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UNDUE HARDSHIP: TITLE I OF THE AMERICANS WITH DISABILITIES ACT

INTRODUCTION

The recently passed Americans with Disabilities Act of 1990¹ (the "ADA") announces the ambitious goal of providing equal rights to the 43 million disabled individuals in the United States. The ADA is a "clear and comprehensive national mandate" to end discrimination against disabled individuals.² Title I of the ADA³ prohibits discrimination by employers on the basis of disability.⁴ Under Title I, discrimination includes⁵ the failure to provide a "reasonable accommodation"⁶ for the disabled individual if such accommodation does not impose an "undue hardship"⁷ on the employer.

1. See Americans With Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327, U.S.C.S. 1663 (Law. Co-op. Aug. 1990).

The ADA prohibits employment discrimination. See *infra* note 4 and accompanying text. For a discussion of Title I and its provisions, see notes 31-34 and accompanying text. Title II, entitled "Public Services," mandates that public services be available to the disabled, provided that an undue financial burden is not demonstrated. See Pub. L. No. 101-336, § 203(c)(2), 104 Stat. 327, 341 U.S.C.S. 1677 (Law. Co-op. Aug. 1990). Title III, entitled "Public Accommodations and Services Operated by Private Entities," requires that public accommodations be made where they are "readily achievable." See *id.* § 301(5), 104 Stat. 327, 357, U.S.C.S. 1693 (Law. Co-op. Aug. 1990). Title IV, entitled "Telecommunications Relay Services," requires that telecommunications services be available unless it would unduly burden the common carriers. See *id.* § 401(d)(5), 104 Stat. 327, 367, U.S.C.S. 1703 (Law. Co-op. Aug. 1990).

2. See S. Rep. No. 116, 101st Cong., 1st Sess., reprinted in 368 Lab. L. Rep. (CCH) 2 (Sept. 14, 1989) [hereinafter *Senate Report*]; H. Rep. No. 485, 101st Cong., 2d Sess., pt. 2, at 22 (1990) [hereinafter *House Report*]; 135 Cong. Rec. S10,702 (daily ed. Sept. 7, 1989).

3. Title I of the ADA is entitled "Employment." See Pub. L. No. 101-336, 104 Stat. 327, U.S.C.S. 1663 (Law. Co-op. Aug. 1990).

4. Section 102(a) provides as follows: "No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." *Id.* § 102(a).

5. Discrimination also includes acts such as classifying jobs in a manner that adversely affects a disabled individual's opportunities, utilizing discriminatory standards or methods of administration, denying or excluding equal benefits, and screening out disabled individuals through qualification standards or selection criteria. See *id.* § 102(b).

6. See *id.* § 102(b)(5). Under Section 101(9) of the ADA, reasonable accommodation may include:

- (A) making existing facilities used by employees readily accessible to and useable 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

Id. § 101(9)(A),(B), 104 Stat. 327, 331, U.S.C.S. 1667 (Law. Co-op. Aug. 1990).

7. *Id.* § 102(b)(5). This language was derived from the HEW regulations, 45 C.F.R. § 84.12, implementing section 504 of the Rehabilitation Act. See *Senate Report, supra* note 2, at 36; *House Report, supra* note 2, at 67.

The ADA, although the most comprehensive anti-discrimination legislation for the disabled, is not the first attempt to protect the rights of the handicapped. Indeed, the ADA's reasonable accommodation and undue hardship language derives from regulations implementing the Rehabilitation Act of 1973 ("Rehabilitation Act").⁸ The Rehabilitation Act sought to expand vocational rehabilitation services and civil rights protections to the handicapped⁹ by affording them equal opportunities in federally funded programs.¹⁰ Unfortunately, the Rehabilitation Act has not had as substantial an effect on the lives of the handicapped as was hoped.¹¹

Although the ADA does not go into effect until July 1992,¹² issues of interpretation must be addressed before the anticipated flood of litigation over its requirements.¹³ The ADA's effectiveness will depend upon how courts and agencies interpret the statute, particularly the reasonable accommodation and undue hardship language. The ADA's legislative history states that federal agencies applying the reasonable accommodation and undue hardship language should do so consistently with interpretations under the Rehabilitation Act.¹⁴ Interpretations under the Rehabilitation Act, however, have been inconsistent.¹⁵ Under the ADA, similar inconsistencies would deprive businesses of the guidance they need to plan and implement accommodations. To avoid this problem and to provide the disabled with meaningful protection of their rights, courts must devise a clear and consistent method of determining what constitutes undue hardship under the ADA. Such judicial action is justified because

8. See Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355, 357, § 2, reprinted in 1973 U.S. Code Cong. & Admin. News 409, 410 (codified as amended at 29 U.S.C. § 701-794 (1988)). This language was derived from the HEW regulations, 45 C.F.R. § 84 (1988), implementing section 504 of the Rehabilitation Act. See *Senate Report*, supra note 2, at 30; *House Report*, supra note 2, at 67.

9. The original purpose of the Rehabilitation Act was to provide research, training and vocational rehabilitation services to prepare the handicapped for employment, independence and self-sufficiency. See Pub. L. No. 93-112, § 2, 87 Stat. 355, 357 (1973) (amended 1978, 1983, 1987).

10. See Pub. L. No. 95-602, § 122, 92 Stat. 2955, 2984 (1978) (codified as amended at 29 U.S.C. § 701 (1988)); 119 Cong. Rec. 24,571 (1973) (statement of Senator Stafford). "Section 504 [of the Rehabilitation Act] was enacted to prevent discrimination against all handicapped individuals, regardless of their need for, or ability to benefit from, vocational rehabilitation services, in relation to Federal assistance in employment, housing, transportation, education, health services, or any other Federally-aided programs." S. Rep. No. 1297, 93d Cong., 2d Sess. 38, reprinted in 1974 U.S. Code Cong. & Admin. News 6373, 6388.

11. See Note, *Employment Discrimination Against the Handicapped and Section 504 of the Rehabilitation Act: An Essay on Legal Evasiveness*, 97 Harv. L. Rev. 997, 997 (1984) [hereinafter Note, *Employment Discrimination*]; Note, *Mending the Rehabilitation Act of 1973*, 1982 U. Ill. L. Rev. 701, 701, 729 (1982) [hereinafter Note, *Mending*]; *House Report*, supra note 2, at 47.

12. The ADA will go into effect on July 26, 1992, 24 months after the date of enactment. See Pub. L. No. 101-336, § 108, 104 Stat. 336, U.S.C.S. 1667 (Law. Co-op. Aug. 1990).

13. See *infra* note 54.

14. *Senate Report*, supra note 2, at 36; *House Report*, supra note 2, at 67.

15. See *infra* notes 49-51 and accompanying text.

the ADA is not an amendment to the Rehabilitation Act, but rather a more comprehensive statute that differs both in scope and effect.¹⁶

Part I of this Note explores the differences between the ADA and the Rehabilitation Act by examining each Act's statutory language, legislative history and policies. Part II discusses the inconsistent interpretations of undue hardship under the Rehabilitation Act, outlining the need for consistent treatment under the ADA. Part III proposes that under Title I of the ADA, courts should employ a presumption in favor of providing accommodations whereby employers are granted only a narrow exemption upon a showing of undue hardship. Further, courts should determine undue hardship by examining the effect of the accommodation on a business' profitability and morale. These terms are quantifiable measures of hardship and will ensure that cases brought under the ADA will be resolved consistently. Part IV proposes an example of the type of regulation that measures the effect on profitability and morale and that identifies the point at which the hardship an employer sustains becomes "undue."

I. BACKGROUND OF THE ADA AND THE REHABILITATION ACT

While the ADA and the Rehabilitation Act share common language and goals, they differ greatly in scope and effectiveness.¹⁷ The Rehabilitation Act was enacted to provide vocational rehabilitation for the handicapped.¹⁸ Although the Rehabilitation Act provides for equal opportunities,¹⁹ Title V of the Act²⁰ is the only provision that can effect this goal.²¹ Section 504 of Title V contains a general prohibition against discrimination on the basis of handicaps,²² but it contains no details or

16. See *infra* notes 17-34 and accompanying text.

17. Differences in statutory scope and effectiveness may be discerned by comparing the Acts' language, see *Southeastern Community College v. Davis*, 442 U.S. 397, 405 (1979), histories, see *Blum v. Stenson*, 465 U.S. 886, 896-97 (1984), and policy rationale, see *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 285 (1956).

18. See 119 Cong. Rec. 24,571 (1973).

19. The purpose of the Rehabilitation Act, which is stated in section 2, is "to develop and implement, through research, training, services, and the guarantee of equal opportunity, comprehensive and coordinated programs of vocational rehabilitation and independent living, for individuals with handicaps in order to maximize their employability, independence, and integration into the workplace and the community." 29 U.S.C. § 701 (1988) as amended by Pub. L. No. 99-506, 100 Stat. 1808 (1986). Although equal opportunity is a stated goal, the language of the Rehabilitation Act does not make explicit its goal of ending discrimination, as do typical civil rights provisions. See *infra* note 30.

20. See Pub. L. No. 93-112, 87 Stat. 355, 390 *codified in* 29 U.S.C. §§ 791-794 (1988) (Title V entitled "Miscellaneous").

21. Section 501 requires affirmative action programs in federal employment, section 503 requires affirmative action programs by federal contractors receiving more than \$2500, and section 504 prohibits discrimination by federally funded programs. See Pub. L. No. 93-112, 87 Stat. 355, 390 *codified in* 29 U.S.C. §§ 791-794 (1988).

22. Section 504 of the Rehabilitation Act provides that

[n]o otherwise qualified handicapped individual in the United States . . . shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program

definitions.²³ Moreover, it is expressly limited to programs and activities that receive federal financial assistance.²⁴

The legislative history of the Rehabilitation Act reveals that Title V was originally an "inconspicuous" part of legislation.²⁵ Staff members developed it late in the drafting of the Act out of concern that discrimination by employers would block the vocational rehabilitation of the handicapped.²⁶ Only in later amendments did Congress reveal its intent to provide equal employment opportunities.²⁷ The true weight of Section 504 did not emerge until several years after its enactment, when the Department of Health, Education and Welfare ("HEW") appointed the Office of Civil Rights to draft implementing regulations for the Rehabilitation Act.²⁸

The language of the ADA is more definite and far-reaching than that of the Rehabilitation Act. The ADA was conceived as a new bill of

or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

Pub. L. No. 93-112, § 504, 87 Stat. 355, 394, amended by Pub. L. No. 95-602, § 119, 92 Stat. 2955, 2982, (codified as amended at 29 U.S.C. § 794 (1988)). An otherwise qualified handicapped individual under section 504 is an individual who can perform the essential functions of his job in spite of his handicap. *See* Southeastern Community College v. Davis, 442 U.S. 397, 406 (1979).

23. *See* 29 U.S.C. § 794 (1988); *see also* Note, *Accommodating the Handicapped: The Meaning of Discrimination Under Section 504 of the Rehabilitation Act*, 55 N.Y.U. L. Rev. 881, 889 (1980)(language of section 504 is unclear).

24. 29 U.S.C. § 794 (1988).

25. R. Scotch, *From Good Will to Civil Rights* 1 (1984). As conceived, section 504 was a logical outgrowth of Titles I through IV. *See id.* at 51-52. Its language paralleled a provision of Title VI of the Civil Rights Act of 1964. "However, there is little in the record to suggest what, if anything, members of Congress had in mind when Section 504 was enacted." *Id.* at 53.

26. *Id.* at 49, 51.

27. At the time of enacting the Rehabilitation Act, section 504 was not discussed in any of the hearings held prior to the law's passage, nor was it discussed when the bill was considered on the floors of the House and Senate. *See id.* at 53. The language of section 504 did not change in the 1974 amendments to the Rehabilitation Act. In Committee Reports, however, Congress finally expressed its intent that section 504 prevent discrimination against all handicapped individuals seeking services from federally assisted programs. *See* S. Rep. No. 1297, 93d Cong., 2d Sess. 38, *reprinted in* 1974 U.S. Code Cong. & Admin. News 6373, 6388.

In 1978 and again in 1986, Congress amended the Rehabilitation Act to include language guaranteeing equal opportunities to maximize the handicapped's employability and independence. *See* Rehabilitation Act Amendments of 1978, Pub. L. No. 95-602, 92 Stat. 2955, 2984 (1978); Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, 100 Stat. 1807, 1808 (1986) (codified as amended at 29 U.S.C. § 701 (1988)).

28. At the time of appointing drafters for the regulations, the Social Rehabilitative Services Administration and the Office of General Council in the HEW shied away from the drafting responsibility because of their lack of experience with such provisions. *See* R. Scotch, *supra* note 25, at 61-63. The HEW finally appointed the drafting responsibility to the Office of Civil Rights which is largely responsible for the civil rights policy behind the regulations. *See id.* at 60-62. Due to political conflict, the regulations were not implemented until 1978. *See id.* at 80; Holmes, *The Disabled Find a Voice, and Make Sure It Is Heard*, N.Y. Times, Mar. 18, 1990, § 4, at 5, col. 1.

rights for the disabled²⁹ that establishes a clear and comprehensive national program to eliminate discrimination against disabled individuals.³⁰ Under Title I of the ADA, employers of fifteen or more employees³¹ are deemed to discriminate if they do not provide reasonable accommodations to enable disabled individuals to perform their jobs. They need not provide the accommodation if they prove that it would impose undue hardship, however.³² The ADA defines undue hardship as "an action requiring significant difficulty or expense,"³³ and enumerates the following factors to determine whether an accommodation imposes an undue hardship: the nature and cost of the accommodation, the size and financial resources of the facility providing the reasonable accommodation, the size and financial resources of the covered business, and the type of operation of the covered entity.³⁴

29. See Rasky, *How the Disabled Sold Congress on a New Bill of Rights*, N.Y. Times, Sept. 19, 1989, § 4, at 5, col. 1.

30. See Pub. L. No. 101-336, § 2(b)(1), 104 Stat. 327, 329, U.S.C.S. 1665 (Law. Co-op. Aug. 1990). The purpose of the ADA is

to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities . . . and to invoke the sweep of congressional authority, including its power to enforce the fourteenth amendment . . . in order to address the major areas of discrimination faced day-to-day by people with disabilities.

Id. § 2(b). This language is similar to that of the Civil Rights Act of 1964. See S. Rep. No. 872, 88th Cong., 2d Sess. 2, reprinted in 1964 U.S. Code Cong. & Admin. News 2355, 2355 (purpose is "to achieve a peaceful and voluntary settlement of the persistent problem of racial and religious discrimination"). The Rehabilitation Act, on the other hand, never states that eliminating discrimination is a goal. See *supra* note 19.

31. See Pub. L. No. 101-336, § 101(5), 104 Stat. 327, 330, U.S.C.S. 1666 (Law. Co-op. Aug. 1990). Title I of the ADA applies to all employers with 25 or more employees for the first two years after enactment, and 15 or more employees thereafter. See *id.*; see also 135 Cong. Rec. S10,711 (daily ed. Sept. 7, 1989) (statement of Sen. Harkin) ("The ADA extends civil rights protections for people with disabilities to cover employment in the private sector . . .").

32. See Pub. L. No. 101-336, § 102(b)(5)(A), 104 Stat. 327, 332, U.S.C.S. 1668 (Law. Co-op. Aug. 1990). The reasonable accommodation and undue hardship language was derived from the HEW regulations, 45 C.F.R. § 84 (1989), implementing section 504 of the Rehabilitation Act. See *Senate Report, supra* note 2, at 36; *House Report, supra* note 2, at 67.

If the employer can show undue hardship, the employer is not discriminating under the ADA. Under Title VII of the Civil Rights Act of 1964, in contrast, conduct found to be discriminatory may nevertheless be permitted. For example, an employer who has engaged in discrimination, proved under the theory of disparate impact, may be permitted to continue such action where it is based on "[f]actors such as the cost or other burdens of proposed alternative selection devices." *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115, 2127 (1989) (quoting *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 998 (1988)). This is known as the business necessity exception to the general prohibition against discrimination. Similarly, under the disparate treatment theory of discrimination, an employer may be permitted to continue discriminatory action based on a bona fide occupational qualification that is absolutely necessary. See 42 U.S.C. 2000e-2(e) (1988); see also *Dothard v. Rawlinson*, 433 U.S. 321, 333-37 (1977) (requirement that prison guards be men was a bona fide occupational qualification).

33. Pub. L. No. 101-336, § 101(10)(A), 104 Stat. 327, 331, U.S.C.S. 1667 (Law. Co-op. Aug. 1990).

34. See *infra* note 81.

II. REASONABLE ACCOMMODATION AND UNDUE HARDSHIP

A. *Reasonable Accommodation and Undue Hardship Under the Rehabilitation Act*

Under the Rehabilitation Act, a handicapped employee establishes a prima facie case of discrimination by proving that he is covered by the Act; that he was denied a job, promotion or raise for which he applied; that he was qualified except for his handicap; and that a reasonable accommodation would enable him to perform the job.³⁵ Upon establishment of a prima facie case, the burden shifts to the employer to show that the accommodation would impose undue hardship.³⁶ The employee then has an opportunity to rebut the employer's showing of undue hardship by coming forward with evidence that the accommodation is actually reasonable.³⁷ While the courts recognize this basic four-step framework, they disagree over what constitutes an undue hardship.³⁸

Under the implementing regulations of section 504,³⁹ courts are to consider three factors in determining whether there was undue hardship.⁴⁰ The regulations, however, provide little indication of the degree of costs that will constitute undue hardship in federally funded programs or agencies.⁴¹ The courts thus have the freedom to create "widely varying pictures" of undue hardship.⁴²

The 1979 Supreme Court decision in *Southeastern Community College v. Davis*⁴³ provides the first and most extensive interpretation of discrim-

35. See *Prewitt v. United States Postal Serv.*, 662 F.2d 292, 309-10 (5th Cir. 1981); *Dexler v. Tisch*, 660 F. Supp. 1418, 1427 (D. Conn. 1987); *Bey v. Bolger*, 540 F. Supp. 910, 924 (E.D. Pa. 1982) (quoting *Prewitt*, 662 F.2d at 309-10).

36. See *Prewitt*, 662 F.2d at 310.

37. See *id.*; see also *Bey*, 540 F. Supp. at 925 (plaintiff bears burden of coming forward to show that accommodation may in fact be reasonable). The burden of coming forward with evidence is merely to "produce evidence to satisfy the judge that [plaintiff] has enough evidence to avoid an unfavorable directed verdict." Note, *Accommodating the Handicapped: Rehabilitating Section 504 After Southeastern*, 80 Colum. L. Rev. 171, 189 n.124 (1980). In contrast, in the context of employment the burden of persuasion requires the employer to "prove that the only reasonable accommodations for the applicant's handicap impose undue hardship." *Id.* at 189 n.125.

38. See *infra* notes 49-50 and accompanying text.

39. See 45 C.F.R. § 84.12(a) (1989).

40. See *id.* at § 84.12(c). The HEW illustrations of various fact patterns show that "a small day-care center might not be required to expend more than a nominal sum, . . . but a large school district might be required to make available a teacher's aide to a blind applicant for a teaching job." 45 C.F.R. Part 84, App. A at 351-52 (1989). Congress has adopted similar language in the ADA concerning reasonable accommodation and undue hardship. See *supra* notes 6-7, 33-34 and accompanying text.

41. The regulations are but an "ambiguous list of unweighted characteristics." Johnson, *The Rehabilitation Act and Discrimination Against Handicapped Workers: Does the Cure Fit the Disease?*, in *Disability and the Labor Market* 242, 260 (M. Berkowitz & M. Hill eds. 1986). The regulations do not help the court answer the ultimate question—"the extent to which a grantee is required to make reasonable modifications." *Alexander v. Choate*, 469 U.S. 287, 299 n.19 (1985).

42. Note, *Employment Discrimination*, *supra* note 11, at 1002-03.

43. 442 U.S. 397 (1979).

ination under section 504 of the Rehabilitation Act.⁴⁴ The *Davis* Court held that Congress intended to require "evenhanded treatment of qualified handicapped persons," not "affirmative efforts to overcome the disabilities caused by handicaps."⁴⁵ The Court recognized, however, that "the line between a lawful refusal to extend affirmative action and illegal discrimination" will not always be clear.⁴⁶ The Court stated that as long as "undue financial and administrative burdens" were avoided, insistence on traditional practices and refusal to employ technology to provide accommodation could constitute illegal discrimination against the handicapped.⁴⁷ Lower courts, however, have not been able to determine with any uniformity when the Rehabilitation Act mandates accommodation.⁴⁸

This ambiguity is costly. Employment discrimination cases under the Rehabilitation Act demonstrate the tension between the cost of accommodations and the need to prevent discrimination against the handicapped.⁴⁹ Because the ambiguous guidelines have fostered inconsistent

44. *See id.* at 405.

45. *Id.* at 410.

46. *Id.* at 412. The Court in *Alexander v. Choate*, 469 U.S. 287 (1985), clarified to some degree the affirmative action language in *Davis*: "[T]he term 'affirmative action' referred to those 'changes,' 'adjustments,' or 'modifications' . . . that would constitute 'fundamental alteration[s]' in the nature of a program . . ." rather than to those changes that would be reasonable accommodations." *Id.* at 300-01 n.20 (citations omitted).

47. *Southeastern Community College v. Davis*, 442 U.S. 397, 412 (1979).

48. *See Note, Mending, supra* note 11, at 713, 717.

49. *See* U.S. Commission on Civil Rights, *Accommodating the Spectrum of Individual Abilities*, 69-71 (Clearinghouse Pub. 81 1983); *see, e.g., Treadwell v. Alexander*, 707 F.2d 473, 478 (11th Cir. 1983) ("doubling up" of workers would impose undue hardship); *Dexler v. Tisch*, 660 F. Supp. 1418, 1428 (D. Conn. 1987) (cost of accommodating individual with step stool and assistance would result in lost efficiency causing undue hardship for Postal Service); *Bey v. Bolger*, 540 F. Supp. 910, 927 (E.D. Pa. 1982) (waiver of five-year work requirement before attaining light duty status would result in extraordinary costs imposed on Postal Service). *But see Simon v. St. Louis County, Mo.*, 656 F.2d 316, 321 & n.9 (8th Cir. 1981) (court implied that waiver of physical requirements of St. Louis Police Department would not cause undue hardship especially where handicap would not prevent applicant from performing tasks of certain departments), *cert. denied*, 455 U.S. 976 (1982); *Nelson v. Thornburgh*, 567 F. Supp. 369, 382 (E.D. Pa. 1983) (where Department of Public Welfare had a budget of over \$300 million, cost was no defense to providing readers for blind employees), *aff'd*, 732 F.2d 146, *cert. denied*, 469 U.S. 1188 (1984); *Smith v. Administrator of Veterans Affairs*, 32 Fair Empl. Prac. Cases (BNA) 986, 990 (C.D. Cal. 1983) (supplying additional supervision, performing blood test or assigning an epileptic nursing assistant to clerical position would be reasonable accommodations in Veterans Administration hospital).

Similarly, cases dealing with public transportation illustrate the lack of a consistent interpretation of the requirement that public transportation be "readily accessible" to handicapped individuals. *See* 29 U.S.C. § 792(b) (1988); *see also* U.S. Commission on Civil Rights, *supra* note 49, at 103 (discussing problems of defining reasonable accommodation). *Compare Disabled in Action of Pa. v. Sykes*, 833 F.2d 1113, 1120-21 (3d Cir. 1987) (city using federal funds for subway stairs must make altered portion readily accessible to handicapped persons), *cert. denied*, 485 U.S. 989 (1988) with *Rhode Island Handicapped Action Comm. v. Rhode Island Pub. Transit Auth.*, 718 F.2d 490, 499 (1st Cir. 1983) (even though transit authority had ample funds to spend over the 3.5% recommended in Department of Transportation regulation, transit authority did not discriminate by not spending more than that amount) and *Dopico v. Goldschmidt*, 687 F.2d 644,

views of when section 504 mandates an accommodation, courts use undue hardship as a label for any accommodation that they have already decided not to require in a given case.⁵⁰ Courts have thus developed idiosyncratic, fact-specific rules without precedential value.⁵¹

B. *Need for Consistent Treatment Under the ADA*

Future interpretations of undue hardship must be consistent for three reasons. First, the ADA demands it. One of the ADA's major purposes is to convert the dependent disabled population into contributors to society.⁵² Congress recognizes the "need to provide clear, strong, consistent, enforceable standards" to effectuate this goal.⁵³ By uniformly interpreting undue hardship as a narrow exemption, courts can deter employers from litigating all but the most unfairly burdensome accommodations. Second, the volume of litigation that the ADA will likely create⁵⁴ demands the efficiency of a uniform standard that quantifies undue hardship. Third, litigation under the Rehabilitation Act demonstrates the problems that inconsistent application of the undue hardship standard causes.⁵⁵ Because these problems must be avoided under the ADA, this

653 (2d Cir. 1982) (accommodations to transit system do not require massive expenditures or fundamental changes and appropriate relief should be fashioned) and *American Pub. Transit Ass'n v. Lewis*, 655 F.2d 1272, 1278 (D.C. Cir. 1981) (Department of Transportation regulations requiring every new system to be accessible imposed burdensome modifications and heavy financial hardships).

In contrast, courts have reached a consensus in cases involving education that cost cannot defeat a handicapped child's right to individualized education programs under the Rehabilitation Act. *See, e.g., Camenisch v. University of Texas*, 616 F.2d 127 (5th Cir. 1980) (interpreters for deaf students should be supplied by university), *rev'd on other grounds*, 451 U.S. 390 (1981); *Tatro v. Texas*, 625 F.2d 557, 563-64 (5th Cir. 1980) (school had duty to administer clean intermittent catheterization to student during school day); *Garrity v. Gallen*, 522 F. Supp. 171, 218 (D.N.H. 1981) (schools had duty to accommodate retarded residents with appropriate auxiliary aids before determining if individual would benefit from services). This disparate treatment can be explained by the special nature of education. Although education is not a fundamental right, *see San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973), it does play a vital role in a free society. *See id.* at 30; *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972); *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923). Also, special statutes have been enacted to ensure an appropriate free public education for the handicapped. *See Education for All Handicapped Children Act*, 20 U.S.C. § 1400 (1988). For a discussion of the effect of the above Act, *see U.S. Commission on Civil Rights, supra* note 49, at 76-78.

50. Note, *Employment Discrimination, supra* note 11, at 1011 & n.87.

51. Johnson, *supra* note 41, at 261.

52. *See* 135 Cong. Rec. S10,711 (daily ed. Sept. 7, 1989) (statement of Sen. Harkin); *see also* 136 Cong. Rec. H2433 (daily ed. May 17, 1990) (statement of Rep. Lukin) ("[T]his bill will help our country use an immense amount of talent, intelligence, and other human resources which heretofore have been underestimated, underdeveloped, and underutilized.").

53. *Senate Report, supra* note 2, at 20; *House Report, supra* note 2, at 50.

54. *See* 135 Cong. Rec. S10,741 (daily ed. Sept. 7, 1989) (statement of Sen. Pryor).

55. *See supra* notes 49-51 and accompanying text. Except for claims involving education, undue hardship has never been a definable hurdle under the Rehabilitation Act. *See supra* note 49.

Note takes the unusual step of guiding the courts toward a more consistent approach even before the statute comes into effect.

III. A MORE QUANTIFIABLE AND PREDICTABLE ANALYSIS OF UNDUE HARDSHIP UNDER THE ADA

Although the ADA seeks to proscribe disability-based employment discrimination, it does so by adopting language from another statute. This language, however, does not provide the tools necessary to accomplish the ADA's goals.⁵⁶ Although addressing similar discrimination, the Rehabilitation Act does not present efficient, predictable and consistent guidelines necessary to effectuate the ADA's goals.⁵⁷ Two changes to the basic four-step framework can be made to better ensure the elimination of employment discrimination based on an individual's disability. First, courts can make the employer's duty to provide reasonable accommodation a "strong" standard⁵⁸ by requiring a presumption in favor of providing reasonable accommodations.⁵⁹ Second, courts can further strengthen the undue hardship standard by treating it as a narrow exemption triggered by a showing of a material negative effect on a business' profitability and morale. Profitability and morale provide a quantifiable measure of the determinative factors in the statute.⁶⁰

A. *Presumption in Favor of Providing Reasonable Accommodations*

Under the ADA, courts will apply the four-step framework used under the Rehabilitation Act to establish a *prima facie* case,⁶¹ but they should make the following change. If the plaintiff establishes the fourth element, that an accommodation would enable the disabled person to perform the job, the court should presume that the accommodation is reasonable and does not impose undue hardship. In the face of this presumption, the employer has the burden of establishing undue hardship by a preponderance of the evidence.⁶² Under a presumption that the accommodation is reasonable and does not impose undue hardship, the disabled individual no longer needs a second chance to come forward with evidence to rebut the employer, as he may under the Rehabilitation Act.⁶³

56. For instance, cost is a more important issue under the ADA because it deals with private businesses rather than the government's deep pockets, which were at issue under the Rehabilitation Act. See 136 Cong. Rec. H2473 (daily ed. May 17, 1990) (statement of Rep. DeLay).

57. See *supra* notes 48-51 and accompanying text.

58. See *Senate Report, supra* note 2, at 20; *House Report, supra* note 2, at 50.

59. See *infra* text and accompanying notes 62-63.

60. See *infra* text and accompanying notes 77-98.

61. See *supra* note 35 and accompanying text.

62. See *Bey v. Bolger*, 540 F. Supp. 910, 926 (E.D. Pa. 1982). While this is the same standard used under the Rehabilitation Act, in practice it will work differently because the presumption that the accommodation is reasonable will make the burden of proof more difficult to meet. For a discussion of the nature of hardships actually placed on the employer, see *infra* notes 106-125 and accompanying text.

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

Because Congress did not explicitly discuss the elements necessary to establish a cause of action under the ADA, adversaries of this proposal will likely maintain that Congress intended to adopt the process used under the Rehabilitation Act. Congress, however, frequently uses the language of previous legislative acts as the springboard for new legislation rather than dipping into the unfamiliar waters of completely new statutory language.⁶⁴ Given the fact that the tone of the ADA differs substantially from that of the Rehabilitation Act,⁶⁵ and that Congress acknowledges the need for "strong, consistent, enforceable standards" to achieve the ADA's goals,⁶⁶ the ADA should not be interpreted according to Rehabilitation Act precedent. The proposed presumption will more readily achieve the ADA's goals: employers will likely be deterred from discriminating if they are aware of the difficulty of getting a claim dismissed, so a reduction in discrimination should follow. In addition, by using a stronger standard, courts will ensure that the disabled are afforded the civil rights opportunities that the Act grants them.

This need for strong, consistent and enforceable standards arises from the civil rights benefits that the ADA provides. Title I seeks to provide two separate benefits: granting the disabled individual an opportunity to be employed without subjecting him to the whim of the employer, and granting disabled Americans the opportunities and protections afforded other minorities for the past 25 years.⁶⁷ The theory behind these benefits is that the country in turn receives economic benefits by helping disabled individuals enter the work force and contribute economically to society, thus ending their cycle of dependency.⁶⁸

64. For example, when the legislature realized the need for section 504 in drafting the Rehabilitation Act, it took prohibitory discrimination language from Title VI of the Civil Rights law instead of writing completely new language. *See* R. Scotch, *supra* note 25, at 51-52. Although the language has been litigated, the result of such adoptions is that the differences between the statutes have given rise to new issues. Thus, there is a need for altering prior interpretations. For instance, racial and sexual discrimination involve mainly two barriers: intentional discrimination for reasons of social bias and neutral standards with disparate impact. *See* Note, *supra* note 23, at 883. Disabled individuals, on the other hand, face four distinct discriminatory barriers: intentional discrimination for reasons of social bias; neutral standards with disparate impact; surmountable impairment barriers; and insurmountable impairment barriers. *See* *Prewitt v. United States Postal Serv.*, 662 F.2d 292, 305 n.19 (5th Cir. 1981). While the former two barriers can be treated according to Title VI and Title VII employment discrimination decisions, the latter two barriers "raise issues . . . peculiar to handicap discrimination"; thus, the courts had to develop new jurisprudence for handicap discrimination. *See id.*

65. *See supra* notes 17-34 and accompanying text.

66. *Senate Report, supra* note 2, at 20; *House Report, supra* note 2, at 50.

67. *See* 135 Cong. Rec. S10,711 (daily ed. Sept. 7, 1989) (statement of Sen. Harkin).

68. *See* National Council on the Handicapped, *On the Threshold of Independence* 45 (1986); Americans with Disabilities Act 1989: Hearings on S. 933 before the Committee on Labor and Human Resources, 101st Cong., 1st Sess. 196-97 (1989) (statement of Atty. Gen. Thornburgh). "Employment offers the possibility of dramatically improving an individual's lifestyle, while at the same time resulting in tremendous financial savings for the Government." National Council on the Handicapped, *On the Threshold of Independence* 45.

Our government spends over \$60 billion dollars annually on disability benefits and

B. *Undue Hardship - Exemption From Reasonable Accommodations*

The parameters of undue hardship are laid out in the ADA's statutory language and congressional history. First, the statute defines undue hardship as "an action requiring significant difficulty or expense."⁶⁹ To determine whether a particular accommodation imposes an undue hardship, courts are to consider four factors: the nature and cost of the accommodation, the size and financial resources of the facility providing the reasonable accommodation, the size and financial resources of the covered business, and the type of operation of the covered entity.⁷⁰ The weight accorded each factor depends upon the facts of the situation and "turns on the nature and cost of the accommodation in relation to the employer's resources and operations."⁷¹ The Senate Report further defines undue hardship as "an action that is unduly costly, extensive, substantial, disruptive, or that will fundamentally alter the nature of the program."⁷²

programs. *See Senate Report, supra* note 2, at 17 (quoting President Bush); *see also House Report, supra* note 2, at 43 ("discrimination results in dependency on social welfare programs that cost the taxpayers unnecessary billions of dollars each year"); 136 Cong. Rec. H2431 (daily ed. May 17, 1990) ("cost of excluding the disabled is \$300 billion a year") (statement of Rep. Gunderson). The ADA will undoubtedly save money that is currently spent, and therefore promises an economic benefit to America. *See* 135 Cong. Rec. S10,713-14 (daily ed. Sept. 7, 1989) (statement of Sen. Harkin); *see also* 136 Cong. Rec. H2444 (daily ed. May 17, 1990) ("More disabled persons working increases earnings, lessens dependence on the Social Security system, increases spending on consumer goods, and increases revenues.") (statement of Rep. Kleczka); Americans with Disabilities Act 1989: Hearings on S. 933 before the Committee on Labor and Human Resources, 101st Cong., 1st Sess. 439 (1989) (statement of Frank Bowe, Hofstra University) (ADA is "one of the key tools we need to reduce federal and state spending"). One authority, referring to the cost of the Rehabilitation Act, stated that "funds generated by eliminating handicap discrimination would return more than 3 dollars for every dollar spent." U.S. Commission on Civil Rights, *supra* note 49, at 75 (footnote omitted).

69. *See supra* note 33 and accompanying text.

70. *See infra* note 81. When courts applied the 501, 503 and 504 implementing regulations, which laid out the three similar factors, they first determined the result and then applied the factor most favorable to its already pre-determined conclusion. *See, e.g., Dexler v. Tisch*, 660 F. Supp. 1418, 1427-29 (D. Conn. 1987) (court found undue hardship by adding effects on operation to costs of several different accommodations suggested); *Nelson v. Thornburgh*, 567 F. Supp. 369, 380 (E.D. Pa. 1983) (court said there was not undue hardship that was justified by overall personnel budget), *aff'd*, 732 F.2d 146, *cert. denied*, 469 U.S. 1188 (1984); *Bey v. Bolger*, 540 F. Supp. 910, 927 (E.D. Pa. 1982) (court found undue hardship given the eventual cost of making accommodations to all possible future applicants, rather than deciding whether one accommodation at hand caused undue hardship).

71. *Senate Report, supra* note 2, at 36; *House Report, supra* note 2, at 67. The Senate Committee Report also adopts the illustrations of obligations given in the Appendix to the HEW regulations. *See supra* note 39.

72. *Senate Report, supra* note 2, at 35; *House Report, supra* note 2, at 67.

These descriptive terms have been used by courts hearing 501 and 504 cases. *See, e.g., Davis*, 442 U.S. at 410, 412-13 ("fundamental alteration" in program, "undue financial and administrative burdens" and "substantial modifications of standards" not required); *Dexler*, 660 F. Supp. at 1429 (accommodations in aggregate would "unduly interfere"); *New Mexico Ass'n for Retarded Citizens v. New Mexico*, 678 F.2d 847, 855 (10th Cir. 1982) (modification of existing programs may be required where financial burden would

While the above definition and factors do give the courts some guidance in interpreting the ADA, the courts nonetheless may engage in the same fact-specific interpretations that crippled the Rehabilitation Act.⁷³ Thus, the ADA requires the courts to make a second departure from the Rehabilitation Act analysis to establish a clear and consistent method of determining undue hardship.⁷⁴ To do so effectively, and thus provide the millions of disabled Americans a genuine opportunity to be employed, courts must quantify⁷⁵ undue hardship and interpret it as a narrow exemption.⁷⁶

Courts can quantify undue hardship in accordance with the four statutory factors and congressional intent by examining an accommodation's effect on a business' profitability and morale.⁷⁷ Profitability is defined as the ability to maximize profits.⁷⁸ For the purpose of this analysis, morale can be defined as the ease and predictability surrounding laborers' jobs.⁷⁹ Hence, morale focuses on whether other jobs have been complicated to such an extent that they have been substantially changed, altered or disrupted.⁸⁰

Measuring hardship by the effect on profitability and morale takes into account all four factors laid out in section 101(10)(B) of the ADA.⁸¹ The

not be "excessive"). However, the courts' use of the terms in these cases did not result from careful considerations of the four factors. *See supra* note 50 and accompanying text.

73. Indeed, the factors are substantially the same as those in the Rehabilitation Act regulations, which resulted in inconsistent interpretations. *See supra* notes 49-51 and accompanying text.

74. Under the Rehabilitation Act, courts could not adopt a coherent interpretation of the language of section 504 because they had no framework to use as a guideline. Thus, they would have been legislators of the statute. The courts are appointed to interpret the law, not create or administer the law. *See generally* D. Horowitz, *The Courts and Social Policy* 59, 257 (1977) (discussing general role of courts when making social policy).

75. *See infra* notes 77-87 and accompanying text.

76. *See infra* notes 102-103 and accompanying text.

77. Although these terms are not the only possible bases to quantify undue hardship, they provide a comprehensive means of addressing all of the ADA's considerations.

78. Profits are defined as the difference between the revenue from product sales and the cost of production. *See* R. Flanagan, R. Smith & R. Ehrenberg, *Labor Economics & Labor Relations* 51 (1984). Black's Law Dictionary similarly defines profit as "the gross proceeds of a business transaction less the costs of the transaction; i.e. net proceeds. Excess of revenues over expenses for a transaction; sometimes used synonymously with net income for the period. Gain realized from business or investment over and above expenditures." Black's Law Dictionary (6th ed. 1990); *see also* U.S. v. Mintzes, 304 F. Supp. 1305, 1312 (D. Md. 1969) ("excess of returns over expenditures").

79. In the employment context, morale refers to an individual's or group's "enthusiasm [and] willingness to endure hardship" in accomplishing the functions or tasks at hand. *See* Webster's Unabridged Dictionary (2nd ed. 1983). The predictability surrounding an employee's job is important because, once destroyed, willingness to endure hardship diminishes and a decrease in overall morale will likely follow. *See* T. Caplow, *How to Run Any Organization* 158 (1976).

80. *See Senate Report, supra* note 2, at 35; *House Report, supra* note 2, at 67.

81. Section 101(10)(B) of Title I states that the factors to be considered when determining undue hardship 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

first factor, the nature of an accommodation,⁸² should be relevant only to the extent that it has an adverse impact on morale or profitability.⁸³ This demonstrates Congress' intent to avoid disrupting non-disabled workers through accommodations and thus materially and adversely affecting morale. The cost of the accommodation⁸⁴ will factor into a profitability analysis as an offset against profits.

The second and third factors, overall financial resources and size of the business and the facility, include the number of employees and "financial resources" of both the facility and the business, as well as the "number, type and location" of the business' facilities.⁸⁵ These terms demonstrate Congress' intent to consider whether the specific business or facility at hand given its resources will be able to accommodate without hindering its ability to operate as a viable, profit-producing employer.⁸⁶ These concerns, therefore, are embraced by the profitability measure.

The fourth factor, type of operation, addresses the composition and structure of the workforce, particularly the "functions" and "administrative or fiscal relationship" of the workplace.⁸⁷ This language reflects congressional concern about the extent to which an accommodation will affect the day-to-day operation of the site and its workers. Any substantial change likely will be reflected by a change in morale. By measuring

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.

Pub. L. No. 101-336, § 101(10)(B), 104 Stat. 327, 331, U.S.C.S. 1667 (Law. Co-op. Aug. 1990).

In both the Senate and House Reports, Congress clearly emphasized that all factors must be considered in their entirety in each case. For instance, the fact that an employer is a large corporation cannot negate the other elements of the third factor or the other factors and impose an obligation to provide accommodations. See *Senate Report, supra* note 2, at 36; *House Report, supra* note 2, at 68. Thus, when interpreting the factors, the courts must look to how the elements of each factor relate and can affect a business' operations.

82. See *supra* note 81, § 101(10)(B)(i).

83. For example, re delegating assignments may affect morale, but raising a desk to fit a wheelchair will not.

84. See *supra* note 81, 101(10)(B)(i).

85. See *supra* note 81, § 101(10)(B)(ii) & (iii).

86. House Representative Hoyer expressed this when he opposed an amendment that limited undue hardship to a percentage of an employee's salary. He stated that depending upon the business' resources, significant difficulty or expense to a small business paying its employees \$20,000 may be \$400 or \$300—a sum much less than 10% of an employee's salary. See 136 Cong. Rec. H2474 (daily ed. May 17, 1990) (statement of Rep. Hoyer).

87. See *supra* note 81, § 101(10)(B)(iv).

profitability, any change that increases the number of workers necessary to achieve a given output also will be recognized.

One argument against these proposed changes is that the statute only enumerates the four factors, but does not refer to profitability and morale. Therefore, if the courts adopt the proposed analysis of undue hardship, they would be legislating rather than interpreting the law.⁸⁸ As was the case with the Rehabilitation Act, however, under the ADA the regulating agency⁸⁹ and the courts must strike a balance between providing accommodations and preserving business viability.⁹⁰ To do so, courts must ascertain the intention of Congress in order to allocate the proper weight to the statutory language.⁹¹ Because the language of the Rehabilitation Act provides no legal standards or guidance for interpreting it, almost any action courts take under the Rehabilitation Act bordered on legislation.⁹² Under the ADA, however, the courts should more easily be able to interpret the language because it is much more definite and has extensive legislative history.⁹³ Because Title I is in the general corpus of discrimination law, courts can also look to general civil rights principles when construing the Act.⁹⁴ One basic interpretive principle in civil

88. A similar argument was made to reverse a district court holding that proposed a cost-benefit analysis to determine whether expenditures for an accessible rapid transit system imposed undue hardship. See *Rhode Island Handicapped Action Comm'n v. Rhode Island Pub. Transit Auth.*, 718 F.2d 490, 494-99 (1st Cir. 1983). In *Rhode Island*, the Court of Appeals for the First Circuit held that the cost-benefit analysis that the district court used did not solve the problem of judgments being "mere personal predilections," because the test did not mention the parameters within which it was to be used. See *id.* at 498. Due to the difficulty of ascertaining numbers to assign to the cost-benefit test, the district court was at best offering an educated guess as to the point at which undue hardship occurred. See *id.* The court's inference was that the district court was legislating, not interpreting the law. See *id.* at 498-99.

Under the proposed profitability and morale analysis, courts do not attempt to attach a price to the benefits of the ADA, but rather concentrate solely on the ascertainable price of the accommodation to the business to determine whether it is an inappropriate price to impose on the employer.

89. Part IV of this Note proposes a regulation that defines the point at which hardship becomes undue as when negative changes in profitability and morale occur. See *infra* notes 126-136 and accompanying text. If the regulating agency were to adopt such a regulation, the courts would merely be giving deference to the agency by following the proposed analysis. If such a regulation were not implemented, the court's "deference [would be] constrained by [their] obligation to honor the clear meaning of [the] statute, as revealed by its language, purpose, and history." *Southeastern Community College v. Davis*, 442 U.S. 392, 411 (1979) (quoting *International Teamsters v. Daniel*, 439 U.S. 551, 566 n.20 (1979)). Where the agency has not followed the spirit of the law, the court could rightfully interject its interpretation of the statute.

90. See generally, *Alexander v. Choate*, 469 U.S. 287, 299 n.19, 300 (1985) (discussing the court's and agency's task under the Rehabilitation Act); Janis, *A Unified Theory For Section 504 Employment Discrimination Analysis: Equivalent Cost-Based Standards for "Otherwise Qualified" and "Reasonable Accommodations"*, 43 Wash. & Lee L. Rev. 63, 72 (1986) (same); Note, *Mending*, *supra* note 11, at 718 (same).

91. See *United States v. Cooper Corp.*, 312 U.S. 600, 606 (1941).

92. See *Rhode Island*, 718 F.2d at 498.

93. See *supra* notes 29-34 and accompanying text.

94. Courts used a similar approach under some Rehabilitation Act cases. See *New*

rights laws is that courts should construe the laws liberally, giving them broad application to remedy the relevant discrimination effectively.⁹⁵

Congress clearly intended the ADA to provide a "consistent" standard to eliminate discrimination.⁹⁶ Based upon this intention, the factors contained in the ADA⁹⁷ and the principle of liberal construction, courts can validly interpret undue hardship as the effect on profitability and morale. This analysis establishes a clearer means to determine whether the ADA requires an accommodation. By using profitability and morale, courts are not inserting new words into Title I, but rather are interpreting the meaning of the four factors in order to quantify hardship. This approach avoids the problem under the Rehabilitation Act of dealing with amorphous concepts that do not lend themselves to consistent results.⁹⁸

Although never mentioned in the legislative history, profitability and morale are at the essence of the four statutory factors.⁹⁹ Quantification of hardship allows the courts to rely on a general rule rather than make fact-specific interpretations of undue hardship. Thus, the point at which hardship becomes undue will be consistent in each case, and businesses will have a predictable basis to determine whether they must provide an accommodation.¹⁰⁰

Merely quantifying hardship to determine the point at which it becomes undue is not enough. Courts should further interpret undue hardship as a narrow exemption triggered only when the accommodation causes "significant difficulty or expense,"¹⁰¹ is "unduly costly, extensive, substantial, disruptive" or "fundamentally alter[s] the nature of the [business]."¹⁰² In other words, a material negative effect in profitability or morale must occur before hardship is undue.

Any change in profitability and morale less than a material negative one will not be sufficient to constitute an undue hardship. While the driving force behind American business is the desire to make a profit, the

York Ass'n for Retarded Children, Inc. v. Carey, 612 F.2d 644, 649 (2d Cir. 1979); Cook v. Budget Rent-A-Car Corp., 502 F. Supp. 494, 501 (S.D.N.Y. 1980); see generally Note, *Mending supra* note 11, at 718-20 (discussing sources of interpretation). Due to the vagueness of the statute and legislative history, their ability to apply the law liberally remained limited.

95. See *Griffen v. Breckenridge*, 403 U.S. 88, 97 (1971); *Cook*, 502 F. Supp. at 501.

96. See *supra* note 53.

97. See *supra* notes 70-72 and accompanying text.

98. See *supra* notes 49-51.

99. See *supra* notes 81-87 and accompanying text.

100. Throughout the legislative process, Representatives of the House reiterated their concern about the lack of guidance provided by Title I's nebulous language. See e.g., 136 Cong. Rec. H2471 (daily ed. May 17, 1990) (statement of Rep. McCollum).

101. Pub. L. No. 101-336, § 101(10)(A), 104 Stat. 327, 331, U.S.C.S. 1667 (Law. Co-op. Aug. 1990).

102. *Senate Report, supra* note 2, at 35; *House Report, supra* note 2, at 67.

Courts created an equally narrow exemption for the bona fide occupational qualification defense under Title VII of the Civil Rights Act of 1964. See *Dothard v. Rawlinson*, 433 U.S. 321, 333-34 (1977); *Torres v. Wisconsin Dep't of Health & Social Serv.*, 838 F.2d 944, 949 (7th Cir. 1988), cert. denied 109 S. Ct. 1133 (1989).

undue hardship exemption promises not profit maximization, but protection from material threats to business viability. By interpreting undue hardship narrowly, Courts follow congressional intent to recognize the "economic realities of our Nation's businesses"¹⁰³ while affording the disabled the basic right to equal employment opportunities.

1. Profitability

In determining whether a material effect on profitability has occurred, courts typically consider the cost of an accommodation to the business.¹⁰⁴ The ADA clearly calls for basing determinations of undue hardship on objective data regarding the cost of the accommodation for a particular individual, not on presumptions as to the abilities of a class of disabled individuals or the hardships they will cause.¹⁰⁵ Closer examination of the cost of implementing required accommodations reveals that, in spite of the fears of the business community,¹⁰⁶ most accommodations can be effected at nominal cost.

The most obvious cost, for example, is that of special equipment or assistance.¹⁰⁷ The accommodation may also impose costs in the form of administrative time and effort expended to restructure or modify the job.¹⁰⁸ Studies have shown, however, that over half the accommodations required are simple¹⁰⁹ and can be provided at no cost, and that thirty

103. 135 Cong. Rec. S10,735 (daily ed. Sept. 7, 1989) (statement of Sen. Harkin). "The Committee expects that a court will look at the *practical realities* of the situation, to determine how the workforce and resources of a covered entity and the facility interrelate." See *House Report, supra* note 2, at 68 (emphasis added).

104. See Janis, *supra* note 90, at 72-73. "All . . . justifications for refusing to hire a handicapped individual are based on cost; whether it is the cost of making accommodations . . . , the risk of future costs, or the cost of making individualized determinations of ability." *Id.* at 72.

105. See *Senate Report, supra* note 2, at 28; see also *House Report, supra* note 2, at 74 (employment decisions cannot be based on paternalistic views); *id.* at 58 (cannot deny employment because of group-based predictions).

106. Opponents of Title I fear the reasonable accommodation mandate because businesses cannot pass the cost of the accommodation on to consumers unless their competition also makes similar expenditures. See Collignon, *The Role of Reasonable Accommodation in Employing Disabled Persons in Private Industry in Disability and the Labor Market* 211 (M. Berkowitz & M. Hill 2d ed. 1986). At first glance, this fear appears justified. See *id.* at 207. Most American businesses strive in dynamic and fiercely competitive environments in which monopoly status is rare and, in any event, short-lived. See J. Hirshleifer, *Price Theory and Applications* 209 (3d ed. 1984). However, this fear is also based on the erroneous assumption that Title I will require large expenditures by employers seeking to comply with its provision. See Collignon, *supra* at 207; see also U.S. Dept. of Labor, *1 A Study of Accommodations Provided to Handicapped Employees by Federal Contractors* 28 (1982) ("The fear that accommodation is expensive is not supported by the data.").

107. See Janis, *supra* note 90, at 73.

108. See *id.*

109. Such simple accommodations could include raising a desk with blocks for a wheelchair; using alternative testing procedures for visually impaired individuals; re-delegating or exchanging assignments; providing constant shifts or modified work schedules to adapt to an individual's particular medical or transportation schedule; providing a

percent of accommodations that do impose costs can be provided for less than \$500.¹¹⁰ In fact, one study found that only eight percent of accommodations would involve costs over \$2000.¹¹¹ In most cases, therefore, businesses suffer only a negligible effect on profitability.¹¹² Thus, only a material effect on profitability should constitute undue hardship.

Another cost that the courts frequently recognize in section 504 cases is a decrease in productivity or efficiency.¹¹³ Common sense, however, suggests that such costs will be nominal: by definition, an employee given reasonable accommodation is an individual otherwise qualified to perform the essential functions of the job.¹¹⁴ On the other hand, justifiable costs from lost efficiency may arise in situations where assistance from a co-worker is required: efficiency is decreased when two people rather than one handle a single task.¹¹⁵

2. Morale

Similarly, a reasonable accommodation may impose hardship on an employer by decreasing firm morale. Morale refers to the effect of the accommodation on the other workers' tasks.¹¹⁶ A material change in morale occurs when the employer fundamentally alters a skilled worker's

speaker-phone, headset or receiver stand so that a person with one functional hand can speak on the phone and write a message; providing braille material and devices; moving a program or service to an accessible part of the building; or having a secretary or staff person serve as a reader for a blind employee rather than hiring a part-time reader. See U.S. Commission on Civil Rights, *supra* note 49, at 2.

110. See U.S. Dept. of Labor, *supra* note 106, at 28-31; U.S. Commission on Civil Rights, *supra* note 49, at 2; E.I. du Pont de Nemours and Company, Equal to the Task: 1981 du Pont Survey of Employment of the Handicapped 17 (1982).

111. See U.S. Dept. of Labor, *supra* note 106, at 28-29.

112. Representative Unsoeld said that Washington State has a similar statute. Yet he saw no evidence that complying businesses were forced out of business because of the cost of accommodating or hiring the disabled. See 136 Cong. Rec. H2434 (daily ed. May 17, 1990) (statement of Rep. Unsoeld).

113. See *Treadwell v. Alexander*, 707 F.2d 473, 478 (11th Cir. 1983); *Dexler v. Tisch*, 660 F. Supp. 1418, 1428 (D. Conn. 1987); *Bey v. Bolger*, 540 F. Supp. 910, 927 (E.D. Pa. 1982).

114. See *Senate Report*, *supra* note 2, at 25-26; *House Report*, *supra* note 2, at 70. For instance if speed is necessary for a position, it should be an essential function of that job.

115. Such situations can only be assessed on a case-by-case basis. See *Senate Report*, *supra* note 2, at 33.

Employing a disabled individual may also impose future costs on the employer. These costs may include the risk that an accident will occur, or that an employee's disability is degenerative and thus his output may deteriorate. See *Janis*, *supra* note 90, at 73-74. The first risk would not be a valid claim because the ADA does not require employers to provide accommodation where it or the individual poses a significant safety risk to others or to property. Similarly, the risk that an employee's ability to do the job will deteriorate is not a valid consideration because an employer cannot refuse to employ a capable individual because he may some day require accommodations that will impose undue hardship. The undue hardship inquiry should remain the same regardless of the degenerative nature of the disability.

116. See *supra* note 79 and accompanying text; see also T. Caplow, *supra* note 79, at 128 (morale refers to satisfaction with the business, not happiness of individual employees).

job to such an extent that the employee harbors resentment and resistance toward the new work environment.¹¹⁷ Although a material effect on morale is intangible and thus difficult to pinpoint, management has an interest in the firm's viability as well as in its workers and thus has reason to find this an unfair price.¹¹⁸

To establish a material effect on morale, employers must demonstrate that the accommodation will substantially or fundamentally disrupt or alter their workforce. Morale is most often affected when the predictability of employees' jobs is disrupted to such an extent that their rewards are less than their efforts, sacrifices and status would have indicated.¹¹⁹ Any major disruption of this sort will likely result in a change in attitude toward the employer and the business,¹²⁰ resulting in damage to the business in the form of disrupted cooperation and potential loss of resources and personnel.¹²¹

Experience under the Rehabilitation Act suggests that serious morale problems under the ADA will be rare. One survey found that only three percent of reasonable accommodations provided under the Rehabilitation Act made co-workers' jobs more difficult.¹²² Under the ADA, such an effect on morale should be equally rare because Congress has already classified certain accommodations as reasonable.¹²³ For instance, job restructuring, which includes redelegating assignments, exchanging assignments, redesigning procedures¹²⁴ and modifying work schedules,¹²⁵ will have ramifications on other employees but generally not of sufficient magnitude to impose undue hardship. Thus, these examples suggest that most accommodations typically will not effect morale and that courts should thus consider them reasonable.

IV. SUGGESTED REGULATION FOR UNDUE HARDSHIP AND REASONABLE ACCOMMODATION

Within one year after the ADA's passage, the delegated agencies must implement regulations that further define obligations under the ADA. Congress has delegated the authority to make regulations implementing

117. See R. Flanagan, R. Smith & R. Ehrenberg, *supra* note 78, at 183. For example, if a construction worker is especially skilled in one particular aspect of building, that worker will no longer use that skill after a reasonable accommodation is made, thus materially altering his job to such an extent that his morale is decreased and the business is negatively affected. Similarly, the firing or moving of an employee from a particular job could materially decrease morale. See *Senate Report*, *supra* note 2, at 32.

118. See R. Flanagan, R. Smith & R. Ehrenberg, *supra* note 78, at 51; T. Caplow, *supra* note 79, at 130-131.

119. See T. Caplow, *supra* note 79, at 158.

120. See *id.* at 158-59.

121. See *id.* at 167-68.

122. See U.S. Dept. of Labor, *supra* note 106, at 33.

123. See *supra* note 6; *Senate Report*, *supra* note 2, at 31; *House Report*, *supra* note 2, at 62-65.

124. See *Senate Report*, *supra* note 2, at 31; *House Report*, *supra* note 2, at 62.

125. See *id.*

Title I to the Equal Employment Opportunities Commission ("EEOC").¹²⁶ Because Title I of the ADA contains reasonable accommodation and undue hardship language—language similar to that used in the regulations implementing the Rehabilitation Act—the EEOC regulation should define discriminatory acts more exactly. The courts will give deference to regulations as long as they comport with the language and legislative intent of the statute.¹²⁷

The implementing regulations must specify the point at which hardship on a business will overcome the substantial benefits of the ADA, or where a business' viability is threatened by a material decrease in profitability and morale. Such a regulation might read as follows:

Undue Hardship. An employer will sustain undue hardship if as a result of providing a reasonable accommodation the employer suffers:

- (a) an X percentage decrease in its net margin.¹²⁸ To determine the percentage change in net margin, cost of accommodation should be added to the previous fiscal year's total cost of sales (expenses) and then divided by the previous fiscal year's revenues. If this figure is X percentage greater than the previous fiscal year's true expense/revenues margin, the accommodation has caused undue hardship. Or,
- (b) an X percentage decrease in morale. The percentage change in morale shall be measured by a change in the work habits of X percent of employees resulting from a decrease in rewards expected for expended efforts.

If pursuant to (a) or (b) an employer sustains undue hardship, it will not have discriminated under Section 102(b)(5) of the ADA.

A regulation that bases the maximum level of hardship employers must sustain on the percentage decrease in net margins and negative fundamental changes in employees' attitudes provides a clear and consistent standard for the judiciary as well as for employers and disabled employees. Because maximizing profitability is the purpose and prerogative of American businesses, it serves as the proper benchmark to determine whether an accommodation imposes undue hardship. Similarly, fundamental changes in employee attitude present an indirect but definite means of destroying a business' viability through a reduction in the energy and enthusiasm of the workforce. This threat to the workforce can hinder the business' ability to retain and recruit the best employees, which may ultimately injure the firm's competitive edge.

The measurement of profitability and morale provides employees at all levels an equal opportunity to receive necessary accommodations. Other

126. See Pub. L. No. 101-336, § 106, 104 Stat. 327, 336, U.S.C.S. 1672 (Law. Co-op. Aug. 1990).

127. See *Southeastern Community College v. Davis*, 442 U.S. 397, 411 (1979).

128. A percentage change in net margin will reflect the absolute change in the margin. For example, if a business' net margin was ten percent prior to making an accommodation and eight percent after providing an accommodation, the percentage change is 20 percent, not two percent.

quantitative means, such as a percentage of an employee's salary,¹²⁹ do not have that virtue. Congress rejected the plan to limit expenditures to a percentage of an employee's salary because it creates a floor, not a ceiling,¹³⁰ and because it discriminates against the lowest paid employees.¹³¹ Finally, such a solution ignores the fact that many accommodations serve more than just the employee who initially requires it, making that employee's salary an improper basis to determine undue hardship.¹³² A regulation based on profitability and morale, on the other hand, does not focus on the individual's position but instead on the accommodation's impact on the business. Furthermore, the regulation requires the businesses that can continue to function competitively to provide accommodations.

Arguably, the proposed regulation is a major departure from the HEW regulation implementing the Rehabilitation Act, but it is not the first to set threshold points at which conduct is no longer discriminatory. An illustration given under the Department of Transportation's regulation for section 504, for example, set a percentage of the budget as the satisfactory amount to expend on making public transportation readily accessible.¹³³ The proposed regulation also addresses congressional intent to protect business viability.¹³⁴ It identifies profitability and morale as quantifiable terms that best illustrate how the four factors relate to undue hardship,¹³⁵ while setting threshold points at which viability is threatened.

By setting points at which hardship becomes undue, the regulation will effectively separate those claims brought because real hardship is imposed from those brought as a result of prejudiced attitudes about the disabled. The latter claims generally assert that accommodations are costly and that disabled individuals will disrupt the workplace.¹³⁶ The proposed regulation will thus provide a way to eliminate nearly all disability discrimination and exclude from employment only those disabled individuals whose disabilities truly require a significantly difficult or expensive accommodation.

129. See 136 Cong. Rec. H2471-72 (daily ed. May 17, 1990).

130. See 136 Cong. Rec. H2472 (daily ed. May 17, 1990) (statement of Rep. Bartlett).

131. See *id.* at H2473 (statement of Rep. Schroeder).

132. See *id.* at H2474 (statement of Rep. Payne).

133. See 49 C.F.R. § 27. Subpt. D, App. A (1989).

134. See *supra* note 103.

135. See *supra* notes 80-81 and accompanying text. The number of employees is only germane to undue hardship when considered in conjunction with the financial resources of the company, because together they determine how much the company can afford before the accommodation negatively changes its profits. The structure of the workforce is important only to the extent that the accommodation will alter it and thus effect morale. Moreover, the cost of the accommodation is only important to the extent it decreases profitability.

136. Congress recognizes that one of the greatest barriers to employing the disabled is not the cost but rather society's attitude toward the disabled. See *Senate Report, supra* note 2, at 35; *House Report, supra* note 2, at 71 & 74.

CONCLUSION

Title I of the ADA affords disabled individuals the opportunity to become active contributors to society by protecting their right to equal employment opportunities. Congress achieved this result by going beyond the limits of the Rehabilitation Act. First, Title I covers all private employers. Second, it provides guidelines that impose on employers the duty of providing reasonable accommodations unless undue hardship is established.

In order to end discrimination against the disabled, courts must interpret the guidelines as requiring a presumption in favor of providing reasonable accommodations. This obligation to provide reasonable accommodations is limited only by congressional intent to preserve business' economic viability. Although businesses may sustain some degree of hardship, such hardship will threaten viability only when it becomes undue—a point that can be represented by a material negative change in profitability or morale.

Basing undue hardship on a decline in profitability and morale breaks down into quantifiable terms the size of the business and facility, the nature of the business and the cost of the accommodation. This approach allows courts to avoid overly fact-specific analysis. If courts apply a presumption in favor of providing reasonable accommodations and if there is a regulation that labels the point at which hardship becomes undue, then congressional intent to allow the 43 million disabled Americans to enter the work force and to preserve the viability of the nation's businesses can be fulfilled.

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