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# THE AMERICANS WITH DISABILITIES ACT: NIGHTMARE FOR EMPLOYERS AND DREAM FOR LAWYERS?

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## I. INTRODUCTION

For the first time in over twenty years, Congress has passed what truly may be described as major civil rights legislation. The Americans with Disabilities Act ("ADA"),[1] directed at discrimination against disabled Americans, represents one of the first concrete fulfillments of President Bush's campaign promise to create a "kinder, gentler America." A major component of the statute, Title I, is designed to prohibit employment discrimination against the disabled. Its lofty goal is to help millions of people with disabilities who want to work but cannot find jobs. However, the ADA is also likely to create major difficulties for employers trying to comply with the new law, and thus it may become a source of frequent litigation.

The ADA enjoyed, not only the support of the Bush Administration, but widespread support in both the Senate and the House of Representatives. The Senate passed its version of the ADA on September 7, 1989 by a vote of 76 to 8.[2] The House version of the

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[1] Americans with Disabilities Act, Lab. Rel. Rep. (BNA) No. 136 (July 16, 1990) [hereinafter "ADA"].

[2] *Senate Passage of Civil Rights Bill Moves Debate Over Disabled to House*, Daily

legislation was passed by a vote of 403 to 20 on May 22, 1990.[3] The Bill was signed into law by President Bush on July 26, 1990 with the considerable fanfare usually accompanying such historic moments.[4] Despite the Bill's rapid march through Congress—it was first introduced in both Houses on May 9, 1989[5]—the ADA has evolved over a period of at least seventeen years. By the late 1960's, after Congress enacted Title VII of the Civil Rights Act of 1964[6] and the Age Discrimination in Employment Act of 1967,[7] concern about protecting disabled Americans was already growing.[8] In fact, by the early 1970's Congress had prepared and passed the Rehabilitation Act of 1973[9] to protect disabled Americans. The Rehabilitation Act, however, covered only federal contractors,[10] recipients of federal financial assistance, and the executive branch of the federal government.[11] Many believed that an amendment to Title VII to protect disabled persons would follow shortly after a shake-out period and some experience with the Rehabilitation Act. However, because of the unique problems encountered in protecting the disabled, revealed partly through the Rehabilitation Act's enforcement, the shake-out period took much longer than anyone expected.

A strong case can be made for protecting disabled individuals from all forms of discrimination, including employment discrimination. According to a Lou Harris poll contained in the Senate Report to its version of the Bill, "two thirds of all disabled Americans between the age[s] of 16 and 64 are not working at all," yet "[s]ixty-six percent of working-age disabled persons, who are not

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Lab. Rep. (BNA) No. 174, at A-5 (Sept. 11, 1989).

[3] *House Overwhelmingly Approves Bill to Bar Employment Bias Against Disabled*, Daily Lab. Rep. (BNA) No. 100, at A-16 (May 23, 1990).

[4] *See* N.Y. Times, July 27, 1990, at 26, col. 1.

[5] *Bill to Prohibit Employment Discrimination Against Disabled Introduced Into Senate, House*, Daily Lab. Rep. (BNA) No. 90, at A-7 (May 11, 1989).

[6] Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 253 (1964) (codified as amended at 42 U.S.C. §§ 2000e-2000e-17 (1988)).

[7] Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (1967) (codified as amended at 29 U.S.C. §§ 621-34 (1988)).

[8] *See, e.g.*, S. REP. No. 318, 93rd Cong., 1st Sess. 2-3, *reprinted in* 1973 U.S. CODE CONG. & ADMIN. NEWS 2076, 2077-91 (Committee on Labor and Public Welfare's report supporting passage of Rehabilitation Act of 1973).

[9] Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (1973) (codified as amended at 29 U.S.C. §§ 701-796 (1988)).

[10] *Id.* § 793.

[11] *Id.* § 794.

working, say that they would like to have a job."[12] The poll also revealed that "[e]ighty-two percent of people with disabilities said they would give up their government benefits in favor of a full time job."[13] Moreover, it also uncovered that "[i]n 1984, fifty percent of all adults with disabilities had household incomes of $15,000 or less. Among non-disabled persons, only twenty-five percent had household incomes in this wage bracket."[14]

One basic problem with legislation protecting the disabled, in contrast to other civil rights legislation in the employment field, is that disabled persons do not fall into distinct categories, such as male or female, under or over forty, or black, white, or hispanic. Who is considered disabled is a fundamental question that is not always easily answered. There are other significant distinctions as well. The following analysis demonstrates that the ADA, perhaps out of necessity, forces an individualized inquiry into many of the issues surrounding its enforcement. An inquiry is made to determine: (1) who is disabled; (2) who is a "qualified individual," notwithstanding his or her disability; and (3) whether that otherwise qualified person can be accommodated to perform the job for which he or she has applied or has been hired without undue hardship to the employer. The accommodation requirement distinguishes the ADA from almost every other legislation of this kind, by forcing the employer to apply an unequal, rather than an equal treatment standard. Hence, even with the seventeen years experience of the Rehabilitation Act, it is no surprise that Title I will not become effective for the twenty-four months following its enactment.[15] During this period, the Equal Employment Opportunity Commission ("EEOC") must issue regulations which will explain this otherwise comprehensive legislation.[16] Even after this exceptionally long gestation period, the ADA will become a lawyer's dream and an employer's nightmare.

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[12] S. REP. No. 116, 101st Cong., 1st Sess. 9 (1989) [hereinafter SENATE REPORT].

[13] *Id.*

[14] *Id.*

[15] ADA, *supra* note 1, § 108, at S-5.

[16] *Compare* ADA, *supra* note 1, § 107, at S-4, 5, *with* Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (1973) (codified as amended at 29 U.S.C. §§ 701-796 (1988)) (Rehabilitation Act contains fewer details regarding employment discrimination).

## II. An Overview of the ADA

### A. *A Blend of Title VII and the Rehabilitation Act*

The ADA is a broad civil rights statute banning discrimination on the basis of disability, not only in the area of employment, but also in public transportation,[17] public accommodation,[18] and telephone services and communications.[19] This Article will focus on Title I of the ADA, which prohibits employment discrimination.

For the most part, Title I was carefully crafted to tie in Title VII of the Civil Rights Act of 1964 with sections 503 and 504 of the Rehabilitation Act of 1973 and its implementing regulations. The effort to blend these provisions together is obvious to employment law practitioners. Further, the legislative history reveals that this was the goal behind Title I. In fact, the Senate Report states:

> Title I of the ADA specifies that an employer, employment agency, labor organization, or joint labor-management committee may not discriminate against any qualified individual with a disability in regard to any term, condition or privilege of employment. The ADA incorporates many of the standards of discrimination set out in regulations implementing Section 504 of the Rehabilitation Act of 1973, including the obligation to provide reasonable accommodations unless it would result in an undue hardship of the operation of the business. The ADA incorporates by reference the enforcement provisions under Title VII of the Civil Rights Act of 1964 [including injunctive relief and backpay].[20]

### B. *A Summary of the Provisions*

The provisions of the ADA can be rather easily summarized, notwithstanding a number of potential legal pitfalls which also will be discussed.

"Disability" is defined in section three of the Act to mean "with respect to an individual—(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such impairment; or (C) being regarded as having such impairment."[21] This definition is

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[17] *See* ADA, *supra* note 1, subtit. B, at S-5.

[18] *See id.* tit. III, S-9.

[19] *See id.* tit. IV, S-13.

[20] Senate Report, *supra* note 12, at 2.

[21] ADA, *supra* note 1, § 3(2), at S-3.

comparable to the definition of the term "handicapped individual" found in section 7 of the Rehabilitation Act of 1973.[22] One interesting yet minor change, is the use of the term "disability" instead of "handicap."[23] This change represents an effort by Congress to make use of currently accepted, up-to-date terminology. During the hearings on this legislation, individuals with disabilities and organizations representing them objected to the use of such terms as "handicapped persons" or "the handicapped."[24]

Title I itself defines a "qualified individual with a disability" as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[25] A "qualified individual" does not include any employee who is a current user of illegal drugs.[26]

The next step prohibits covered entities from discriminating "against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."[27] Discrimination also includes the failure of an employer to make "reasonable accommodations to the known physical or mental limitations" of the qualified individual who is an applicant or employee, unless the employer can demonstrate that the accommodation would impose an "undue hardship on the operation of [its business]."[28] It is also discrimination under the ADA to deny an employment opportunity to a qualified individual with a disability because of the need to reasonably accommodate him or her.[29]

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[22] *See* Rehabilitation Act of 1973, Pub. L. No. 93-112, § 7(6), 87 Stat. 361 (1973) (codified as amended at 29 U.S.C. §§ 701-796 (1988)).

[23] SENATE REPORT, *supra* note 12, at 21.

[24] H.R. REP. No. 485, 101st Cong., 2d Sess. § 2, at 50. It is, perhaps, reminiscent of similar changes in terminology to reflect sensitivities of protected groups, such as from "Colored" to "Negro" to "Black" to "African-American."

[25] ADA, *supra* note 1, § 101(8), at S-3.

[26] *Id.* § 104(a), at S-4. However, an individual who is otherwise handicapped shall not be excluded from the protections of this Act if such individual also uses or is addicted to drugs. *Id.*

[27] *Id.* § 102(a), at S-3. Compare the regulations implementing section 794 of the Rehabilitation Act of 1973. *See* SENATE REPORT, *supra* note 12, at 25; *see also* 42 U.S.C. § 2000e-2(a)(1) (1988).

[28] ADA, *supra* note 1, § 102(b)(5)(A), at S-3; *see also* 41 C.F.R. § 60-3 (1989).

[29] ADA, *supra* note 1, § 102(b)(5)(B), at S-3.

The ADA devotes specific attention to medical examinations and inquiries of job applicants. Generally, these are prohibited, except that an inquiry may be made to determine the ability of an applicant to perform job-related functions. Medical examinations may only be conducted *after* an offer of employment has been made, provided that all entering employees are examined and the information is kept confidential.[30] Testing for the use of illegal drugs, which is not considered a medical examination within the meaning of the statute, is excepted from the rule.[31]

Once employment begins, an employer may not require medical examinations or conduct inquiries "unless such examination or inquiry is shown to be job-related and consistent with business necessity."[32]

Section 103 sets forth three limited defenses to charges of discrimination under the ADA. First, an employer may assert the defense of business necessity, premised on job-relatedness, to a charge "that an alleged application of qualification standards, tests, or selection criteria . . . screen out or tend to screen out" disabled individuals, i.e., disparate impact claims.[33] Second, an employer "may include a requirement that an individual [with a currently contagious disease or infection] shall not pose a direct threat to the health or safety of other individuals in the workplace."[34] Finally, an employer may assert a religious entity defense similar to the one in Title VII.[35]

Section 104 of the Act addresses the problems of alcohol and illegal drugs. In general, employers may prohibit the use of alcohol or illegal drugs at the workplace; may require that employees not be under the influence of alcohol or illegal drugs at the workplace; and may require that employees conform their behavior to require-

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[30] *Id.* § 102(c)(3), at S-3, 4. According to the Senate Report, "all entering employees" may be limited to a *category* of employees, such as all police officers, as compared to all city employees. SENATE REPORT, *supra* note 12, at 39. This provision can be a trap for the unwary. If an offer is withdrawn after the prospective employee has submitted to a medical exam, a *prima facie* case of discrimination is established. The employer must then be prepared to defend his actions by offering a reason acceptable under ADA guidelines.

[31] ADA, *supra* note 1, § 102(c)(4), at S-4.

[32] *Id.*

[33] *Id.* § 103(a), at S-4.

[34] *Id.* § 103(b), at S-4.

[35] *Compare id.* § 103(c) *with* 42 U.S.C. § 2000e-1 (1988) (both Americans with Disabilities Act and Civil Rights Act exempt religious bodies from prohibition on employment of persons of particular religious belief).

ments established under the Drug Free Workplace Act.[36] Drug users or alcoholics may be held to the same standard for employment or job performance to which the employer holds other individuals.[37]

Section 105 requires the employer to post notices "describing the applicable provisions of the Act."[38] Section 106 requires the EEOC to issue regulations within one year of the date of enactment, and section 108 provides that Title I will be effective twenty-four months from the date of enactment.[39] Of greatest import is section 107, which ties enforcement of the ADA to Title VII of the Civil Rights Act by providing that the remedies and procedures of Title VII shall apply to the ADA.

## III. A Critical Look

### A. *Coverage and Enforcement*

The two areas where the ADA will have the most far-reaching and immediate impact are: (1) coverage, which has been greatly expanded; and (2) enforcement, which will be stepped up. These changes are straightforward and are not likely to lead to a significant amount of appellate litigation to determine their application.

Presently, the Rehabilitation Act of 1973 covers two types of employers. The first group is government contractors, who are covered by section 503. Specifically, this section applies to any contract or subcontract in excess of $2,500 and requires the contractors and subcontractors to take affirmative action to employ and advance qualified individuals with disabilities.[40] The second group of employers, covered by section 504, applies to recipients of federal financial assistance and any executive agency of the federal government, including the United States Postal Service.[41] Section 504 applies primarily to state and local governmental agencies, and

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[36] 41 U.S.C. §§ 701-707 (1988).

[37] ADA, *supra* note 1, § 104, at S-4.

[38] *Id.* § 105, at S-4.

[39] *Id.* §§ 106, 108, at S-4, 5. The EEOC has had 17 years of similar experience with the Rehabilitation Act. It should not take the EEOC a protracted length of time to promulgate regulations, although it probably will. The shortcomings of the Act, discussed at length below, are not going to be solved by more time. If solved at all, it will be done by the evolution of the case law or statutory amendment.

[40] 29 U.S.C. § 793 (1990).

[41] *Id.* § 794.

colleges, universities, and public schools. Rarely is federal financial assistance provided to the private, for-profit employer.[42] While the government contractor language covers most large employers and a relatively high percentage of employees, it leaves unprotected a significant number of employees who work for private organizations.[43]

Four years from the date of its enactment, the ADA will cover all employers with fifteen or more employees,[44] making its coverage identical to that of Title VII. For the first two years after its enactment, however, there is an exception for employers with fifteen to twenty-four employees.[45]

Perhaps the most interesting and positive change in the coverage aspects of the Act is that Congress makes itself subject to the provisions of the Bill.[46] This is a commendable reform, as one of the most inequitable aspects of prior employment legislation has been Congress' practice of exempting itself from coverage, following a "do as I say, not as I do" approach.[47]

The enforcement provisions of the ADA are far more significant in many respects than the coverage provisions. Under section 503, enforcement was delegated to the U.S. Department of Labor, Office of Federal Contract Compliance Programs ("OFCCP").[48] While the OFCCP is a long-time enforcer of affirmative action programs under the Rehabilitation Act, an executive order,[49] and the Vietnam era Veterans' Readjustment Assistance Act of 1974,[50] it has been notoriously understaffed.[51] The OFCCP has maintained low visibility, and has been a poor stepsister of the EEOC. These weaknesses have significantly affected the enforcement of the Rehabilitation Act, particularly since a majority of courts have held that there is no private right of action under section 503 of the

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[42] *See id.*

[43] *See id.* § 793.

[44] ADA, *supra* note 1, § 101(5)(A), at S-3.

[45] *Id.*

[46] *Id.* § 509, at S-15.

[47] *See, e.g.*, 42 U.S.C. § 2000e(b) (1988) (excluding government agencies from definition of "employer" within meaning of Civil Rights Act).

[48] 29 U.S.C. § 793(b) (1990).

[49] Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (1965).

[50] 38 U.S.C. §§ 2021-2026 (1988).

[51] In fiscal year 1989, the Office of Federal Contract Compliance Programs (OFCCP) had an operating budget of $51,863,000 and a staff of 1,015 employees. In contrast to the OFCCP, the EEOC had an operating budget of approximately $194,624,000 and a staff of over 4,000.

Act.[52] Courts have upheld the OFCCP's discretionary authority over enforcement decisions.[53] Various other imaginative approaches to bring litigation of discrimination actions of persons with disabilities under this section have failed as well. For example, some courts have held that because employees with disabilities are not intended to be third party beneficiaries of government contracts, they are not permitted to sue employers under a third party beneficiary theory.[54]

A private right of action exists under section 504 of the Rehabilitation Act.[55] However, because it applies only to federal agencies and recipients of federal financial assistance, it has virtually no application to the private sector. While this private right of action applies only to federal agencies,[56] it is not limited to those programs where the primary purpose of federal funding is to promote employment.[57] There are, however, limitations, which may

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[52] *See, e.g.*, Hodges v. Atchison, Topeka & Santa Fe Ry., 728 F.2d 414 (10th Cir.) (former railroad employee has no private right of action against former employer under Rehabilitation Act when employee dismissed for incorrect statements on job application), *cert. denied*, 469 U.S. 822 (1984); Beam v. Sun Shipbuilding & Dry Dock Co., 679 F.2d 1077 (3d Cir. 1982) (former employee has no private right of action against former employer under Rehabilitation Act when employee alleges dismissal due to epilepsy).

[53] *See, e.g.*, Moon v. Donovan, 29 Fair Empl. Prac. Cas. (BNA) 1780 (N.D. Ga. 1982) (federal district court lacks jurisdiction to issue writ of mandamus against Secretary of Labor for failure to institute administrative action against government contractor that dismissed employee due to disability), *aff'd*, 747 F.2d 599 (11th Cir. 1984), *cert. denied*, 471 U.S. 1055 (1985).

[54] *See* D'Amato v. Wisconsin Gas Co., 760 F.2d 1474, 1483-84 (7th Cir. 1985); Howard v. Uniroyal, Inc., 719 F.2d 1552, 1556 (11th Cir. 1983); *see also* Meyerson v. Arizona, 709 F.2d 1235, 1238 (9th Cir. 1983) (plaintiff cannot circumvent rule that no private right of action exists by asserting section 793 rights via 42 U.S.C. section 1983), *cert. granted and judgment vacated*, 465 U.S. 1095 (1984).

[55] *See* Cousins v. Secretary of United States Dep't of Transp., 857 F.2d 37, 44-46 (1st Cir. 1988), *vacated on other grounds*, 880 F.2d 603 (1st Cir. 1989); Smith v. United States Postal Serv., 766 F.2d 205, 206 (6th Cir. 1985). Remedies for violations of section 504 are the same as those set forth in Title VII of the Civil Rights Act of 1964. *See* 42 U.S.C. § 2000e (1988).

[56] *See* 29 U.S.C. § 794 (1988); Consolidated Rail Corp. v. Darrone, 465 U.S. 624, 636 (1984).

[57] However, the Court found that Congress intended to prohibit "employment discrimination regardless of purpose of the federal financial assistance." *Darrone*, 465 U.S. at 635. The issues of what constitutes federal financial assistance and whether the timing of such assistance might affect the plaintiff's standing to sue have also been addressed. *See, e.g.*, Paralyzed Veterans of America v. Civil Aeronautics Bd., 752 F.2d 694, 707-08 (D.C. Cir. 1985) (board operating certificates held not to be federal financial assistance), *rev'd on other grounds*, 477 U.S. 597 (1986); Lemmo v. Willson, 583 F. Supp. 557, 560 (D. Colo. 1984) (certification of apprenticeship program by Department of Labor held not financial assistance); Bachman v. American Soc'y of Clinical Pathologists, 577 F. Supp. 1257, 1262 (D.N.J.

challenge plaintiffs to address various jurisdictional issues.[58]

Under the ADA, the issues of a private right of action and standing will virtually disappear because it adopts the Title VII procedures and remedies.[59] This will give disabled individuals the right to sue for reinstatement or hiring, retroactive compensation, and such other equitable relief the court deems appropriate.[60]

During the course of the ADA's enactment, controversy centered on its procedures and remedies. The initial versions of the Bill provided that enforcement would be consistent with the remedies and procedures set forth in Title VII and 42 U.S.C. section 1981. Under section 1981, the plaintiff is entitled to compensatory and punitive damages, and, more importantly, to a jury trial.[61] The Bush Administration opposed the inclusion of section 1981 remedies and procedures and conditioned its support for the ADA on the understanding that this portion of the Bill would be deleted.[62] The Senate's final version of the Bill reflected this trade off.[63] Before the House's version passed in the House, the Civil Rights Act of 1990 was introduced in Congress.[64] One of the Bill's provisions sought to amend Title VII to provide for punitive and compensatory damages and jury trials.[65] Since the Bush Administration believed that Congress had not lived up to its end of the bargain, Representative F. James Sensenbrenner, Jr. (R-Wis.) offered an amendment to the House version of the Bill that would have limited the ADA's remedies and procedures to the current remedies and procedures of Title VII, i.e., no punitive and compensatory damages or jury trials. The amendment failed in the House by a vote of 192 to 227, shortly before the ADA was passed.[66] While the Bush Administration strongly supported the Sensenbrenner amendment, the view that the ADA should provide

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1983) (agency no longer receiving assistance may be sued for discrimination that occurred while it was receiving assistance).

[58] For instance, the Court has interpreted the statute to ban discrimination only in the specific program receiving federal funds. *See Darrone*, 465 U.S. at 636.

[59] ADA, *supra* note 1, § 107(a), at S-4.

[60] 42 U.S.C. § 2000e-5(g) (1988).

[61] Johnson v. Railway Express Agency, 421 U.S. 454, 459-60 (1975).

[62] *Statement of Acting Assistant Attorney General James Turner Before House Small Business Committee on Americans with Disabilities Act*, Daily Lab. Rep. (BNA) No. 37, at D-1 (Feb. 23, 1990).

[63] *Id.* at D-3.

[64] *See* S. 2104, 101st Cong., 1st Sess. (1990); H.R. 4000, 101st Cong., 1st Sess. (1990).

[65] Daily Lab. Rep. (BNA) No. 37, at D-2 (Feb. 23 1990).

[66] Daily Lab. Rep. (BNA) No. 100, at A-16, 17 (May 23, 1990).

disabled persons with the same rights and remedies afforded to women and minorities under Title VII prevailed.[67] It appears, however, that this battle will be fought another day as the Civil Rights Act of 1990 winds its way to final consideration—with the ADA provisions following the same course as the rest of Title VII.

Although the foregoing changes in coverage, remedies, and procedures are significant and will impact immediately on the civil rights of the disabled when the ADA becomes effective, they will not present much of a challenge to the legal profession. In contrast, the issues discussed below are likely to present the greater challenge, as employers will have to grapple with them in the first instance, and the legal community thereafter.

### *B. Who is Protected?*

#### 1. Defining "Disability"

One of the issues likely to lead to considerable litigation is determining who is "disabled" within the meaning of the ADA. As previously indicated, there is no substantive difference between the term "disability," as used in the ADA, and the term "handicap," as used under the Rehabilitation Act.[68]

The first prong of the definition deals with an individual with a "physical or mental impairment that substantially limits one or more of the major life activities of such individual."[69] The Senate Report defines a "physical or mental impairment" as:

> (1) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or (2) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.[70]

However, the report goes on to say that "[i]t is not possible to include in the legislation a list of all the specific conditions, diseases, or infections that would constitute physical or mental impair-

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[67] *Id.*

[68] SENATE REPORT, *supra* note 12, at 21.

[69] ADA, *supra* note 1, § 3(2)(A), at S-3.

[70] SENATE REPORT, *supra* note 12, at 22.

ments."[71] Yet it also states that the term "physical or mental impairment" does not include simple physical characteristics (*e.g.*, blue eyes or black hair), the existence of a prison record, age, and sexual orientation.[72]

Of considerable importance are the issues concerning AIDS. Congress devoted much attention to the protection of persons with this disease. The Senate Report states that "a person infected with the Human Immunodeficiency Virus ("AIDS") is covered."[73] The coverage of AIDS was discussed again on the Senate floor by Senator Kennedy (D-Mass.), a sponsor of the legislation. He said that "the legislation implemented a recommendation of the Presidential Commission on the Human Immunodeficiency Virus Epidemic by

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[71] *Id.*

[72] *Id.*

[73] *Id.* This issue, however, was the last to be resolved in conference before the bill became law. On June 6, 1990, the Senate passed a motion to instruct Senate conferees to accept a House-passed amendment permitting employers to refuse to assign individuals with AIDS or HIV virus to food handling positions. The amendment was intended primarily to shield restaurants and other employers in the food industry from a possible loss of customers if they were forced under the ADA to place employees with AIDS or other communicable diseases in food handling jobs.

The House-approved amendment reads as follows:

> Food-Handling Jobs—It shall not be a violation of this Act for an employer to refuse to assign or continue to assign any employee with an infectious or communicable disease of public health significance to a job involving food handling, provided that the employer shall make reasonable accommodation that would offer an alternative employment opportunity for which the employee is qualified and for which the employee would sustain no economic damage.

Daily Lab. Rep. (BNA) No. 110, at A-12 (June 7, 1990). This issue was finally resolved in conference with the addition of section 103(d) to the ADA, which provides as follows:

> (d) LIST OF INFECTIOUS AND COMMUNICABLE DISEASES.—
>
> (1) IN GENERAL.—The Secretary of Health and Human Services, not later than 6 months after the date of enactment of this Act, shall—
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> (A) review all infectious and communicable diseases which may be transmitted through handling the food supply;
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> (B) publish a list of infectious and communicable diseases which are transmitted through handling the food supply;
>
> (C) publish the methods by which such diseases are transmitted; and
>
> (D) widely disseminate such information regarding the list of diseases and their modes of transmissability to the general public. Such list shall be updated annually.
>
> (2) APPLICATIONS.—In any case in which an individual has an infectious or communicable disease that it transmitted to others through the handling of food, that is included on the list developed by the Secretary of Health and Human Services under paragraph (1), and which cannot be eliminated by reasonable accommodation, a covered entity may refuse to assign or continue to assign such individual to a job involving food handling.

prohibiting discrimination against those who test positive for the AIDS virus."[74] This brought about extensive discussion on the Senate floor, including a floor amendment sponsored by Senator Armstrong (R-Colo.) specifying that the Bill does not cover " 'homosexuality,' 'bisexuality,' 'transvestism,' 'pedophilia,' 'transsexualism,' 'exhibitionism,' 'voyeurism,' 'compulsive gambling,' kleptomania or pyromania, gender identity disorders, current psychoactive substance use disorders, [and] current psychoactive substance-induced organic mental disorders . . . which are not the result of medical treatment, or other sexual behavior disorders."[75] Although the amendment eliminated a wide variety of disorders from coverage, persons who test positive for HIV still appear to be covered.

Disputes will inevitably arise over what constitutes a substantial limitation on "one or more of major life activities of [an] individual."[76] The Senate Report does not assist in answering this question as it merely states that "[p]ersons with minor, trivial impairments, such as a simple infected finger are not impaired in a major life activity."[77] Use of such an obvious and oblique example leaves unresolved, for example, the question of whether a person with a broken leg or other temporary disability is excluded.

Under the Rehabilitation Act, there have been numerous cases discussing the issue of whether an individual is handicapped.[78] For example, the Sixth Circuit has held that the term does not encompass characteristics that merely render an individual incapable of performing particular jobs.[79] Whether this ruling will apply to the ADA is yet to be determined. Furthermore, a district court has held that transitory illnesses, which have no permanent effect on a

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> (3) CONSTRUCTION.—Nothing in this Act shall be construed to preempt, modify, or amend any State, county, or local law, ordinance, or regulation applicable to food handling which is designed to protect the public health from individuals who pose a significant risk to the health or safety of others, which cannot be eliminated by reasonable accommodation, pursuant to the list of infectious or communicable diseases and the modes of transmissability published by the Secretary of Health and Human Services.

ADA, *supra* note 1, § 103(d), at S-4. Ironically, based upon current medical information, AIDS is not likely to make this list.

[74] Daily Lab. Rep. (BNA) No. 174, at A-6, 7 (Sept. 11, 1989).

[75] 135 CONG. REC. S10833 (daily ed. Sept. 7, 1989) (statement of Sen. Armstrong).

[76] ADA, *supra* note 1, § 3(2)(A), at S-3.

[77] SENATE REPORT, *supra* note 12, at 23.

[78] *See, e.g.*, cases cited *infra* notes 78-84.

[79] *See* Jasany v. United States Postal Serv., 755 F.2d 1244, 1249 (6th Cir. 1985).

person's health are not disabilities.[80] Neither the ADA nor its legislative history address this issue. The Fifth Circuit has held that left-handedness is not a disability.[81] The Fourth Circuit has maintained that acrophobia was not a disability where the plaintiff testified that his fear of heights had never affected his work prior to his present job.[82]

In *School Board of Nassau County, Florida v. Arline*,[83] the Supreme Court confronted the issue of whether a person with a contagious disease is handicapped within the meaning of section 504 of the Rehabilitation Act. The Court ruled that the Rehabilitation Act covers any contagious disease which substantially limits a major life activity of an otherwise covered person.[84] The *Arline* Court focused on the third prong of the definition of handicap/disability, that of an individual "regarded as having such an impairment." The Court in *Arline* explained: "Such an impairment might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment."[85]

Varying interpretations of the second and third prongs of the statutory definition of "disability" may occasionally lead to litigation. The first prong, however, is more susceptible to expansion and will probably be the subject of substantial litigation.

2. Defining "Qualified Individual with a Disability"

More troublesome than the definition of disability is the issue of who is a "qualified individual with a disability." Section 101(8) of the ADA defines such a person as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[86]

The definition hinges largely on the phrase "essential functions." The Senate Report provides that "the phrase 'essential

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[80] *See* Stevens v. Stubbs, 576 F. Supp. 1409, 1414 (N.D. Ga. 1983).

[81] *See* de la Torres v. Bolger, 781 F.2d 1134, 1137 (5th Cir. 1986).

[82] Forrisi v. Bowen, 794 F.2d 931, 934 (4th Cir. 1986).

[83] 480 U.S. 273 (1987).

[84] *Id.* at 284.

[85] *Id.* at 283.

[86] ADA, *supra* note 1, § 101(8), at S-3. Comparable terms are found in sections 501 and 504 of the Rehabilitation Act. *See* Rehabilitation Act of 1973, Pub. L. No. 93-112, §§ 501, 504, 87 Stat. 355 (1973) (codified as amended at 29 U.S.C. §§ 791, 794 (1988)).

functions' means job tasks that are fundamental and not marginal," and that "[t]he point of including this phrase within the definition . . . is to ensure that employers can continue to require that all applicants and employees, including those with disabilities, are able to perform the essential, i.e., non-marginal functions of the job in question."[87] The report further states that "the employer's judgment regarding what functions are essential as a matter of business necessity" should be given consideration.[88] Again we are faced with the question of what functions are essential. Assuming, *arguendo*, that any function which accounts for fifty percent of a job is essential, we must ask, what about thirty-three percent, twenty percent, or ten percent? Is a percentage even a relevant consideration? Moreover, in a multi-dimensional job there are usually several necessary functions. This is particularly true for professionals and those in management. What individual functions are "essential"? Maybe no individual function by itself is truly essential. If one function is not essential, do two or three or more in combination become "essential"? Truly absurd results could ensue if combinations are not allowed.

Employers may take some solace from that part of the definition of "essential functions" which states:

> For the purposes of this title, *consideration* shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description *shall be considered evidence* of the essential functions of the job.[89]

For the most part, however, this provision will not be very reassuring to employers on closer reading. Merely giving "consideration . . . to the employer's judgment" means very little, except that it cannot be totally disregarded and should assure that the evidence is admissible, just as previously prepared, written descriptions will be admissible. But Congress provides no guidance as to what *weight* this evidence should provide. Surely this evidence would or should be admissible. In fairness, previously prepared, written descriptions, unless prepared as a subterfuge of the Act, should be given great deference.

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[87] SENATE REPORT, *supra* note 12, at 26.

[88] *Id.*

[89] ADA, *supra* note 1, § 101(8), at S-3 (emphasis added).

Additionally, the word "qualified" will affect application of the ADA. The Senate Report states that it "intends to reaffirm that this legislation does not undermine an employer's ability to choose and maintain qualified workers."[90] To that end the report continued that "an employer is still free to select the most qualified applicant[s] available and to make decisions based on reasons unrelated to the existence or consequence of a disability."[91]

The Supreme Court had occasion to interpret the words "otherwise qualified" as used in the Rehabilitation Act in *Southeastern Community College v. Davis*,[92] where a deaf person was denied admission into a clinical nursing program. Holding that the applicant was not "otherwise qualified," the Court determined that "[a]n otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap."[93] What if we substitute the word "job" for "program?" To be "qualified," must a person meet all the job's requirements? Or does the use of the word "essential" in the definition modify *Southeastern Community College*? If so, then can the nurse with a hearing disability still function as a clinical nurse although she would not necessarily be unable to perform many of the functions that a clinical nurse must perform? May the employer pay her less if she does not perform all the functions of the job?

In *Arline*, the Supreme Court remanded the case to determine whether the plaintiff was "otherwise qualified" for her job.[94] The Court directed the trial court "to conduct an individualized inquiry and make appropriate findings of fact."[95] Congress appears to follow the Supreme Court's lead. But by forcing individualized inquiries, the EEOC will have difficulty drafting regulations; employers and ultimately the courts will have little guidance in making their individual decisions.

The Senate Report also discusses the issue of the "individual [who by virtue of his disability] poses a direct threat to the health

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[90] SENATE REPORT, *supra* note 12, at 26.

[91] *Id.*

[92] 442 U.S. 397 (1979).

[93] *Id.* at 406.

[94] *Arline*, 480 U.S. at 289.

[95] *Id.* at 287. Specifically, the trial court was instructed to conduct an individualized inquiry " 'based on reasonable medical judgments . . . about (a) the nature of the risk . . . (b) the duration of the risk . . . (c) the severity of the risk . . . and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm.' "

or safety of others or poses a direct threat to property."[96] Unfortunately, by stating that these determinations should be made on "a case-by-case basis," the Senate is once again encouraging factual disputes. According to the report, the employer would have to specify the risk that the disabled individual might pose, then demonstrate "that no reasonable accommodation is available that can remove the risk."[97] Similarly, if an employer alleges that a mental disability is a potential threat to the health or safety of others, the employer is required to specify the behavior that poses the anticipated threat. Again, the Senate Report "requires a fact-specific individualized inquiry resulting in a 'well-informed judgment grounded in a careful and open-minded weighing of the risks and alternatives.' "[98]

The term "qualification standards," which appears in section 103 of the ADA, is a defense related to the term "qualified individual with a disability." Qualification standards permit an employer to require that employees must not be a danger to the health or safety of other employees.[99] This language was adopted from *Arline* which required an "individualized inquiry" and is similar to the language in the Senate Report mandating a case-by-case, fact-specific, inquiry.

### C. *Reasonable Accommodation and Undue Hardship*

What sets disability discrimination apart from almost any other type of prohibited discrimination, is that the employer must make reasonable accommodations for the employee's disability in addition to not discriminating *against* the disabled individual. That is, *favored* rather than simply *equal* treatment is required.

The term "reasonable accommodation" appears throughout the Act. For example, the definition of a "qualified individual with a disability" is one who "with or without *reasonable accommodation*, can perform the essential functions of the employment position."[100] Next, under section 102, the statute defines discrimination to include:

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[96] SENATE REPORT, *supra* note 12, at 27.

[97] *Id.*

[98] *Id.* (quoting Hall v. United States Postal Serv., 857 F.2d 1073, 1079 (6th Cir. 1988), quoting Arline v. School Bd. of Nassau County, Florida, 772 F.2d 759, 764-65 (11th Cir. 1985), *aff'd*, 480 U.S. 273 (1987)).

[99] SENATE REPORT, *supra* note 12, at 40.

[100] ADA, *supra* note 1, § 101(8), at S-3.

> (5)(A) not making *reasonable accommodations* to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or
>
> (B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make *reasonable accommodation* to the physical or mental impairments of the employee or applicant[.][101]

Then under section 103, the statute sets forth defenses to include:

> (a) In General - It may be a defense to a charge of discrimination under this Act that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by *reasonable accommodation* . . . .[102]

Considering their significance, it is not surprising that the definitions of "reasonable accommodation" and "undue hardship" are set forth in Title I.[103] Again, a case-by-case approach has been adopted to determine whether a particular accommodation is reasonable. The case-by-case analysis is required by the definitions, the Senate Report, and the case law interpreting the term "reasonable accommodation" under the Rehabilitation Act.

"Reasonable accommodation" is defined by the statute as follows:

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

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[101] *Id.* § 102(5)(A)-(B), at S-13 (emphasis added).
[102] *Id.* § 103(a), at S-4 (emphasis added).
[103] *Id.* § 101(8)-(9), at S-3.

viduals with disabilities.[104]

The Senate Report states:

> The definition includes illustrations of accommodations that may be required in appropriate circumstances. The list is not meant to be exhaustive; rather, it is intended to provide general guidance about the nature of the obligation. Furthermore, the list is not meant to suggest that employers must follow all of the actions listed in each particular case. Rather, the decision as to what reasonable accommodation is appropriate is one which must be determined based on the particular facts of the individual case. This fact-specific case-by-case approach to providing reasonable accommodations is generally consistent with the interpretations of this phrase under . . . the Rehabilitation Act of 1973.[105]

Under the Rehabilitation Act, courts have followed a case-by-case analysis. For example, in *Trimble v. Carlin*,[106] the Postal Service was found liable because it failed to demonstrate that certain duties of an injured employee must be performed without accommodation, that is, without the assistance of equipment.[107] However, in *Baker v. Department of Environmental Conservation*,[108] a district court held that the employer did not violate the Rehabilitation Act because the Act did not require the granting of special permission for the use of motorized vehicles in designated wilderness areas by plaintiffs with disabilities.[109] The court reasoned that this was not a reasonable accommodation since the use of such vehicles "would be inimical to the nature of these areas."[110] In still another case, *Vickers v. Veterans Administration*,[111] the Veterans Administration was held to have sufficiently accommodated an employee with hypersensitivity to tobacco smoke by separating the desks of smokers and non-smokers and seeking improvements in the ventilation and exhaust systems.[112] The foregoing cases frowned upon narrowly individualized claims and are probably representative of the case-by-case analysis to be seen under the ADA.

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[104] *Id.* § 101(9)(A)-(B), at S-3.
[105] SENATE REPORT, *supra* note 12, at 31.
[106] 633 F. Supp. 367 (E.D. Pa. 1986).
[107] *Id.* at 370.
[108] 634 F. Supp. 1460 (N.D.N.Y. 1986).
[109] *Id.* at 1466.
[110] *Id.*
[111] 549 F. Supp. 85 (W.D. Wash. 1982).
[112] *Id.* at 89-90.

In two cases with broader implications, the courts found that reasonable accommodation does not require an employer to move a disabled worker to a new or different position. In *Dexler v. United States Postal Service*,[113] a district court held that reasonable accommodation does not require the employer to "consider handicapped applicants for jobs for which they have not applied, assuming that the employer does not do so for applicants who are not handicapped."[114] In *Carty v. Carlin*,[115] the court stated that reasonable accommodation "does not include a requirement to reassign or transfer an employee to another position. Preferential reassignment for handicapped employees was not intended by the Rehabilitation Act."[116] However, the ADA calls into question the continued viability of these interpretations. The examples set forth in the ADA, as well as the comments contained in the Senate Report, suggest a major departure from the Rehabilitation Act. In contrast to the holding in *Carty*, the term "reasonable accommodation" under section 101 may include "job restructuring, part-time or modified work schedules, [or] *reassignment to a vacant position*."[117]

Further, the statute calls for "the provision of qualified readers or interpreters . . . for individuals with disabilities."[118] The Senate Report states that:

> The legislation . . . explicitly includes provision of qualified readers of [sic] interpreters as examples of reasonable accommodations. As with readers and interpreters, the provision of an attendant to assist a person with a disability during parts of the workday may be a reasonable accommodation *depending on the circumstances of the individual case.* Attendants may, for example, be required for traveling and other job-related functions.[119]

In *Southeastern Community College v. Davis*,[120] the Supreme Court held that section 504 of the Rehabilitation Act did not require the petitioner to provide the respondent with individualized attention as part of the clinical training in a nursing program, not-

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[113] 40 Fair Empl. Prac. Cas. (BNA) 633 (D. Conn. 1986).
[114] *Id.* at 639.
[115] 623 F. Supp. 1181 (D. Md. 1985).
[116] *Id.* at 1188.
[117] ADA, *supra* note 1, § 101 (9)(A), (B), at S-3 (emphasis added).
[118] *Id.*
[119] SENATE REPORT, *supra* note 12, at 33 (emphasis added).
[120] 442 U.S. 397 (1979).

withstanding Health, Education and Welfare ("HEW") regulations which provided for " 'auxiliary' aids such as sign language interpreters."[121] The Court stated, "an interpretation of the regulations that required the extensive modifications necessary to include respondent in the nursing program would raise grave doubts about their validity."[122] Congress appears to have accomplished in the ADA what the Supreme Court was unwilling to do under the Rehabilitation Act.

Further evidence of how broadly Congress views the term "reasonable accommodation" can be found in its analysis of the interrelationship between collective bargaining agreements and the duty to accommodate. The Senate Report states that "if a collective bargaining agreement reserves certain jobs for employees with a given amount of seniority, it may be considered as a factor in determining whether it is a reasonable accommodation to assign an employee with a disability without seniority to that job."[123] To even suggest that the sacrosanct seniority provisions of a collective bargaining agreement may be attacked is troublesome. It is one thing to attack seniority provisions adopted because of a historical pattern of discrimination based on race and to permit plaintiffs to seek their "rightful place," but granting super-seniority attacks one of organized labors most cherished tenets.

Another Supreme Court decision that will be affected by the ADA is *Ansonia Board of Education v. Philbrook*.[124] In *Ansonia*, an employee denied the use of so-called personal business days for the observance of religious holy days brought suit under Title VII. The Court held that the employer need not accept the employee's accommodation proposals.[125] However, the Senate Report suggests a contrary result under the ADA. It states that "[t]he expressed choice of the applicant or employee shall be given *primary consideration* unless another effective accommodation exists that would provide a meaningful equal employment opportunity or that the accommodation requested would pose an undue hardship."[126]

Thus, in determining what is a reasonable accommodation

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[121] *Id.* at 408 (citing 45 C.F.R. § 84.44 (1978)).

[122] *Id.* at 410.

[123] SENATE REPORT, *supra* note 12, at 32.

[124] 479 U.S. 60 (1986).

[125] *Id.* at 68. In *Ansonia*, the Court stated that "where the employer has already reasonably accommodated the employee's religious needs, the statutory inquiry is at an end." *Id.*

[126] SENATE REPORT, *supra* note 12, at 35 (emphasis added).

Congress apparently intends to disregard earlier Supreme Court decisions under both the Rehabilitation Act and Title VII.

A closer look at the definition of "undue hardship," which is inextricably linked[127] to "reasonable accommodation," confirms the foregoing observation. The Senate Report articulates Congress' intent to change the definition from that found in Title VII. The report reads:

> [T]he Committee wishes to make it clear that the principles enunciated by the Supreme Court in *TWA v. Hardison*, (citation omitted) are not applicable to this legislation. In *Hardison*, the Supreme Court concluded that under Title VII of the Civil Rights Act of 1964 an employer need not accommodate persons with religious beliefs if the accommodation would require more than a de minimis cost for the employer."[128]

There is no question that under the ADA, an undue hardship would require a finding of more than a *de minimis* cost incurred by the employer. The statute defines "undue hardship" as "an action requiring significant difficulty or expense."[129] The Senate Report speaks of "an action that is unduly costly, extensive, substantial, disruptive, or that will fundamentally alter the nature of the program."[130]

Not only has the substantive law changed, making it more difficult for employers to prove undue hardship, but here again, the statute dictates an ad hoc inquiry to determine what constitutes an "undue hardship." The Senate Report states that the court should consider several factors in its determination:

> (1) the overall size of the business of the covered entity with respect to number of employees, number and type of facilities and size of the budget; (2) the type of operation maintained by the covered entity, including the composition and structure of the entity's workforce; and (3) the nature and cost of the accommodation needed.[131]

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[127] *See, e.g.*, ADA, *supra* note 1, § 102(b)(5)(A), at S-3. These two are linked in the ADA's discussion of what constitutes discrimination: [The term discrimination includes] not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity." *Id.*

[128] SENATE REPORT, *supra* note 12, at 36.

[129] ADA, *supra* note 1, § 101(10)(A), at S-3.

[130] SENATE REPORT, *supra* note 12, at 35.

[131] SENATE REPORT, *supra* note 12, at 36.

The Senate Report further states that whether an undue hardship exists will depend on various factors, including the type of accommodation, the expense involved, and the employer's financial condition.[132] The report relied on the appendix accompanying an HEW regulation which contrasted the requirement placed on a small day care center to expend a nominal sum, with a large school district required to incur a much greater expense.[133]

This approach may be a cause of distress to employers and will encourage satellite litigation. A decision handed down by a Pennsylvania district court construing the Rehabilitation Act may indicate where the ADA is headed. In *Nelson v. Thornburgh*,[134] the court weighed the social costs of denying an accommodation against the economic cost to the employer. In holding that the state was required to provide readers to blind income maintenance workers as a reasonable accommodation, the court relied on HEW regulations that specified the following facts to be assessed for purposes of reasonable accommodation:

> (1) The overall size of the recipient's program with respect to the number of employees, number and type of facilities, and size of budget; (2) The type of recipient's operation, including the composition and structure of the recipient's workforce; and (3) The nature and cost of the accommodation needed.[135]

In essence, the ADA considers the same factors. In *Nelson*, the employees were first-level welfare agency workers responsible for receiving and recording information from welfare applicants and determining eligibility for benefits.[136] Their duties involved extensive paperwork with standardized forms.[137] The court reasoned that the social costs of excluding the plaintiffs from their profession far outweighed the modest cost of accommodation upon the financially sound employer, in this case, the state.[138]

If this type of social welfare standard is accepted under the ADA, it could strip large, and perhaps not-so-large employers of *any* undue hardship defense. Moreover, it establishes a unique

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[132] *Id.*

[133] *Id.*

[134] 567 F. Supp. 369 (E.D. Pa. 1983), *aff'd mem.*, 732 F.2d 145 (3d Cir. 1984), *cert. denied*, 469 U.S. 1188 (1985).

[135] *Id.* at 379 (quoting 45 C.F.R. § 84.12 (1982)).

[136] *Nelson*, 567 F. Supp. at 371-72.

[137] *Id.*

[138] *Id.* at 382.

form of socialism. Instead of the government providing jobs for the disabled as may be done in traditionally socialized countries, employers are forced to provide jobs for the disabled and thus alone shoulder, what should be, at least in part, society's burdens.[139] Further, the government has offered no financial assistance to aid employers who may be faced with added expenses, such as paying for the reader or interpreter, nor has it even allowed for a meaningful tax credit.[140]

## CONCLUSION

The ADA, while well-conceived and well-intended, will place an onerous burden on employers. Moreover, it will induce considerable litigation to determine who is "disabled" and who is a "qualified individual with a disability." "Reasonable accommodation" and "undue hardship" must be approached on a case-by-case basis. Certainly, the EEOC regulations cannot fully resolve such problems for several years, if ever. Thus, the ADA will lack clear guidelines of conduct for employers to follow. Without adequate notice of how to comply with the ADA, employers and employees alike will have to resort to the courts continuously to answer even the most rudimentary inquiries. When they do, the cases will not be resolved easily. While motions for summary judgment have been a useful procedure to weed out the other types of frivolous Title VII actions, the "individualized, case-by-case" approach to disability claims will not lend itself very well to such motions.

Furthermore, as the Civil Rights Bill of 1990 will most likely become law, having been passed in both houses, and, under some circumstances, will include the right to a jury trial, the ADA will become a free-for-all. Every "individualized inquiry" will be a jury question. The jury will sit virtually as a court of equity without meaningful legal guidance. While some of the laudable objectives of the ADA undoubtedly will be achieved, there is no doubt that numerous ADA claims will be asserted by attorneys playing the jury wheel of fortune.

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[139] Compare, for example, pensions, health insurance and income with social security tax collection. More and more, the employer, both public and private, is becoming the agency to provide these benefits or services.

[140] The Internal Revenue Code section 51, does provide "targeted jobs credit" in certain limited situations, *i.e.*, for individuals with physical or mental disabilities constituting a substantial handicap to employment who have been referred after completing or while receiving vocational rehabilitation services. *See* I.R.C. § 51 (1990).