents an employer from circumventing Title I by contracting for services through a third party. This prohibition applies when the contractual arrangement or relationship has the effect of discriminating against a qualified individual with disabilities.⁷⁸ This includes relationships or contracts the employer has with employment or referral agencies, labor unions,⁷⁹ and organizations providing training and apprenticeship programs.⁸⁰ For example, where an employer contracts out for training off the employer's premises, the employer has the responsibility to investigate the facilities to ensure that they are accessible. The employer must also ensure that disabled employees can participate in the training activities themselves with

75. *Ackerman v. Western Elec. Co.*, 643 F. Supp. 836 (N.D. Ca. 1986), *aff'd*, 860 F.2d 1514 (9th Cir. 1988); *Rozanski v. A-P-A Transp.*, 512 A.2d 335 (Me. 1986); *Johnson v. Civil Serv. Comm'n*, 153 Cal. App. 3d 585, 200 Cal. Rptr. 289 (1984); *Maine Human Rights Comm'n v. Canadian Pac.*, 458 A.2d 1225 (Me. 1983); *Foods, Inc. v. Iowa Civil Rights Comm'n*, 318 N.W.2d 162 (Iowa 1982); *Sterling Transit Co. v. Fair Employment Practice Comm'n*, 121 Cal. App. 3d 791, 175 Cal. Rptr. 548 (1981); *Chicago and North Western R.R. v. Labor and Indus. Review Comm'n*, 91 Wis. 2d 462, 283 N.W.2d 603 (Wis. Ct. App. 1979), *aff'd*, 98 Wis. 2d 592, 297 N.W.2d 819 (Wis. 1980); *Department of Health and Social Serv. v. Labor and Indus. Review Comm'n*, 30 Fair Empl. Prac. Cas. (BNA) 404 (Wis. Cir. Ct. 1979).

76. 340 Pa. Super. 542, 490 A.2d 912 (1985).

77. *Id.* at 548, 490 A.2d at 917.

78. *Disabilities Act* § 102(b)(2).

79. *But see* *Shea v. Tisch*, 870 F.2d 786 (1st Cir. 1989).

80. *Disabilities Act* § 102(b)(2).

or without reasonable accommodations.

C. Standards, Criteria, and Methods of Administration

Section 102(b)(3) of Title I prohibits an employer from using a selection procedure or other employment practice that has a disparate impact on individuals with disabilities.⁸¹ Congress relied on the United States Supreme Court opinion in *Alexander v. Choate*⁸² to support this provision. In *Choate*, the initial issue presented was whether proof of discriminatory animus is always needed to establish a violation of section 504, or whether discrimination can be found when there is merely discriminatory effect.⁸³ The Court rejected the argument that in every situation where disparate impact is shown a prima facie case is established under section 504.⁸⁴ The Court also rejected the argument that section 504 prohibited only intentional discrimination against the handicapped.⁸⁵ The Court assumed without deciding that there would be situations where a prima facie case under the Rehabilitation Act could be made from disparate impact alone.⁸⁶ The Court cited its earlier decision in *Southeastern Community College v. Davis*⁸⁷ as a guide to determine which disparate impact cases would be actionable under section 504.⁸⁸ Similarly, the *Davis* decision should be a starting point in determining which disparate impact cases are actionable under Title I.

D. Relationships and Associations

Section 102(b)(4) of Title I prohibits an employer from discriminating against qualified individuals because of their relationship or association with an individual who has a known disability.⁸⁹

81. Disabilities Act § 102(b)(3).

82. 469 U.S. 287 (1985). In *Choate*, the state of Tennessee had proposed reducing the number of annual inpatient hospital days that state medicaid would pay hospitals on behalf of a medicaid recipient. *Id.* at 289. Respondent alleged that the state proposed policy would have a disparate impact on the handicapped, thereby violating section 504 of the Rehabilitation Act. *Id.* The Court rejected this contention, finding that Tennessee's proposed medicaid plan did not have a particular exclusionary effect on the handicapped. *Id.* at 302.

83. *Id.* at 292.

84. *Id.* at 299.

85. *Id.* at 294.

86. *Alexander v. Choate*, 469 U.S. 287, 299 (1985).

87. 442 U.S. 397 (1979).

88. *Alexander v. Choate*, 469 U.S. 287, 299 (1985).

89. Disabilities Act § 102(b)(4).

Congress intended to prevent discrimination against employees or applicants who care for a disabled individual, such as a spouse or child, based on the assumption that they would be frequently absent from work.⁹⁰ Congress, however, has qualified this section by allowing an employer to terminate an employee violating the employer's attendance requirements regardless of whether they must care for a disabled individual, as long as the employer's policies are enforced uniformly.⁹¹

*E. Qualification Standards, Employment Tests,
and Other Selection Criteria*

Section 102 of Title I also prohibits other discriminatory employment practices. These include a failure to reasonably accommodate individuals with known physical or mental limitations,⁹² screening out individuals with disabilities through the use of tests and qualification standards,⁹³ and failing to select and administer tests that would effectively evaluate qualifications and skills.⁹⁴

Congress intended to prohibit employers from screening out disabled applicants by requiring applicants to perform nonessential job functions, or by maintaining job criteria that has the impact of excluding the disabled. The selection procedure itself must be based on legitimate, job-related requirements and standards.⁹⁵ Further, Congress emphasized that selection procedures should be considered in conjunction with the employer's requirement of reasonable accommodation. The employer is required to accommodate the employee, if it does not create an "undue hardship" on the employer.⁹⁶

90. H.R. REP. 101-485 pt. 2, *supra* note 16, at 61.

91. *Id.*

92. Disabilities Act § 102(b)(5).

93. *Id.* § 102(b)(6).

94. *Id.* § 102(b)(7).

95. H.R. REP. 101-485 pt. 2, *supra* note 16, at 71.

96. Congress described the relationship between reasonable accommodation and the selection process as follows:

If a person with a disability applies for a job and meets all selection criteria except one that he or she cannot meet because of a disability, the criterion must concern an essential, non-marginal aspect of the job, and be carefully tailored to measure the person's actual ability to do this essential function of the job. If the criterion meets this test, it is nondiscriminatory on its face and it is otherwise lawful under the legislation. However, the criterion may not be used to exclude an applicant with a disability if the criterion can be satisfied by the applicant with a reasonable accommodation. A reasonable accommo-

To illustrate the relationship between selection criteria and reasonable accommodation, Congress cited *Stutts v. Freeman*.⁹⁷ In *Stutts*, the plaintiff, who was dyslexic, was denied entrance into an apprenticeship training program for heavy equipment operators at Tennessee Valley Authority (TVA).⁹⁸ Because of his dyslexia, Stutts could not pass the General Aptitude Test Battery (GATB).⁹⁹ Non-written tests, however, indicated that he had the aptitude and ability to perform the duties of a heavy equipment operator.¹⁰⁰ In response to this dilemma, TVA unsuccessfully attempted to persuade the Alabama State Employment Service to give Stutts an oral GATB examination.¹⁰¹ TVA also unsuccessfully attempted to obtain the results of the tests that Stutts had taken after he had received his low GATB score.¹⁰² Failing to obtain oral test scores for Stutts, yet aware that he had "above average intelligence, coordination and aptitude for a position as a heavy equipment operator," TVA nonetheless denied Stutts the opportunity to participate in the apprenticeship program.¹⁰³

The Eleventh Circuit held that once an employer determined that an employee was qualified except for passing a written test, the Rehabilitation Act mandates that the employer determine whether the written test was a valid selection criteria, and if so, whether the employee could have been reasonably accommodated.¹⁰⁴ According to the court, TVA had not shown that the ability to read was a necessary physical qualification for a position as a heavy equipment operator.¹⁰⁵ TVA also failed to demonstrate that providing accommodation to Stutts, by obtaining someone to act as a "reader" for him, would be unreasonably burdensome.¹⁰⁶ In finding that TVA had not made the efforts required by the Rehabilitation Act to expand employment opportunities for handicapped persons, the court stated that "when TVA uses a test

dation may entail adopting an alternative, less discriminatory criterion.

Id. at 71.

97. *Stutts v. Freeman*, 694 F.2d 666 (11th Cir. 1983) (noted in H.R. REP. 101-485 pt. 2, *supra* note 16, at 71).

98. *Id.* at 668.

99. *Id.*

100. *Id.*

101. *Stutts v. Freeman*, 694 F.2d 666, 668 (11th Cir. 1983).

102. *Id.*

103. *Id.*

104. *Id.*

105. *Stutts v. Freeman*, 694 F.2d 666, 668 (11th Cir. 1983).

106. *Id.* at 669.

which cannot and does not accurately reflect the abilities of a handicapped person, as a matter of law they must do more to accommodate that individual than TVA has done in regard to Mr. Stutts."¹⁰⁷

Both *Stutts* and the legislative history of Title I support the proposition that Title I requires employers to not only maintain nondiscriminatory and job-related selection procedures and criteria, but also offer reasonable accommodation, where appropriate, thereby allowing qualified yet "disabled" employees and applicants an opportunity to obtain employment.

F. Medical Examinations and Inquiries

Section 102(c) of Title I limits employer use of medical examinations and inquiries regarding medical conditions, when such information is not job-related or considered a business necessity.¹⁰⁸ Title I does, however, permit an employer to require an applicant to submit to a medical examination after the applicant has received an offer of employment, or to condition an offer of employment pending a favorable medical examination.¹⁰⁹ Similarly, an employer can conduct voluntary medical examinations of its employees and make inquiries as to whether an employee can perform job-related duties and functions.¹¹⁰ As with other sections of Title

107. *Id.*

108. Disabilities Act § 102(c).

109. *Id.* § 102(c)(3). Conditioning an offer of employment pending a medical examination is only permissible if:

- (A) all entering employees are subjected to such an examination regardless of disability;
- (B) information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, except that:
 - (i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;
 - (ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and
 - (iii) government officials investigating compliance with this Act shall be provided relevant information on request; and
- (C) the results of such examination are used only in accordance with this title.

Id. § 102(c)(3). However, Title I does not prohibit an employer from inquiring into the ability of an applicant to perform job-related duties. See *Id.* § 102(c)(2)(B).

110. Disabilities Act § 102(c)(4)(B).

I, undefined terms such as "job-related" and "business necessity" are fact driven issues. Consequently, differences will arise as to their meaning and application to a particular employer or industry. More importantly, employers are still required to make reasonable accommodations, if needed, where the medical examination reveals that the applicant or employee has a disability.

Title I avoids the controversial issue of drug testing in the workplace. It states that drug testing is not considered a medical examination,¹¹¹ and nothing in Title I should be "construed to encourage, prohibit, or authorize the conducting of drug testing for the illegal use of drugs by job applicants or employees or making employment decisions based on such test results."¹¹²

G. Miscellaneous Prohibitions

Title V of the ADA also prohibits some forms of employment discrimination.¹¹³ For example, Title V prohibits employers from retaliating against an employee or applicant who exercises the right to bring a legal action under the ADA, as well as individuals who testify or assist in such proceedings.¹¹⁴

V. DEFENSES

Section 103 of the ADA provides employers with a limited number of defenses to charges of discrimination filed under the Act.¹¹⁵ Specifically,

[i]t may be a defense to a charge of discrimination under this Act that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be *job-related* and consistent with *business necessity*, and such performance cannot be accomplished by *reasonable accommodation*, as required under this title.¹¹⁶

111. *Id.* § 104(d)(1).

112. *Id.* § 104(d)(2). A similar provision addresses organizations subject to the jurisdiction of the Department of Transportation. *Id.* § 104(e).

113. See Disabilities Act §§ 501-14.

114. *Id.* § 503(a).

115. See *id.* § 103.

116. *Id.* § 103(a)(emphasis added).

Employers who raise the business necessity defense have the burden of articulating a legitimate, nondiscriminatory reason for their employment practice.¹¹⁷ In determining whether an employer has clearly met this burden, at least one state court¹¹⁸ has relied on the analysis in *Robinson v. Lorillard Corporation*.¹¹⁹ In *Lorillard* the court stated that "the business purpose must be sufficiently compelling to override any [discriminatory] impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies which would better accomplish the business purpose advanced . . ."¹²⁰ In applying the business necessity test established by *Lorillard*, employers must also establish that performance of the job could not be accomplished by reasonable accommodation.¹²¹

An employer may, however, establish health and safety qualifications requiring that "an individual . . . not pose a direct threat to the health or safety of other individuals in the workplace."¹²² Maine courts, interpreting a similar state provision,¹²³ have held that the health and safety defense is only permitted if the employer has performed "individual assessments of the relationship between an employee's handicap and the specific and legitimate requirements of his job."¹²⁴ Similar standards for raising the health and safety defense can be expected by the courts in interpreting Title I of the ADA.

Employers will be required to substantiate the claim that the

117. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

118. *See, e.g., Frank v. American Freight Sys., Inc.*, 398 N.W.2d 797, 802 (Iowa 1987).

119. 444 F.2d 791 (4th Cir. 1971). The Supreme Court also applied a business necessity test in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

120. *Lorillard*, 444 F.2d at 798 (footnote omitted).

121. *See* Disabilities Act § 103.

122. Disabilities Act § 103(b).

123. *See, e.g., ME. REV. STAT. ANN. tit. 5, § 4573(4)* (1989). This section provides:

4. Refuse to hire or discharge physically or mentally handicapped.

Nothing in this Act shall prohibit an employer from refusing to hire or discharging a physically or mentally handicapped employee, or subject an employer to any legal liability resulting from the refusing to employ or the discharge of a physically or mentally handicapped employee, where the employee, because of the physical or mental handicap, is unable to perform his duties or perform those duties in a manner which would not endanger the health or safety of the employee or the health or safety of others . . .

124. *Plourde v. Scott Paper Co.*, 552 A.2d 1257, 1259 (Me. 1989) (quoting *Rozanski v. A-P-A Transport, Inc.*, 512 A.2d 335, 340 (Me. 1986) (quoting *Canadian Pac. Ltd.*, 458 A.2d 1224, 1234 (Me. 1983))).

health and safety of employees will be jeopardized if the individual with the disability is hired. Title I defines "direct threat" as "a significant risk to health or safety of others that cannot be eliminated by reasonable accommodation."¹²⁵ Mere speculation by employers of possible injury that may occur will be rejected.¹²⁶

Courts have cautiously entertained the health and safety defense. For example, in *Bentivegna v. United States Department of Labor*, the court stated that "[a]ny qualification based on the risk of future injury must be examined with special care if the Rehabilitation Act is not to be circumvented easily, since almost all handicapped persons are at greater risk from work-related injuries."¹²⁷ Moreover, a number of governmental studies conducted on the performance and safety records of handicapped workers have empirically documented that handicapped workers' safety records are equal to, if not better than, non-handicapped workers.¹²⁸

Other defenses under this section include a provision permitting religious organizations to give preference to people of a particular religion in hiring.¹²⁹ There is also a provision allowing a business to refuse to assign or continue to assign an individual, who has a listed infectious or communicable disease that can be transmitted to others through the handling of food, where reasonable accommodation is not feasible.¹³⁰

The Secretary of Health and Human Services (HHS) is responsible for publishing and disseminating on an annual basis a list of infectious and communicable diseases which are transmitted through the handling of food.¹³¹ Based on this list, an employer can refuse to assign or continue to assign an individual with an infectious or communicable disease on the list. Employers, however, still have a responsibility under Title I to reasonably accommodate individuals by assigning them to another position not involving food handling, if they qualify for the position and if the employer is not unduly burdened.¹³² It is unclear whether employers have the same responsibility to accommodate applicants. Based

125. Disabilities Act § 101(3).

126. See, e.g., *Mantoletto v. Bolger*, 767 F.2d 1416, 1422 (9th Cir. 1985).

127. 694 F.2d 619, 622 (9th Cir. 1982).

128. *Hearings on S. 933*, *supra* note 12, at 318.

129. Disabilities Act § 103(c)(1).

130. *Id.* § 103(d)(2).

131. *Id.* § 103(d)(1).

132. *Id.* § 101(9)-(10).

on the general intent of the statute to protect applicants as well as employees, the EEOC and the courts will most likely interpret this section to include applicants.

VI. EXCLUSIONS

In addition to providing a limited number of defenses to charges of discrimination, the ADA also specifically excludes some conditions and characteristics from the definition of disability. The ADA does not protect individuals who are presently engaged in the use of illegal drugs, when the employer's action is based on this use.¹³³ An employee, however, who completes or participates in a supervised rehabilitation program and is no longer engaging in the use of illegal drugs is covered by the ADA.¹³⁴ Moreover, if an employer incorrectly perceives that an employee is engaging in the illegal use of drugs, the employee is protected by the ADA.¹³⁵ The ADA also states that homosexuality and bisexuality are not impairments, and consequently are not included in the definition of disability.¹³⁶ In addition, the ADA defines "disability" to exclude other types of sexual behavior such as transvestism and transsexualism.¹³⁷ The ADA also excludes from the definition of disability compulsive gambling,¹³⁸ kleptomania,¹³⁹ pyromania, and psychoactive substance use disorders resulting from current use of illegal

133. Disabilities Act § 104(a).

134. *Id.* § 104(b). Further, during Senate Committee hearings on Title I, it was reported that:

[t]he reasonable accommodations provision . . . does not affirmatively require that a covered entity must provide a rehabilitation program or an opportunity for rehabilitation for any job applicant who is a drug addict or alcoholic or for any current employee who is a drug addict or alcoholic against whom employment-related actions are taken. . . . Although [not required] the Committee strongly encourage[d] covered entities to follow the lead of the Federal government . . . to offer such rehabilitation programs or provide an opportunity for rehabilitation.

S. REP. NO. 101-116, *supra* note 56, at 41-42.

135. Disabilities Act § 104(b)(3).

136. *Id.* § 511(a).

137. *Id.* § 511(b).

138. *Id.* § 511(b)(2). Under the Rehabilitation Act of 1973, however, at least one court considered compulsive gambling to be a mental disorder affecting the plaintiff's major life activities. *Rezza v. Department of Justice*, 46 Fair Empl. Prac. Cas. (BNA) 1366, 1369 (E.D. Pa. 1988).

139. Disabilities Act § 511(b)(2). Kleptomania may be considered a handicap under state law. *See, e.g., Fields v. Lyng*, 705 F. Supp. 1134 (D. Md. 1988), *aff'd mem.*, 888 F.2d 1385 (4th Cir. 1989).

drugs.¹⁴⁰

VII. REASONABLE ACCOMMODATION AND UNDUE HARDSHIP

Unlike the prohibition of discrimination on the basis of race, sex, color, and national origin provided for in the Civil Rights Act of 1964,¹⁴¹ Title I of the ADA requires employers to do more than just prohibit discrimination on the basis of an individual's disability. Title I imposes an affirmative duty on employers to reasonably accommodate an individual with a disability unless it would create an undue hardship on the employer's business operation, or it is too costly.¹⁴²

The issues of reasonable accommodation and undue hardship have been the most reoccurring disputes before courts interpreting state handicap discrimination laws and the Rehabilitation Act.¹⁴³ The difficulty of complying with state and federal laws seems not to be a result of employers having a recalcitrant disposition toward such laws, but that it is difficult to identify what constitutes reasonable accommodation and what sufficiently establishes undue hardship.¹⁴⁴

140. *Id.* § 511(b)(2)-(3).

141. 42 U.S.C. §§ 1981-2000h-6 (1988).

142. Disabilities Act § 102(b)(5)(A).

143. See generally Annotation, *Who is "Qualified" Handicapped Person Protected From Employment Discrimination Under Rehabilitation Act of 1973 (29 USCS §§ 701 et seq.) and Regulations Promulgated Thereunder*, 80 A.L.R. FED. 830 (1986); Annotation, *Construction and Effect of § 504 of the Rehabilitation Act of 1973 (29 USCS § 794) Prohibiting Discrimination Against Otherwise Qualified Handicapped Individuals In Specified Programs or Activities*, 44 A.L.R. FED. 148 (1979).

144. See *Wardlow v. Great Lakes Express Co.*, 128 Mich. App. 54, 71, 339 N.W.2d 670, 677 (1983). In a concurring opinion, Judge Bronson requested that the State Department of Civil Rights develop and promulgate standards on the nature and extent an employer is obligated to accommodate an employee's handicap and what constitutes "undue hardship." *Id.* The court stated that such standards were needed to eliminate the "uncertainties which pervade this area of the law." *Id.* See also *Gloss v. General Motors Corp.*, 138 Mich. App. 281, 284, 360 N.W.2d 596, 598 n.1 (1984).

The United States Supreme Court also determined in *Alexander v. Choate* that "[d]iscrimination against the handicapped was perceived by Congress to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference--of benign neglect." 469 U.S. 287, 295 (1985). Federal agencies and commentators on the plight of the handicapped similarly have found that discrimination against the handicapped is primarily the result of apathetic attitudes rather than affirmative animus." *Id.* at 296. This is not to suggest that intentional and invidious discrimination against individuals with disability does not exist. See generally UNITED STATES COMMISSION ON CIVIL RIGHTS, ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES (1983); UNITED STATES COMMISSION ON CIVIL RIGHTS, CIVIL RIGHTS ISSUES OF HANDICAPPED AMERICANS: PUBLIC POLICY IMPLICATION: A CONSULTATION (1981).

A. Reasonable Accommodation

Under Title I of the ADA, "reasonable accommodation" may include:

- (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
- (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.¹⁴⁵

The United States Supreme Court first addressed the "reasonable accommodation" requirement in *Southeastern Community College v. Davis*.¹⁴⁶ The *Davis* Court held that "[s]ection 504 imposes no requirement upon an educational institution to lower or to effect substantial modifications of standards to accommodate a handicapped person."¹⁴⁷ In *School Board of Nassau County v. Arline*,¹⁴⁸ the Supreme Court clarified an employer's legal responsibility to reasonably accommodate individuals under section 504 of the Rehabilitation Act. The Court found that "[e]mployers have an affirmative obligation to make a reasonable accommodation for a handicapped employee."¹⁴⁹ Both *Davis* and *Arline*, as well as the legislative history of Title I,¹⁵⁰ indicate that employers will not be required to substantially modify their educational program or business operation to accommodate an applicant or employee. The trial courts, however, will be required to determine the meaning of "substantial modification."

The legislative history of Title I provides informal guidelines for accommodating an "otherwise qualified individual" with a "known" disability.¹⁵¹ Congressional Committee Reports emphasize that Title I only mandates an employer to accommodate an

145. Disabilities Act § 101(9).

146. 442 U.S. 397 (1979).

147. *Id.* at 413.

148. 480 U.S. 273 (1987).

149. *Id.* at 289 n.19.

150. See generally H.R. REP. 101-485, pt. 2, *supra* note 16, at 62-76.

151. *Id.* at 65.

individual if the employer is aware of the physical or mental limitation of the applicant or employee.¹⁵² This strongly implies that employees and applicants are responsible for informing the employer of such limitations.¹⁵³ Courts have generally relieved employers of liability under the Rehabilitation Act when the employer lacked the knowledge that an applicant or employee required a reasonable accommodation to perform an essential function of a job.¹⁵⁴ A few courts have indicated, however, that when an employer should have known that an applicant or employee was a qualified handicapped individual, the employer was held liable for failing to provide reasonable accommodation for the employee.¹⁵⁵

Further, the Congressional Committee suggests that employers consult with individuals with disabilities to determine the appropriate type of accommodation needed.¹⁵⁶ Individuals with disabilities normally are more familiar with the type of accommodation needed to successfully perform their duties. Moreover, because of this familiarity, individuals with disabilities will be aware of the simplest and the most cost effective method of accommodation.¹⁵⁷

On those occasions when the applicant or employee is not familiar enough with the employer's organization to recommend methods of accommodation, the Committee suggests the following informal guidelines for employers:

Step I.

Identify barriers to equal employment opportunities by distinguishing between essential and nonessential job tasks; obtain input from the individuals with the disability as to their limitations to perform the essential task; thereafter, the employer should determine those job tasks that limit the individual's ability to effectively perform the task.

Step II.

Identify possible methods of accommodation, beginning with consulting the disabled individual, and other resources familiar with the special needs of individuals with the particular disability.

152. *Id.*

153. *Id.*

154. *Dowden v. Tisch*, 685 F. Supp. 153, 156 n.3 (E.D. Tex. 1988).

155. *See Ferguson v. United States Dep't of Commerce*, 680 F. Supp. 1514 (M.D. Fla. 1988), *vacated and withdrawn*, 694 F. Supp. 1541 (M.D. Fla. 1988).

156. H.R. REP. 101-485, pt. 2, *supra* note 16, at 65-66.

157. *Id.*

Step III.

Assess the reasonableness and feasibility of the proposed accommodations, including cost, reliability, whether it can be provided in a timely manner, and whether it will assist the individuals to perform at an acceptable standard of performance.

Step IV.

Determine whether the most appropriate accommodation for the employee would create an "undue hardship" on the employer's business operation.¹⁵⁸

The Congressional Committee strongly discourages employers from unilaterally providing an accommodation for an applicant or employee.¹⁵⁹ The Congressional Committee cited *Chalk v. United States District Court Central District of California*¹⁶⁰ as an example of how an employer's unilateral act of accommodation adversely affected an employee. In *Chalk*, a certified teacher of hearing-impaired students in Orange County California was diagnosed as having Acquired Immune Deficiency Syndrome (AIDS).¹⁶¹ In an effort to accommodate the teacher, the Department of Education reassigned Chalk to an administrative position and prevented him from performing his teaching duties.¹⁶² Chalk was offered the same amount of pay and benefits, and even given the option of working at home.¹⁶³ If he insisted on returning to the classroom, however, the Department threatened to file a civil action for declaratory relief.¹⁶⁴ Even after Chalk's personal physician and a physician representing the educational department cleared Chalk to return to work, he was denied the opportunity to return to his regular teaching duties.¹⁶⁵

Chalk refused his employer's offer of accommodation.¹⁶⁶ His employer subsequently filed an action for declaratory relief in the Orange County Superior Court.¹⁶⁷ Chalk then filed an action in federal district court seeking both preliminary and permanent in-

158. *Id.* at 66.

159. *Id.* at 65.

160. 840 F.2d 701 (9th Cir. 1988).

161. *Id.* at 703.

162. *Id.*

163. *Id.*

164. *Chalk v. United States Dist. Court Cent. Dist. of Cal.*, 840 F.2d 701, 703 (9th Cir. 1988).

165. *Id.*

166. *Id.*

167. *Id.*

junctions barring the Department from preventing him from performing his teaching duties.¹⁶⁸ In essence, Chalk claimed that his employer violated the Rehabilitation Act of 1973 because he did not request an accommodation, the accommodation for his disability was not necessary to perform his job, and he was adversely affected as a result of the reassignment.¹⁶⁹ The district court denied Chalk's motion for a preliminary injunction, refusing to order the Department to reinstate him to his original position.¹⁷⁰

The Ninth Circuit reversed. The court cited the Supreme Court's decision in *Arline* indicating the need for "an individualized inquiry and appropriate findings of fact, so that '§ 504 [may] achieve its goal of protecting handicapped individuals from deprivation based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to such legitimate concerns of grantees as avoiding exposing others to significant health and safety risks.'" ¹⁷¹

An employer who fails to consider any reasonable accommodation for an applicant or employee with a "known" disability violates Title I of the ADA.¹⁷² Federal courts have consistently held that employers covered by the Rehabilitation Act violate it when they make absolutely no efforts to accommodate individuals with a handicap.¹⁷³ Similarly, and more frequently, state courts, in enforcing state laws which prohibit discrimination on the basis of handicap, have reached the same conclusions.¹⁷⁴ Moreover, federal courts applying state law under diversity jurisdiction¹⁷⁵ often hold that an employer's failure to consider accommodation alternatives is a violation of state law.¹⁷⁶ In *Cain v. Hyatt*,¹⁷⁷ the court held

168. *Chalk v. United States Dist. Court Cent. Dist. of Cal.*, 840 F.2d 701, 703 (9th Cir. 1988).

169. *Id.* at 703-04.

170. *Id.* at 704.

171. *Id.* at 705 (quoting *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 287 (1987)).

172. Disabilities Act § 102(b)(5).

173. See, e.g., *Strathie v. Department of Transp.*, 716 F.2d 227 (3d Cir. 1983); *Fitzgerald v. Green Valley Area Educ. Agency*, 589 F. Supp. 1130 (S.D. Iowa 1984).

174. *Milan v. Illinois Human Rights Comm'n*, 169 Ill. App. 3d 979, 523 N.E.2d 1155 (1988); *Jenks v. AVCO Corp.*, 340 Pa. Super. 542, 490 A.2d 912 (1985).

175. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) (requires federal courts having diversity jurisdiction to apply state substantive law).

176. *Cain v. Hyatt*, 734 F. Supp. 671 (E.D. Pa. 1990); *Kimbro v. Atlantic Richfield Co.*, 889 F.2d 869 (9th Cir. 1989); *Ackerman v. Western Elec. Co., Inc.*, 643 F. Supp. 836 (N.D. Cal. 1986).

177. 734 F. Supp. 671 (E.D. Pa. 1990).

that it was "patently obvious" "[t]hat the defendants made absolutely no effort to accommodate the plaintiff's disability . . . [because] [t]hey terminated him . . . within one week of his having informed [the defendants] that he had AIDS."¹⁷⁸ Similarly, in *Holland v. Boeing Company*,¹⁷⁹ the employer "selectively reassigned" the plaintiff to a position where the employee could not perform the required job functions without accommodation.¹⁸⁰ The employer argued that "it was not required to expend special effort on behalf of [the employee] or other handicapped employees."¹⁸¹ The Supreme Court of Washington held otherwise, indicating that employers must provide reasonable accommodations for handicapped employees.¹⁸²

Based on legal precedents established by state and federal courts, determining whether an accommodation is reasonable or would create a financial burden on the employer is a factual determination to be evaluated on an individual basis. It is clear from the legislative history that Title I also requires such an individual assessment. Consequently, the courts in interpreting Title I should follow these legal precedents established by state and federal courts.

B. *Undue Hardship*

The term "undue hardship" is defined in the ADA as "an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B)."¹⁸³ This section is

178. *Id.* at 682-83.

179. 90 Wash. 2d 384, 583 P.2d 621 (1978) (en banc).

180. *Id.* at 386, 583 P.2d at 622.

181. *Id.* at 387, 583 P.2d at 622.

182. *Id.* at 389, 583 P.2d at 624. See also *Dean v. Seattle*, 104 Wash. 2d 627, 708 P.2d 393 (1985). The Supreme Court of Washington provides guidance as to an employer's responsibility to reasonably accommodate a handicapped employee. The court held that the [employer] failed to make reasonable accommodations to [employee's] handicap when . . . [employer] treated him as any other job applicant, did not determine the extent of his disability, did not call him into the office to assist him in applying for other positions but left the initiative to him. [Employee] received no special attention from the personnel office when he tried to find another position within [the organization]. . . . [The] [e]mployer acknowledged having job openings that [the employee] could not have discovered on his own. [The employer's] personnel made themselves available to [the employee] but took no affirmative steps to help him find another position. This was required of them as 'reasonable accommodation'.

104 Wash. 2d 627, 639, 708 P.2d 393, 400.

183. Disabilities Act § 101(10)(A).

derived from federal regulations promulgated to enforce the Rehabilitation Act.¹⁸⁴

Subparagraph (B) sets forth a number of factors to be considered when determining whether an accommodation is reasonable or creates an undue hardship. These factors include:

- (i) the nature and cost of the accommodation needed under this Act;
- (ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;
- (iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and
- (iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.¹⁸⁵

Congress indicated that the above list is not exclusive, therefore, enforcement agencies, the courts, as well as employers may consider other appropriate factors.¹⁸⁶ For example, the number of applicants or employees who may benefit from the accommodation, whether the work site is temporary and whether the work site is an office or construction site, whether there is outside funding available for accommodations all may be considered.¹⁸⁷ In other words, employers might legitimately argue the issue of "undue hardship" where the relative cost outweighs the benefits to a limited number of individuals with disabilities. Simultaneously, Congress strongly discourages such an argument by indicating that the mere use of an accommodation by one employee or applicant does not of itself automatically negate the requirement to "reasonably accommo-

184. Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving or Benefiting From Federal Financial Assistance, 84 C.F.R. § 84.12 (1990); Equal Employment Opportunity in the Federal Government, 29 C.F.R. §§ 1613.701-1613.707 (1990).

185. Disabilities Act § 101(10)(B).

186. H.R. REP. 101-485, pt. 2, *supra* note 16, at 69.

187. *Id.* at 69-70.

date."¹⁸⁸ Nor should the individual assessment of an employee with a disability have a negative impact because the benefits of the accommodation will only affect the employee who requested the accommodation.¹⁸⁹ The Committee also indicated that if an accommodation is determined to be an "undue hardship on the employer," the employer is not totally relieved from accommodating the individual with the disability.¹⁹⁰ The employer is still responsible for providing the cost of accommodation that would not cause an undue hardship.¹⁹¹ The additional cost can be paid by the individual with the disability or other external sources.

The cost and difficulty of accommodating an individual with a disability is probably the weakest defense an employer can raise under Title I. It will be difficult, if not impossible, to persuade governmental enforcement agencies and the courts that any and all accommodations are unreasonable, costly, and likely to create an undue hardship on the employer's operation.¹⁹² Nevertheless, most employers' initial response is to claim that it will be too costly to take measures to accommodate handicapped employees without a sincere assessment of the true cost.

Studies assessing the costs of accommodation have empirically dispelled any basis for such fears and misconceptions by employers.¹⁹³ Repeated testimony during Congressional hearings on the ADA illustrated that, in most cases, the cost of accommodation is minimal or negligible.¹⁹⁴ Accommodating an individual with a disability can be as simple and inexpensive as lowering the height of a

188. *Id.* at 69.

189. *Id.*

190. *See, e.g.*, H.R. REP. 101-485, pt. 2, *supra* note 16, at 68.

191. *Id.*

192. *See, e.g.*, *McMullen v. Labor and Indus. Review Comm.*, 148 Wis. 2d 270, 434 N.W.2d 830 (1988). *But see* *Blumhagen v. Clackamas County*, 91 Or. App. 510, 756 P.2d 650 (1988). The court held that to permanently assign a deputy sheriff to a desk rotational position as a "reasonable accommodation" would impose an "undue hardship" on the employer's operation. *Id.* at 517, 756 P.2d at 655.

193. E.I. DU PONT DE NEMOURS AND COMPANY, *EQUAL TO THE TASK: 1981 DU PONT SURVEY OF EMPLOYMENT OF THE HANDICAPPED* (1982); U.S. DEPARTMENT OF LABOR, *A STUDY OF ACCOMMODATIONS PROVIDED TO HANDICAPPED EMPLOYEES BY FEDERAL CONTRACTORS*, VOL. 1 (1982); Berwitz, *Job Accommodation*, in *AFFIRMATIVE ACTION FOR THE HANDICAPPED 69* (U.S. Department of Labor, Office of Federal Contract Compliance Program 1980).

194. Illustrative examples include: A timer with an indicator light which allowed a deaf medical technician to perform the laboratory tests required for her job; a light probe which allowed a receptionist who was visually impaired to determine which lines on a telephone were ringing, on hold, or in use at her company; a headset for a phone which allowed an insurance salesperson with cerebral palsy to write while talking.

computer desk for a person in a wheelchair. Unfortunately, as with affirmative action programs, it is the extraordinary and most expensive accommodations that receive most attention. This has bolstered the inaccurate perception that it is too costly to accommodate an individual with a handicap.¹⁹⁵

Congress has also made it clear that the ADA requires a much higher standard in accommodating handicapped employees than the *de minimis* standard applied to the accommodation of employees' religious beliefs under the Civil Rights Act.¹⁹⁶ The *de minimis* standard was first articulated by the United States Supreme Court in *TWA, Inc. v. Hardison*,¹⁹⁷ which held that employers need only accommodate employees with particular individual religious beliefs, if the cost of accommodation was *de minimis*.¹⁹⁸ Congress, however, specifically rejected the *de minimis* standard with respect to the ADA and required that employers meet a higher standard before denying an individual with a disability a job.¹⁹⁹ The Courts have also rejected the *de minimis* standard under the Rehabilitation Act and under state handicap discrimination laws.²⁰⁰

Employers who argue that it is unduly costly to reasonably accommodate an individual with a disability have a heavy burden in convincing the court of their position. Organizations that pursue the defense that it is too costly to accommodate may eventually be forced to provide their financial records to the EEOC, and ultimately to the courts, or to pay the cost of taking measures to accommodate the individual. Many organizations will opt to accom-

195. UNITED STATES COMMISSION ON CIVIL RIGHTS, ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES 2 (1983) (citing Roberts, *Harder Times Make Social Spenders Hard Minded*, New York Times, Aug. 3, 1980, at E3; *Helping the Handicapped: Without Crippling Institutions*, Time, Dec. 5, 1977, at 34).

196. H.R. REP. 101-485, pt. 2, *supra* note 16, at 68.

197. 432 U.S. 63 (1977).

198. The Court held that:

[t]o require [the employer] to bear more than a *de minimis* cost in order to give [the employee] Saturdays off is an undue hardship . . . [t]o require [the employer] to bear additional costs when no such costs are incurred to give other employees the days off that they want would involve unequal treatment of employees on the basis of their religion.

Id. at 84.

199. H.R. REP. 101-485, pt. 2, *supra* note 16, at 68.

200. *Holland v. Boeing*, 90 Wash. 2d 384, 390, 583 P.2d 621, 624 (1978); *Harrison v. Marsh*, 691 F. Supp. 1223, 1229 (W.D. Mo. 1988). *But see Phillips v. City of Seattle*, 111 Wash. 2d 903, 911, 766 P.2d 1099, 1104 (1989); *King v. Iowa Civil Rights Comm.*, 334 N.W.2d 598, 602 (Iowa 1983).

modate, in lieu of making their financial records public.²⁰¹ Moreover, state and federal courts have been unreceptive to this defense.²⁰²

VIII. WHO IS A QUALIFIED INDIVIDUAL WITH A DISABILITY?

The ADA requires employers to reasonably accommodate a "qualified individual" with a disability.²⁰³ The ADA defines a "qualified individual" as:

an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this title, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.²⁰⁴

In *School Board of Nassau County v. Arline*,²⁰⁵ the United States Supreme Court addressed the issue of how to determine whether an individual is "an otherwise qualified person." The Supreme Court indicated that "an individualized inquiry" should be made by the district court.²⁰⁶ Logically, such an inquiry should be made by employers when making employment decisions which may adversely affect individuals with disabilities. The Supreme Court further indicated that unless an "individualized inquiry" is made, handicapped individuals will not have the full protection of the Rehabilitation Act because "prejudice, stereotypes, or unfounded fear" may be directed at handicapped individuals.²⁰⁷ In further defining "an otherwise qualified person," the Supreme Court in *Arline* cited its earlier decision in *Southeastern Commu-*

201. See, e.g., *Nelson v. Thornburgh*, 567 F. Supp. 369 (E.D. Pa. 1983); *aff'd*, 732 F.2d 146 (3d Cir. 1984), *cert. denied*, 469 U.S. 1188 (1985); *Kohl v. Woodhaven Learning Center*, 672 F. Supp. 1226 (W.D. Mo. 1987). In both cases the court reviewed the organizations' financial records and determined that it was not too costly to accommodate the handicapped individual.

202. *Ackerman v. Western Elec. Co., Inc.*, 643 F. Supp. 836 (N.D. Cal. 1986); *McAdams v. U & I, Inc.*, 84 Or. App. 329, 733 P.2d 945 (1987).

203. Disabilities Act § 101(8).

204. *Id.*

205. 480 U.S. 273 (1987).

206. *Id.* at 287.

207. *Id.*

nity College v. Davis.²⁰⁸ In *Davis*, the Court stated, "[a]n otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap."²⁰⁹ In *Arline*, the Court applied the *Davis* definition of an "otherwise qualified person" in an employment context. The Court stated that:

[A]n otherwise qualified person is one who can perform the "essential functions" of the job in question. When a handicapped person is not able to perform the essential functions of the job, the court must also consider whether any "reasonable accommodation" by the employer would enable the handicapped person to perform those functions. Accommodation is not reasonable if it . . . imposes undue "financial and 'administrative burdens . . .'"²¹⁰

Thus, it is clear from *Arline* that a "qualified handicapped person" can be an individual who cannot perform the essential functions of the job without reasonable accommodation. Some employers have attempted to argue that they are not required to provide reasonable accommodations unless applicants can first demonstrate the ability to perform the job without accommodation. Lower courts have rejected employers' arguments that a "qualified handicapped person" must first be able to perform the essential function of a job without reasonable accommodation to be considered "qualified."²¹¹ At the same time, the elimination of an essential duty, function, or program would not be considered a reasonable accommodation.²¹² The definition of "qualified individual with a disability" in the ADA encompasses, and is consistent with, the analysis articulated in *Arline*.

What constitutes the "essential functions of the job" has become the critical determinative for employers to establish. Unfortunately, the Act fails to establish clear and concise guidelines and standards for determining what entails the "essential functions of a job." The courts, however, have had some experience in determining which elements of a job are absolutely essential for its performance.²¹³ For example, in *Coffman v. West Virginia Board of*

208. 442 U.S. 397 (1979).

209. *Id.* at 406.

210. *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 287 n.17 (1987) (citations omitted).

211. *Trimble v. Carlin*, 633 F. Supp. 367 (E.D. Pa. 1986).

212. *Jasany v. United States Postal Serv.*, 755 F.2d 1244 (6th Cir. 1985).

213. *Trimble v. Carlin*, 633 F. Supp. 367 (E.D. Pa. 1986).

Regents,²¹⁴ the trial court examined the job description for the position assigned to the handicapped employee and determined that the employee could not perform the essential functions of the job.²¹⁵ Moreover, the employer was not required to retain the employee when he could only perform some of the duties.²¹⁶ Similarly, in *Plourde v. Scott Paper Company*,²¹⁷ the court held that if the employer was required to remove the lifting aspect of the job, it would eliminate the "essential nature" of the position. In *Simon v. St. Louis County, Missouri*,²¹⁸ however, the Eighth Circuit reversed the district court's decision that a paraplegic police officer could not perform the essential functions of the job.²¹⁹ In remanding the case, the court stated that:

the district court should consider whether the requirements for police officers . . . [based on testimony], are reasonable, legitimate, and necessary requirements for all positions within the department. The district court should determine whether the ability to make a forceful arrest and the ability to perform all of the duties of all of the positions within the department are in fact uniformly required of all officers. If not uniformly required, they should not be considered actual requirements for all positions. Also, consideration should be given to Simon's actual physical condition in combination with Simon's police experience, and further determinations made as to exactly what functions within the department he has the physical abilities to perform. Finally, the court should determine whether the accommodations necessary in order to employ Simon as a commissioned police officer are unreasonable.²²⁰

The court in *Ackerman v. Western Electric Company, Inc.*,²²¹ after completing a detailed inquiry of the essential functions of a job, determined that the handicapped employee, an asthmatic, could perform the essential function of the job with reasonable accommodation.²²² Court determinations of the essential functions of particular jobs under the ADA will be as diverse as these decisions

214. 386 S.E.2d 1 (W.Va. 1988).

215. *Id.* at 4.

216. *Id.* at 6.

217. 552 A.2d 1257 (Me. 1989).

218. 656 F.2d 316 (8th Cir. 1981), *cert. denied*, 455 U.S. 976 (1982).

219. *Simon*, 656 F.2d at 320.

220. *Id.* at 321.

221. 643 F. Supp. 836 (N.D. Cal. 1986).

222. *Id.* at 847.

under the Rehabilitation Act and state handicap discrimination laws.

The employer's judgment in determining what is essential, as revealed in the job description prepared prior to the selection process, will be considered by enforcement agencies and the courts.²²³ This evidence, however, is not conclusive but merely persuasive.²²⁴ Consequently, employees can present evidence to establish that the "essential functions" of the job, as outlined by the employer in the job description, are pretextual.²²⁵

Congress left unanswered in the ADA whether job descriptions and an employer's judgment would be given much weight when employees are selected and promoted within the organization. Employers, particularly private sector employers, often select individuals through the "old boys network," without advertising positions or even interviewing candidates. Moreover, job descriptions are sometimes not developed or written until the newly created or vacant positions are filled. Title I may force employers to modify this practice.

IX. ENFORCEMENT AND REMEDIES

Congress directed and authorized the United States Equal Employment Opportunity Commission (EEOC) to enforce the ADA, as well as to establish administrative rules and regulations for the Act's enforcement.²²⁶ The ADA mandates that the EEOC issue regulations no later than one year after the date of enactment.²²⁷ Prior to issuing the proposed regulations, the EEOC solic-

223. See Disabilities Act § 101(8).

224. Courts have applied the model for presenting evidence and burden of proof standard in Title VII discrimination cases developed by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) to handicap discrimination cases filed under the Rehabilitation Act. Thus, plaintiff initially establishes that he is an otherwise qualified handicapped individual. Once plaintiff meets this burden, the defendant must articulate legitimate, nondiscriminatory reasons for rejecting plaintiff. If defendant meets this burden, the burden shifts back to the plaintiff to show that the reasons presented by the defendant were pretextual and that plaintiff was rejected on the basis of his handicap.

For a review of courts' analysis of the burden of proof model in handicap discrimination litigation, see *Arneson v. Heckler*, 879 F.2d 393 (8th Cir. 1989); *Norcross v. Sneed*, 755 F.2d 113 (8th Cir. 1985); *Sisson v. Helms*, 751 F.2d 991 (9th Cir. 1985); *Doe v. New York Univ.*, 666 F.2d 761 (2d Cir. 1981); *Prewitt v. United States Postal Serv.*, 662 F.2d 292 (5th Cir. 1981); *New York State Ass'n for Retarded Children v. Carey*, 612 F.2d 644 (2d Cir. 1979).

225. *Id.*

226. Disabilities Act § 107.

227. *Id.* at § 106.

ited comments from the public and special interest groups on the proposed content of the regulations.²²⁸ It is expected that the EEOC guidelines will provide a detailed explanation on how to comply with Title I, and will clarify such terms as "reasonable accommodation" and "undue hardship."²²⁹ Traditionally, courts have given significant consideration to EEOC rules and regulations when deciding cases under the Civil Rights Act.²³⁰ Similarly, the Supreme Court in *Arline*, in determining whether an individual has a handicap as defined by section 504 of the Rehabilitation Act, cited HHS rules and regulations for implementing section 504.²³¹

Title I incorporates the powers, procedures, and remedies set forth in the Civil Rights Act.²³² Consequently, disabled employees working in the private sector, as well as state and local government employees, will have the right to file discrimination charges with the EEOC. Likewise, organizations will also have the power to file charges of discrimination on behalf of individuals with covered disabilities and have the power to bring charges alleging that an employer's employment policies and practices adversely impact persons with disabilities.²³³ Generally, the time limitation for filing a charge of discrimination with the EEOC is 180 days after the alleged act of discrimination.²³⁴ The time limitation may be extended to 300 days, if the charging party must initially file with a state or local job agency.²³⁵ The EEOC will attempt to resolve the charge of discrimination through conciliation.²³⁶ If conciliation fails and the charge is not resolved, the EEOC must issue a "right to sue letter" indicating the Commission's determination that discrimination occurred or indicating the Commission's dismissal of the charge.²³⁷

Section 505 of the ADA provides attorney's fees for the prevailing party.²³⁸ Other remedies available may include backpay;

228. 55 Fed. Reg. 31192 (1990).

229. 56 Fed. Reg. 8578, 8595 (1991).

230. The United States Supreme Court stated that administrative interpretations by enforcing agencies are "entitled to great deference." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975) (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1964)).

231. *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 279-80 (1987).

232. Disabilities Act § 107(a).

233. EEOC Procedural Regulations, 29 C.F.R. § 1601.7 (1990).

234. *Id.* at § 1601.13(a).

235. *Id.* at § 1601.13(3).

236. *Id.* at § 1601.24.

237. EEOC Procedural Regulations, 29 C.F.R. § 1601.28(b) (1990).

238. Disabilities Act § 505.

benefits, and injunctive relief.²³⁹ Under the Civil Rights Act of 1990, remedies would have been further enhanced to include compensatory and punitive damages, and expert witness fees.²⁴⁰ The Civil Rights Act of 1990 was reintroduced in the first session of the 102nd Congress.²⁴¹ Any additional remedies that become available under the Civil Rights Act will most likely be incorporated into Title I of the ADA.

Individuals and organizations filing charges of discrimination under the ADA have the right to file civil actions in federal court if their charges are not resolved during the administrative process.²⁴² The United States Attorney General's Office can also intervene or bring suit itself when discrimination claims involve governmental agencies, or political subdivisions.²⁴³ Moreover, the EEOC can file a civil suit on behalf of an individual, or where there is a pattern or practice of discrimination against individuals with disabilities.²⁴⁴ Furthermore, employers can be assured that Title I will be aggressively enforced by the EEOC. Evan Kemp, Jr., chairman of the EEOC, and former director of Ralph Nader's Disability Rights Center, has repeatedly voiced his support for enforcement of the ADA.²⁴⁵

Employers faced with a charge of discrimination from the EEOC under Title I should immediately begin an internal investigation to determine whether they have violated the ADA. A determination that a violation has occurred may be resolved early to mitigate potential liability. The initial questions the EEOC will ask of the employer are: (1) whether the employer was aware of the applicant's or employee's disability, (2) whether the employer

239. 42 U.S.C. § 2000e-5(g) (1988).

240. S. 2104, 101st Cong., 2d Sess. (1989). The Civil Rights Act of 1990 would have effectively reversed several employment discrimination decisions issued in 1989 by the Supreme Court. The Act would have allowed compensatory and punitive damages, and a jury trial in certain situations. The Senate failed to override President Bush's veto of the Act by a narrow margin.

241. H.R. 1, 102d Cong., 1st Sess. (1991).

242. EEOC Procedural Regulations, 29 C.F.R. § 1601.28 (1990).

243. *Id.* at § 1601.29.

244. Disabilities Act § 107; 42 U.S.C.A. § 2000e-5, 6 (1988).

245. Regarding enforcement of the ADA, Chairman Kemp quoted President Bush's position on the ADA stating that "I am going to do whatever it takes to make sure the disabled are included in the mainstream. For too long, they've been left out. But they're not going to be left out anymore." EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, SELECTED REMARKS PREPARED FOR EVAN J. KEMP, JR., CHAIRMAN 31 (1990) [hereinafter SPEECHES OF CHAIRMAN KEMP].

made any effort to reasonably accommodate the individual, (3) what are the essential functions of the position, (4) whether it would have been an undue burden to accommodate the individual, and (5) whether documents support the claim of an undue hardship on the organization. Employers should have already completed a detailed internal response to these and related questions prior to making personnel decisions involving individuals with disabilities affecting major life activities. Those employers who have completed such an inquiry will be in a better position to respond to the EEOC's investigation as well as any subsequent lawsuits.

X. IMPACT AND FUTURE LITIGATION

Title I of the ADA will have a tremendous impact on efforts to achieve full employment and equal employment opportunities for individuals with disabilities. An estimated 666,000 employers will be covered by Title I and an additional 83,250 units of state and local government will be covered by the Act as well.²⁴⁶ Title I will cause employers to gradually change their negative and stereotypical attitudes toward individuals with disabilities. These attitudes have prohibited and limited access to job opportunities for individuals with disabilities. Employers will recognize that they have an untapped pool of workers who are highly productive, conscientious, and motivated. Simultaneously, individuals with disabilities will be given an equal opportunity to achieve economic and social parity with workers who do not have disabilities.

The ADA will be more powerful in eradicating employment discrimination against individuals with disabilities than the Rehabilitation Act for three primary reasons. First, the ADA covers a substantially larger number of employers than the Rehabilitation Act by permitting applicants and employees with disabilities to file charges of discrimination against private employers. Under the Rehabilitation Act, charges of discrimination were limited to employers who were governmental contractors. Second, the enforcement of the Rehabilitation Act by the United States Department of Labor's Office of Contract Compliance Programs has been sporadic, if not dismal. The EEOC, even with its laggard enforcement record, will aggressively attempt enforcement of Title I.²⁴⁷ Third, the right to file private actions is clearly permissible under Title I, but is

246. S. REP. 101-116, *supra* note 56, at 88-89.

247. See *supra* note 245.

limited under the Rehabilitation Act.²⁴⁸ In other words, individuals have greater access to the courts under the ADA than under the Rehabilitation Act. For example, less than 300 lawsuits have been filed under the Rehabilitation Act since it was enacted in 1973.²⁴⁹

One of the immediate effects of Title I is that employers will re-evaluate and modify their employment practices, including employment applications, interview questions, medical inquiries, medical examinations, advertisements, and particularly job descriptions. The ADA may not cause, as some fear, a "nuclear litigation explosion,"²⁵⁰ but it will surely cause a "job description explosion" as employers prepare, many for the first time, job descriptions to use as a defense against claims of discrimination. No position will escape the scrutiny of job analysis and modification.

Undoubtedly, there will be substantial litigation over the interpretation of such terms as reasonable accommodation, essential functions, undue hardship, as well as the term disability itself. The application of these terms in a charge of discrimination or in a lawsuit is fact dependant. Consequently, employers, the EEOC, the courts, and individuals with disabilities can all reach different conclusions as to the meaning and application of these terms in a particular instance. Hence, attorneys will have an opportunity to argue the meaning and application of these terms on a case by case basis.

As with other federal and state anti-discrimination statutes, frivolous claims will undoubtedly be pursued under Title I. Many of these claims, however, should be weeded out during the EEOC's administrative process. Notwithstanding the EEOC guidelines and regulations, courts will have to evaluate and decide these issues on a case by case basis. Guidelines promulgated by the EEOC and HHS, however, will provide courts with some parameters to follow in determining these issues.

Title I will have an impact on how and when personnel deci-

248. Generally, there is no private right of action available under section 503 of the Rehabilitation Act which covers employers who have service, supply, or construction contracts in excess of \$2,500.00 with the federal government. 29 U.S.C. § 793(a) (1988). The right to private action under section 504 was not confirmed until 1984 by the Supreme Court decision in *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624 (1984).

249. *EEOC Official Tells Small-Business Group Agency Aims For "Workable" ADA Regulations*, Daily Lab. Rep. (BNA) No. 138, at A10 (July 18, 1990).

250. Samborn, *Will Disabilities Law Produce Litigation?*, Nat'l L.J., Aug. 13, 1990, at 3, col. 3.

sions are made, particularly where an applicant or employee has a known disability. Employers will be required to determine whether the disability is covered by Title I, as well as determine whether the disability affects a major life activity. If the individual's disability is covered by Title I the employer should conduct an individual inquiry to determine if the employee can be reasonably accommodated or whether an accommodation is needed. These additional steps in the employer's selection process will further delay personnel decision-making, a process which is already encumbered by other governmental regulations and internal procedures.

Title I will also affect employers' decisions on whether to use various employment tests in their selection procedures. Although Title I does not prohibit the use of tests to determine an individual's qualifications, proving that a test or testing procedures are job related or a business necessity may be too costly and time consuming for an employer to validate. Consequently, employers will continue to abandon the use of tests as an employee selection device. Employers, however, will continue, and may even increase, the use of tests to determine whether employees are using illegal drugs and alcohol on the job. The ADA does not prohibit such testing.²⁵¹

Employers who ignore the implications of Title I in hiring, promoting, and terminating employees will be engulfed in defending charges of discrimination. Moreover, employers who fail to conduct individualized inquiries into accommodating employees with disabilities could also face charges of employment discrimination. The following statement by Chairman Kemp, clearly articulates the EEOC's position on employers who fail to comply with Title I: "There are employers who are terrified of disabled people and they will exaggerate the costs and difficulties of accommodation and end up in lawsuits."²⁵² Every employer covered by Title I, therefore, should begin developing procedures to incorporate Title I's requirements and policies into their human resource system prior to the Act's effective date.²⁵³

The financial burden on employers of complying with Title I is

251. Disabilities Act § 104(d)(2).

252. ADA, *Civil Rights Bill Focus of ABA Sessions*, Wash. Fair Emp. Prac. (BNA) Report 396, Part II (Aug. 7, 1990).

253. See H. PERRITT, JR., *AMERICANS WITH DISABILITIES HANDBOOK* (1990) (practical guide to employers compliance with ADA).

uncertain. As previously discussed, various studies and testimony presented to Congress during debate over the ADA support the position that accommodating employees with a disability costs very little.²⁵⁴ The real cost to employers may be derived primarily from defending claims of discrimination filed by applicants and employees.

Aside from direct litigation cost, employers may incur costs arising from the following sources:

- (1) modification of equipment and the work area;
- (2) modification of structural design, for example wheel chair ramps and braille numbers in elevators;
- (3) modification of job descriptions, employment applications, personnel policies and procedures;
- (4) modification of interviewing and selection procedures;
- (5) conducting individualized assessments of applicants and employees;
- (6) teaching supervisors and managers about Title I;
- (7) purchasing special audio recording devices; and
- (8) contracting with readers and interpreters.

254. *Hearings on S. 933, supra* note 12, at 228-34 (statement of Senator Tom Harkin). The following are typical of low-cost accommodations enabling employees with disabilities to perform their jobs:

- (1) An individual working in the food service industry, who only had the use of one hand, was able to perform all of the tasks expected of her except opening cans. The company purchased a specially designed can opener for people who only have the use of one hand. The cost of the accommodation was \$35.00.
- (2) A legally blind receptionist was provided a light probe which allowed her to determine which lines on a telephone were ringing, on hold, or in use. The cost of the accommodation was \$45.00.
- (3) A salesperson with cerebral palsy was provided a headset for a phone that allowed him to write while talking. The cost of the accommodation was \$49.95.
- (4) A grounds keeper who had recovered from a stroke had limited use of one arm, yet to maintain his position needed to be able to rake grass. The use of a detachable extension arm on the rake allowed him to grasp the handle on the extension with the hand with limited use and control the rake with his other hand. The cost of the accommodation was \$19.80.
- (5) A medical technician who was deaf needed a timer that had an indicator light in order to perform the lab tests required by her job. The cost of the accommodation was \$26.95.
- (6) A potato inspector was required to core out bad spots in potatoes with a potato corer. Carpal tunnel syndrome drastically reduced the inspector's ability to perform this task. An adapted potato corer mounted on a table allowed the inspector to remain in his position. The cost of the accommodation was \$33.
- (7) A housekeeper in a motel who had bending restrictions needed to inspect under the beds when she cleaned rooms. A mirror on an extending wand and a reacher allowed her to both inspect and reach any items under the beds. The cost of the accommodation was \$11.00.

Many of these costs will be a one-time expense for employers. Nevertheless, these costs could mean the difference between profit or loss for smaller employers. Larger employers may have already completed many of the above modifications to comply with state handicap discrimination laws and the Rehabilitation Act. Thus, it will not be unduly burdensome for larger employers to comply with the ADA.

Title I will also have a substantial impact on the number of charges of discrimination filed and processed by the EEOC. The EEOC receives more than 60,000 employment discrimination charges a year.²⁵⁵ The EEOC has projected that Title I will increase the number of discrimination charges filed with the agency by as much as 20 percent.²⁵⁶ Without adequate resources,²⁵⁷ the influx of additional charges of discrimination will further overload a complaint processing system already plagued by lengthy processing times and a backlog of cases. To further complicate matters, the number of multi-basis discrimination claims will also increase. For example, an individual who files a race, sex, and/or age claim may consider disability as an additional claim.²⁵⁸ Multi-basis discrimination claims tend to take additional time to process, as well as to litigate. Thus, multi-basis claims increase even further the time and cost of presenting and defending discrimination claims.

In an effort to avoid the untenable cost and time of litigation, employers and individuals with disabilities will actively engage in alternative means of resolving the unavoidable conflicts. Most disputes will, or at least should be, resolved through mediation taking place in the employer's internal process or in the EEOC administrative process.²⁵⁹

255. 1986-1988 EEOC COMBINED ANNUAL REPORT (1989).

256. SPEECHES OF CHAIRMAN KEMP, *supra* note 245, at 1.

257. It is estimated that the EEOC will need a budget of at least 15 million dollars annually to enforce Title I. This would include an additional 240 employees in its field offices and 70 additional employees at its headquarters. S. REP. 101-116, *supra* note 56, at 90-91.

258. *See, e.g.,* Butler v. Department of the Navy, 595 F. Supp. 1063, 1065 (D. Md. 1984). In this case, the employee filed charges against the Department of the Navy alleging a discrimination on the basis of his race, age, and handicap.

259. The ADA encourages the use of alternative dispute resolution (ADR) mechanisms to resolve disputes arising under the Act. *See* Disabilities Act § 513.

CONCLUSION

Title I of the ADA may have a tremendous impact on the employability of individuals with disabilities. Moreover, Title I will enhance the likelihood that Congress will achieve its goal of improving the economic status of disabled individuals by removing discriminatory barriers to full employment. However, as with other federal regulations prohibiting employment discrimination, such as Title VII and the Rehabilitation Act, the real impact of the ADA will depend upon how courts, enforcement agencies, and Congressional amendments clarify and interpret employers' legal obligations under the Act.