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# Private Rights of Action for Handicapped Persons under Section 503 of the Rehabilitation Act

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# NOTES

## PRIVATE RIGHTS OF ACTION FOR HANDICAPPED PERSONS UNDER SECTION 503 OF THE REHABILITATION ACT

### INTRODUCTION

Of all minorities, the twenty-eight million handicapped persons in the United States suffer the most severe limitations on employment opportunity.[1] The impact of these limitations is apparent from the fact that among the working-age population approximately two-thirds of the blind, more than one-half of all paraplegics, and over three-fourths of persons with epilepsy are unemployed.[2] The precise number of persons with handicapping conditions more or less severe than those mentioned who are unemployed or underemployed because of their handicaps is impossible to determine.[3] Congress recognized the severe employment problems of the disabled as a national problem responsible for economic waste and social dislocation.[4] Congress also recognized that employment barriers were also barriers to integration of handicapped persons into society.[5]

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1. *See* ten Broek & Matson, *The Disabled and the Law of Welfare*, 54 CAL. L. REV. 809 (1966); *see generally* Burgdorf & Burgdorf, *A History of Unequal Treatment: The Qualifications of Handicapped Persons as a "Suspect Class" Under the Equal Protection Clause*, 15 SANTA CLARA LAW. 855, 861-68 (1975). Congress estimated that the number of adult persons with handicapping physical or mental conditions ranges from 28 million to 50 million. S. REP. NO. 1297, 93d Cong., 2d Sess. 34 (1974), *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 6373 [hereinafter S. REP. NO. 1297].

2. 118 CONG. REC. 3321 (1972). *See also* Burgdorf & Burgdorf, *supra* note 1, at 864; Note, *Potluck Protections for Handicapped Discriminatees: The Need to Amend Title VII to Prohibit Discrimination on the Basis of Disability*, 8 LOY. CHI. L. REV. 814, 815 (1975).

3. The Senate Committee on Labor and Public Welfare, which reported the Rehabilitation Act, 29 U.S.C. §§ 701-94 (1976), noted the lack of accurate information on the problems of handicapped persons:

> There is no more devastating comment on the nature of our public policy or the lives of these [handicapped individuals] than society's inability to provide accurate and current figures on how many individuals are handicapped, what forms of disability they have, and what kind of services they receive or need.

S. REP. NO. 1297, *supra* note 1, at 28.

4. S. REP. NO. 318, 93d Cong., 1st Sess. 26, *reprinted in* [1973] U.S. CODE CONG. & AD. NEWS 2076 [hereinafter S. REP. NO. 318].

5. *Id.*

Over a sixty year period, Congress responded to the employment problems of handicapped persons through the enactment of a series of laws, culminating in the Rehabilitation Act of 1973.[6] The Rehabilitation Act establishes a number of comprehensive programs aimed at the rehabilitation of physically and mentally handicapped persons for the purpose of increasing their opportunities to engage in gainful employment.[7] The Act provides for general rehabilitation services,[8] architectural modifications for the accommodation of handicapped persons,[9] research on handicapping conditions,[10] and training of both handicapped persons and rehabilitation personel.[11] That Congress intended these services to enhance handicapped persons' employment prospects is evidenced by the Act's definition of a handicapped person as one who: "A) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and B) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services . . . ."[12] Moreover, an express purpose of the Act is to increase and expand employment opportunities for handicapped individuals in the public and private sectors.[13]

Title V of the Rehabilitation Act, particularly Sections 501, 503 and 504, mounts a direct tripartite attack on handicap employment

6. The earliest of these laws was the Smith-Fess Act, ch. 219 § 1, 41 Stat. 735 (1920) (repealed 1973) (offered training, counseling, and placement services for physically handicapped persons). The Smith-Fess Act was later supplemented by the Vocational Rehabilitation Amendments to the Social Security Act, ch. 190 § 1, 57 Stat. 374 (1943) (repealed 1973) (extended rehabilitation services to the mentally impaired; redefined rehabilitation services as "any services necessary to render a disabled individual fit to engage in a remunerative occupation." *Id.* at § 10). *See* Vocational Rehabilitation Amendments at Pub. L. No. 90-391, 82 Stat. 297 (1968) (repealed 1973); Pub. L. No. 89-333, 79 Stat. 1282 (1965) (repealed 1973); ch. 655 § 2, 68 Stat. 652 (repealed 1973) (These amendments generally increased federal support for and expanded rehabilitation services). The Rehabilitation Act, Pub. L. No. 93-112, 87 Stat. 357 (1973) is codified at 29 U.S.C. §§ 701-94 (1976).

7. *Id.* at § 702.

8. *Id.* at § 791.

9. *Id.* at § 760-64.

10. *Id.*

11. *Id.*

12. *Id.* at § 706(6). A considerably broader definition of "handicapped individual" was adopted in 1974 for purposes of Section 503, the focus of this note. "Handicapped individual" for purposes of Section 503 is defined as any person who: "(A) has a physical or mental impairment which substantially limits one or more of a person's major life activites, (B) has a record of such an impairment, or (C) is regarded as having such an impairment." *See* text *infra*, at notes 36 to 48, for an explanation of the significance of this definition.

13. 29 U.S.C. § 701(8) (1976).

discrimination. Briefly stated, Section 501 bans discrimination against qualified handicapped individuals employed by or seeking employment with federal agencies.[14] Section 504 prohibits discrimination on the basis of handicap in programs receiving federal financial assistance.[15]

Of all the programs established by Congress, Section 503,[16] the focus of this note, potentially has the most dramatic impact on handicap employment discrimination in the private sector. It mandates that employers holding contracts with the United States or a federal agency must promise to take affirmative action to employ and advance in employment qualified handicapped individuals in carrying out every government contract of over $2,500.[17] Enforcement of this provision is delegated to the Department of Labor.[18] Any handicapped person who believes that a federal contractor has failed or refused to abide by the terms of the Act may file a complaint with the Secretary of Labor. The Department of Labor must promptly investigate every complaint and "take such action thereon as the facts and circumstances warrant . . . ."[19] As this note will demonstrate, for

14. *Id.* at § 791. In addition, this section establishes an elaborate affirmative action program to utilize handicapped individuals wherever possible in government services. Whereas Sections 503 and 504 limit their application to *qualified* handicapped individuals, no requirement of qualification is specified in Section 501.

15. 29 U.S.C. § 794 (1976), reads:

> No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

16. *Id.* at § 793.

17. The term affirmative action is difficult to define. In the Section 503 context, there is no requirement of quotas or specific timetables and goals. The Department of Labor has defined affirmative action as: "a set of specific and result-oriented procedures to which a contractor commits himself to apply every good-faith effort. The objective of these procedures is equal employment opportunity." 41 C.F.R. § 60-2.10 (1977). The implementation regulations for Section 503 suggest that an affirmative action program must include the following: dispensing information to handicapped individuals informing them of their rights under the Act; making special efforts in employment recruitment and promotions to reach handicapped individuals; inviting handicapped individuals who are already employed by the contractor to come forward with suggestions on how their needs can best be accommodated; making every reasonable effort to accommodate the physical and mental limitations of handicapped employees; and reviewing all physical and mental job qualifications and making such changes as are necessary to avoid screening out qualified handicapped individuals. 41 C.F.R. § 60-741.6 (1977). Although the precise obligations of affirmative action are difficult to determine, one thing is clear: "The obligation to take affirmative action imports more than the negative obligation not to discriminate." Southern Ill. Builders Ass'n v. Ogelvie, 471 F.2d 680, 684 (7th Cir. 1972).

18. 29 U.S.C. § 793(b) (1976).

19. *Id.*

numerous reasons, including agency inefficiency and lack of a trained staff, Department of Labor enforcement has thus far failed to secure the rights guaranteed to handicapped persons by Section 503.[20]

Following a brief outline of Section 503's provisions, this note examines supplemental and alternative theories of relief from employment discrimination available to beneficiaries of the Act. Mandamus actions against the Department of Labor[21] and review of administrative action under the Administrative Procedure Act[22] are considered first. Although these remedies are limited in scope, plaintiffs seeking to force the Department of Labor to take action against a non-compliant contractor may find them to be valuable. After discussing these judicial remedies for administrative action, the basis for direct civil actions by a qualified handicapped individual against a non-compliant contractor will be explored. In this regard, this note analyzes Section 503 in light of the test suggested by the United States Supreme Court in *Cort v. Ash*[23] for determining whether a court should imply a private right of action from a statute not explicitly authorizing one. Although a number of lower courts have denied an implied right of action under Section 503,[24] the reasoning of the courts in denying relief will be critically examined. Additionally, this note considers whether qualified handicapped individuals can sue as third party beneficiaries of the contract between the government and the contractor. Courts have not addressed this issue to date,[25] but this note explains how third party beneficiary contract analysis also yields a favorable result for persons protected by the Act. Finally, the problems of exhaustion of administrative remedies and primary jurisdiction involved in actions against federal contractors are discussed. These analyses provide handicapped individuals alternatives to total reliance on the Depart-

20. *See* text *infra*, at notes 66 to 77.

21. 28 U.S.C. § 1361 (1976), provides for United States District Court jurisdiction in mandamus cases brought against government employees and officers. *See* text *infra*, at notes 78 to 91.

22. 5 U.S.C. §§ 701-06 (1976).

23. 422 U.S. 66 (1975) (action brought by stockholder of corporation to recover damages from the board of directors who used corporate funds in violation of the Federal Election Campaign Act, 28 U.S.C. § 610 (1970 and Supp. III 1973) (relief denied).

24. Woods v. Diamond State Tel. Co., 440 F. Supp. 1003 (D. Del. 1977); Moon v. Roadway Express, Inc., 439 F. Supp. 1308 (N.D. Ga. 1977); Rogers v. Frito-Lay, Inc., 433 F. Supp. 200 (N.D. Tex. 1977). *Contra*, Duran v. City of Tampa, 451 F. Supp. 954 (M.D. Fla. 1978); Drennon v. Philadelphia Gen. Hosp., 428 F. Supp. 809 (E.D. Pa. 1977).

25. *But see* Guertin v. William Marsh Rice Univ., No. 76-H-880 (S.D. Tex., filed Jan. 27, 1978), in which the plaintiff is proceeding on a third party beneficiary theory.

ment of Labor for enforcement of their rights under Section 503. Before developing these strategies more fully, however, a number of threshhold issues and definitions must be examined.

## THRESHHOLD ISSUES: THE SECTION 503 PLAN

### *General Provisions*

Section 503 of the Rehabilitation Act imposes obligations on an estimated 270,000 contractors employing approximately one-third of the United States work force.[26] By its terms, federal contracts costing more than $2,500 are to include a provision binding the contractor to a policy not to discriminate against job qualified employees or applicants for employment on the basis of handicap.[27] Additionally, the contractor promises to take affirmative action to employ and advance in employment qualified handicapped individuals at all levels of employment, including executive levels.[28] Modification, extensions and renewals of government contracts, as well as all sub-contracts entered into in carrying out the main contract, are also governed by Section 503.[29]

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26. Lublin, *Lowering Barriers for the Handicapped*, Wall St. J., January 27, 1976, at 1, col. 1.

27. 29 U.S.C. § 793 (1976). The precise contractual language required is found at 41 C.F.R. § 60-741.4 (1977):

> (a) The contractor will not discriminate against any employee or applicant for employment because of physical or mental handicap in regard to any position for which the employee or applicant for employment is qualified. The contractor agrees to take affirmative action to employ, advance in employment and otherwise treat qualified handicapped individuals without discrimination based upon their physical or mental handicap in all employment practices such as the following: employment, upgrading, demotion or transfer, recruitment, advertising, layoff or termination, rates of pay or other forms of compensation, and selection for training, including apprenticeship.

28. *Id.* Affirmative action guidelines are set forth generally at *id.* § 60-741.6.

29. 29 U.S.C. § 793 (1976). Should a contracting agency or contractor fail to include the prescribed language in a contract or sub-contract as required by the Act, the implementation regulations provide for incorporation of the clause by operation of law. 41 C.F.R. § 60-741.23 (1977).

The regulations also require every government contractor or sub-contractor holding a government contract for $50,000 or more and having 50 or more employees to prepare and maintain a written affirmative action plan. The plan must set forth the contractor's policies, practices, and procedures with respect to his obligations under the Act. The contractor must make this plan available for employee inspection at each of the contractor's facilities during designated hours. *See* 41 C.F.R. §§ 60-741.5—60-741.6.

The Act and regulations provide some exemptions from the non-discrimination clause. All contracts and sub-contracts involving less than $2,500 are exempt.[30] Additionally, if the President determines that special circumstances in the national interest warrant an exemption, he may waive the requirements of Section 503 for any particular contract. If he does so, however, he must set forth his reasons in writing in accordance with administrative guidelines.[31] All other government contracts are required to include the prescribed non-discrimination clause.[32]

Although the Act states that it applies only to employment involved in carrying out government contracts, the Department of Labor's implementation regulations presume that all employees of a government contractor are engaged in carrying out the contract.[33] Although the non-discrimination clause applies to all of a government contractor's employees and applicants for employment, a contractor's facilities which are in all respects separate and distinct from those related to the performance of the contract are exempt from the requirements of Section 503.[34] Even then, the Director of

30. 29 U.S.C. § 793(a) (1976). The $2,500 lower limit of Section 503 contrasts with the lower limit of $10,000 under the analogous provisions of the Vietnam Era Veterans Readjustment Assistance Act of 1974, 38 U.S.C. 2012 (1976) (requires federal contractors and sub-contractors to take affirmative action to employ and advance in employment Vietnam era veterans), and Executive Order 11246, 3 C.F.R. § 169 (1974) (requires, *inter alia*, federal contractors and sub-contractors to develop employment practices which do not tend to discriminate on the basis of race, color, religion, sex, or national origin).

31. 29 U.S.C. § 793(c) (1976).

32. Although not mentioned in the Act, the implementation regulations waive the requirements of Section 503 in three additional circumstances: for contracts and subcontractors with regard to work performed outside the United States by employees not recruited within the United States; contracts with a state or local government which does not participate in work on or under the contract or sub-contract; and for contracts or sub-contracts considered essential to the national security and awarding of such contracts without compliance with Section 503 is deemed essential to the national security. 41 C.F.R. § 60-741.3 (1977).

33. *Id.* at § 60-741.3(5).

34. The regulations provide that:

> The Director may waive the requirements of the affirmative action clause with respect to any of a prime contractor's or subcontractor's facilities which he or she finds to be in all respects separate and distinct from activities of the prime contractor or subcontractor related to the performance of the contract or subcontract, provided that he or she also finds that such a waiver will not interfere with or impede the effectuation of the Act. Such waivers shall be considered only upon the request of the contractor or subcontractor.

*Id.*

the Office of Federal Contract Compliance Programs is given discretion to determine whether waiver would undermine the goals of the Act.[35] Clearly, the regulations take a comprehensive stance on Section 503 coverage by including a broader range and greater number of employment positions than is facially apparent from the statute itself.

*Qualified Handicapped Individuals*

In addition to the expansive interpretation of which employees are engaged in carrying out a government contract, Section 503 adopts a broad definition of who is handicapped. For purposes of Section 503, a handicapped individual is "any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment or (iii) is regarded as having such an impairment."[36] Focusing on employability, the Department of Labor concluded that a person is "substantially limited" in a major life activity if he is likely to experience difficulty in securing, retaining, or advancing in employment because of a physical or mental condition.[37] "Major life

35. *Id.*

36. 29 U.S.C. § 706(6) (1976). The original definition of handicapped person was changed in 1974. A handicapped person was formerly defined as one who "(A) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment, and (B) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services . . . ." *Id.* This definition was retained for purposes of determining eligibility for rehabilitation services.

The definition cited in the text was added in 1974 for purposes of Sections 501, 503, and 504 of the Act. Congress felt that the former definition made little sense when applied to discrimination in employment because of its focus on disability. The non-discrimination sections of the Act, particularly Sections 503 and 504, require a person to be qualified for an employment position. Moreover, in parts (B) and (C) of the new definition Congress recognized that persons who are perceived as having an impairment, persons who were at one time erroneously thought to have an impairment, or who have recovered from an impairment, are also the victims of discrimination. The new definition substantially broadens the protected class of persons and shifts the focus from disability to capability of handicapped persons. *See* S. REP. NO. 1297, *supra* note 1, at 29. *See* notes 42 to 52 *infra* and accompanying text for a discussion of the term "qualified."

In 1978, Congress again amended the definition of handicapped individual for purposes of Title V of the Act. The purpose of this amendment was to clarify that alcoholics and drug abusers whose current use of alcohol or drugs prevents them from performing the job duties assigned or because of alcohol or drug abuse would constitute a direct threat to others' property or safety are not included under the definition of handicapped individual. 29 U.S.C.A. § 706(6) (Supp. 1979).

37. 41 C.F.R. § 60-741.2 (1977). To the extent that intelligence is not job related, low level intelligence is also covered.

activities" include communication, ambulation, self-care, socialization, education, and transportation.[38] This focus on employability encompasses a great many more persons than a definition which focuses only on actual disability.

Severe handicapping conditions[39] such as paralysis, blindness and epilepsy are clearly covered by these definitions, but much more subtle handicaps are also included. For example, relatively minor incapacities such as disfigurement or stuttering fall under the Act's coverage because of their potential impact on employability. Congress, however, went beyond actual disability in its protection against unreasonable discrimination on the basis of handicap.

Congress recognized that discrimination on the basis of handicap is as much a result of employers' perceptions of disability as it is of actual disability. In order to combat discrimination based on erroneous perceptions, the Act prohibits employment discrimination against persons "regarded as being handicapped."[40] Identical considerations led Congress to include persons with a record of disability in their definition of handicapped person. This added definition protects persons who have recovered from disabilities, and those persons with erroneous records of disability.[41] For example, persons

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38. *Id.* at § 60-741 App. A.

39. The Rehabilitation Act defines the term "severe handicap" as a "disability which requires multiple services over an extended period of time" and results from a number of specified conditions. 29 U.S.C. § 706(12) (1976).

40. 29 U.S.C. § 706(6)(c) (1976). *See* S. REP. NO. 1297, *supra* note 1, at 27. The impact of perceptions of disability by others manifests itself in the phenomenon known as the "self-fulfilling prophecy." Behavioral scientists who have studied this phenomenon have recognized that persons seen by others as being incapable of performing certain functions tend to develop in a manner consistent with other's expectations. *See generally* Burgdorf & Burgdorf, *supra* note 1, at 858. Moreover, discrimination based on perceived disability will tend to complicate social adjustment. A particularly severe example of this was noted in cases in which heroin addicts participated in methadone maintenance programs. Denial of employment to these persons on the basis of participation created problems in these persons' lives similar to those which led to addiction in the first place. *See* Note, *Methadone Maintenance Programs and Participation as a Hiring Criterion*, 5 COLUM. HUMAN RIGHTS L. REV. 421, 422 (1973).

41. One reason advanced by employers for discrimination against persons who have recovered from a disability or who are partially disabled is the fear that a job-related second injury may cause a person to become totally disabled. The enhanced danger of complete disability, employers fear, will increase their workman's compensation premiums. This liability can be mitigated somewhat through the use of "second-injury funds" by employers. It is also offset by the above-average safety record of handicapped employees. *See* Note, 8 LOY. CHI. L. REV., *supra* note 2, at 820-25. *See generally* Baker & Karol, *Employee Insurance Benefit Plans and Discrimination on the Basis of Handicap*, 27 DEPAUL L. REV. 1013 (1978).

who have recovered from epilepsy or cancer and persons who at an early age were misdiagnosed as having a disability and whose records still reflect the misdiagnosis are covered. The Act thus encompasses a broad spectrum of handicapping conditions.

Although Section 503 prohibits discrimination by government contractors on the basis of all degrees of handicap, mere proof of handicap is not enough to secure protection of the Act in a given situation. Only those persons who are otherwise qualified for an employment position are protected. The regulations define a qualified handicapped individual as one who is "capable of performing a particular job with reasonable accommodation to his or her handicap."[42] Through the addition of this criterion, employers are protected from excessively burdensome responsibilities.

Employers, however, still must determine what constitutes reasonable accommodation to a particular handicap. Clearly, when dealing with a person merely perceived as disabled or with an erroneous record of disability, the employer has no particular problems because the individual's ability is not affected. The employer must simply put aside his bias when dealing with the individual in employment relations. Questions do arise as to the meaning of reasonable accommodations, however, when the employer deals with persons who are substantially limited in major life activities due to disability. The regulations indicate that employees' physical and mental limitations must be accommodated unless accommodation imposes an "undue hardship" on the contractor's business.[43] Business necessity and financial costs are specifically mentioned as appropriate considerations in determining the degree of a contractor's obligations.[44] However, the regulations offer no guidance on whether "reasonable accommodation" demands employer acceptance of lower job performance expectations or merely requires job facility accommodation.[45] The type of accommodation required is thus an important question for employers and persons covered by the Act.

Although the situation is far from clear, several factors indicate that employers need make no accommodation for lower job

42. 41 C.F.R. § 60-741.1 (1977).

43. *Id.* at § 60-741.6(d).

44. *Id.*

45. One commentator has suggested that there is no difference between job performance accommodation and physical accommodation. Both result in lowered output and in either case the employer makes a sacrifice. Note, *Affirmative Action Toward Hiring Qualified Handicapped Individuals*, 49 So. CAL. L. REV. 785, 815-17 (1976).

performance expectations under the Act. First, both the paternalism suggested by this type of accommodation and the resentment generated among fellow workers by lower job performance standards for selected employees create further barriers to integration of handicapped persons into society.[46] Congress intended to eradicate vestiges of charity wherever feasible and to assure handicapped persons a life of dignity, fully integrated into the social mainstream.[47] Secondly, the Act affects all levels of employment, including the executive.[48] Lowering executive level productivity would not be tolerated by contractors because of business necessity. However, physical accommodation would be only minimally disruptive to accepted business practices. Finally, interpreting accommodation in terms of expectations would conflict with the provision of the Fair Labor Standards Act which permits employers to pay handicapped individuals whose disability affects productive capacity less than the minimum wage.[49] The implementation regulations under

46. *See* C. BRIDGES, JOB PLACEMENT OF THE PHYSICALLY HANDICAPPED 31 (1946) ("The disabled need sympathetic understanding, not sympathy or special handling"); Siller, *Attitudes Toward Disability*, CONTEMP. VOCATIONAL REHABILITATION 72 (1976) (Treatment of the handicapped with special or benevolent attitudes constitutes a veiled discrimination). *Contra* Wright, *Equal Treatment of the Handicapped by Federal Contractors*, 26 EMORY L.J. 65, 101-02 (1977) (sympathetic attitudes are not discriminatory). *See* Rogers v. Frito-Lay, Inc., 433 F. Supp. 200, 202 (N.D. Tex. 1977) (special treatment of handicapped results from sympathy, not intolerance).

Sex discrimination cases are apposite in the present context. In Weeks v. Southern Bell Tel. & Tel., 408 F.2d 288 (5th Cir. 1969), plaintiff was denied a position on the basis of a company policy which prohibited women from being considered for a job which involved occasional handling of a 34 pound fire extinguisher. Rejecting the company's "romantic paternalism," the court held that women must be considered on the basis of their actual ability to perform a job. *Id.* at 290. *Accord*, LaFleur v. Cleveland Board of Educ., 414 U.S. 632 (1974) (pregnant teachers denied opportunity to continue to teach after fifth month of pregnancy); Rosenfeld v. Southern Pac. Co., 444 F.2d 1219 (9th Cir. 1971) (plaintiff denied job as a telegraph agent because employer believed position was too strenuous for a woman).

47. The Congress finds that—

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(6) it is essential that recommendations be made to assure that all individuals with handicaps are able to live their lives independently and with dignity, and that the complete integration of all individuals with handicaps into normal community living, working, and service patterns be held as the final objective.

Pub. L. No. 93-651, § 301, 89 Stat. 2-16 (1974) (White House Conference on Handicapped Individuals Act).

48. 41 C.F.R. § 60-741.6(a) (1977). *See* discussion of job-relatedness *infra* at notes 156 to 165. *See also* Lang, *Protecting the Handicapped from Employment Discrimination: The Job-Relatedness and Bona Fide Occupational Qualification Doctrines*, 27 DEPAUL L. REV. 989 (1978).

49. 29 U.S.C. § 214(D) (1976).

Section 503 specifically forbid reduction of compensation offered to any "otherwise qualified" employee because of handicap.[50] The obvious converse of this requirement is that an employee not otherwise qualified for a position may receive lowered compensation without violating Section 503. All of the above-mentioned factors tend to indicate that accommodation need only concern physical requirements of handicapped persons and that handicapped persons must compete on an equal footing with other employees in all other respects.

In spite of the ambiguities of the definition of "qualified handicapped individual," this Act clearly protects a large number of persons in the private sector who were previously unprotected. The problem remains, however, how persons purportedly benefitted by Section 503 effectuate the rights granted by the Act. The Act itself grants a specific right in an aggrieved handicapped person to complain to the Department of Labor if he believes that a government contractor is not in compliance with his obligations under the contract.[51] But beyond this procedure, the Act is silent as to remedies.[52] Remedies, therefore, comprise the subject matter of the remainder of this note.

## ENFORCEMENT OF SECTION 503 BY THE DEPARTMENT OF LABOR

The Department of Labor's Office of Federal Contract Compliance Programs (hereinafter OFCCP) is burdened with the bulk of responsibility for enforcement of Section 503 of the Rehabilitation Act.[53] In addition to enforcement of Section 503, the OFCCP enforces two analogous programs affecting employment opportunities for employees of government contractors: Section 402 of the Vietnam Era Veterans Readjustment Act which requires federal contractors to take affirmative action to employ and advance in employment

50. 41 C.F.R. § 60-741.4 (1977). Specifically, the contract requires that the employer not discriminate on the basis of handicap in "rates of pay and other forms of compensation." *Id.* Other compensation presumably includes insurance benefits which are frequently of special importance for handicapped employees because of the difficulties they often have in obtaining insurance.

51. 29 U.S.C. § 793(c) (1976).

52. Compare Sections 501 and 504 of the Act which were amended in 1978 to give plaintiffs explicit rights to sue for violations of these provisions. 29 U.S.C.A. §§ 791, 794 (Supp. 1979).

53. 41 C.F.R. § 60-741.25. The Director of the OFCCP may delegate compliance responsibilities under the Act to a specified officer of the contracting agency. Ultimate approval of all enforcement actions undertaken by the contracting agency must still come from the Director. *Id.* at § 60-741.24.

qualified veterans of the Vietnam era;[54] and Executive Order 11246 which mandates equal opportunity for all persons employed by federal contractors without regard to race, color, religion, sex, or national origin.[55] Enforcement of these programs occurs primarily through compliance review of affirmative action programs developed by the contractors.[56] The purpose of these compliance reviews is to determine whether the contractor is guilty of any systematic discrimination against protected classes of employees.[57] Section 503 enforcement is increasingly being geared to directed compliance reviews.[58]

Aside from its task of directed compliance reviews, Section 503 requires the OFCCP to process individual complaints from handicapped persons alleging contractor non-compliance. Any handicapped individual who believes that any contractor has failed or refused to comply with the provisions of his government contract relating to employment of handicapped persons may file a complaint with the Department of Labor.[59] The Department of Labor's authorized enforcement agency, the OFCCP, is required to investigate complaints promptly and to take such action on the complaints as the facts and circumstances warrant.[60] If the OFCCP determines that a contract

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54. 38 U.S.C. § 2012 (1976).

55. 3 C.F.R. § 169 (1977).

56. *See* OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, DIRECTED COMPLIANCE REVIEW PROCEDURES FOR VETERANS AND HANDICAPPED WORKER'S AFFIRMATIVE ACTION PROGRAMS UNDER SECTION 402 OF THE VIETNAM ERA VETERANS READJUSTMENT ASSISTANCE ACT OF 1974 AND SECTION 503 OF THE REHABILITATION ACT OF 1973, AS AMENDED, (Draft, January 3, 1978); UNITED STATES DEPT. OF LABOR, OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS TASK FORCE, PRELIMINARY REPORT ON THE REVITALIZATION OF FEDERAL CONTRACT COMPLIANCE PROGRAM 9 (1977). [hereinafter cited as COMPLIANCE REVIEW PROCEDURES].

57. COMPLIANCE REVIEW PROCEDURES, *supra* note 56. In Reynolds Metals Co. v. Rumsfeld, 564 F.2d 663 (4th Cir. 1977), the court noted the function of the OFCCP:

> The Compliance Office monitors government contractors to determine whether they are meeting their commitments as equal opportunity employers. It gives priority to the eradication of systematic discrimination rather than to the investigation and resolution of complaints about isolated instances of discrimination. The duty of the Compliance Office and Compliance agencies to receive and promptly process complaints must be considered in this context. The complaints which they process are those dealing with systematic violations of a company's contractual obligation to comply with the requirements of the contract programs, rather than those dealing with the violation of rights afforded an individual employee.

58. COMPLIANCE REVIEW PROCEDURES, *supra* note 56.

59. 29 U.S.C. § 793(b) (1976).

60. *Id.*; 41 C.F.R. § 60-741.26 (1977); *cf.* Reynolds Metals Co. v. Rumsfeld, 546 F.2d 663 (4th Cir. 1977).

violation exists, the implementation regulations require the agency to proceed first with "persuasive and conciliatory" efforts of enforcing compliance.[61] The offending contractor must commit itself to an approved corrective action program in order to be considered in compliance.[62]

Should the OFCCP's efforts at reaching a conciliatory agreement fail, the regulations prescribe a number of alternative enforcement procedures. Although judicial action is included,[63] the enforcement regulations emphasize other remedies. With approval of the Director of OFCCP, contract progress payments may be withheld until the contractor complies, or the contract may be terminated.[64] The most severe penalty for non-compliance is debarment of the contractor from eligibility for future government contracts.[65] These remedies for non-compliance clearly focus on the enormous leverage the government wields in its power to award and administer procurement contracts.

Although the manipulation of these remedies is potentially an effective enforcement tool, the OFCCP has a dismal record of success in effectuating the rights guaranteed by Section 503. Fewer than half of the complaints received by the OFCCP in a year are resolved.[66] A recent Department of Labor task force report severely criticized the OFCCP for lacking the will and commitment to enforce Section 503. The report suggested that alternative means of enforcing the Act be adopted.[67] Moreover, the Section 503 implementation regulations adopted by the Department of Labor are regarded by

61. 41 C.F.R. § 60-741.26 (1977). If the contractor has an applicable internal review procedure, the regulations require exhaustion of this procedure first. If the complaint has not been resolved internally within 60 days, it will be processed by the OFCCP. *Id.*

62. *Id.* In the event compliance responsibilities are delegated to a contracting agency, the Director must approve of a contractor's commitment to corrective action before the contractor is considered in compliance. *Id.*

63. *Id.* at § 60-741.28(b).

64. *Id.* at § 60-741.28(c)(d).

65. *Id.* at § 60-741.28(e). The Director of the OFCCP is required to periodically distribute a list of contractors and sub-contractors debarred from future contracts. *Id.* at § 60-741.31. To date, no contractors have been debarred.

66. In fiscal year 1975, the OFCCP received 331 complaints, 97 having been resolved. 63 U.S. DEPT. OF LABOR ANN. REP., FISCAL YEAR 1975 33 (1976). During fiscal year 1976, over 1,500 complaints were received and less than 800 were closed. Under Section 402 of the Vietnam Era Veterans Readjustment Assistance Act, only 33 of 108 were closed. 64 U.S. DEPT. OF LABOR ANN. REP., FISCAL YEAR 1976 30 (1977). In fiscal year 1977, 82 workers received back pay awards. During the same period, over 2,000 complaints were filed. 65 U.S. DEPT. OF LABOR ANN. REP., FISCAL YEAR 1977 58 (1978).

67. COMPLIANCE REVIEWS PROCEDURES, *supra* note 56, at 28.

the Congressional Oversight Committee as inadequate to enforce Section 503, particularly because of their emphasis on conciliation.[68] At the same time that the OFCCP was criticized for lack of effective enforcement of Section 503 through the review procedure, the agency changed its focus on achieving compliance from individual complaint review to contractor implementation procedure review.[69] The pur-

68. *Oversight Hearings on Rehabilitation of the Handicapped Programs and the Implementation of the Same by Agencies Under the Rehabilitation Act of 1973 Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Public Welfare*, 94th Cong., 2d Sess. 321-22, 1502-03 (1976) (remarks of Congressman Dodd and Senator Williams). Senator Williams said at the hearings:

> It has been almost 3 long years since these provisions became the law of the land. [Reference to Title V of Rehabilitation Act of 1973.] And we are deeply concerned.
>
> We are concerned *that there has been little progress in hiring and promoting disabled persons by Federal contractors* and by the Federal Government itself; that regulations have yet to be issued to implement the law prohibiting discrimination by Federal grantees, and that the rights of millions of handicapped individuals have been allowed to suffocate as a result of inadequate public educational programs about these rights and remedies *and because of inadequate enforcement of these rights.*
>
> We have heard from many of the groups representing the handicapped that these programs have so far been a failure. They are frustrated and angry—and I don't blame them.
>
> We know that the agencies have done little in the way of actual enforcement—that the cases processed by all the agencies under these laws total less than 1,000 in the 3-year history of this statute.
>
> We know that the agencies have not hired the personnel which the Congress has mandated as necessary for enforcement of these laws.
>
> . . . .
>
> The purpose of these Hearings is so that disabled individuals do not have to wait another 3 years for an implementation and, or another 100 years for the right to life, liberty, and the pursuit of happiness to become a reality.

*Id.* at 1502-03 (emphasis added).

> Congressman Dodd noted the failure of enforcement mechanisms as well:
>
> Even with the provision already enacted by Congress in the Rehabilitation Act of 1973, specifically Section 501, 503, and 504 [29 U.S.C. §§ 791, 793 and 794], there has been little elimination of discrimination against the handicapped. This is a result of . . . a lack of enforcement by the Federal Government of these sections, . . . .
>
> At my request the General Accounting Office undertook a study of Section 503 and 504 of The Rehabilitation Act of 1973. Their report issued last August disclosed *that 3 years after enactment there has been minimal enforcement of Section 503* and none devised by the executive branch to implement 504.

*Id.* at 321-22.

69. COMPLIANCE REVIEW PROCEDURES, *supra* note 56, at 33.

pose of implementation reviews is to determine whether a contractor is meeting its commitments under the Act and to eradicate any vestiges of systematic discrimination. The reviews are not intended to deal with violation of individual rights.[70] All of these factors suggest that the prospective benefits to individual handicapped persons under Section 503 are in serious danger of being diluted unless the beneficiaries of the Act are given powers to ensure enforcement.

Recognizing administrative inability to effectively enforce federal laws, Congress and the courts have frequently vested private parties with the right to seek judicial remedies for violation of statutory duties.[71] Congress provided explicit private rights of action under several statutes, including sections of the Rehabilitation Act.[72] When a statute lacks an explicit private remedy, the federal courts have frequently implied a private right of action in addition to the remedies provided by the statute.[73] These statutory and court created remedies include both actions against the enforcement agency and actions against the offending party.

Under Section 503 a handicapped person harmed by a federal contractor's discrimination on the basis of handicap has a number of alternative remedies. He may file a complaint with the Department

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70. *See* Reynolds Metals Co. v. Rumsfeld, 564 F.2d 663, 668 (4th Cir. 1977).

71. *See, e.g.*, Allen v. Board of Elections, 393 U.S. 144 (1970) (failure of Attorney General to enforce Voting Rights Act); J.I. Case v. Borak, 377 U.S. 426 (1964) (failure of Securities and Exchange Commission to enforce Securities and Exchange Act); Adams v. Weinberger, 391 F. Supp. 269 (D.D.C. 1975) (Civil Rights Act); Comment, 17 SANTA CLARA LAW. 405, 408-13 (1977); S. REP. NO. 147, 93d Cong., 1st Sess. (1973) (Age Discrimination in Employment Act). In a recent four year period, HEW's Office for Civil Rights resolved only one-fifth of the 871 discrimination complaints it received and "did almost nothing" to enforce the law. Washington Post, Nov. 8, 1977, at 1, col. 3. *See generally* Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Relief*, 83 YALE L.J. 425 (1974).

72. *See, e.g.*, 42 U.S.C. § 1857h-2 (1976) (citizens suits authorized to enforce the Clean Air Act); 42 U.S.C. § 1983 (1976) (suits authorized for violations of civil rights).

73. *See* Note, *Implying Civil Remedies From Federal Regulatory Statutes*, 77 HARV. L. REV. 285 (1963). Texas & Pac. Ry. Co. v. Rigsby, 241 U.S. 33 (1916), is the leading case on the theory of implied remedies. In it the Court implied a private right of action in favor of an employee of a railroad injured because of a violation of the Federal Safety Appliance Act. A number of cases have followed the lead of *Rigsby*. *See, e.g.*, J.I. Case v. Borak, 377 U.S. 426 (1964) (Securities and Exchange Act); Tunstall v. Brotherhood of Locomotive Firemen and Engineers, 323 U.S. 210 (1944) (Railway Labor Act); Burke v. Compania Mexicana de Aviacion, 433 F.2d 1031 (9th Cir. 1971). *But see* Cort v. Ash, 422 U.S. 66 (1975) (Fair Election Campaign Act); National Ry. Passenger Corp. v. National Ass'n of Ry. Passengers, 414 U.S. 453 (1974) (Amtrack Act).

of Labor as Section 503 provides[74] and await agency determination of his claim. This procedure has the advantage of relative low cost, but as previously suggested, the complainant is quite likely to be dissatisfied with the outcome. In addition to this remedy, the complainant may bring an action against the OFCCP, reviewing the agency action or inaction, in order to force the agency to perform its legal duties.[75] Although of value in certain circumstances, actions against an agency have serious limitations.[76] The major limitation is that courts will only intervene in agency determinations where there is demonstrable abuse of discretion. Consequently a wronged handicapped individual may find a direct lawsuit against a non-compliant contractor in which the injured party seeks damages or specific relief, or both, a preferable means of enforcing his rights. The direct lawsuit against a non-compliant contractor is costly and frequently involves lengthy delays, but it may be the only effective enforcement tool available in most situations. This conclusion has been borne out in situations under similar laws.[77] Each of the available remedies has its own limitations and pitfalls which must be explored.

### COMPELLING AN ENFORCEMENT AGENCY TO ACT: MANDAMUS

A mandamus action against the Director of the OFCCP is one alternative remedy available to a handicapped person dissatisfied with agency enforcement of his claim against a non-compliant contractor. According to the federal mandamus statute, an action for

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74. *See* text *supra*, at notes 66 to 70.

75. These actions are authorized by 28 U.S.C. § 1361 (1976) (Mandamus) and 5 U.S.C. §§ 701-06 (1976).

76. *See* Albert, *supra* note 71, at 426-29.

77. It now appears that effective enforcement of the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* (1976), is entirely dependent upon private law suits by aggrieved individuals. In a Senate Special Committee on Aging report, the committee noted:

> [E]mployer refusals to hire older workers jumped from 683 in fiscal 1971 to 818 in fiscal 1972. Failure to promote mature workers was involved in 339 instances, nearly 28% greater than the previous year. And, these figures represent only a fraction of the violations under the law, since many illegal practices go unreported. . . . Despite the clear cut need for vigorous enforcement, only 136 court actions, or about 36 per year, had been filed by the Department of Labor through fiscal 1972 . . . . [O]nly limited time is devoted to age discrimination activities, although the problem is still severe and and may be intensifying.

S. REP. NO. 147, 93d Cong., 1st Sess. 66 (1973). *See also* Comment, 17 SANTA CLARA LAW. 405 (1977).

mandamus may be brought in a federal district court against an officer or employee of the federal government or a federal agency to compel the performance of a legal duty which the officer or employee owes to the plaintiff.[78] Unless he has delegated his power to enforce Section 503 to the contracting agency, the Director of the OFCCP will be the defendant owing a duty of enforcement of the Act to a handicapped person.[79]

In order to maintain his action in mandamus against the Director of the OFCCP or other enforcement official, the plaintiff must demonstrate that the duty owed to him is mandatory and not merely discretionary.[80] By the terms of Section 503, the Director owes duties to handicapped individuals protected by the act. Those duties are two-fold: to receive and promptly investigate complaints alleging non-compliance and to take such action as the complaint and its circumstances warrant.[81]

The duty to receive and investigate complaints is fairly self-evident. An aggrieved handicapped person is given an explicit right in the statute to complain to the Department of Labor.[82] The Department must "promptly investigate" each complaint.[83] The plaintiff who believes that the OFCCP or its designated enforcement agency omitted or unreasonably delayed investigation of his complaint may bring an action to compel the agency to act on his claim.[84] Although the plaintiff may compel the agency to respond to his complaint through a mandamus action, the mandamus cases indicate that in the absence of specific mandatory guidelines, investigation may be conducted in the manner in which the agency deems appropriate.[85]

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78. "The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C. § 1361 (1976).

79. When the Director has delegated any of his authority to enforce the Act pursuant to 41 C.F.R. § 60-741.24(b) (1977), the person who obtains that authority may be a proper co-defendant.

80. Mandamus will not lie unless the duty allegedly owed imposes a mandatory or ministerial obligation. If the alleged duty is discretionary, the duty is not owed. *E.g.*, Short v. Murphy, 512 F.2d 374 (6th Cir. 1975).

81. "The agency shall promptly investigate such complaint and shall take such action thereon as the facts and circumstances warrant, consistent with the terms of such contract and the laws and regulations applicable thereto." 29 U.S.C. § 793 (1976).

82. *Id.*

83. *Id.*

84. *See* National Resources Defense Counsel, Inc. v. Morton, 388 F. Supp. 829, 834-41 (D.D.C.), *aff'd*, 527 F.2d 1386 (D.C. Cir. 1974).

85. *See* Udall v. Taunak, 398 F.2d 795 (10th Cir. 1968); Lewis v. Western

The courts will not oversee the manner in which an agency performs its duties absent evidence of arbitrary or unreasonable conduct.[86] Aside from being able to compel an agency to respond to his complaint by investigation, the complainant may request the court to issue an order compelling the OFCCP to take appropriate action on his complaint.[87]

In the event a violation of the Section 503 non-discrimination clause is discovered, the implementation regulations require the enforcement agency to pursue one of a number of enforcement procedures.[88] Among these are withholding of progress payments, cancellation of the contract, debarment of the contractor, and civil litigation.[89] The choice of enforcement procedures appears to be a matter of discretion within the agency, but at the very least the plaintiff may be able to compel the agency to exercise its discretionary powers.[90] Again, the court will not make the choice for the agency and thereby displace the agency's role. But the exercise of this choice and subsequent agency action is subject to judicial review.[91]

The degree of discretion which the enforcement agency is permitted to exercise in the investigation of complaints and pursuit of enforcement indicates that mandamus may be useful to a complainant in very few instances. The apparent lack of effective enforcement of Section 503 by the OFCCP, however, is an indication that this remedy will increase in importance as a tool for handicapped persons. Obviously, the more ineffectual the OFCCP appears in the eyes of the courts, the more likely that mandamus and other forms of relief against an administrative agency will be employed.

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Airlines, Inc., 379 F. Supp. 684 (M.D. Cal. 1974); Clore Restaurant, Inc. v. Payne, 72 F. Supp. 677 (D.D.C. 1947).

86. State Highway Comm'n v. Volpe, 479 F.2d 1099 (10th Cir. 1973). *See* Administrative Procedure Act, 5 U.S.C. §§ 701, 706 (1976); Text, *infra*, at notes 92 to 97. *But see* National Resources Defense Counsel v. Morton, 388 F. Supp. 829, 841 (D.D.C.), *aff'd*, 527 F.2d 1386 (D.C. Cir. 1974), wherein the court retained jurisdiction of the case until the agency complied with the judgment rendered.

87. 29 U.S.C. 793(c) (1976).

88. *See* 41 C.F.R. § 60-741.28 (1977); text, *supra*, at notes 53-55.

89. *Id.*

90. United States *ex rel.* Chicago Great Western Ry. Co., v. ICC, 294 U.S. 50, 61 (1935); National Resources Defense Counsel, Inc. v. Morton, 388 F. Supp. 829, 834 (D.D.C.), *aff'd*, 527 F.2d 1386 (D.C. Cir. 1974); North American Van Lines, Inc. v. ICC, 386 F. Supp. 665, 683 (N.D. Ind. 1974).

91. Natural Resources Defense Counsel, Inc. v. Morton, 388 F. Supp. at 842; Lewis v. Western Airlines, Inc., 379 F. Supp. 684, 686 (M.D. Cal. 1974).

### REVIEW OF COMPLIANCE AGENCY ACTION UNDER THE ADMINISTRATIVE PROCEDURE ACT[92]

A second theory of relief to which a complainant under Section 503 may be entitled in an action against the OFCCP is judicial review of the agency's performance under the Administrative Procedure Act (hereinafter APA).[93] The APA provides that a person adversely affected or suffering a legal wrong because of agency action is entitled to judicial review of that action.[94] The plaintiff in such an action, in some respects, is in the same position as a plaintiff in an ordinary lawsuit. A rule created for his benefit has been disregarded causing him damage. The only relief available to him is in court.

The most significant difference between an action seeking judicial review of an enforcement agency's action and a lawsuit against a private party is in the variety of factors applied by the court in granting relief. In a typical lawsuit against a private party, the court makes determinations of fact and law de novo and then renders a judgment which, when enforced, compels specific action. When a court reviews an agency's conduct, it looks only to the factors which the agency applied in reaching its decision to act.[95] If the agency applied the correct factors in reaching its decision, and applied the factors reasonably and in accordance with the law, then the agency's decision stands. If the court finds one of an enumerated list of abuses relating to administrative due process in the agency's decision-making process, then the agency's decision is set aside.[96] The court will not compel specific agency action in most instances. Instead, the agency must make a redetermination of the issues involved in the case in light of the court's decision and interpretations.[97]

To date there have been no cases seeking judicial review of OFCCP enforcement decisions, although there are potentially situa-

92. 5 U.S.C. §§ 701-06 (1976). There is necessarily some overlap of this topic with the mandamus section of the note. Mandamus is an appropriate remedy under the APA, although the type and scope of relief available under the APA is more diverse.

93. *Id.*

94. "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute is entitled to judicial review thereof." *Id.* at § 706.

95. *Id.*

96. *Id.* at § 706(2).

97. The issues involved in judicial review of agency action are extremely complex and a full treatment of these issues is beyond the scope of the present note. *See generally* K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 23.01-28.21 (1958, Supp. 1971, Supp. 1976, & Supp. 1978).

tions in which the remedy would be appropriate. Those situations would be primarily cases in which the plaintiff filed a complaint with the OFCCP and the agency either failed to find a violation or found a violation but took enforcement action deemed by the complainant to be inappropriate. The latter situation would, in most instances, involve a failure on the part of the OFCCP to recover back wages, lost seniority, or both, while imposing some other sanction. In either case the plaintiff alleges an injury due to agency action which, if unredressed, would not only harm himself, but also undermine the congressional purpose of eliminating employment discrimination on the basis of handicap among government contractors.

A key preliminary issue in such a lawsuit against the Director of the OFCCP is whether the agency's action is committed to agency discretion by law, within the meaning of Section 701 of the APA, and therefore not subject to review.[98] Contractors, the most likely opponents to judicial review of compliance agency action, are apt to argue that the implementation regulations allow complete agency discretion in enforcement proceedings. These opponents will point to the informality the regulations endorse in settling complaints.[99] They may also stress that where informality fails, the remedies specified in the regulations are all phrased in the alternative.[100] The regulations appear to commit the OFCCP's choice to the Director's discretion. Thus, determinations and agency prescribed remedies are arguably not subject to review.

As additional support for the argument against review, contractors might contend that the agency is acting within its special sphere of expertise.[101] Its decisions are based on complex factors and special knowledge beyond the competency of the court. Because the compliance agency is in a better position to know the needs of the contractor and the abilities of a particular handicapped person, the court should not interfere with the OFCCP's decisions.[102]

This analysis of Section 503 has several weaknesses. Initially, it fails to make an adequate distinction between matters which merely involve agency discretion and those which are committed to agency

98. The APA creates a presumption in favor of judicial review except to the extent that it is made expressly not reviewable by terms of the statute or "committed to agency discretion by law." 5 U.S.C. § 701 (1976). *See* Abbott Laboratories v. Gardner, 387 U.S. 136, 140-41 (1967).

99. 41 C.F.R. § 60-741.26 (1977).

100. *Id.* at § 60-741.28 (1977). *See* text *supra*, at notes 59 to 62.

101. *See* Wright, *supra* note 46, at 91-92.

102. *Id.*

discretion by law.[103] The former are reviewable while the latter are not.[104] Clearly, the choice of the manner in which investigation of a complaint will be conducted and the enforcement procedures utilized by the OFCCP involve agency discretion. But such action is arguably not committed to agency discretion by law because the Act requires the agency to investigate every complaint it receives. The Act also requires the OFCCP to take action warranted by the facts and circumstances, consistent with the terms of the contract, applicable law, and regulations. The terms of the Act indicate that agency action is reviewable because the agency must apply law in its decisions of what is appropriate action. Obviously interpretation of statutory and contractual terms is within the court's area of special competence.[105] Moreover, the courts have a vast amount of experience from sex and race discrimination cases to draw upon in examining factual determinations of discrimination and reasonable accommodation.[106] Although handicapping conditions and the limitations handicaps impose are much less familiar to the courts, traditional concepts of discrimination can be applied in reviewing the factors on which an agency bases its decisions.[107]

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103. *See, e.g.*, Kletschka v. Driver, 411 F. 2d 436 (2d Cir. 1969). In *Kletschka*, the court had before it the issue of whether the Veterans Administration had conspired against a doctor in refusing to grant him a research grant for development of an artificial heart. The court refused to review the decision because of the expertise required in making determinations of whether to award a research grant. The court found the agency's knowledge was so superior to that of the court, that it would not be practical to review such a decision.

Professor Davis is critical of this decision because of the court's focus on the technical sidelights of the case rather than the legal issues involved:

> Finding facts about an alleged conspiracy is in the heart of judicial competence, even if the subject matter is highly specialized; so would be an inquiry into motivation of the officials, the propriety of what they chose to consider, the plausibility of their findings, and a determination of whether the findings supported the decision. Much of what the plaintiff wanted reviewed may thus have been within judicial competence.

K. DAVIS, ADMINISTRATIVE LAW TEXT 517 (3d ed. 1971).

104. *See* K. DAVIS, ADMINISTRATIVE LAW TREATISE § 28.05 (1958 & Supp. 1970).

105. K. DAVIS, ADMINISTRATIVE LAW TEXT 517 (3d ed. 1971).

106. *See, e.g.*, Nance v. Union Carbide, Inc., 397 F. Supp. 436, 454 (W.D.N.C. 1975), and authorities cited therein on judicial expertise in determining sex discrimination in employment.

107. *See, e.g.*, LaFluer v. Cleveland Bd. of Education, 414 U.S. 646 (1975) (pregnant school teachers not permitted to teach beyond fifth month of pregnancy held unlawfully discriminatory); Gurmankin v. Costanzo, 556 F.2d 184 (2d Cir. 1976) (school system refusal to consider blind applicants for teaching position held unlawfully discriminatory).

A case involving the Labor Management Reporting and Disclosure Act is instructive on how a court can apply familiar concepts in an area given over to agency enforcement.[108] The Act gives the Secretary of Labor exclusive power to initiate proceedings against a union to set aside an election in which there have been unlawful irregularities.[109] In *DeVito v. Schultz*,[110] the plaintiff brought an action seeking a writ of mandamus to compel the Secretary of Labor to initiate proceedings to set aside the results of an election. The court found that the plaintiff had a judicially enforceable right to demand that the Secretary exercise his discretionary authority in a manner consistent with the requirements of the Act. Although the court would not replace its decision for that of the Secretary, it ordered the Secretary to reopen the investigation of the election. If after re-investigation the Secretary still would not initiate proceedings, then a full written explanation had to be provided. In ruling that the factors which the agency considered in making its determination were reviewable, the court stated that courts have a duty to maintain minimum standards in the Executive Department. Only through strict scrutiny of agency action by the courts would there be assurance that the wishes of Congress would not be frustrated by the discretionary decisions of an administrator.[111]

*DeVito* is analogous to the situation in which the Director of the OFCCP has refused to initiate compliance procedures or has initiated compliance actions which fail to give the complainant an adequate remedy. In these instances, a plaintiff can demand that the OFCCP set forth its reasons for denying the relief sought. *DeVito* principles require the courts to closely scrutinize the basis on which these decisions are made.

The plaintiff who has lost wages or seniority because of a contractor's non-compliance which the OFCCP failed to recover in enforcement proceedings is in the best position to make use of a

108. DeVito v. Schultz, 300 F. Supp. 381 (D.D.C. 1969) (brought under the Labor Management Reporting and Disclosure Act, 29 U.S.C. §§ 481-83 (1976)). *See also* Hodson v. Lodge 851, Ass'n of Machinists and Aerospace Workers, 454 F.2d 545 (7th Cir. 1971); NAACP v. Levi, 418 F. Supp. 1109 (D.D.C. 1976).

109. 29 U.S.C. § 481(e) (1976). *See* Calhoun v. Harvey, 379 U.S. 134 (1964).

110. 300 F. Supp. 381 (D.D.C. 1969).

111. 300 F. Supp. at 383. *DeVito* also stands for the proposition that where the administrative remedy is exclusive, judicial scrutiny will be strict in order to insure that the rights granted by the statutory scheme are not undermined. *Id.* This stricter standard may become applicable if direct private remedies against contractors are precluded by the courts.

remedy against the agency. Debarment of the contractor or a conciliatory agreement which prescribes prospective relief only is inappropriate from the handicapped person's perspective. In order to ensure that the rights which Congress granted handicapped persons under Section 503 are enforced, the courts should closely examine prospective solutions to discrimination. Only the threat of retroactive liability in the form of back wages and seniority will adequately discourage government contractors from avoiding implementation of Section 503 requirements.[112]

Although an action challenging an administrative decision of the OFCCP has obvious value in certain circumstances,[113] it also presents serious limitations. First of all the plaintiff is not entitled to a de novo court determination of what the contractor is obligated

112. In Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975), the Court observed:

> If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality. It is the reasonably certain prospect of a back pay award that 'provides the spur or catalyst which causes employers . . . to self-examine and self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history.' (citation omitted).

*Id.* at 417-18.

In 1977 only 82 workers recovered back pay through agency enforcement of Section 503. During the same period, 2,000 complaints were received by the OFCCP. 65 DEPT. OF LABOR ANN. REP. FISCAL YEAR 1977 58 (1978).

113. Two additional circumstances exist in which review of OFCCP performance may be beneficial. The first of these is the situation in which the OFCCP has reviewed and approved a contractor's affirmative action program relating to the employment of handicapped individuals and the plaintiff alleges that the plan does not conform with the Act. Again, there are no cases to date on point under Section 503. However, in an analogous situation, the court in Percy v. Brennan, 384 F. Supp. 800 (S.D.N.Y. 1974), held that plaintiffs were entitled to challenge OFCCP approval of an affirmative action program proposed by New York construction contractors with obligations under Executive Order 11246. The court would not prescribe the terms of the affirmative action program, but it would order the OFCCP to reject the proposed plan and enforce 11246. Section 503 employees are in virtually the same position as the plaintiffs in *Percy* and could conceivably force OFCCP withdrawal of approval from defective employment programs.

A second instance in which a plaintiff may consider utilizing a suit challenging administrative action is that in which a contracting agency has entered a contract with a non-compliant contractor. In Hadnot v. Laird, 463 F.2d 304 (D.C. Cir. 1972), the court found that private litigants could seek order to force the Secretary of Defense and the Administrator of the General Services Administration to abrogate existing contracts and to restrain further contracting with companies which allegedly failed to comply with Executive Order 11246. This case indicates that qualified handicapped individuals may challenge the validity of government contracts in order to ensure effective enforcement of Section 503 of the Rehabilitation Act.

to give him. The court will examine the basis on which an agency made its determination of these obligations, but it will not substitute its judgment for that of the agency. As long as a rational basis for the agency's judgment exists, the decision will stand. Secondly, the plaintiff is likely to experience lengthy delays before receiving relief from a court. He must exhaust his remedies within the OFCCP[114] before he can begin the long wait on the court docket. Finally, a prospective plaintiff must consider the expense involved in bringing such a difficult and novel lawsuit.[115]

Despite these limitations, a qualified handicapped individual may find an action against the OFCCP will accomplish his goals. Although a more desirable form of action may be a direct action against a federal contractor, there is no assurance that a direct action will be available under the Act.[116] In the event that a direct action is foreclosed by the courts, the beneficiaries of Section 503 will inevitably become more dependent on vigorous enforcement by the OFCCP and judicial review of its decisions. Hopefully the courts will recognize that the Department of Labor cannot effectively enforce Section 503 and will permit a private right of action to supplement agency enforcement. However, direct civil actions against contractors, possibly on either an implied remedy theory or third party beneficiary theory, present their own problems.

## DIRECT CIVIL ACTION AGAINST A NON-COMPLIANT GOVERNMENT CONTRACTOR: IMPLIED RIGHT OF ACTION

An action brought directly against a non-compliant federal contractor is an obvious alternative to a lawsuit against the OFCCP. A

114. *Id.* In Moon v. Roadway Express, Inc., 439 F. Supp. 1308 (N.D. Ga. 1977), it took one year for the OFCCP to determine that there was a violation of Section 503, even though the facts were virtually undisputed. Interview with Beverly M. Bates, attorney for plaintiff (September 30, 1978).

115. A hopeful sign with respect to the burden of litigation is indicated in Johnson v. Department Admin. Serv.'s, No. 1-77-348 (S.D. Ohio 1978). In *Johnson*, the court awarded attorneys' fees to the prevailing plaintiff in a Section 504 handicap discrimination suit. This decision was rendered before Section 504 was amended to include a provision for attorney's fees.

In Duran v. City of Tampa, 430 F. Supp. 75 (M.D. Fla. 1977), the district court allowed attorneys' fees in a Section 503 suit brought directly against the City, a federal contractor. [1978] EMPL. PRAC. DEC. (CCH) 8635.

The criteria for permitting recovery of attorneys' fees frequently cited by the courts are found in Johnson v. Georgia Highway Express, 488 F.2d 714, 717-19 (5th Cir. 1974).

116. To date the district courts are divided on the issue of whether a private remedy under Section 503 should be implied. *See* note 24, *supra*.

plaintiff suing a government contractor for discrimination has two theories on which he may base his cause of action: the doctrine of implied remedies, and third party beneficiary contract theory.

Implying civil remedies from statutes not specifically authorizing them has a long history in the federal courts.[117] The theoretical basis for such actions is analogous to that of tort negligence *per se*. That is, the legislature passes a statute in order to require a certain standard of conduct for the benefit of a class of persons. When a person regulated by the statute fails to conform to the established standard, the persons within the protected class damaged by the violation have a cause of action. Private rights of action thus serve as means of enforcing the statute[118] and re-distributing the losses caused by non-compliance.

Although the courts are divided on the issue of whether relief should be permitted in direct actions against non-compliant government contractors, they are unanimous in their choice of analysis.[119] The courts have agreed that the four relevant factors which the Supreme Court articulated in *Cort v. Ash*,[120] are dispositive. These factors are:

1) Is the plaintiff a member of the especial class for whose benefit the statute was enacted;[121]

2) Is there any indication of explicit or implicit legislative intent to either create or deny a private remedy;

3) Would a private right of action be consistent with the purposes of the underlying legislative scheme;[122]

4) Is the cause of action one which is traditionally the concern of the states.

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117. *See* note 24, *supra*. *See generally* Note, *Implying Remedies From Federal Statutes*, 77 HARV. L. REV. 285 (1963); Note, *Implied Private Actions Under Federal Statutes—The Emergence of a Conservative Doctrine*, 18 WM. & MARY L. REV. 429 (1976).

118. Justice Douglas often referred to this as the "Private Attorney General" concept. *See, e.g.*, Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970).

119. *See* cases cited in note 24 *supra*.

120. 422 U.S. 65 (1975).

121. J.I. Case v. Borak, 377 U.S. 426, 431-35 (1964).

122. Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 395-97 (1971); Holloway v. Bristol-Meyers Corp., 485 F.2d 986, 989-99 (D.C. Cir. 1973).

Obviously no one disputes that qualified handicapped persons are within the class for whose especial benefit Section 503 of the Rehabilitation Act was enacted.[123] Moreover, a plaintiff seeking relief from discrimination on the basis of handicap is alleging infringement of the right which Section 503 was intended to create.[124] As the Supreme Court has noted on other occasions, where federally created rights have been invaded it is the duty of the courts to be alert to provide remedies which will effectuate those rights.[125] The plaintiff alleging that he is a qualified handicapped individual discriminated against on the basis of his handicap in employment with a government contractor thus satisfies the first relevant factor of *Cort*. Indeed, some commentators have concluded that this is the most crucial of the four factors.[126]

Whether there is any indication of legislative intent either to create or deny a private right of action is the second factor relevant to the determination of whether a private right of action should be implied from Section 503. Evidence of explicit legislative intent one way or the other is non-existent with respect to Section 503. Although there is no express indication of legislative intent to create or deny a private cause of action, an absence of explicit intent is not dispositive of this factor. As Justice Brennan explained in *Cort*: "[I]n situations in which it is clear that federal law has granted a class of persons certain rights, it is not necessary to show an intent to *create* a private cause of action, although an explicit purpose to *deny* such a remedy would be controlling."[127] However, the absence of explicit legislative intent on a private right to sue requires some inquiry into implicit legislative intent.

In *Rogers v. Frito-Lay, Inc.*,[128] the first reported decision involving a private right of action under Section 503, the court concluded that Congress implicitly intended to deny a private right of action under Section 503.[129] The court based its conclusion on the fact that Cogress provided a complaint procedure for administrative enforcement of the Act and rejected numerous attempts to amend Title VII of the Civil Rights Act to include handicapped persons. Title VII amendment would provide handicapped persons with an

123. Moon v. Roadway Express, Inc., 433 F. Supp. 200, 202 (N.D. Tex. 1977).

124. *See* 29 U.S.C. §§ 701, 793 (1976); *See also* S. REP. NO. 1297, *supra* note 1, at 28.

125. J.I. Case v. Borak, 377 U.S. 426, 433 (1964).

126. Seng, *Private Rights of Action*, 27 DEPAUL L. REV. 11 (1978). *See also* Piper Inc. v. Chris Craft Industries, Inc. 430 U.S. 1 (1977).

127. 422 U.S. at 82 (emphasis in original).

128. 433 F. Supp. 200, 202 (N.D. Tex. 1977).

129. *Id. Accord*, Wright, *supra* note 46, at 92.

explicit right to sue. Congress, the court maintained, did not intend to bestow a right of action upon qualified handicapped individuals.[130]

Whatever light the failure of Congress to amend Title VII sheds on Congress' intent with respect to a private right of action under Section 503 is extremely dim. A more probable conclusion to be drawn from Congress' failure to amend Title VII is that it was unwilling to extend employment protection on as broad a scale as Title VII, which covers nearly all employers in the United States.[131] Rather, because of the potentially burdensome accommodations required for employment of handicapped persons, Congress chose to proceed cautiously in this new area.[132] By confining for the present the newly created rights in qualified handicapped individuals to situations involving federal financial assistance and government contracts, Congress could ensure that accommodation costs would be borne equitably. Accommodation costs can, in this manner, be passed on to the federal government by the terms of the contract.[133]

Even though Congress was cautious in its extension of rights to handicapped individuals with respect to employment, no ground exists for the conclusion that these rights would not be vigorously enforced. The legislative history abounds with evidence that Section 503 was considered tantamount to a bill of rights for handicapped individuals which carried out the intent of the sponsors of the amendments to Title VII.[134] The complaint procedure nowhere appears in

130. 433 F. Supp. at 202.

131. Title VII, 42 U.S.C. 2000e(b) (1976), defines "employer" as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceeding year . . . ."

132. In 1978 Congress moved one step closer to providing full statutory remedies to handicapped persons protected under Title V of the Rehabilitation Act by granting an express private cause of action under Sections 501 and 504 of the Act. 29 U.S.C. §§ 791, 793. Section 503 was the subject of a similar proposed amendment, but the amendment failed in Congress.

133. *See* 41 C.F.R. § 60-741.32 (1977), which provides that costs of accommodation may be charged to the government in accordance with the disputed clause of the contract.

134. Senator Humphrey, the sponser of the Rehabilitation Act, emphasized that the Act carried out his intentions in attempting to amend Title VI:

> [T]his bill correctly emphasized the need to make services responsive to individual needs, and to make every effort to enable a handicapped person to lead a productive and financially independent life.
>
> I welcome the additional requirement in this bill for an affirmative action program under which Federal contractors shall undertake to employ and advance in employment qualified handicapped individuals. Moreover, another section of this bill specifically prohibits discrimination against an otherwise qualified handicapped or severely handicapped in-

the legislative history as an exclusive remedy for violations of the Act.[135] The legislative history indicates, instead, that Congress was intent on establishing the rights of the handicapped in these selected areas.[136]

In conjunction with the inference which the *Rogers* court drew from the failure of Congress to amend Title VII, the court found that because Congress provided an administrative remedy in the complaint procedure, all other remedies were excluded. The court based its conclusion on the maxim of statutory construction *expressio unius est exclusio alterius;* the expression of one thing excludes all others. The *Rogers* court relied on *National Railroad Passenger Corp. v. National Association of Railroad Passengers* (hereinafter *Amtrack*).[137] In *Amtrack*, a suit brought by railroad passengers to enjoin discontinuance of certain routes, the Court said: "When legislation provides a particular remedy or remedies, courts should not expand coverage of the statute to subsume other remedies."[138] The application of this doctrine creates a presumption against implication which can only be rebutted by evidence which affirmatively shows that Congress did not intend the designated remedy to be exclusive.[139]

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dividual, solely by reason of his or her handicap, resulting in that person being excluded from participation in, or denied the benefits of, any program or activity receiving Federal financial assistance.

I am deeply gratified at the inclusion of these provisions, *which carry through the intent of original bills which I introduced jointly with the Senator from Illinois (Mr. Percy) in the last Congress, S.3044 and S.3458, to amend, respectively Title VI and VII of the Civil Rights Act of 1964,* to guarantee the right of persons with a mental or physical handicap to participate in programs receiving Federal assistance and to make discrimination in employment because of these handicaps, and in the absence of bonafide occupational qualification an unlawful employment practice. The time has come to firmly establish the right of these Americans to dignity and self-respect as equal and contributing members of society and to end the virtual isolation of millions of children and adults from society.

119 CONG. REC. 635 (1973) (emphasis added).

135. *See* Duran v. City of Tampa, 451 F. Supp. 954 (M.D. Fla. 1978); Drennon v. Philadelphia Gen. Hosp., 428 F. Supp. 809, 815 (1977).

136. An inference of Congress' intent in passing the Rehabilitation Act and achieving its goals can be drawn from the fact that both the 1973 Act and the 1974 Amendments were passed by overwhelming margins after Presidential veto. *See* [1973] U.S. CODE CONG. & AD. NEWS 2076; [1974] U.S. CODE CONG. & AD. NEWS 6373.

137. 414 U.S. 453 (1974).

138. *Id.* at 458.

139.

Since the Amtrack Act creates a public cause of action for the enforcement of its provisions and a private cause of action only under very

Government contractors opposed to implication argue that Congress provided a specific remedy in the complaint procedure which is presumed to be exclusive. There is no contrary evidence of legislative intent to rebut this presumption. Therefore, private rights of action are excluded on the principal of *expressio unius.*[140]

The *expressio unius* argument has a serious logical flaw which courts have too frequently ignored in their mechanical application of the doctrine. *Expressio unius* is a rule of presumed intention which assumes that the draftsman has made a comprehensive review of all of the provisions of a statute from which the inference might be drawn that silence indicates a considered judgment of rejection. Attributing such omniscience to Congress is clearly unrealistic.[141] There is no indication whatsoever that the draftsmen of Section 503 gave any consideration to the effect specification of a complaint procedure would have on implication of other remedies. Presumably

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limited circumstances, this maxim would clearly compel the conclusion that the remedies created in § 307(a) are the exclusive means to enforce the duties and obligations imposed by the Act. But even the most basic general principles of statutory construction must yield to *clear contrary* evidence of legislative intent.

*Id.* (emphasis added).

140. Woods v. Diamond State Tel. & Tel., 440 F. Supp. 1003, 1004 (D. Del. 1977); Moon v. Roadway Express, Inc., 439 F. Supp. 1308 (N.D. Ga. 1977); Rogers v. Frito-Lay., Inc., 433 F. Supp. 200, 201 (N.D. Tex. 1977). *See* Wright, *supra* note 46, at 91-92.

141. Use of this rule of statutory construction is unwise, especially in making such a complex determination as that of implied private rights of action. . . . Given the nature of the legislative process, often resulting in compromise and ambiguous language, and given the complexity of statutes and schemes of regulation, such a factor, which focuses only on the express terms of the statute, is of limited use, especially if the statute has broad remedial purposes . . . . Apparently, a majority of courts would refuse to consider it controlling for the purpose of establishing legislative intent because the rule often establishes nothing but only raises further questions.

Not only has the rule of *expressio unius* been rejected generally, but also, courts repeatedly have refused to apply the maxim in implication cases. Whether defined liberally or strictly, implication requires the court to look beyond the express language of the statute. As the *expressio unius* rationale includes a presumption against any such extension of statutes, it is inherently inimical to implication. No case adopting this rule as controlling ever has inferred a private right of action. In *Amtrak* this restrictive principle was used to raise an almost irrebutable [sic] presumption against implication. Although such a severe construction was not applied in *Cort* restrictive application of the principle was not expressly rejected.

18 WM. & MARY L. REV., *supra* note 117, at 452-53.

Congress considered the complaint procedure to be *one* mechanism through which the purposes of the Act could be achieved. Congress could not know how effective the procedure, unsupplemented, would be in actual practice. Clearly the courts should not over-emphasize the fact that an act provides one administrative remedy when considering whether to imply a judicial remedy from the statute.

The Supreme Court in a unanimous opinion in *Cort v. Ash*, clarified the application of the doctrine of *expressio unius* as applied in *Amtrack*. The Court noted that in *Amtrack* there was a private cause of action provided in favor of *certain* plaintiffs, employees of the railroads, concerning the particular provision at issue. It was in that context that the doctrine was applied.[142] In addition the Court found that there was specific support in the legislative history of the Amtrack Act for the proposition that the statutory remedies were to be exclusive.[143] Under Section 503 of the Rehabilitation Act, there is neither an express right of action in favor of certain plaintiffs nor specific support in the legislative history for the proposition that the complaint procedure was to be exclusive.

On other occasions the Supreme Court rejected a mechanical application of *expressio unius* in order to provide remedies, the need for which was not apparent when the statute was drafted. In *Allen v. State Board of Elections*,[144] the Court implied a private cause of action from the Voting Rights Act in spite of the fact that the Act provided for elaborate administrative enforcement mechanisms.[145] The Court found that the achievement of the Act's laudable goal would be severely hampered if each citizen were required to depend solely on litigation instituted at the discretion of the limited staff of the Attorney General.[146]

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142. In *Cort*, the opponents of an implied remedy asked the Court to infer from the fact that some private remedy was provided with regard to one section of the statute in question, all other private remedies were excluded on the principle of *expressio unius*. The Court responded:

> We find this excursion into extrapolation of legislative intent entirely unilluminating. In *Amtrack*, there was a private cause of action in favor of certain plaintiffs concerning the particular provision at issue [employees]. It was in this context that we referred to . . . [*expressio unius*]. In addition, there was specific support in the legislative history of the Amtrack Act for the proposition that the statutory remedies were to be exclusive.

422 U.S. at 82 n.14.

143. *Id.*; Amtrack, 414 U.S. at 458.

144. 393 U.S. 544 (1969).

145. *Id.* at 556-57.

146. *Id.*

Similarly, in *J.I. Case v. Borak*,[147] a case brought by an investor alleging damages from violations of the Securities and Exchange Act, the Court implied a private right of action to supplement Securities and Exchange Commission enforcement.[148] Approving of *Borak* and similar cases, the Court recently reaffirmed its position that administrative remedies specified in an act are not dispositive on the issue of implication.[149] The Court has taken the position that where necessary to ensure the effectiveness of congressionally created rights, private remedies will be implied to protect the particular class for whose benefit the statute was enacted.

The Court's alertness to supplement specific statutory remedies with private remedies militates in favor of implication of a private right of action under Section 503. As in *Allen* and *Borak*, the administrative remedies are inadequate to ensure that congressional goals will be realized.[150] Blind reliance on a mechanical application of the doctrine of *expressio unius* to exclude private enforcement of the Act may result in the subversion of these goals.

Moreover, in most cases involving implication, it is unlikely that any conclusive evidence of congressional intent on the issue of private remedies will be found in the legislative history or from statutory construction. One who claims to have found congressional intent either to create or deny a private cause of action is left with a puzzling problem: why, if Congress had definite intentions on the matter, did it fail to express its intention on the face of the statute?[151] The truth of the matter is that in most instances a search

147. 377 U.S. 426 (1964).

148. *Id.* at 434-35.

149. The reasoning of these holdings is that, where congressional purposes are likely to be undermined absent private enforcement, private remedies may be implied in favor of the particular class intended to be protected by the statute.

. . . .

Indeed, the Court in *Borak* carefully noted that because of practical limitation upon the SEC's enforcement capabilities, '[p]rivate enforcement . . . provides *a necessary supplement to Commission action*.' 377 U.S. at 432. (Emphasis added). Similarly, the Court's opinion in *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 730 (1975), in reaffirming the availability of a private right of action under § 10(b), specifically alluded to the language in *Borak* concerning the *necessity* for supplemental private remedies without which congressional protection of shareholders would be defeated.

Piper Inc. v. Chris-Craft Industries, Inc., 430 U.S. 1, 25 (1977).

150. *See* text *supra*, at notes 66 to 70.

151. *See* 18 WM. & MARY L. REV. *supra* note 117, at 452-53; Note, *Private Rights of Action: Some Implications for Implication*, 123 U. PA. L. REV. 1392, 1405 (1974).

of legislative history or application of principles of statutory construction is meant to find evidence of what Congress would have said had it considered the issue of private remedies. The absence of conclusive evidence of legislative intent from either the legislative history or statutory construction of Section 503 suggests that the other factors articulated in *Cort* should be dispositive.[152] Perhaps second only to whether the plaintiff is in the especial class, the question of whether implication of a private remedy would be consistent with the underlying legislative scheme and purpose of Section 503 must be considered.

The purpose of the legislative scheme underlying Section 503 is clearly to expand employment opportunities with government contractors for qualified handicapped individuals.[153] Congress provided qualified handicapped persons with one means of effectuating this purpose through the complaint procedure. If an additional private remedy is to be implied from the Act, courts must find that the additional remedy is consistent both with the goal of expanding employment opportunity for handicapped persons and with the existing enforcement scheme. Opponents of implication of a private remedy under Section 503 contend that private lawsuits enforcing the Act are inconsistent with the legislative scheme.[154] They argue that private litigation would not advance employment opportunities for handicapped individuals and would disrupt orderly enforcement of the OFCCP program.

In suppport of their contention that a private cause of action would not promote employment opportunity, opponents of private remedies under Section 503 maintain that application of traditional litigation concepts of discrimination does not apply in the handicap bias situation. Unlike race, opponents of implication assert that a handicap may directly affect the ability to perform a certain job. Race is not inherently inconsistent with ability; disability is. Because disability directly affects job performance, the courts have no judicially manageable standards which they can apply. The lack of appropriate standards would result in sporadic and inconsistent

152. In Mason v. Beliu, 543 F.2d 215, 221 (D.C. Cir.), *cert. denied*, 429 U.S. 852 (1976), the court held that where there is no clear indication of legislative intent to permit or deny a private remedy, the decision should be based on the remaining three factors of *Cort v. Ash*.

153. 29 U.S.C. § 701(6) (1976).

154. Wright, *supra* note 46, is the leading commentator opposing a private remedy under Section 503. Mr. Wright was counsel for the defense in Rogers v. Frito-Lay, Inc., 433 F. Supp. 200 (N.D. Tex. 1977).

enforcement of Section 503 which would have no appreciable impact on employment of handicapped persons.[155]

The argument that traditional discrimination concepts are inappropriate in handicap discrimination cases is unpersuasive in the Section 503 context. Section 503 explicitly limits its coverage to otherwise qualified handicapped individuals. This means that a handicapped individual must meet the essential qualifications for a job in order to be protected.[156] For instance a person with only a right arm has a disability, but the same person is unimpaired in relation to jobs which only require one arm. The employer may only disqualify a person for job performance related impairments.[157] Once ability to perform a job is determined, the question of whether the employer has invidiously discriminated against someone on the basis of handicap is as amenable to judicial resolution as is a case involving discrimination based on sex.[158]

Determination of discrimination on the basis of race or sex is actually similar to discrimination on the basis of handicap in many instances. Discrimination which results from the use of selection criteria unrelated to job performance is prohibited in all cases involving government contractors.[159] Physical requirements such as

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155. Rogers v. Frito-Lay, Inc., 433 F. Supp. at 202; Wright, *supra* note 46, at 92-94.

156. *See* text *supra*, at notes 42 to 49.

157. *See* Lang, *Protecting the Handicapped from Employment Discrimination: The Job-Relatedness and Bona Fide Occupation Qualification Doctrines*, 27 DEPAUL L. REV. 989 (1978).

158. *See* LaFluer v. Board of Education, 414 U.S. 646 (1974); Halderman v. Penhurst, 446 F. Supp. 1295 (E.D. Pa. 1978).

159. The standard for determining whether a job selection criterion is a job related qualification was enunciated by the Supreme Court in Griggs v. Duke Power Co., 401 U.S. 424 (1971): "The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." *Id.* at 431. This comports well with the OFCCP definition of "qualified handicapped individual" as one who "is capable of performing a particular job, with reasonable accommodation to his or her handicap." 41 C.F.R. § 60-741.2 (1977).

*Cf.* The test used in Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224 (5th Cir. 1976), an age discrimination law suit:

> [I]f all or substantially all members of a class do not qualify for a particular position, or if there is no practical way reliably to differentiate the qualified from the unqualified applicants in that class, it is then that . . . otherwise proscribed discrimination is permitted as a BFOQ [bona fide occupational qualification].

As Wright, *supra* note 46, at 73, suggested, this test had the effect of exempting bus driving from the Age Discrimination Act. In like manner certain types of positions could be exempted from Section 503 requirements. For example, since perfect eye-

height,[160] weight,[161] or physical strength,[162] when not job related, have been held to be sexually or racially discriminatory. Job qualifications, such as 20/20 vision[163] or having no history of epileptic attacks,[164] when not truly related to bona fide job requirements unreasonably discriminate against the class of persons lacking those qualifications. By ignoring actual abilities and focusing on disabilities, such employment practices relegate entire classes to inferior positions.[165] The vast experience of the courts in dealing with these types of factors suggests that courts can adequately deal with discrimination on the basis of handicap using traditional equal opportunity concepts.

Aside from the contention that a private remedy under Section 503 should fail because of the lack of judicially applicable standards, opponents of implication argue that private lawsuits against contractors would undermine orderly enforcement of the Act by the OFCCP. They point to the legislative history which stresses the importance

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sight is essential for airline pilots, Section 503 would impose no obligations on airlines to accommodate pilots with visual impairments.

160. Dothard v. Raulinson, 433 U.S. 321 (1977); Davis v. County of Los Angeles, EMPL. PRAC. DEC. ¶ 11,219 (9th Cir. 1976); [1976] EEOC DECISIONS (CCH) ¶ 6223.

161. Rosenfeld v. Southern Pac. Co., 444 F.2d 1219 (9th Cir. 1971); Meadows v. Ford Motor Co., 62 F.R.D. 98 (W.D. Ky. 1973), *modified on other grounds*, 510 F.2d 939 (6th Cir. 1975), *cert. denied sub nom.*, Local Union 682, U.A.W. v. Ford Motor Co., 425 U.S. 998 (1976); Redinger v. General Motors Corp., 325 F. Supp. 1089 (S.D. Ohio 1971), *rev'd on other grounds*, 474 F.2d 949 (6th Cir. 1972).

162. Long v. Sapp, 502 F.2d 34 (5th Cir. 1974); Bowe v. Colgate Palmolive Co., 416 F.2d 711 (7th Cir. 1970); Nance v. Union Carbide Corp., 397 F. Supp. 436 (W.D.N.C. 1975).

163. *See* Gurmankin v. Costanzo, 556 F.2d 184 (3d Cir. 1977); Nuld v. American Hockey League, 439 F. Supp. 459 (W.D.N.Y. 1977).

164. *See* Duran v. City of Tampa, 430 F. Supp. 75 (M.D. Fla. 1977).

165. *See* LaFluer v. Board of Education, 414 U.S. 632 (1974); Halderman v. Penhurst, 446 F. Supp. 1295 (E.D. Pa. 1978). *See generally* Burgdorf & Burgdorf, *supra* note 1, at 899-910.

In *LaFluer*, a case dealing with the validity of teachers' mandatory pregnancy leaves after the fifth month of pregnancy, the court observed:

> While the medical experts in these cases differed on many points, they unanimously agreed on one—the ability of any particular pregnant woman to continue at work past any fixed time in her pregnancy is very much an individual matter. Even assuming, *arguendo*, that there are some women who would be physically unable to work past the particular cutoff dates embodied in the challenged rules, it is evident that there are large numbers of teachers who are fully capable of continuing work for longer than the . . . regulations allow. Thus the conclusive presumption in these rules . . . is 'neither necessarily nor universally true;' and is violative of the Due Process Clause.

*Id.* at 645-46.

of consistent interpretation of Section 503 and its companion Sections 501 and 504.[166] This consistency was considered essential for the success of the entire program.[167] The critics of implied remedies maintain that private enforcement would result in a patchwork of inconsistent adjudications.[168] Agency enforcement, on the other hand, would result in consistent application of standards adopted in the regulations.

The impact of the argument that an implied remedy under Section 503 would disrupt consistent interpretation of the requirements of the Act is substantially dissipated by the fact that only qualified handicapped individuals are protected under Section 503. As discussed above, federal contractors are not required to ignore handicapping conditions when making employment decisions. They are merely required to make sure that discrimination on the basis of handicap is rationally related to business necessity. The requirements of Section 503 thus require no special expertise which the courts do not already possess from dealing with discrimination in other contexts.[169] Nor is the OFCCP a specialized regulatory agency charged with broad discretionary powers to control a complex industrial or commercial relationship.[170] Instead Section 503 gives rights to handicapped employees and gives the OFCCP some powers to help achieve those rights.

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166. *See* S. REP. NO. 1297, *supra* note 1, at 4.

167. *See* WRIGHT, *supra* note 46 at 90-95.

168. *Id.*

169. In Fagot v. Flinkote Co., 305 F. Supp. 407 (E.D. La. 1969), the court found that a private litigant could sue for back wages because of violations of the Fair Labor Standards Act. The court observed that although the Department of Labor was charged with enforcement of the FLSA, a private right of action would not interfere with agency enforcement. The court noted, "[t]he FLSA is not a regulatory law delegating broad discretionary responsibility to a specialized administrative agency charged with governing an industry or phase of commercial relations. Instead, it bestows a series of rights on a broad class of employees, and arms the Secretary of Labor with extensive power to help the employees to enforce those rights." *Id.* at 413. *Cf.* Montana-Dakota Util. Co. v. Northwestern Publ. Serv. Co., 341 U.S. 246 (1951) (determination of reasonableness of power rates left to broad discretion of Federal Power Commission); *accord* T.I.M.E., Inc., v. United States, 359 U.S. 464 (1959) (similar situation involving reasonableness of freight rates; held, a matter for the Interstate Commerce Commission).

Similarly, Section 503 grants rights to a broad class of employees and arms the OFCCP with powers to help employees derive the intended benefit from the act. However, there is no indication that the Department of Labor has special expertise in this area or is given the kind of broad discretion found in other regulatory schemes such as those in the Federal Power Act and the Motor Carrier Act.

170. 120 CONG. REC. 30534 (1974). *See* Drennon v. Philadelphia Gen. Hosp., 428 F. Supp. 809, 815 (E.D. Pa. 1977).

In a related context,[171] Justice Stevens applied the *Cort* test to Title VI of the Civil Rights Act[172] which prohibits discrimination on the basis of race, color, or national origin by recipients of federal financial assistance. In the context of the entire legislative scheme, Stevens found no conflict between the administrative mechanism prescribed in Title VI and a private remedy against a non-compliant recipient of federal aid.[173] Title VI only provides explicitly for judicial review of enforcing agency or department actions.[174] Administrative enforcement of Title VI focuses on compliance reviews, negotiated settlements, and in the event negotiations fail, termination of funding. However, Stevens concluded that because administrative enforcement is geared to cutting off federal funds and not vindication of personal rights, a private lawsuit to secure individual rights was compatible with existing administrative remedies.

Similarly, administrative enforcement of Section 503 is geared to negotiations backed up by a threat of contract cancellation or debarment for non-compliance. Permitting an individual to sue for cancellation would clearly be inconsistent with the purposes of the administrative scheme. However, a private action seeking relief only for an alleged violation is wholly compatible with administrative enforcement. A private action may in fact be the only means of securing these personal rights.

Moreover, there is evidence in the legislative history that the Committee on Labor and Public Welfare, which reported the Rehabilitation Act, approved of a private cause of action under Section 504 of the Act.[175] Every Circuit Court of Appeals which faced the issue of whether Section 504 enforcement should be supplemented

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171. Regents of the University of California v. Bakke, 438 U.S. 265 (1978) (Stevens, J., concurring in the judgment in part and dissenting).

172. 42 U.S.C. § 2000d (1976).

173. 438 U.S. at 419 nn.26-28.

174. As Judge Carter, commenting on *Bakke*, noted:

> It seems to this court that a deliberate intention not to afford a private right of action under Title VI is too much to infer from the omission of express language. Congress mentions private rights of action under Titles VII and II only while also specifying restrictions upon the exercise of those rights that do not normally obtain in a federal court. Failing to create an express private right of action under Title VI is, therefore, wholly consistent with Congress' explicitly creating causes of action only where it also established procedural prerequisites that differ from those ordinarily obtaining in federal courts.

Guardians Assoc. of New York v. New York City Civil Service Comm'n, 47 U.S.L.W. 2561 (1979).

175. 120 CONG. REC. 30534 (1974); S. REP. No. 1297, *supra* note 1, at 26-27.

with a private right of action before the Act was amended to include one, has agreed that private enforcement is consistent with the Act.[176] Given Congress' intent that Sections 503 and 504 be interpreted consistently, these decisions militate in favor of implication of a private remedy under Section 503.

A direct action by aggrieved handicapped individuals would provide an effective supplement to enforcement of Section 503 by OFCCP compliance reviews. The limited staff of the agency, now directing its attention away from individual complaint proceedings, would be reinforced by handicapped individuals acting as private attorneys general enforcing the Act. While the OFCCP concentrates on eradication of systematic discrimination and prospective broadening of opportunities, private litigants could seek recovery of wrongfully withheld back wages. Indeed, as the Supreme Court recognized in *Albemarle Paper Co. v. Moody*,[177] back pay has an obvious connection with the purposes of achieving equality of employment because of the burdens it imposes on employers:

> If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality. It is the reasonably certain prospect of a back pay award that provides the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history.[178]

Thus, a private right of action appears to be entirely consistent with the legislative purpose behind Section 503 of expanding employment opportunities for qualified handicapped individuals.

In addition to consistency with the legislative scheme, considerations involving legislative intent, and whether the plaintiff is within the special class for whose benefit the statute was enacted, *Cort v. Ash* requires inquiry into existing state remedies in determining whether a remedy should be implied from a federal statute.[179]

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176. The leading case under Section 504 implying a private right of action is Lloyd v. Regional Transp. Auth., 548 F.2d 1277 (7th Cir. 1977). *Accord*, Davis v. Southeastern Comm. College, 574 F.2d 1158 (4th Cir. 1978); Kampmeir v. Nyquist, 553 F.2d 296 (2d Cir. 1977); United Handicapped Fed'n v. Andre, 550 F.2d 413 (8th Cir. 1977).

177. 422 U.S. 405, 417 (1975).

178. *Id.* at 417 (citations omitted in original).

179. 422 U.S. at 84-85. The thrust of the argument in favor of implying a remedy where federal law is silent was noted in the Court's analysis of J.I. Case v.

If the area legislated is traditionally an area of state law, there is generally no need to provide plaintiffs with an additional forum.[180] On the other hand, if state law should happen to impose no liability on the particular conduct at issue, then the argument for implication of a right to sue is strengthened.[181]

Although fifteen states do not have laws which offer protection to handicapped individuals,[182] protection from employment discrimination has not been relegated to the states.[183] No prohibition

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Borak, 377 U.S. 426, 434-35 (1964):

> In *Borak* . . . we said '[I]f the law of the state happened to attach no responsibility to the use of misleading proxy statements, the whole purpose of § 14(a) of the Securities Exchange Act of 1934 might be frustrated. 377 U.S. at 434-35 . . . . In *Borak*, the statute involved was clearly an intrusion of federal law into the internal affairs of corporations; to the extent that state law differed or impeded suits, the congressional intent could be compromised in state-created causes of action.

*Id.* at 85.

180. *Id.*

181. *Id.*

182. *See* Cook, *Non-discrimination in Employment Under the Rehabilitation Act of 1973*, 27 AM. U.L. REV. 39 nn.53-60 (1978), for an exhaustive recitation of all state laws concerning the handicapped.

The following states, territories, and possessions have no statutes protecting handicapped persons from discrimination in employment: Alabama, Arizona, Arkansas, Canal Zone, Colorado, Deleware, Georgia, Guam, Idaho, Louisiana, Missouri, Oklahoma, Puerto Rico, South Carolina, South Dakota, Utah, Virgin Islands, Virginia, and Wyoming.

183. *See* the following state statutes on handicap discrimination: ALASKA STAT. § 18.80.220(a)(1) (Cum. Supp. 1978); CAL. LAB. CODE §§ 1420(a), 1432.5 (West Supp. 1979); CONN. GEN. STAT. §§ 1-1f, 31-126(a) (Cum. Supp. 1979); D.C. CODE ENCYL. §§ 6-1504, -1508 (West Supp. 1979); FLA. STAT. ANN. § 413.08(3) (West Cum. Supp. 1979); HAW. REV. STAT. §§ 378-1(7), -2, -9 (1968 & Supp. 1979); ILL. ANN. STAT. ch. 38, § 65-23 (Smith-Hurd 1977); IND. CODE §§ 22-9-1-2, -3(q), -13 (1976); IOWA CODE ANN. §§ 601A.2(11), .6(1), .7(1), .8(1) (West 1975); KAN. STAT. §§ 44-1001, -1002(j), -1009(a)(1) (Cum. Supp. 1978); KY. REV. STAT. §§ 207.130(2), .150(1) (Supp. 1978); ME. REV. STAT. tit. 5, §§ 4552, 4553.7-A, 4572 (1979); MD. ANN. CODE art. 49B, §§ 17, 18(g), 19(a), 20 (Cum. Supp. 1978); MASS. GEN. LAWS ANN. ch. 149, § 24K (Cum. Supp. 1978); MICH. STAT. ANN. §§ 3.550(103)(b), (202) (Rev. Vol. 1978); MINN. STAT. ANN. §§ 363.01, Subd. 25, .03, Subd. 1(2) (Cum. Supp. 1978); MISS. CODE ANN. § 43-6-15 (Cum. Supp. 1978); MONT. REV. CODE ANN. §§ 64-305(10), (13), —306(1)(a) (Cum. Supp. 1977); NEB. REV. STAT. §§ 48-1102(8), 1104, 1108(1) (Supp. 1978); NEV. REV. STAT. §§ 613.330, .350(1), (2) (1978); N.H. REV. STAT. ANN. §§ 354-A:3(13), -A:8 (Supp. 1978); N.J. STAT. ANN. §§ 10:5-4.1, -5(q) (West 1978); N.M. STAT. ANN. §§ 4-33-2(k), -7 (1975); N.Y. EXEC. LAW §§ 292(21), 296(1), (1-a) (McKinney Cum. Supp. 1972-1978); N.C. GEN. STAT. § 128-15.3 (Cum. Supp. 1977); OHIO REV. CODE ANN. §§ 4112.01(k), (m), .02(A) (Baldwin 1976); OR. REV. STAT. §§ 659.400, .425 (1975); PA. STAT. ANN. tit. 43, §§ 954(p), 955 (Purdon Cum. Supp. 1978-79); R.I. GEN. LAWS ANN. art. 4419e, §§ 28-5-6(H), -7 (Supp. 1978); TENN. CODE ANN. § 8-4131 (Supp. 1978); TEX. REV. CIV. STAT. ANN. art. 4419e §§ 1, 3(g) (1976); VT. STAT. ANN. tit. 21, § 498 (Cum. Supp. 1978); VA. CODE § 40.1-28.7 (Repl. vol. 1976); WASH. REV. CODE § 49.60.180 (Supp.

against employment discrimination existed at common law. Until the period of the Civil Rights Movement in the 1960's, few states enacted statutes aimed at employment discrimination. State statutes regarding handicap employment discrimination enacted since the Civil Rights period vary considerably in the degree of protection afforded.[184] On the other hand, the federal government led the fight combatting employment discrimination on the basis of handicap as well as on the basis of other classifications.[185] These facts indicate that this is not an area of traditional state interest or state concern.

Moreover, the federal government has a special interest in regulating employment discrimination in the Section 503 context because of the special relationship the government has with government contractors. State laws regulating discrimination on the basis of handicap are passed pursuant to a state's police powers. Unrelated to this, Congress imposed the requirements of Section 503 on employers through the existence of a contractual relationship with the employer. Section 503 is an example of the government's powers to fix terms and conditions on which it will make needed purchases in order to implement national policies.[186] By accepting the terms of the contract, employers covered by the Act choose to bind themselves to the affirmative action mandate. Because state statutes and Section 503 are based on different premises of power, implication of a private federal remedy would not invade an area of state law where adequate remedies may or may not exist.

Implication of a private right of action from Section 503 is thus consistent with the four relevant factors prescribed by the Supreme Court in *Cort v. Ash*. Qualified handicapped individuals are within the special class of persons protected by the statute. The legislative history, although inconclusive when examined for evidence of intent to bestow a private right of action on handicapped persons, does not indicate an explicit intent to deny a private cause of action to per-

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1978); W. VA. CODE § 5-11-9 (Cum. Supp. 1978); WIS. STAT. Ann. §§ 111.32(5)(a), (f) (West 1974 & Cum. Supp. 1978).

184. A number of states protect only the physically handicapped. *E.g.*, FLA. STAT. ANN. § 413.08(3) (Supp. 1979); MISS. CODE ANN. § 43-6-15 (Supp. 1978).

185. *See generally* 42 U.S.C. §§ 1971-2000h-6, 3601-3631 (1976).

186. The freedom of the government to use its purchasing powers in order to accomplish social goals was recognized in Perkins v. Luken Steel Co., 310 U.S. 113 (1940), in which the Court stated: "[T]he Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms upon which it will make needed purchases." *Id.* at 127. In *Perkins*, the power of the government to set a minimum wage for employees of government contractors was upheld. *See* 41 U.S.C. § 35 (1976).

sons covered by the statute. In fact the unsatisfactory enforcement efforts of the OFCCP, the agency charged with responsibility for enforcing the Act, suggests that the absence of a private cause of action for qualified handicapped individuals may undermine the congressional purposes of Section 503. The increasing stress of the OFCCP on compliance reviews of federal contractors suggests that a private cause of action will provide a necessary supplement to agency action. Athough the states have taken some steps toward eliminating handicap bias, a federal cause of action based on Section 503 would not offend any state programs, primiarly because of the contractual relationship between the United States and federal contractors.

There are a number of pitfalls and limitations on a private right of action against a federal contractor. Time and expense are two major considerations which any person contemplating a private action cannot ignore. The doctrines of primary jurisdiction and exhaustion of administrative remedies are also likely to pose some problems for the potential handicap discrimination plaintiff. However, before considering these matters, the potential plaintiff may also want to examine an alternative direct civil action theory based on contract doctrine.

## DIRECT CIVIL ACTION AGAINST NON-COMPLIANT FEDERAL CONTRACTORS UNDER SECTION 503: THIRD PARTY BENEFICIARY

Although Section 503 lawsuits brought by private litigants against non-compliant government contractors have focused on the *Cort v. Ash* analysis, a theory of relief sounding in contract deserves attention. A qualified handicapped individual who is employed by or is an applicant for employment with a government contractor is a third-party beneficiary of the contract between the United States and the contractor by virtue of the non-discrimination clause prescribed by Section 503. The handicapped individual must establish that the contract has bestowed upon him rights which he can enforce. In contract terms, the plaintiff must prove that he is an intended beneficiary of the contract. Although the law is somewhat unsettled on this issue, there are indications which suggest the availability of a contractual remedy.

Modern contract doctrine suggests that a contract remedy is available for qualified handicapped individuals under the non-discrimination clause.[187] Section 145 of the RESTATEMENT (SECOND)

187. *See* RESTATEMENT (SECOND) OF CONTRACTS § 133 (Tent. Drafts No.'s 1-7 (1973).

OF CONTRACTS states that third party beneficiaries may sue to enforce their rights under a government contract unless such law suits would contravene the policy of the law authorizing the contract or prescribing remedies for its breach.[188] The rationale accompanying the RESTATEMENT indicates that provision in the statute for government control over the litigation and settlement of claims is a factor which would make a direct action against a contractor inappropriate.[189] Although there is an interest in orderly enforcement of the Act by the compliance agency, it is apparent that the OFCCP is increasingly putting its enforcement efforts on compliance reviews and prospective remedies.[190] This change in focus militates in favor of a supplemental private remedy for specific acts of non-compliance causing damage to individual handicapped employees.

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188. The RESTATEMENT (SECOND) clearly would consider qualified handicapped persons intended beneficiaries within the meaning of § 133, which states:

> (1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and . . . (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.

The intent to benefit handicapped individuals is self-evident from Section 503. Moreover, the recognition of a right to performance in the beneficiary is explicit in the statute's grant of a right to file a complaint with the Department of Labor in the event of contractor non-compliance. Section 135 of the RESTATEMENT (SECOND) indicates that an intended beneficiary can enforce the contract duty created by Section 503 of the Rehabilitation Act. RESTATEMENT (SECOND) OF CONTRACTS § 135 (Tent. Draft Nos. 1-7 (1973).

Special rules dealing with government contracts were adopted in the RESTATEMENT (SECOND):

> (1) The rules stated in this Chapter apply to contracts with a government or governmental agency except to the extent that application would contravene the policy of the law authorizing the contract or prescribing remedies for its breach.
>
> (2) In particular, a promisor who contracts with a government or governmental agency to do an act for or render a service to the public is not subject to contractual liability to a member of the public for consequential damages resulting from performance or failure to perform unless
>
> (a) the terms of the promise provide for such liability; or
>
> (b) the promisee is subject to liability to the member of the public for the damages and a direct action against the promisor is consistent with the terms of the contract and with the policy of the law authorizing the contract and prescribing remedies for its breach.

*Id.* at § 145.

189. *Id.* at § 145, Comment a.

190. *See* United States Department of Labor, COMPLIANCE REVIEW PROCEDURES, *supra* note 56, at 9; [1978] Transfer Binder EMPL. PRAC. DEC. (CCH) ¶ 5027.

The doctrine of the RESTATEMENT also requires that the terms of the promise to the government provide for liability to third parties damaged by a breach.[191] The apparent purpose of this requirement is to limit the contractor's liability to those matters within the contemplation of the parties. The non-discrimination clause does not provide explicitly for liability to pay damages to handicapped individuals. This promise, however, can be implied from the clause. The non-discrimination clause, which states that the contractor will not discriminate against qualified handicapped individuals in any employment practice, also provides that the contractor may be subject to actions for non-compliance.[192] The OFCCP has already taken the position that back wages are an appropriate remedy for non-compliance.[193] Permitting individual handicapped persons to recover back wages or seniority will not expose the contractor to any greater liability than anticipated at the outset of the agreement.[194]

No cases have been decided under Section 503 on third party beneficiary analysis,[195] but the Supreme Court recently indicated its willingness to accept this rationale in a related context. In *Lau v. Nichols*,[196] the Court granted relief to students in the San Francisco school system claiming discrimination on the basis of national origin.[197] The plaintiffs asserted their rights as third party beneficiaries of a contract between the government and the school system through which the school received federal financial

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191. *See* note 188 *supra*.

192. 41 C.F.R. §§ 60-741.4, 741-28 (1977).

193. *See* 65 UNITED STATES DEP'T. OF LABOR ANN. REP. FISCAL YEAR 1977 58 (1978).

194. Permitting recovery on the contract may in fact be better for the contractor than an implied remedy in terms of keeping liability within anticipated bounds. A contractual remedy would be limited by the rule of Hadley v. Baxendale, 156 Eng. Dep. 145 (1854). On the other hand, a suit on an implied remedy might include damages resulting from emotional suffering. The court's dismissal of Woods v. Diamond State Tel. & Tel., 440 F. Supp. 1003 (D. Del. 1977), a Section 503 suit, was in part based on reluctance to expose federal contractors to excessive liability based on emotional distress caused by handicap discrimination. *Woods* was brought on an implied remedies theory under Section 503. *Cf.* Rogers v. Exxon Research and Eng'r Co., 404 F. Supp. 324 (D.N.J. 1975) (court permitted recovery for pain and suffering incurred by an employee forced into retirement in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621).

195. *But see* Whittaker v. University of New York, No. 77C-2258 (E.D.N.Y., filed Nov. 14, 1977), in which the plaintiff alleged employment discrimination on the basis of handicap in violation of Section 504. The plaintiff sued as a third party beneficiary of a federal financial assistance contract.

196. 414 U.S. 563 (1974).

197. *Id.* at 569.

assistance. In return for the financial assistance, the Court found that the school system contractually agreed not to discriminate on the basis of national origin, pursuant to Section 601 of the Civil Rights Act.[198]

Similarly, in *Gomez v. Florida State Employment Services*,[199] the Fifth Circuit Court of Appeals held that migratory farm workers could assert third party beneficiary rights in contracts entered under the Wagner-Peyser Act.[200] That Act provides a substantial portion of the funding for state employment agencies. The court found that by accepting funds from the federal government, the state becomes contractually bound to the regulations governing employment services as promulgated by the Department of Labor. Likewise, employers who utilize the services of federally funded state agencies also become contractually bound to the regulations. The court held that migratory farm workers who were recruited by employers through these agencies could enforce the Department of Labor regulations relating to housing and terms of employment as third party beneficiaries of the contracts.[201]

The analogy of *Lau* and *Gomez* to a law suit brought under Section 503 is obvious. Government contractors agree to certain terms and conditions in their contract for the benefit of qualified handicapped individuals. These persons are in the best position to enforce these provisions of the contract and will experience harm if they are not enforced.[202] Therefore, a qualified handicapped individual should be entitled to bring an action to enforce his rights as a third party beneficiary.[203] Of course a suit brought under either an implied

198. 42 U.S.C. § 2000d (1976). This section was the model for Section 504 of the Rehabilitation Act. 414 U.S. at 571 (Stewart, J., concurring).

199. 417 F.2d 569 (5th Cir. 1969).

200. 29 U.S.C. §§ 49 *et seq.* (1976).

201. 417 F.2d at 572. A third party beneficiary cause of action has also been upheld under the Hill-Burton Act, 42 U.S.C. §§ 291 *et seq.* (1976), which provides as a condition of receiving federal funds, a hospital must provide services to indigents. *See* Euresti v. Stenner, 458 F.2d 1115 (10th Cir. 1972); Corum v. Beth Israel Medical Center, 339 F. Supp. 909 (S.D.N.Y. 1973); Cook v. Ochaner Foundation Hosp., 319 F. Supp. 603 (E.D. La. 1970).

202. *See* Drennon v. Philadelphia General Hosp., 428 F. Supp. 809 (E.D. Pa. 1977). "The remedy sought in this case, the employment of plaintiff and members of her class in positions from which they were purportedly excluded in violation of the Rehabilitation Act, could not better foster the goals of the legislation in question." *Id.* at 815.

203. *But see* the following cases which have denied a private right of action under Executive Order 11246 on either a third party beneficiary or an implied remedies theory: Weise v. Syracuse University, 522 F.2d 397 (2d Cir. 1975); Farkas v.

remedies theory or third party beneficiary theory still confronts other issues; in particular the doctrines of exhaustion of administrative remedies and primary jurisdiction.

## EXHAUSTION OF ADMINISTRATIVE REMEDIES AND PRIMARY JURISDICTION

The doctrines of exhaustion of administrative remedies and primary jurisdiction are issues in a lawsuit against a non-compliant federal contractor regardless of whether the suit is brought on an implied remedies theory, third party beneficiary theory, or both. Where applicable, exhaustion of administrative remedies is a precondition to a lawsuit. The doctrine requires that before a plaintiff may bring an action to the court he must seek whatever relief is available to him from an agency which has jurisdiction over the controversy.[204] Primary jurisdiction, on the other hand, involves the question of whether an agency or a court should make a determination in an action over which the court properly has jurisdiction. If the court decides that an agency has particular expertise in an area, then the court may defer to the agency in order to obtain the benefit of that expertise while retaining jurisdiction over the suit.[205]

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Texas Instruments, Inc., 375 F.2d 629 (5th Cir. 1976), *cert. denied*, 389 U.S. 977 (1968); Farmer v. Philadelphia Electric Co., 329 F.2d 3 (3d Cir. 1964); Traylor v. Safeway Stores, Inc., 402 F. Supp. 872 (N.D. Cal. 1975); Braden v. University of Pittsburgh, 392 F. Supp. 188 (W.D. Pa. 1975).

The Executive Order 11246 cases are distinguishable on several grounds from actions brought under Section 503 of the Rehabilitation Act. First, all of the cases except *Traylor* were decided before the Supreme Court decided *Cort v. Ash*. Consequently, the analysis of the Executive Order was undertaken without the benefit of the factors considered relevant in *Cort*. Secondly, alternative means of enforcing the rights guaranteed the protected class of Executive Order 11246 are available under 42 U.S.C. § 1981, which gives discriminatees the right to sue. *See* Lewis v. FMC Corp., 11 FAIR EMPL. PRAC. (BNA) 31, 34 (N.D. Cal. 1975). On the other hand, handicapped persons have no alternative federal means of protecting their rights to be free from discrimination in employment. Finally, there is some doubt as to whether the President has the ability, without congressional action, to create a right by Executive Order which can be enforced by a private cause of action. *See* Masco v. United Airlines, 13 FAIR EMPL. PRAC. (BNA) 1549, 1551 (W.D. Pa. 1976). There is after *Cort* no doubt that a private cause of action can be implied from a federal statute. Consequently, the cases decided under Executive Order 11246 are not precisely on point with cases brought under Section 503.

204. *See* K. DAVIS, ADMINISTRATIVE LAW TREATISE § 20.01 (1958), for a detailed analysis of the exhaustion rule.

205. *See id.* at § 19.01. The principle of primary jurisdiction was clearly articulated in MCI Communications Corp. v. American Tel. & Tel. Co., 496 F.2d 214 (3d Cir. 1974):

> The doctrine of primary jurisdiction has been developed by courts in order to avoid conflict between the courts and an administrative agency

In the Section 503 context, the court will likely consider both exhaustion and primary jurisdiction.

A court may require a plaintiff under Section 503 to exhaust the complaint procedure with the OFCCP before bringing suit against a contractor. The reason likely to be advanced in support of this requirement is that a private remedy should not be permitted to undercut effective administrative remedies already provided or unnecessarily burden the courts.[206]

Countering this argument is the question of whether the administrative alternative under Section 503 is reasonable. When exhausting administrative remedies would take an unreasonable amount of time with a substantial likelihood that the plaintiff would not receive the relief he is entitled to, the usual necessity of exhaustion is not required.[207] When unreasonable delays occurred in actions brought before the National Railroad Adjustment Board, the Supreme Court held that wrongfully discharged employees could seek direct relief in the courts.[208] Similarly, in *Allen v. State Board of Elections*,[209] the Court held that because of the Attorney General's limited staff, individual plaintiffs could seek direct relief in the courts from violations of the Voting Rights Act.[210] In both of these situations, the Court was impressed with the fact that the agencies empowered to enforce the rights involved were inadequate. The OFCCP's clear inadequacy in enforcing Section 503 militates against requiring exhaustion.

On the other hand, a court which waives exhaustion of administrative remedies as a formal pre-condition to suit might still invoke the doctrine of primary jurisdiction. Similar to exhaustion, the rationale of primary jurisdiction is to avoid waste of judicial energy

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> arising from either the court's lack of expertise with the subject matter of the agency's regulation or from contradictory rulings by the agency and the court. Under the doctrine, a court should refer a matter to an administrative agency for resolution, even if the matter is otherwise properly before the court, if it appears that the matter involves technical or policy considerations which are beyond the court's ordinary competence and within the agency's particular field of expertise.

*Id.* at 220.

206. *See* Lewis v. Western Airlines, Inc., 379 F. Supp. 684, 688 (C.D. Cal. 1974).

207. Duran v. City of Tampa, 451 F. Supp. 954 (M.D. Fla. 1978).

208. Walker v. Southern Ry. Co., 385 U.S. 196 (1966). *See also* Smith v. Illinois Bell Tel. Co., 270 U.S. 587 (1926) (Court refused to require exhaustion because of the two year agency delay).

209. 393 U.S. 544 (1966).

210. *Id.*

by having matters decided at the agency level whenever feasible. Additionally, primary jurisdiction is one means of avoiding adjudications inconsistent with agency determinations in an area in which an agency has special expertise.[211] With respect to conservation of judicial energy, again the unreasonable delays by the OFCCP and unsatisfactory resolution of the complaints it receives weighs against referral of an aspect of the suit to the agency.[212] These factors arguably outweigh the burdens placed on the judicial system because they threaten to undermine the rights which Section 503 guarantees.

Moreover, there is no compelling reason to defer to agency expertise in the Section 503 context. The OFCCP is not a highly specialized agency delegated broad discretionary powers in a comprehensive scheme of regulation. Because applicants and employees covered by the Act must be qualified to perform the essential job functions in question, courts can apply traditional concepts of discrimination.[213] The courts already possess a vast amount of experience in this type of discrimination, thereby obviating the need to defer to agency expertise.

An appealing alternative to both exhaustion of administrative remedies and primary jurisdiction was recently suggested in a law suit brought by a private litigant under Section 504 of the Act. In *Whitaker v. City University of New York*,[214] the Department of Health, Education and Welfare recognized a private right of action

211. *See* note 198 *supra*. In Natural Resources Defense Council, Inc. v. Morton, 388 F. Supp. 829 (D.D.C. 1974), a case involving enforcement of the National Environmental Policy Act (NEPA) by the Bureau of Land Management (BLM), the court refused to invoke the doctrine of primary jurisdiction. The court noted that it would be less willing to consider the claims of the plaintiffs if the BLM had demonstrated more diligence in pursuing its role. However, withholding a decision on the merits until the BLM made a final determination, the court held, would thwart congressional intent, reducing NEPA to a "paper tiger." *Id.* at 835-36. The court maintained that granting a stay of proceedings pending an agency decision was a matter that was within the discretion of the court to be based on all the facts and circumstances presented. *Id.*

212. The fact that the OFCCP does not have broad discritionary powers in a comprehensive scheme of regulation also distinguishes the Section 503 situation from that presented to the court in *Amtrack*, discussed at notes 137 to 147, *supra*. In *Amtrack*, there was a clear danger that multiple litigation would undermine congressional goals of increasing passenger service efficiency by discontinuing unprofitable routes. 414 U.S. at 460-61. That danger is clearly not present under Section 503. Rather than undermining congressional goals, private litigation will substantially advance them.

213. *See* text *supra*, at notes 42 to 49.

214. Whitaker v. City Univ. of New York, 77C-2258 (E.D.N.Y., filed Nov. 14, 1977).

as a desirable and effective means of enforcing the non-discrimination requirements of the companion to Section 503, Section 504, which covers recipients of federal financial assistance.[215] HEW opposed the requirement of exhaustion of administrative remedies, and presumably primary jurisdiction, on the ground that the administrative procedures are, like Section 503's, primarily designed to enforce the terms of the contract between the government and the recipients of federal funds. The remedy of cutting off these funds, HEW maintained, was not an appropriate form of relief for individual instances of discrimination. HEW nevertheless recognized that it has an obligation to aid the court in interpreting the Section 504 regulations. To that end the Department had petitioned the court for permission to enter the case as *amicus curiae* in order to present to the court its interpretations of the regulations.[216] A similar position to that of HEW taken by the OFCCP would be persuasive to a court faced with the issue under Section 503.

Although the OFCCP has not taken a position with respect to private rights of action under Section 503 of the Rehabilitation Act, the view of HEW on Section 504 seems to be peculiarly appropriate. This is especially true in light of the fact that Congress expressed a strong desire that Sections 503 and 504 be interpreted consistently.[217] Moreover, the OFCCP has already recognized that it functions more effectively by conducting compliance reviews of contractors than by processing individual complaints.[218] The complaint backlog and the apparent lack of commitment by the OFCCP also suggests the lack of adequate relief from contractor non-compliance. These factors suggest that the courts and the OFCCP should consider *amicus* participation by the agency as an alternative to strict application of the doctrines of exhaustion of remedies and primary jurisdiction in a Section 503 lawsuit.

## CONCLUSION

Section 503 of the Rehabilitation Act represents the most far-reaching achievement of Congress to date in expanding employment opportunities for handicapped persons in the private sector. Although its application is limited to government contractors, the pervasive influence of government contracts on the employment

215. *Id.*
216. *Id. See* Note, *Implying Civil Remedies*, *supra* note 117, at 294 n.63.
217. 120 CONG. REC. 30534 (1974).
218. DEPARTMENT OF LABOR, COMPLIANCE REVIEW PROCEDURES, *supra* note 56, at 9.

market is indisputable. Moreover, the Department of Labor's broad interpretation of the Act has contributed to its over-all impact. The Section 503 non-discrimination mandate will clearly have an enormous effect on employment opportunities for mentally and physically impaired persons.

Unfortunately, ineffective enforcement of Section 503 requirements by the OFCCP threatens to undermine the aggressive and far-reaching goals of the Act. The OFCCP has demonstrated that it is both unwilling and incapable of enforcing the rights of handicapped persons protected by Section 503. Instead, the agency has focused on directed compliance reviews of government contractor's affirmative action programs. Although directed compliance reviews may be an effective means for eliminating blatant systematic violations of the non-discrimination requirements, these reviews do little to either remedy the effects of past discrimination or to encourage voluntary compliance. This lack of vigorous pursuit of individual claims substantially lessens the benefits of the Act.

On the other hand, a handicapped individual has a number of legal options which he may exercise to enforce his rights and thereby accomplish the goals of the Act. One of these alternatives is a mandamus action against the OFCCP to compel it to perform its duties. However, the most effective enforcement tool which may be available to plaintiffs is a direct civil action against a non-compliant contractor on either an implied remedies or third party beneficiary contract theory. The Act does not specifically provide for direct civil actions against government contractors and there is no clear evidence in the legislative history that one was intended. However, the Supreme Court has taken the position that it is the duty of the courts to adjust their remedies to ensure that the purposes of Congress are not frustrated. The courts are now in an excellent position to fulfill that duty by implying a private remedy under Section 503 or by permitting one on a third party beneficiary contract theory.

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