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NOTES

THE AMERICANS WITH DISABILITIES ACT: IMPLICATIONS FOR JOB REASSIGNMENT AND THE TREATMENT OF HYPERSENSITIVE EMPLOYEES

INTRODUCTION

July 26, 1990, signaled the beginning of a new era for individuals with disabilities: on that day the Americans with Disabilities Act of 1990 (hereinafter ADA) was signed into law.¹ The ADA extends the protections of Titles II and VII of the Civil Rights Act of 1964² to individuals with disabilities, thereby prohibiting discrimination on the basis of physical or mental disability by private and public employers, state and local governments and services, providers of transportation services, providers of public accommodations and services, and common carriers of telecommunication services.³ This comprehensive piece of legislation will complete the process, begun by the passage of the Rehabilitation Act of 1973,⁴ of incorporating individuals with disabilities into the economic and social mainstream of American life.

In addition to extending the scope of existing civil rights laws, the ADA will clarify some of the ambiguities found in the language and provisions of sections 501 and 504 of the Rehabilitation Act.⁵ One of its most troublesome provisions had

¹ Americans with Disabilities Act of 1990 (ADA), Pub. L. No. 101-336, 1990 U.S.C.A.N. (104 Stat.) 327 (to be codified at 42 U.S.C. §§ 12101-12213 and 47 U.S.C. §§ 225, 611).

² 42 U.S.C. §§ 2000a to a-6, 2000e to e-17 (1988).

³ ADA §§ 102, 202, 222-228, 242, 302-304, 401 & 402.

⁴ Pub. L. No. 93-112, §§ 500-504, 87 Stat. 390, 390-94 (codified as amended at 29 U.S.C. §§ 790-794(c) (1988)) [hereinafter Rehabilitation Act].

⁵ 29 U.S.C. §§ 791 & 794. Sections 501 and 504 prohibit discrimination against indi-

prompted the question of whether job reassignment was a mandated form of reasonable accommodation under the Rehabilitation Act.⁶ Reassignment involves the transfer of an employee with a disability from a position the employee is no longer able to perform to a job that the individual can perform. Courts and administrative agencies currently continue to disagree about the extent of an employer's duty to reassign an employee with a disability, causing cases to be resolved differently depending on whether the parties have pursued administrative or legal remedies.⁷

This Note will argue that by explicitly identifying job reassignment as one form of reasonable accommodation required by the ADA, Congress has mandated that all employers must reassign an employee with a disability to a vacant position if an accommodation that would enable the employee to remain in her original position cannot be made and the reassignment will not pose an undue hardship to the employer.⁸ In addition, it will argue that both the case law surrounding the Civil Rights Act and Congress's stated legislative intent in passing the ADA require that employers and courts not deem reassignment unreasonable and thus unnecessary because of the existence of collective bargaining agreements that attach a seniority requirement to the position that is currently available.

This Note will also examine an area of law included in the ADA that was not previously covered by the Rehabilitation Act: the prohibition of preemployment medical examinations and

viduals with disabilities by the federal government and federal government agencies (§ 501, 29 U.S.C. § 791) and by programs or activities receiving federal financial assistance (§ 504, 29 U.S.C. § 794).

While codification of the Rehabilitation Act changed the section numbers from those used in the original bill, the section numbers used in the original version, e.g., §§ 501-504, are still used by individuals practicing in the area of disability law to refer to specific provisions of the Act.

⁶ Job reassignment would generally be required if an employee either became disabled while employed, or if an employee's existing disability prevented her from continuing to perform the duties of her job, and no other accommodations could be made that would enable her to continue in her current job. At this stage, an employer would have to look for vacant positions at the employee's current job level that the employee would be qualified for and could now perform. ADA § 101(9)(B).

⁷ See Kathryn W. Tate, *The Federal Employer's Duties Under the Rehabilitation Act: Does Reasonable Accommodation or Affirmative Action Include Reassignment?*, 67 TEX. L. REV. 781 (1989). See also notes 57-86 and accompanying text *infra*.

⁸ ADA §§ 101(9) & (10).

questionnaires that inquire about disabilities. It will explore the contexts in which these questionnaires usually occur, the limited manner in which such inquiries can be made pursuant to the ADA, and the actions an employer may take based upon the results of permissible inquiries. Finally, this Note will argue that the ADA's prohibition of discrimination extends to genetic testing in the workplace and to individuals who do not currently have disabilities but who are identified by such tests as having a high risk of becoming injured in the future. The ADA will therefore not only clarify and extend the protections of earlier laws, but will also extend the protection of federal laws to individuals not commonly perceived as having disabilities.

I. BACKGROUND

A. *Previous Federal Legislation Prohibiting Discrimination on the Basis of Disability*

Congress took its first steps toward prohibiting discrimination against persons with disabilities in 1973 with the passage of the Rehabilitation Act.⁹ This Act prohibited discrimination by the federal government, federally funded agencies, federal contractors, and any recipients of federal money. The last of these groups—recipients of federal funding—was covered under section 504¹⁰ and has received the most attention in the courts.

Although the Rehabilitation Act was enacted in 1973, the bill failed to explicitly authorize regulatory agencies to adopt and enforce implementing regulations,¹¹ and agencies did not be-

⁹ Although the Civil Rights Act of 1964 prohibited discrimination in employment and in the provision of public accommodations and services on the basis of race, color, national origin and sex, it did not prohibit such discrimination based on an individual's disability.

¹⁰ Rehabilitation Act § 504, 29 U.S.C. § 794. Section 504 reads, in pertinent part: No otherwise qualified handicapped individual in the United States, as defined in Section 706(7), 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.

The other sections of the Rehabilitation Act governing employment are: § 501 (29 U.S.C. § 791), covering discrimination by the federal government and federal government agencies; § 502 (29 U.S.C. § 792), covering the removal of architectural barriers in federal buildings; and § 503 (29 U.S.C. § 793), covering recipients of federal contracts.

¹¹ See Judith W. Wegner, *The Antidiscrimination Model Reconsidered: Ensuring Equal Opportunity Without Respect to Handicap Under Section 504 of the Rehabilitation Act of 1973*, 69 CORNELL L. REV. 401, 411-12 (1984).

gin adopting regulations until after the President issued an executive order in 1980 directing executive agencies to draft regulations to enforce the provisions of the Act.¹² The first regulations promulgated pursuant to the Rehabilitation Act were not codified in the Code of Federal Regulations until 1985, over ten years after its enactment.¹³ In addition to these problems, applications of section 504 of the Rehabilitation Act were severely limited in 1984 after the United States Supreme Court decided *Grove City College v. Bell*.¹⁴ The Court held that while Grove City College was a recipient of federal funds under the anti-discrimination mandate of Title IX, the phrase "program or activity" used in the statute referred to the specific program or activity of the college that had received the funds.¹⁵ Thus, because the college had only received federal funds by accepting federal student loans for tuition, only the college's financial aid department was covered under Title IX and similar laws; the college as a whole was not.¹⁶ As a result, the only discrimination proscribed by Title IX was discrimination within the financial aid department.¹⁷ Although section 504 was not at issue in this case, because section 504 incorporated the same "program or activity" language as Title IX, its coverage was also limited by *Grove City* to those specific programs or activities that directly received federal funds.¹⁸

¹² See Exec. Order No. 12,250, 45 Fed. Reg. 72,995 (1980).

¹³ See, e.g., 22 C.F.R. §§ 142.1-42 (1985) (Dep't of State); 43 C.F.R. §§ 17.1-.280 (1985) (Dep't of the Interior); 45 C.F.R. §§ 605.0-.61 (1985) (Nat'l Science Found.); 32 C.F.R. §§ 56.1-.10 (1985) (Office of Sec'y of Defense); 29 C.F.R. §§ 32.1-.51 (1985) (Office of Sec'y of Labor); 38 C.F.R. §§ 18.1-.461 (1985) (Veterans Admin.); 49 C.F.R. §§ 27.1-.129 (1985) (Office of Sec'y of Transp.).

¹⁴ 465 U.S. 555 (1984). In *Grove City* a municipal college challenged the Department of Health Education and Welfare's (HEW's) interpretation of Title IX of the Education Amendments of 1972. Title IX prohibits educational institutions that are recipients of federal funds from discriminating on the basis of sex in any of its programs. After HEW threatened to cut off the college's funding because of its refusal to provide an Assurance of Compliance with Title IX's provisions, the college filed suit claiming that because it had only received federal funding through students' Basic Educational Opportunity Grants (BEOGs), Title IX's prohibition against sex discrimination did not apply. *Id.* at 563. Because the college had received no grants directly from the government—they had accepted tuition money that the students had received as loans from the federal government—the college argued that it had received no federal funds. *Id.* The Court disagreed.

¹⁵ *Id.* at 573-74.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ See generally *Niehaus v. Kansas Bar Assocs.*, 793 F.2d 1159 (10th Cir. 1986) (use

For the next four years, it was nearly impossible to prove discrimination under section 504.¹⁹ Finally, in 1988, Congress enacted the Civil Rights Restoration Act of 1987 [hereinafter CRRA].²⁰ The CRRA defined the phrase "program or activity" as meaning "all the operations of [any entity] any part of which is extended Federal financial assistance."²¹ Thus, Section 504 once again prohibited discrimination by any entity receiving any federal money, as was originally intended.²²

B. *The Americans With Disabilities Act of 1990*

1. History

Although the CRRA in combination with the Rehabilitation Act prohibited discrimination on the basis of disability by all federally funded private or public entities, it could not prevent the daily discrimination by private parties not receiving federal funding that individuals with disabilities face.²³ Every day, individuals with disabilities are denied jobs, prevented from eating in restaurants, forced to sit in the back of theaters, unable to use public transportation, and are even prevented from visiting public zoos.²⁴

of federal grant money to repay part of loan not sufficient for federal financial assistance); *Eivins v. Adventist Health Sys./Eastern & Middle Am., Inc.*, 651 F. Supp. 340 (D. Kan. 1987) (hospital holding company not recipient of federal financial assistance through hospital's receipt of Medicaid); *Chaplin v. Consolidated Edison Co. of N.Y.*, 628 F. Supp. 143 (S.D.N.Y. 1986) (federally subsidized training program not sufficient to make entire organization recipient of federal financial assistance).

The Court later clarified and slightly limited the *Grove City* decision in *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624 (1984). The Court stated that *Grove City* only applied to students and educational institutions and that it should not be analogized to apply to non earmarked direct grants. *Id.* at 636. The *Darrone* Court held that a discrimination suit brought by an employee may be maintained even if the employer received no federal aid targeted at promoting employment as long as the program the employee worked in was a recipient of federal financial assistance. *Id.* at 636-37.

¹⁹ See generally *Civil Rights Restoration Act of 1987: Hearings Before the Senate Comm. on Labor and Human Resources*, 100th Cong., 1st Sess. 3 (1987) (statement of Sen. Kennedy) [hereinafter *Hearings*].

²⁰ Pub. L. No. 100-259, 102 Stat. 28 (1988) (codified at 20 U.S.C. §§ 1681, 1687, 1688, 29 U.S.C. §§ 706, 794, 42 U.S.C. §§ 6107, 2000d-4a) (Supp. 1990)).

²¹ 20 U.S.C. § 1687.

²² See *Hearings*, *supra* note 19, at 79-80.

²³ See S. REP. No. 116, 101st Cong., 1st Sess. 6 (1989) [hereinafter *SENATE REPORT*].

²⁴ *Id.* at 7. In addition to listing other examples of blatant discrimination, the *SENATE REPORT* included a story from the *Washington Post* about "a New Jersey zoo keeper who refused to admit children with Downs Syndrome because he feared they would up-

In October 1987 members and representatives of the disability community began working with Congress to develop a bill that would prohibit these types of discrimination and enable individuals with disabilities to enjoy the rights that other Americans enjoy.²⁵ The Americans with Disabilities Act was passed by both houses and was signed into law on July 26, 1990. The different sections of the ADA become effective on various dates between January 26, 1992, and July 26, 1994.²⁶

2. Provisions

The ADA addresses five areas in which individuals with disabilities commonly face discrimination: employment, services provided by public entities, public and private transportation, public accommodations and services provided by private entities, and telecommunications.²⁷ For the purposes of the entire law, an individual with a disability is defined as a person who:

- (A) [has] a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
- (B) [has] a record of such an impairment; or
- (C) [is] [] regarded as having such an impairment.²⁸

set the chimpanzees." *Id.*

²⁵ Address by Chai R. Feldblum, Program by the Association of the Bar of the City of New York on Employment of People with Disabilities Today in New York, and Tomorrow Under the Americans with Disabilities Act (Oct. 1, 1990).

Drafters familiar with the delay in promulgating § 504 regulations incorporated much of the language of those regulations into the text of the ADA itself; this would prevent a delay in issuing regulations to carry out the ADA, enable courts to use § 504 case law to resolve suits arising under it, and also prevent a lack of uniformity in the regulations various agencies must promulgate to comply with the ADA.

²⁶ See text accompanying notes 27-56 *infra*.

²⁷ §§ 102, 202, 222-228, 242, 302-304, 401 & 402.

²⁸ § 3(2). Excluded from this definition are certain conditions, including homosexuality and bisexuality, transvestitism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, other sexual behavior disorders, compulsive gambling, kleptomania, pyromania, and psychoactive substance use disorders resulting from current illegal use of drugs. § 511. In addition, the term "qualified individual with a disability" used in Title I of the ADA (employment) excludes current users of illegal drugs. § 104(a), (b)(1)-(3).

Nonetheless, the ADA is quite inclusive. It prohibits discrimination against a person who has a known relationship or association with a person who has a known disability. § 102(b)(4). This provision, not included in § 504, is intended to prevent employers or service providers from refusing to employ or provide services to an individual who, for example, has a child who is developmentally disabled, or who volunteers in a community program serving individuals with AIDS. See SENATE REPORT, *supra* note 23, at 30. An employer or provider of services is not, however, required to provide reasonable accom-

Title I of the ADA prohibits discrimination by private employers against a qualified person with a disability.²⁹ Such an individual is a person with a disability who, either with or without a reasonable accommodation, is able to perform the essential functions of the job she holds or desires.³⁰ This does not mean that the individual must be able to perform all job-related tasks but only those that are fundamental to the position.³¹ In addition, the employer is required to make reasonable accommodations that would permit the individual to perform the job in question.³² Reasonable accommodations include making existing facilities accessible to and usable by that employee or applicant, as well as:

job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.³³

An employer is not required to make an accommodation if she can prove that making an accommodation would impose an "undue hardship" on the operation of the business.³⁴ Factors included in determining whether a specific accommodation would present an undue hardship include the "nature and cost of the accommodation needed," the "overall financial resources of the facility" and of any larger owning entity, the effect on resources, and any other impact on the operation of the facility.³⁵ Accordingly, a large corporation may be required to make an accommodation that would be deemed unreasonable for a smaller, independently owned business.³⁶ In addition, even if one type of

modations to such persons if they do not have disabilities themselves. *Id.*

²⁹ § 102(a).

³⁰ § 101(8). An exception is made if an individual would pose a direct threat to the health or safety of others, provided that the threat cannot be eliminated through reasonable accommodation. § 101(3).

³¹ § 101(8). For example, driving would be an essential function for a bus driver; it would not be an essential function for a counselor at a halfway house who might occasionally be required to drive a client to a doctor's appointment.

³² § 102(b)(5)(A) & (B).

³³ § 101(9)(B).

³⁴ § 102(b)(5)(A).

³⁵ § 101(10)(B).

³⁶ SENATE REPORT, *supra* note 23, at 36.

accommodation were judged to be unreasonable, the employer might be able to make other, less expensive accommodations that would still allow the employee to fulfill the functions of her position.³⁷

The ADA also prohibits discrimination in other areas of employment under Title I, including the manner in which employment tests, qualifications standards or other selection procedures are administered, in the provision of insurance to employees, and in the inquiry into the physical or mental ability of an applicant or employee to perform the job.³⁸ This title becomes effective on July 26, 1992, for employers of twenty-five or more employees, and on July 26, 1994, for employers of fifteen or more employees.³⁹

Title III of the ADA, which also extends to discrimination in the private sector, prohibits discrimination in the private provision of accommodation or services to the public.⁴⁰ The ADA specifies twelve categories of covered private entities that supply public accommodations or services.⁴¹ Included under these categories are entities such as grocery stores, zoos, day care centers,

³⁷ *Id.* at 31. This accommodation need not be the *best* accommodation possible, but must be one that enables the employee to perform the duties of her job. Employers must, however, consider all possible accommodations before firing or refusing to hire an individual. *Id.* at 31-32.

³⁸ ADA, §§ 102(b)(6), (c)(2)-(4), & 501(c).

³⁹ §§ 101(5)(A) & 108.

⁴⁰ §§ 301-310.

⁴¹ § 301(7). As listed in the House Judiciary Report, the categories are:

1. Places of lodging
2. Establishments serving food or drink
3. Places of exhibition or entertainment
4. Places of public gathering
5. Establishments selling or renting items
6. Establishments providing services
7. Stations used for public transportation
8. Places of public display or collection
9. Places of recreation
10. Places of education
11. Establishments providing social services
12. Places of exercise or recreation.

H. REP. No. 485, 101st Cong., 2d Sess., pt. 3, at 54 (1990) [hereinafter JUDICIARY REPORT]. Categories 9 and 12, although similar, are meant to indicate different types of facilities. "Places of recreation" is intended to include "a park, zoo, [or] amusement park," while "places of exercise or recreation" is intended to cover establishments such as "a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation." ADA § 301(7)(I), (L).

hotels, restaurants, professional offices, adoption agencies and bowling alleys.⁴² These entities are prohibited from discriminating against individuals with disabilities in a manner that would prevent "the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation."⁴³ To prevent discrimination, covered entities must provide auxiliary aids and services to those individuals who need them and remove architectural and communication barriers when such provision or removal is "readily achievable."⁴⁴

Titles II and III, which went into effect on January 26, 1992, cover all forms of transportation (except air travel) provided by either public or private entities.⁴⁵ They require all new buses and rail cars to be physically accessible to individuals with disabilities and prohibit any actions that would deprive a person with a disability of the full and equal enjoyment of transportation services.⁴⁶ In addition, they require public entities operating a fixed-route system to provide paratransit and special transpor-

⁴² § 307. Certain entities are exempted from these provisions, namely private clubs and establishments that are exempted from coverage under title II of the Civil Rights Act of 1964, as well as religious organizations and entities controlled by religious organizations. *Id.*

⁴³ §302(a). Covered entities must provide goods or services that are equal to those given to other individuals and that are not different or separate from those provided to other individuals (except as necessary to provide services as effective as those provided to others). § 302(b)(1)(A)(i)-(iii). In addition, they may not use administrative methods or eligibility criteria that tend to discriminate on the basis of disability, nor fail to make reasonable modifications in policies, practices or procedures when they are needed to make services available to individuals with disabilities (unless such modifications would fundamentally alter the nature of such goods or services). § 302(b)(2)(A)(i) & (ii).

⁴⁴ § 302(b)(2)(A)(iii)-(v). Auxiliary aids and services are the means of assistance necessary to accommodate individuals with disabilities in order to allow them to participate equally in public accommodations or services. For example, a restaurant would be required to provide either a brailled menu or someone to read the menu to a blind patron. Business owners are not required to make an accommodation if it is not readily achievable, specifically, if it is not "easily accomplishable and able to be carried out without much difficulty or expense." § 301(9). However, *all* new construction and alterations to existing facilities must be readily accessible to and usable by individuals with disabilities. § 303(a)-(b).

⁴⁵ § 222-228, 242 & 304.

⁴⁶ §§ 222, 224, 228, 242(a) & (b), 302(2)(B)-(D), 304, 305, 306(a) & (d)(2). In addition, the ADA requires that operators make good faith efforts to buy used vehicles that are accessible and to ensure that any remanufactured vehicles are made accessible to individuals with disabilities. § 222(b) & (c).

tation services⁴⁷ and require all providers to make all new facilities (including stations) and existing stations that are major transfer points and end-of-the-line stations accessible to individuals with disabilities.⁴⁸

Title II also prohibits discrimination on the basis of disability by all state and local government entities; it extends the protections of Titles I and III to individuals working for or seeking services from any state or local government entity.⁴⁹ The entities are defined to include any state or local government, and any agency, department, or other instrumentality of any state or local government.⁵⁰ In addition to providing the same accommodations required of private entities in Titles I and III, governments are required to take the actions necessary to prevent discrimination in the provision of services.⁵¹ Due to their size and resources, state and local governments may also be required to provide accommodations for individuals that a similarly sized private employer might not be required to make.⁵²

⁴⁷ Paratransit services include providing special buses or vans along a fixed route system, enabling individuals who need the assistance of another person to board, ride or disembark from a vehicle, or persons who are unable to get to a normal boarding location, to use the fixed-route system. *Id.* § 223. Individuals requiring assistance may include individuals with vision impairments, individuals with mobility impairments who require assistance other than the operation of a wheelchair lift, and individuals with mental disabilities who need someone to tell them when they have reached their desired destination.

⁴⁸ §§ 223(a), 226, 242(e)(1), 227(b)(1)-(2) & 242(e)(2)(A)(i)-(iv). See also H.R. REP. No. 485, 101st Cong., 2d Sess., pt. 1, at 28 - 33 (1990) [hereinafter PUBLIC WORKS AND TRANSPORTATION REPORT]; H.R. REP. No. 485, 101st Cong., 2d Sess., pt. 4 at 41, 51-2 (1990) [hereinafter ENERGY AND COMMERCE REPORT]. Existing stations that are not major transfer points or end-of-line stations need not be made accessible.

⁴⁹ § 202.

⁵⁰ § 202(1). In addition, § 502 explicitly sets forth that states shall not be able to claim Eleventh Amendment immunity from a court action arising under this Act; a state shall be liable for the same legal and equitable remedies as any public or private defendant who violates the ADA. Section 502 was specifically intended to meet the requirements of *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985). JUDICIARY REPORT, *supra* note 41, at 72 (citing *Atascadero*) (legislature must clearly state intention of statute to remove 11th Amendment immunity).

⁵¹ § 202. In order to prevent discrimination, governments are encouraged to educate public employees about disabilities. JUDICIARY REPORT, *supra* note 41, at 50. For example, individuals with epilepsy are often arrested and jailed inappropriately because police officers have not been trained to recognize and aid an individual who is having a seizure. Often, after arrest, these individuals are not allowed to take their medication while in jail, leading to further seizures. Training public employees about disabilities would prevent this type of discrimination. *Id.*

⁵² For example, a privately run day-care center might not be required to make a

Title IV of the ADA makes telecommunications services and public service announcements accessible to individuals with hearing and speech impairments. Common carriers of telecommunications services will be required to make intrastate and interstate telecommunications relay services available to individuals with speech and hearing impairments.⁵³ These services will permit individuals with hearing or speech impairments to communicate with individuals who do not have impairments. This is usually done by having an individual with a speech or hearing impairment communicate with a relay operator via TDD (Telecommunications Device for the Deaf), while the operator vocally relays the message to the other party via standard telephone. Carriers may provide this service themselves, by contracting with other carriers or in concert with other carriers, but they may not charge individuals wishing to use the relay services any additional amount for the service.⁵⁴ In addition, all television public service announcements that are produced or funded by the federal government must now be closed-captioned.⁵⁵ The provisions of Title IV go into effect on July 26, 1993.⁵⁶

II. ANALYSIS

A. *Expanding the Definition of Reasonable Accommodation*

Since the enactment of the Rehabilitation Act, there has been much controversy over the scope of the term "reasonable accommodation."⁵⁷ Specifically, the debate is over whether an employer must explore reassignment to a vacant position as a form of reasonable accommodation when other forms of accommodation have been unsuccessful. Such a reasonable accommodation means that a reassigned employee would be transferred to a position similar to the one she was hired to fill;⁵⁸ preferably,

costly accommodation, while a day-care center run by a large school district might be required to make the same accommodation. JUDICIARY REPORT, *supra* note 41, at 51.

⁵³ § 401(a).

⁵⁴ *Id.*

⁵⁵ *Id.* § 402.

⁵⁶ *Id.* § 401(a) (amending Communications Act of 1934, 47 U.S.C. § 225(c)).

⁵⁷ See text accompanying notes 64-86 *infra*.

⁵⁸ H.R. REP. NO. 485, 101st Cong., 2d Sess., pt. 2 at 63, 65-66 (1990) [hereinafter EDUCATION AND LABOR REPORT]. This does not mean that the job must have the same duties as the original position, but that the employee should not be demoted as a result of her disability. The employer should first attempt to transfer the employee laterally to

it should be at the same job and salary level as the original position. Reassignment would enable the employee to continue to be a productive part of the work force while requiring little or no other accommodation on the part of the employer.

After several years of conflict, federal administrative agencies finally resolved their differences in interpreting the Rehabilitation Act in 1986, deciding that an employer must reassign an employee with a disability to a vacant position if other forms of accommodation have failed.⁵⁹ Courts, however, have continued to hold that an employer does not have a duty to reassign under the Rehabilitation Act.⁶⁰ These decisions have frequently relied on the fact that reassignment would violate a collective bargaining agreement, thus causing an undue hardship to the employer and to other employees. These decisions are contrary to Title VII case law, which has held that collective bargaining agreements cannot prohibit remedies required under Title VII.⁶¹

Congress attempted to prevent such a split between decision-making bodies by identifying job reassignment as a form of reasonable accommodation in the ADA.⁶² Accordingly, the case law previously developed in resolving Rehabilitation Act failure-to-reassign claims should not be used by courts in determining similar claims brought under the ADA. Instead, the courts should look to the reports accompanying the ADA, in which the House and Senate describe the standards that should be used when determining whether reassignment is an appropriate form of reasonable accommodation.⁶³

a position she could fill. *See id.*

⁵⁹ See text accompanying notes 64-74 *infra*.

⁶⁰ See text accompanying notes 75-86 *infra*.

⁶¹ See text accompanying notes 108-109 *infra*.

⁶² ADA § 101(9)(B). See text accompanying note 33 *supra*.

⁶³ See text accompanying notes 87-91 *infra*.

1. Courts' Confusion Regarding Whether the Rehabilitation Act's Reasonable Accommodation Requirement Includes Job Reassignment

- a. *EEOC and MSPB Policy*

Many cases arising under section 501 of the Rehabilitation Act are heard by either the Merit Systems Protection Board (hereinafter MSPB) or the Equal Employment Opportunity Commission (hereinafter EEOC).⁶⁴ The MSPB is a federal body responsible for reviewing federal employers' decisions involving civil service law, while the EEOC is responsible for enforcing anti-discrimination law.⁶⁵ Prior to 1976 the two federal agencies took opposite stances on whether job reassignment was a required form of reasonable accommodation.⁶⁶ EEOC regulations and decisions stated that reassignment was required, while the MSPB consistently held that reassignment was beyond the scope of the Rehabilitation Act.⁶⁷

In 1986 a special panel of the MSPB resolved this issue when it reviewed the different decisions reached by the EEOC and MSPB in the case of *Ignacio v. United States Postal Service*.⁶⁸ The special panel generally only looks at "whether the substance of the EEOC's decision with which the MSPB disagrees was actually predicated on a misinterpretation of civil

⁶⁴ Section 501 covers the federal government and federal administrative agencies. 29 U.S.C. § 791 (1988).

⁶⁵ Richard J. Ericson, Comment, *Reasonable Accommodation of the Handicapped Federal Employee: Extending the Legal Duty of the Employer*. *Ignacio v. United States Postal Serv.*, 10 GEO. MASON U. L. REV. 267 (1987).

⁶⁶ For a discussion of reasonable accommodation, see text accompanying notes 32-37 *supra*.

⁶⁷ See *Ignacio v. United States Postal Serv.*, EEOC Petition No. 03840005 at 13 (Sept. 4, 1984) (available on microfiche in EEOC Decisions (IHS), at 1189/A-13); *Orias v. Department of Navy*, EEOC Petition No. 03820090 (Nov. 8, 1983) (available on microfiche in EEOC Decisions (IHS) at 1087/B-08); *Alvarado v. United States Postal Serv.*, EEOC Petition No. 03830052 (Oct. 13, 1983) (available on microfiche in EEOC Decisions (IHS) at 1165/F-09). Cf. *Whitaker v. United States Postal Serv.*, 29 M.S.P.B. 638 (1986); *Hong Woo v. Department of Navy*, 27 M.S.P.B. 203 (1985); *Ignacio v. United States Postal Serv.*, 16 M.S.P.B. 530 (1983).

⁶⁸ 30 M.S.P.B. 471 (Special Panel 1986). The special panel is composed of a chair appointed by the President and one member each of the EEOC and MSPB, and it reviews all cases in which the MSPB has determined that an EEOC decision misinterprets civil service law or that the EEOC has reached a civil service decision that is not supported by the evidence presented. See Ericson, *supra* note 65, at 267.

service law."⁶⁹ In *Ignacio* the panel needed to decide whether the EEOC had misinterpreted civil service law by requiring federal employers to reassign employees with disabilities to vacant positions when other forms of accommodation had been unsuccessful.⁷⁰ Upon review, the panel concluded that the EEOC's interpretation of the Rehabilitation Act requiring an employer to consider reassignment was a reasonable interpretation of the Act.⁷¹

However, the special panel did not rule that an employer must reassign an employee with a disability but only that the employer must *consider* reassignment.⁷² Thus, an employer still has the opportunity to show that reassigning an employee would constitute an "undue hardship." In *Carter v. Tisch*, a Fourth Circuit case following *Ignacio*, the court held that this duty to consider reassignment does not mean that reassignment is required under the regulations.⁷³ Accordingly, to avoid a discrimination claim, employers under the Rehabilitation Act need only show that they considered reassigning an employee with a disability before termination and that the reassignment would have posed an undue hardship.⁷⁴ Thus, while the *Ignacio* decision seemingly expanded the responsibility of federal employers, courts have pulled the teeth with which it could have protected employees with disabilities.

b. Case Law

Despite the EEOC's interpretation of section 501, federal courts have consistently ruled that job reassignment is not a required form of reasonable accommodation.⁷⁵ In one of the earliest cases, the Tenth Circuit held that if an individual's disability prevented her from performing the duties required in her job classification, she was not an "otherwise qualified handicapped person" under the Rehabilitation Act.⁷⁶ This interpretation of

⁶⁹ *Ignacio*, 30 M.S.P.B. at 481.

⁷⁰ *Id.*

⁷¹ *Id.* at 486-87.

⁷² *Id.* at 475.

⁷³ 822 F.2d 465, 468 (4th Cir. 1987).

⁷⁴ See *Ericson*, *supra* note 65, at 280. See also notes 75-86 and accompanying text *infra*.

⁷⁵ See text accompanying notes 76-86 *infra*.

⁷⁶ *Daubert v. United States Postal Serv.*, 733 F.2d 1367 (10th Cir. 1984). See also

“otherwise qualified handicapped person” would preclude job reassignment as a form of reasonable accommodation; unless an individual is “otherwise qualified” for the original job in question, the protections of the Rehabilitation Act do not apply.⁷⁷

In the same case, the court also determined that the Postal Service was unable to reduce the plaintiff's duties or reassign her to another position, as such actions would have violated the seniority terms of a collective bargaining agreement.⁷⁸ Because she did not have the requisite seniority to hold a light duty position under the agreement, such reassignment would have interfered with the rights of other employees.⁷⁹ This belief that abiding by the terms of collective bargaining agreements is more important than preserving individuals' civil rights has been restated by federal courts across the nation.⁸⁰

Southwestern Community College v. Davis, 442 U.S. 397, 406 (1979) (“An otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap.”); E.E. Black, Ltd. v. Marshall, 497 F. Supp. 1088 (D. Haw. 1980) (the only relevant test in determining whether an applicant is a qualified handicapped individual is whether the person is capable of performing the tasks required in the job applied for); Carty v. Carlin, 623 F. Supp. 1181, 1188 (D. Md. 1985) (the “position in question” is the present position occupied).

The relevant part of § 504 states, “[n]o otherwise qualified individual with handicaps . . . shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity . . . conducted by any Executive agency or by the United States Postal Service.” 29 U.S.C. § 794. A “qualified handicapped individual” is defined as “a handicapped person who, with or without reasonable accommodation, can perform the essential functions of the position in question” 29 C.F.R. § 1613.702(f).

⁷⁷ The circular reasoning surrounding the term “otherwise qualified” has been noted by Professor Tate. To be covered by the Rehabilitation Act, an individual with a disability has to be “otherwise qualified” to hold the position in question “with or without” reasonable accommodation by the employer, i.e., if the individual did not have a disability, that person would be viewed as qualified to hold the job. Because the employee seeking to be reassigned admittedly is unable to fulfill the duties of the position originally held, under some courts' analysis the employee is no longer “qualified” to hold the job in question. Tate, *supra* note 7, at 838-39. However, as reassignment is now a form of reasonable accommodation under the ADA, in addition to determining whether the employee is qualified for the original position, the employer and court must also determine whether the employee would be qualified to hold any position to which the employee could be reassigned.

The ADA uses the term “qualified individual with a disability” and defines it 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.” ADA § 101(8).

⁷⁸ *Daubert*, 733 F.2d at 1370.

⁷⁹ *Id.*

⁸⁰ *See Shea v. Tisch*, 870 F.2d 786, 790 (1st Cir. 1989) (reassigning employee to dif-

The Supreme Court, however, has indicated that reassignment is a valid means of reasonable accommodation.⁸¹ In *School Board of Nassau County v. Arline*, the Court noted that:

Employers have an affirmative obligation to make a reasonable accommodation for a handicapped employee. Although they are not required to find another job for an employee who is not qualified for the job he or she was doing, they cannot deny an employee alternative employment opportunities reasonably available under the employer's existing policies.⁸²

Because this interpretation of the Rehabilitation Act only suggests that employers reassign an employee if another job is "reasonably available," lower courts have continued to hold that job reassignment is not required if it violates a collective bargaining agreement. In *Davis v. United States Postal Service*, the district court read *Arline* as being consistent with this evaluation, because:

[T]he collective bargaining agreement and the Postal Service's regulations do not make the non-entry level positions which plaintiff seeks reasonably available to him. In fact, these positions are unavailable to all entry level workers unless no employee secures the position through the contractually required bidding process.⁸³

ferent position would "violate the collective bargaining rights of other employees"; *Carter v. Tisch*, 822 F.2d 465, 467 (4th Cir. 1987) (reassigning an employee to a position he was not entitled to might interfere with the rights of other employees under the collective bargaining agreement); *Jasany v. United States Postal Serv.*, 755 F.2d 1244, 1251-52 (6th Cir. 1985) ("An employer cannot be required to accommodate a handicapped employee by restructuring a job in a manner which would usurp the legitimate rights of other employees in a collective bargaining agreement."); *Dexler v. Tisch*, 660 F. Supp. 1418 (D. Conn. 1987) (collective bargaining agreements are factors to consider in deciding reasonableness of a proposed accommodation); *Hurst v. United States Postal Serv.*, 653 F. Supp. 259, 263 (N.D. Ga. 1986) (reassignment to position governed by seniority system not within scope of Act); *Carty v. Carlin*, 623 F. Supp. 1181, 1188-89 (D. Md. 1985) (preferential reassignment could violate other employees' rights under a collective bargaining agreement). See also *Davis v. United States Postal Serv.*, 675 F. Supp. 225 (M.D. Pa. 1987) (no duty to reassign applicant to non-entry-level position as defined in collective bargaining agreement); *Wimbley v. Bolger*, 642 F. Supp. 481, 486 (W.D. Tenn. 1986) (no obligation to transfer employee from current position to another which employee would be able to perform even where collective bargaining agreement provides procedures for reassignment).

⁸¹ *School Bd. of Nassau County v. Arline*, 480 U.S. 273 (1987) (school teacher susceptible to tuberculosis is "handicapped individual" and if qualified must be afforded reasonable accommodation).

⁸² *Id.* at 289 n.19.

⁸³ 675 F. Supp. 225, 233 (M.D. Pa. 1987).

The court relied on the fact that the positions Davis sought and could have performed were not available to other entry-level employees.⁸⁴ The Court held that section 501 did not require employers to make exceptions to existing policy or reassign individuals with disabilities to positions that would not normally be available to employees without seniority.⁸⁵

Thus, although courts have acknowledged that job reassignment may be a valid form of reasonable accommodation, few have been willing to afford the method sufficient authority to override existing policy or collective bargaining agreements.⁸⁶ Accordingly, individuals choosing to pursue a private right of action in court to avoid administrative delays and procedural limitations will have their cases resolved differently from those choosing a purely administrative resolution to the case: a plaintiff choosing the more time-consuming administrative route will have the case settled using EEOC and MSPB policy that supports reassignment, while those going to court will face the current anti-reassignment case law. The courts' reading not only defeats the goal of predictability, but it also limits the Rehabilitation Act's intended prohibition of discrimination against individuals with disabilities.

2. Job Reassignment as a Form of Reasonable Accommodation Under the ADA

a. *The Duty to Reassign*

In drafting the ADA, Congress explicitly included job reassignment as a required form of reasonable accommodation.⁸⁷

⁸⁴ *Id.* at 234.

⁸⁵ *Id.* Other post-*Arline* cases include: *Shea v. Tisch*, 870 F.2d 786, 790 (1st Cir. 1989) (*Arline* only applies if policies for reassignment are already in place; otherwise, reassignment would violate collective bargaining agreement); *Carter v. Tisch*, 822 F.2d 465, 467 (4th Cir. 1987) (*Arline* applies only to existing policies for reassignment).

⁸⁶ One district court has refused to allow collective bargaining agreements to supersede employee civil rights. In *Rhone v. United States Dep't of Army*, 665 F. Supp. 734 (E.D. Mo. 1987), the Eastern District of Missouri held that EEOC regulations required reassignment as a form of reasonable accommodation and that most reassignment could be dealt with under collective bargaining agreements through provisions requiring negotiations to resolve personnel problems. *Id.* at 743-46. See also *Coley v. Secretary of Army*, 689 F. Supp. 519, 523 (D. Md. 1987) (because efforts must be made to reassign employee to another position, the term "position in question" refers to all the positions to which he could be assigned).

⁸⁷ § 101(9)(B).

The definition of reasonable accommodation includes:

(B) job restructuring, part-time or modified work schedules, *reassignment to a vacant position*, acquisition or modification of examinations or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.⁸⁸

The House Education and Labor Report and the Senate Report accompanying the ADA explicitly discussed job restructuring as a form of reasonable accommodation:⁸⁹

The legislation specifies that discrimination includes the failure by a covered entity to make reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability. . . . Reasonable accommodation may also include reassignment to a vacant position. If an employee, because of disability, can no longer perform the essential functions of the job that she or he has held, a transfer to another vacant job for which the person is qualified may prevent the employee from being out of work and employer from losing a valuable worker. Efforts should be made, however, to accommodate an employee in the position that he or she was hired to fill before reassignment is considered. The Committee also wishes to

⁸⁸ *Id.* (emphasis added). Compare this to the language of the regulations implemented to enforce the Rehabilitation Act:

(b) Reasonable accommodation may include, but shall not be limited to: (1) making facilities readily accessible to and usable by handicapped persons; and (2) job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, appropriate adjustment or modification of examinations, the provision of readers and interpreters, and other similar actions.

29 C.F.R. § 1613.704. This list of possible accommodations did not include reassignment as a form of reasonable accommodation. Instead, the notion of reassignment came from the United States Office of Personnel Management's *Handbook on Reasonable Accommodation*, which explains the accommodations listed in the EEOC regulations in less technical terms. In the section of the handbook discussing what federal employers should do if a current employee becomes disabled after employment, it states as one alternative course of action:

Reassignment: The employee's work experience and education may indicate that he or she can perform satisfactorily in another position. Under certain circumstances, an exception may be made to normal qualification standards to facilitate reassignment. Reassignment need not necessarily be limited to positions of the same grade or series. The possibility that the employee would be willing to accept reassignment to a lower grade position with less strenuous physical or mental demands is not to be overlooked.

U.S. OFFICE OF PERSONNEL MANAGEMENT, HANDBOOK ON REASONABLE ACCOMMODATION 10.

⁸⁹ EDUCATION AND LABOR REPORT, *supra* note 58, at 62-63; SENATE REPORT, *supra* note 23, at 31.

make clear the reassignment need only be to a vacant position—"bumping" another employee out of a position to create a vacancy is not required.⁹⁰

The Senate Report placed a limitation on job reassignment, stating that it is available only to individuals who, because of a disability, are no longer able to satisfactorily perform the duties of the position they currently hold.⁹¹

It is important to note that while reassignment is a required form of reasonable accommodation, it should only be considered as a last resort.⁹² Therefore, when it would be possible to accommodate an employee by job restructuring or modifying the employee's work schedule, such avenues must be pursued before reassigning the employee to another position.⁹³ This situation would arise if a fact pattern similar to the one in *Taylor v. Department of the Army* were to arise in a case under the ADA.⁹⁴ In *Taylor* a mail clerk suffered an injury causing stiffness and loss of strength in her hands. A year after the onset of her disability, Taylor was promoted to the position of medical clerk (typist). Unable to type because of her disability, she acted primarily as a receptionist while another clerk-typist performed all typing duties.⁹⁵ When Taylor's supervisor learned that she did not type, the supervisor attempted to fire her because she was physically unable to perform her duties.⁹⁶ The MSPB decided that because it was unreasonable for the Army to have promoted an employee with a hand injury to a typing position, the Army had to reinstate her to her former position as mail clerk.⁹⁷

⁹⁰ EDUCATION AND LABOR REPORT, *supra* note 58, at 62-63.

⁹¹ SENATE REPORT, *supra* note 23, at 32. In addition, neither report says that an employee *cannot* be "bumped" from a position to create a vacancy for an employee with a disability; they merely state that such an action is not required. *Id.* at 32; EDUCATION AND LABOR REPORT, *supra* note 58, at 63 ("reassignment need only be to a vacant position—"bumping" another employee out of a position to create a vacancy is not required"). Thus, should an employer wish to accommodate an employee with a disability by transferring another employee, such reassignment may be within the scope of reasonable accommodation, albeit not required.

⁹² EDUCATION AND LABOR REPORT, *supra* note 58, at 63 ("[e]fforts should be made, however, to accommodate an employee in the position that he or she was hired to fill before reassignment is considered.")

⁹³ *Id.*

⁹⁴ 27 M.S.P.B. 90 (1985).

⁹⁵ *Id.* at 91-92.

⁹⁶ *Id.* at 92.

⁹⁷ *Id.* at 93.

If this case were to be decided under the ADA, the employer (and the MSPB) would have to attempt to accommodate Taylor by other means before reassigning her to another position.⁹⁸ First, it would not be unreasonable to promote an employee with a hand injury to a "typing" position *if* a modified keyboard or another alternative input device (auxiliary aid) would allow her to perform the functions of a typist.⁹⁹ If this accommodation was not successful or possible because of the type of injury, the employer would be required to allow the type of job restructuring devised by Taylor and her co-worker. Since both employees were, as a team, able to complete the tasks assigned to each of them, the employer suffered no ill effects as a result of the restructuring.¹⁰⁰ Accordingly, under the ADA, the employer would be required to allow, if not actively encourage, this type of job restructuring.¹⁰¹ If job restructuring had not enabled Taylor and her co-worker to satisfactorily perform their duties, then the employer would have been required to reassign Taylor to another position.¹⁰²

⁹⁸ See EDUCATION AND LABOR REPORT, *supra* note 58, at 63.

⁹⁹ The ADA prohibits "limiting . . . a job applicant or employee in a way that adversely affects the opportunities or status of such applicant . . . because of the disability of such applicant or employee." § 102(b)(1). Although there may be other opportunities for promotion other than to clerk-typist, this promotion would be reasonable as long as accommodation could be provided. Similarly, if an alternative aid, such as a special type of keyboard, could enable an entry-level employee with a hand injury to perform the duties of a typist, the employer should be required to make the accommodation.

¹⁰⁰ Because the employer would be paying two employees anyway—two clerk typists—the fact that one acted primarily as a clerk and the other primarily as a typist would not change the fact that two employees were needed to complete the work assigned to the two positions.

¹⁰¹ Although one of the essential functions of the position "clerk-typist" is, presumably, typing, the mere fact that Taylor was unable to type would not render her unqualified for the job. Section 101(8) of the ADA 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." Because the definition of reasonable accommodation includes "job restructuring," § 101(9)(B), the definition of qualified individual can be read as "an individual with a disability who, with . . . reasonable accommodation, [including job restructuring,] can perform the essential functions . . ." §101(8). Because restructuring the clerk-typist positions enabled Taylor (and the other typist) to satisfactorily perform the duties of her (their) position(s), she was qualified to hold the position of medical clerk-typist under the ADA.

¹⁰² Although this position would have to be one Taylor was qualified to hold, it would not necessarily have to be the position from which Taylor was originally transferred. Because Taylor was promoted before her disability was discovered, under the ADA, efforts should be made to transfer her to a position of equal salary and job grade

b. *Treatment of Collective Bargaining Agreements*

Both the House and Senate addressed the issue of collective bargaining agreements in their reports.¹⁰³ While both houses recognized that collective bargaining agreements might be relevant when determining whether a particular job reassignment is reasonable, such an agreement "would not be determinative on the issue."¹⁰⁴ Accordingly, a collective bargaining agreement that established seniority guidelines for certain positions could be considered when deciding whether reassigning an employee with a disability who does not have seniority is a reasonable accommodation.¹⁰⁵ The presence of that agreement, however, should not be used as the sole factor for finding reassignment unreasonable.¹⁰⁶

To eliminate this conflict entirely, Congress, in its reports explaining the provisions of the ADA, encouraged employers and unions negotiating collective bargaining agreements after the effective date of the ADA to include a provision that would permit employers to "take all actions necessary to comply with this legislation."¹⁰⁷ Because a suit could arise under the ADA immediately upon its effective date, it would be prudent for employers to take note of this advice now, so that ADA compliance provisions will be included in the collective bargaining agreements that are operative when the ADA takes effect.

Even if employers were to ignore Congress's recommendation, the Supreme Court has held that the policies promoted by civil rights statutes are sufficient to override the interests of other employees and collective bargaining agreements. In *Franks v. Bowman Transportation Co., Inc.*, the Supreme Court

before demoting her to her original position.

¹⁰³ EDUCATION AND LABOR REPORT, *supra* note 58, at 63; SENATE REPORT, *supra* note 23, at 32. The ADA itself, however, does not discuss this issue.

Collective bargaining agreements are the contracts negotiated between a union and management, specifying salary grades for certain job levels, the seniority required for certain jobs, amount of vacation and sick leave for employees, and similar issues affecting employment.

¹⁰⁴ EDUCATION AND LABOR REPORT, *supra* note 58, at 63. The Senate Report states that a collective bargaining agreement "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." SENATE REPORT, *supra* note 23, at 32.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* EDUCATION AND LABOR REPORT, *supra* note 58, at 63.

held that one of the goals of Title VII is to make victims of discrimination whole; if the only way to make a plaintiff whole is for the court to grant retroactive seniority as well as back pay, then collective bargaining agreements should be overridden.¹⁰⁸ The Court's rationale—that Congress viewed prohibiting discrimination as having the highest priority—would seem to apply to the ADA as well. While the Rehabilitation Act is very limited in scope—it applies only to entities funded with federal money—the ADA has the same broad coverage as Title VII of the Civil Rights Act and refers to Title VII in describing its enforcement provisions.¹⁰⁹ Accordingly, while courts may have been hesitant to invoke the broadest powers of Congress to override contractual agreements to enforce the provisions of the Rehabilitation Act, they should accord the ADA the same power as the Supreme Court has granted Title VII of the Civil Rights Act.

Both Congress's discussion of collective bargaining and the Title VII case law suggest that most Rehabilitation Act reassignment cases decided by the federal courts would have been decided differently under the ADA. Although some courts have stated that collective bargaining agreements are only factors to be considered in determining whether an accommodation is reasonable, they have found the existence of a seniority provision in

¹⁰⁸ 424 U.S. 747, 763-72 (1976). In *Franks*, a Title VII racial discrimination case, plaintiffs sought an award of retroactive seniority as part of their damages. Defendants argued that awarding seniority to employees who had not been working in the seniority-earning position (determined to be a result of discrimination) would violate collective bargaining agreements.

The Court also stated: "in enacting Title VII of the Civil Rights Act of 1964, Congress intended to prohibit all practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex, or national origin . . . and ordained that its policy of outlawing such discrimination should have the 'highest priority.'" *Id.* at 763 (citations omitted).

¹⁰⁹ Congress states that the purposes of the ADA are:

- (1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;
- (2) to provide clear, strong, consistent enforceable standards addressing discrimination against individuals with disabilities;
- (3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and
- (4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

§ 2(b) (emphasis added).

the collective bargaining agreement sufficient to determine that a reassignment is unreasonable.¹¹⁰ As the presence of a collective bargaining agreement was the sole reason invoked against reassignment in the Postal Service decisions, similar cases brought under the ADA should require reassignment.¹¹¹

If the ADA is to be enforced and used to its full power, courts must begin to look at the breadth of other civil rights statutes and prohibit discrimination against individuals with disabilities as Congress intended. While the Rehabilitation Act was a step in the right direction, because of its very limited scope—it only applied to those employers who were tied to the federal government in some way—courts may have been hesitant to interpret it as broadly as they had interpreted Title VII. By passing the ADA, Congress has sent a clear message that discrimination against individuals is not acceptable in this society. The courts must not run from the responsibility Congress has placed upon them, but instead must face the challenge to protect the interests of individuals with disabilities, even at the risk of burdening employers.

Under the ADA, an individual who develops a disability that prevents her from continuing to work at her current job will not immediately become unemployed, as is often the case today. Instead, her employer will have to examine all possible options available to keep the employee with a disability in the company. Should job restructuring or other accommodation not be adequate to accommodate the employee, the employer must explore fully the possibility of reassigning the employee before deciding to terminate her. While reassignment will not always be feasible, it will at least enable some individuals with disabilities to remain employed even after their ability to perform the tasks of their original position is impaired.

¹¹⁰ See *Davis v. United States Postal Serv.*, 675 F. Supp. 225, 235 (M.D. Pa. 1987). See also *Dexler v. Tisch*, 660 F. Supp. 1418 (D. Conn. 1987) (although collective bargaining agreement does not supersede federal law, its provisions must be considered when analyzing reasonableness of accommodation). The only other factors courts considered were the reasons employers and employees usually enter into collective bargaining agreements, such as to allow for career advancement of employees and to attract and retain management-level personnel. See, e.g., *Davis*, 675 F. Supp. at 235.

¹¹¹ See notes 94-102 *supra*.

B. *Prohibition of Preemployment Medical Examinations and Implications Regarding Genetic Screening*

The ADA also prohibits an employer practice that was not covered under the language of the Rehabilitation Act itself—preemployment medical examinations. While some of the federal agencies promulgating regulations pursuant to the Rehabilitation Act included prohibitions on medical testing, the provisions were inconsistent and inadequate to prevent discrimination on the basis of disability.¹¹² Such prohibitions are especially important today as more employers are screening applicants for potential future health risks.¹¹³ Not only can employers screen out applicants who may be unable to perform their jobs sometime in the future, but they can also minimize the potential liability and insurance costs related to hiring these workers. A 1982 survey by the Congressional Office of Technology Assessment [hereinafter OTA] showed that 4.6 percent of the major employers surveyed had used biochemical or cytogenetic tests in the past, 1.6 percent were currently testing applicants, and 16.1 per-

¹¹² 41 C.F.R. § 60-741.6 (1983) (Office of Federal Contract Compliance Programs regulations enforcing § 503); 45 C.F.R. § 84.14 (1983) (Health and Human Services regulations for enforcing § 504).

Neither of these provisions prohibits conducting preemployment medical examinations or inquiries entirely. The § 504 regulations require only that, if preemployment medical examinations are required, they be conducted only after an offer of employment has been made conditional on acceptable results, and that they be required of all applicants; they need not even demonstrate that the information obtained from the examination is *relevant* to the applicant's ability to perform job-related activities. 45 C.F.R. §§ 84.14(c). This provision neither prohibits preemployment inquiry nor sets up a stringent standard by which testing can be judged. Tests do not need to be a business necessity, nor must they relate to the ability to perform the essential functions of the job; the tests are not even required to be highly predictive of injury or inability to perform the job. *Id.* See MARK A. ROTHSTEIN, *MEDICAL SCREENING OF WORKERS* 117 (1984).

The § 503 regulation appears weaker on the surface, allowing preemployment examination of applicants with disabilities even if examinations are not required of all applicants. 41 C.F.R. § 60-741.6(c)(3). However, if the testing tends to screen out qualified individuals with disabilities, "the requirements shall be related to the specific job or jobs for which the individual is being considered and shall be consistent with business necessity and the safe performance of the job." 41 C.F.R. § 60-741.6(c)(1). Applying the § 503 business necessity test to medical examinations and screening procedures, the methods used "(1) must have a scientifically valid basis, (2) must have a high predictive value, and (3) must be the most accurate and least onerous alternative." ROTHSTEIN, *supra*, at 118.

¹¹³ A discussion of genetic screening and testing for future health risks follows at text accompanying notes 130-35 *infra*.

cent expected to begin testing within the next five years.¹¹⁴ Moreover, as technology has advanced, it is likely that many more employers are genetically screening applicants today.¹¹⁵

In addition, there has been some debate as to the Rehabilitation Act's applicability to an individual who does not currently have a disability, but who is at risk of developing a specific disability in the future.¹¹⁶ Because the Rehabilitation Act was intended to be narrow in scope, some argue that including these individuals under its coverage would be contrary to legislative intent.¹¹⁷ The ADA, in contrast, was intended to be a broad anti-discrimination law, equal in scope and protection to the Civil Rights Act of 1964,¹¹⁸ and therefore would cover such

¹¹⁴ OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, *THE ROLE OF GENETIC TESTING IN THE PREVENTION OF OCCUPATIONAL DISEASE* (1983) [hereinafter OTA Study]. The OTA conducted an anonymous survey of the "Fortune 500" companies, eleven major labor unions, and fifty of the biggest private utilities. Approximately 65 percent of those companies targeted responded to the survey. *Id.* at 9. Because of the anonymous nature of the survey, it was impossible to tell if screening is more prevalent in some industries than in others. However, it is possible that the use of screening is higher than suggested by the study, as one trade association reportedly attempted to discourage corporate participation in the survey. Richard Severo, *59 Top U.S. Companies Plan Genetic Screening*, N.Y. TIMES, June 23, 1982, at A12. In addition, the study was conducted in 1982, and respondents were only looking ahead to possible practices by 1987; no later studies have been done to document the current prevalence of genetic screening by employers.

¹¹⁵ Since 1983 researchers have been able to study DNA to identify genetic markers for Huntington's disease and other disorders. In addition, geneticists are now using these same technologies to look at an individual's predisposition to nonoccupational illnesses. MARK A. ROTHSTEIN, *MEDICAL SCREENING AND THE EMPLOYEE HEALTH COST CRISIS 72-76* (1989). Accordingly, besides being able to screen for work-related risks, employers are now able to screen for individuals who are predisposed towards heart disease or other illnesses, and thereby cut general health insurance costs.

¹¹⁶ See, e.g., Katherine Brokaw, *Genetic Screening in the Workplace and Employers' Liability*, 23 COLUM. J.L. & SOC. PROBS. 317 (1990) (not settled whether Rehabilitation Act would protect genetically susceptible individuals); Edith F. Canter, *Employment Discrimination Implications of Genetic Screening in the Workplace Under Title VII and the Rehabilitation Act*, 10 AM. J. L. & MED. 323 (1984) (genetically susceptible individual within scope of Act); Ellen R. Peirce, *The Regulation of Genetic Testing in the Workplace—A Legislative Proposal* 46 OHIO ST. L.J. 771 (1985) (genetically susceptible individual within definition of disability); Mark A. Rothstein, *Employee Selection Based on Susceptibility to Occupational Illness*, 81 MICH. L. REV. 1379 (1983) (case law unclear whether susceptible individuals covered by Act); Robert Wachbroit, *Making the Grade: Testing for Human Genetic Disorders*, 16 HOFSTRA L. REV. 583 (1988) (genetically susceptible individuals not within scope of Act); Laura Rowinski, Note, *Genetic Testing in the Workplace*, 4 J. CONTEMP. HEALTH L. & POL'Y 375 (1988) (genetically susceptible individuals probably not within protected class, and even if they were, business necessity defense would exempt employer).

¹¹⁷ ROTHSTEIN, *supra* note 112, at 120.

¹¹⁸ See note 109 and accompanying text *supra*.

individuals.

Finally, the Rehabilitation Act applies only to federal employers and employers receiving federal funds through grants and contracts.¹¹⁹ Accordingly, only those employers doing business with the federal government are prohibited from discriminating. While the CRRA broadened the coverage of the Rehabilitation Act to reach entities receiving federal funds in any part of their operation, many employers engaging in genetic screening do not receive any federal money, and therefore are still not covered.

1. Prohibition Under the ADA

Section 102(c) of the ADA prohibits the most frequently used technique to discriminate against individuals with cancer, epilepsy, mental illness, heart disease, diabetes, AIDS and other "hidden" disabilities—preemployment medical examinations and inquiries.¹²⁰ Employers have frequently required applicants to complete a medical questionnaire asking about these disabilities at the same time they completed an employment application. If applicants refused to complete the questionnaire, they were ineligible for employment; if they lied, they could be fired if the truth were later discovered. The ADA now prohibits employers from screening out applicants who have disabilities that are immaterial to their qualifications for a job.¹²¹

Under the ADA, neither public nor private employers are permitted to conduct preemployment medical examinations, to ask an applicant whether she has a disability, or to ask about the nature or severity of a disability.¹²² Employers are, however, allowed to ask an applicant whether she has the ability to per-

¹¹⁹ 29 U.S.C. §§ 793-794 (1988). See note 5 *supra*.

¹²⁰ See EDUCATION AND LABOR REPORT, *supra* note 58, at 72. See also note 112 *supra*.

The Rehabilitation Act does not prohibit preemployment medical examinations, although they are regulated by some agency regulations promulgated pursuant to it. Regulations interpreting § 504 provide that preemployment medical examinations may be required only if they are required of all employees. 28 C.F.R. § 42.513 (1982). Those interpreting § 503 are less restrictive, permitting an employer to require preemployment examinations of applicants with disabilities, even if such examinations are not required of all applicants. 41 C.F.R. § 60-741.6 (1983). In both instances, the examinations must still be job related, promoting "business necessity and safe performance." 29 C.F.R. § 32.14 (1982).

¹²¹ ADA § 102(c)(1)-(4).

¹²² § 102(c)(2)(A).

form job-related functions.¹²³ Once an offer of employment has been made, employers may conduct medical examinations that are "job-related and consistent with business necessity" and the job offer may be conditional on the individual being physically or mentally capable of performing the job.¹²⁴ If an employer wishes to test applicants, all applicants must be subject to the same examination.¹²⁵

Any information obtained through such testing must be treated as a confidential medical record.¹²⁶ It may only be provided to supervisors or managers in order to allow them to make necessary restrictions or accommodations, and to safety personnel if the disability might require emergency treatment.¹²⁷ In addition, information may be released to officials investigating the employer's compliance with the ADA.¹²⁸ The same restrictions apply to employers wishing to conduct medical examinations or inquiries of current employees; an examination is permitted if all employees are required to submit to an examination, and the examination is specifically job related and is consistent with business necessity.¹²⁹

¹²³ § 102(c)(2)(B).

¹²⁴ § 102(c)(3) (4)(A). Similarly, the testing of current employees is also subject to these provisions. § 102(c)(4)(A).

¹²⁵ § 102(c)(3)(A). Employers may also conduct voluntary medical examinations as part of an employee health program. § 102(c)(4)(B).

This provision differs from the § 504 regulations in three significant ways. First, it allows examinations only after a conditional job offer has been made. Second, it requires that the *same* examination be given to all employees; under the § 504 regulations, it was not illegal to subject applicants with a disability to examinations that were different from those given to other applicants. Third, the § 504 regulations only required that the examinations be relevant to the job in question; the ADA requires that the tests be specifically job related and consistent with business necessity. The latter part of the requirement draws upon the § 503 regulations that if a test tends to screen out applicants with disabilities, the test must be "related to the specific job or jobs for which the individual is being considered and shall be consistent with business necessity and the safe performance of the job." 41 C.F.R. § 60-741.6 (1983).

¹²⁶ ADA § 102(c)(3)(B).

¹²⁷ § 102(c)(3)(B)(i) & (ii).

¹²⁸ § 102(c)(3)(B)(iii).

¹²⁹ § 102(c)(4)(A) & (B). Another exception applies if employers wish to conduct voluntary medical examinations as part of an employee health program that is available to employees at the work site. Any information obtained from such an examination is subject to the same confidentiality requirements as examinations of prospective employees. § 102(c)(4)(C).

2. Genetic Screening and Other Means of Testing for Susceptibility to Workplace Hazards

Researchers advocated genetic screening in employment as early as 1963.¹³⁰ Ten years later, only three United States chemical companies were using the tests; the researchers again encouraged genetic testing in the workplace and suggested testing for even more traits, including sickle cell trait and alpha₁-antitrypsin deficiency.¹³¹ By 1978 Du Pont had begun testing black employees for sickle cell trait,¹³² and by 1982 seventeen of the companies surveyed by the Office of Technology Assessment (OTA) admitted having used genetic tests within the past twelve years.¹³³ While there are no current data on genetic testing in the workplace, advancing technology and increased concerns about liability and health care costs suggest that more employers are using genetic tests today than ever before.

Medical testing may refer to two distinct types of tests. First, there is medical or genetic screening, in which a test is done to determine the presence or absence of a particular condi-

¹³⁰ See Herbert E. Stokinger & John T. Mountain, *Test for Hypersusceptibility to Hemolytic Chemicals*, 6 ARCHIVES ENVTL. HEALTH 495, 495-96 (1963).

¹³¹ See Herbert E. Stokinger & L.D. Scheel, *Hypersusceptibility and Genetic Problems in Occupational Medicine—A Consensus Report*, 15 J. OCCUPATIONAL MED. 564 (1973).

These two tests were two of the most common screening devices. Sickle cell trait refers to a person who is heterozygous, or carries one gene for sickle cell anemia (an individual with sickle cell anemia is homozygous, or has two sickle cell genes). While a person with sickle cell trait will never develop the anemia, many scientists believe that an individual with the trait is at an increased risk of blood oxygen deficiency. In addition, other scientists believe that individuals with the trait are also more susceptible to hemolytic anemia, therefore they recommend avoiding exposure to anemia producers such as benzene, lead and cadmium, blood enzyme tension reducers such as cyanide and carbon monoxide, and methemoglobin formers, such as aromatic amino and nitro compounds. ROTHSTEIN, *supra* note 112, at 55.

Serum alpha₁-antitrypsin [hereinafter SAT] is a protein that protects the lung from certain enzymes. An individual with a SAT deficiency is predisposed to alveolar destruction and the development of emphysema. Accordingly, an individual with the deficiency is at increased risk in a dusty environment or an environment with other respiratory irritants. While individuals who are homozygous for the deficiency are extremely likely to develop chronic destructive pulmonary disease even without additional irritants, those who are heterozygous only have a 10 percent chance of becoming ill, even when exposed to workplace hazards. *Id.* at 57-58.

¹³² ROTHSTEIN, *supra* note 112, at 53; Richard Severo, *Du Pont Defends Genetic Screening*, N.Y. TIMES, Oct. 18, 1981, § 1, at 31.

¹³³ OTA STUDY, *supra* note 114, at 9.

tion, gene, or trait that may cause an illness in the future.¹³⁴ Examples are lower back x-rays for congenital defects, biochemical genetic tests for the sickle cell gene, and recombinant DNA tests for Huntington's disease. Genetic screening permits employers to identify hypersusceptible individuals—individuals who possess a genetic trait that makes them more likely to become ill after exposure to a certain substance in the workplace.

The second type of testing is medical monitoring, in which periodic tests are done to ensure that an employee's exposure to hazardous substances in the workplace has not had a serious effect on the employee's health. For example, the Occupational Safety and Health Act (hereinafter OSHA) requires that employees working with toxic substances be periodically examined to monitor any effects the toxins may have.¹³⁵

3. Implications of the ADA on Genetic Screening of Applicants

a. Permissibility of Preemployment Testing for Hypersusceptibility and Risk of Future Injury

Under the medical examination provision of the ADA, medical testing is allowed if such tests are conducted routinely on all applicants after a conditional job offer has been made, as long as the testing is "job-related and consistent with business necessity."¹³⁶ This would include tests to determine whether an individual is physically or mentally able to perform a job.¹³⁷ Medical testing may be permissible under this section if it is used for monitoring.¹³⁸ Genetic screening, on the other hand, does not relate to an employee's current ability to perform a job, nor does it alert the employee to a developing condition, or to an overexposure to a specific health hazard. Instead it may, for example, identify individuals who have a genetic predisposition toward ill-

¹³⁴ See Mark A. Rothstein, *Medical Screening of Workers: Genetics, AIDS and Beyond*, 2 LAB. L.J. 675 (1987). Other factors used to predict the likelihood of future illness are innate characteristics, behavioral factors, general health status, and medical status related to prior occupational exposure. *Id.*

¹³⁵ ROTHSTEIN, *supra* note 112, at 19. See for example, if an employee were routinely exposed to lead at the workplace, the employee would be required to submit to yearly blood tests to measure the levels of lead in the employee's blood.

¹³⁶ ADA § 102(c)(4)(A).

¹³⁷ §§ 102(c)(2)(B) & 103(a); EDUCATION AND LABOR REPORT, *supra* note 58, at 73.

¹³⁸ Peirce, *supra* note 116, at 777.

nesses caused by exposure to certain chemicals.¹³⁹ Although it can warn an individual that exposure to a certain substance may affect her health more than it would affect a co-worker, it does not mean that the employee will definitely develop the disease, even if exposed to the chemical.¹⁴⁰ Thus, while the test may alert the individual to a potential for disease, or to a need for more frequent monitoring, it does not indicate a current disability or an incapacity to perform a job. Because such information does not relate to the applicant's ability to perform her job, genetic screening, unlike monitoring, is not permitted under the ADA.¹⁴¹

Employers may assert that screening out hypersusceptible applicants is necessary, citing concerns such as future job safety, increased workers' compensation costs, future liability, health benefits, and other costs associated with absenteeism, sick leave, and turnover.¹⁴² While these economic concerns are valid, few courts have upheld the theory that economic concerns outweigh employees' civil rights.¹⁴³

b. Prohibition of Discrimination Based on Results of Genetic Tests and the Risk of Future Harm

Even if medical examinations and genetic tests are permitted to enable employers to identify employees who may be more susceptible to job-related injuries, employers may not use the results of those tests to discriminate against an individual with a potential disability.¹⁴⁴ Individuals who are hypersusceptible or

¹³⁹ See text accompanying notes 112-19 and 130-35 *supra*.

¹⁴⁰ ROTHSTEIN, *supra* note 134, at 677-78. Often, even the increased risk will not significantly affect the probability that the employee will contract the disease. For example, an individual has a genetic trait that increases her risk of illness tenfold. The risk of that illness in the general population is one in 10,000. Even though the individual's risk is ten times higher, her absolute risk (one in 1000) is still quite low. *Id.* at 678.

¹⁴¹ § 102(c)(4)(A).

A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

¹⁴² Brokaw, *supra* note 116, at 326.

¹⁴³ For a detailed discussion of the business necessity defense, see text accompanying notes 173-89 *infra*.

¹⁴⁴ During the House floor debate preceding the passage of the ADA, three representatives discussed the applicability of the ADA to discrimination based on genetic testing and the risk of future harm. Representative Owens of New York stated:

who have congenital or other latent disabilities are covered by the ADA as individuals who are regarded as having a disability.¹⁴⁵ This definition of disability, the same as the definition used in the Rehabilitation Act, has been interpreted to include conditions that currently do not limit an individual (other than in securing the particular job desired) but which weaken, diminish or damage an individual's health, or which are perceived by an employer as weakening, diminishing or damaging one's health or ability to perform the job in question.¹⁴⁶

In *E.E. Black, Ltd. v. Marshall, Crosby*, an apprentice carpenter, was denied a position by a general contractor when a preemployment physical revealed a congenital back anomaly.¹⁴⁷ Although the condition did not currently impair the carpenter's ability to perform an apprentice's duties, the company refused to hire him because the condition made him a "poor risk for

These protections of the ADA will also benefit individuals who are identified through genetic tests as being carriers of a disease-associated gene. There is a record of genetic discrimination against such individuals, most recently during sickle cell screening programs in the 1970's. With the advent of new forms of genetic testing, it is even more critical that the protections of the ADA be in place. Under the ADA, such individuals may not be discriminated against simply because they may not be qualified for a job sometime in the future. The determination as to whether an individual is qualified must take place at the time of the employment decision, and may not be based on speculation regarding the future. Moreover, such individuals may not be discriminated against because they or their children might incur increased health care costs for the employer.

136 CONG. REC. H4623 (daily ed. July 12, 1990). Representatives Edwards and Waxman made similar statements regarding the applicability of the ADA to hypersusceptible individuals. *Id.* at H4624, H4626-27.

¹⁴⁵ See ADA § 3(2)(A) & (C); SENATE REPORT, *supra*, note 23, at 24.

The definition of disability includes an individual who is "regarded as having . . . an impairment [that limits one or more major life activity]." Thus, if an individual were not hired because she tested positive for a certain genetic trait which *may* make her more susceptible to on-the-job hazards, the perception by the employer that this individual has a physical impairment which would prevent her from carrying out her job (and the subsequent refusal to hire) would make this applicant a person who is "regarded as having such an impairment." § 3(2)(C).

¹⁴⁶ See *E.E. Black, Ltd. v. Marshall*, 497 F. Supp. 1088 (D. Haw. 1980) (latent congenital back defect is disability if perceived as such by employer and impairs ability to secure employment in chosen field). See also *Vickers v. Veterans Admin.*, 549 F. Supp. 85 (W.D. Wash. 1982) (employee "unusually sensitive to tobacco smoke" was handicapped within meaning of statute).

¹⁴⁷ 497 F. Supp. at 1091. The anomaly, a partially sacralized transitional vertebra, occurs in eight to nine percent of the population. While the condition may put him at risk for possible back injury in the future, there is no agreement in the medical profession on how large the risk is. ROTHSTEIN, *supra* note 112, at 119.

heavy labor."¹⁴⁸ The company still refused to hire him after an orthopedist wrote a letter to the company, stating that if Crosby "kept his back and abdominal muscles in good tone, 'he should be able to perform whatever he prefers.'"¹⁴⁹

The Hawaii district court concluded, first, that the apprentice was impaired or perceived as impaired under the definitions of the Rehabilitation Act.¹⁵⁰ It held that the broad definition of an impairment as "any condition which weakens, diminishes, restricts, or otherwise damages an individual's health or physical or mental activity" was a logical interpretation of impairment, consistent with Congress's intentions.¹⁵¹ Because the company perceived Crosby's condition as weakening, diminishing and restricting his ability to perform jobs involving heavy labor, the apprentice was clearly impaired or regarded as impaired under the statute.¹⁵²

Second, the court addressed the requirement that the impairment substantially limit a major life activity of the apprentice.¹⁵³ As working constituted a major life activity under the Act,¹⁵⁴ the court needed to determine how broadly the concept of securing employment and working should be construed. The court decided that a person's limitation should be determined by looking at her particular situation; accordingly, factors to be examined include the number and type of jobs from which the person is disqualified, the availability of other jobs in the person's geographical area, and the person's own training and job experience.¹⁵⁵ Accordingly, since Crosby was training to be a carpenter,

¹⁴⁸ 497 F. Supp. at 1091.

¹⁴⁹ *Id.* at 1092.

¹⁵⁰ *Id.* at 1098 (citing 29 U.S.C. § 706(7)(A) & (B)).

¹⁵¹ *Id.* at 1098. Looking at the legislative history of the Rehabilitation Act, the court noted that in 1974 Congress amended the statute, adding "is regarded as having such an impairment" and stating that "[t]heir intent was to protect people who are denied employment because of an employer's perceptions, whether or not those perceptions are accurate." *Id.* at 1097.

¹⁵² *Id.* at 1098.

¹⁵³ 29 U.S.C. § 706(8)(B). The provision states that a handicapped individual is a person who "has a physical or mental impairment which substantially limits one or more of such person's major life activities . . ." *Id.*

¹⁵⁴ The statute also states that an "individual with handicaps" is one who "has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment." 29 U.S.C. § 706(8)(A).

¹⁵⁵ 497 F. Supp. at 1099-1101. If an individual were denied one job but had other opportunities, she might not be substantially limited. But if she were disqualified from

should other contractors follow Black's rationale and disqualify him from all apprentice-level jobs, he would be disqualified from all jobs within his chosen field. Thus, he was substantially limited in his ability to secure employment.¹⁵⁶

Although the court refused to decide if and when an employer could refuse to hire an individual with a disability, believing that avoiding the possibility of future injury was consistent with business necessity and safe performance of the job, the court did say that the risk of future injury "does not make an otherwise capable person incapable."¹⁵⁷ However, the court suggested a high standard for deciding what degree of future risk is required to find screening consistent with business necessity.¹⁵⁸

The holding that an individual at risk for future injury is "handicapped" under the Rehabilitation Act if an employer treats the risk as a disability is equally applicable to other types of congenital conditions and hypersensitivity. Crosby had an identified medical condition that did not currently impair his ability to work, but that might have impaired his ability to work in the future; this is analogous to most cases of future risk or hypersusceptibility.¹⁵⁹ Although a hypersusceptible person may not be currently disabled, it is the employer's perception of her as being incapable of performing the job because of her genetic predisposition that qualifies her as an individual with a disability. While *Black* was decided under section 503 of the Rehabilitation Act rather than under the ADA, the same reasoning should still apply under the new law, for the definition of the individuals covered is the same.

Two subsequent circuit court cases also addressed the issue

similar positions by all the employers in her geographical area, she might be substantially limited. For example, if she were trained as a chemist and were disqualified from a chemistry position, but were able to get a job as a truck driver, she would be considered substantially limited in her ability to work in her chosen field.

¹⁵⁶ *Id.* at 1102.

¹⁵⁷ *Id.* at 1103. The court refused to decide whether the risk of harm was serious enough to warrant a valid business necessity defense for lack of sufficient evidence at the time, and held the issue for further proceedings. *Id.* at 1104.

¹⁵⁸ *Id.* The court used the example of an individual having a 90% chance of having a heart attack after working at a particular job for one month. While the individual might be qualified for the position, screening out this person might be consistent "with business necessity and the safe performance of the job." *Id.*

¹⁵⁹ See Peirce, *supra* note 116, at 795 ("From the decision, we can conclude that a possibility of future impairment can be considered an impairment protected under the Act if perceived to be a handicap by the employer.").

of discrimination based on risk of future injury.¹⁶⁰ In *Bentivegna v. United States Department of Labor*, the City of Los Angeles refused to hire Bentivegna, an applicant with diabetes.¹⁶¹ The city required all applicants with diabetes to show blood sugar test results that were consistently below a certain level. At his physical examination, one of Bentivegna's tests indicated what the city considered a lack of control of his diabetes. The city then terminated Bentivegna from his position as a building repairer.¹⁶²

The Ninth Circuit addressed the issue of whether Bentivegna was qualified for the position in question.¹⁶³ The city's argument was that uncontrolled diabetes would cause an employee to contract serious infections from minor injuries and heal more slowly, and be more likely to have long term health problems.¹⁶⁴ The court dismissed the city's distinction between controlled and uncontrolled diabetes, stating that the distinction was not sufficiently supported to justify firing an employee with diabetes.¹⁶⁵ The court then stated that "allowing remote concerns [about long-term health problems] to legitimize discrimination against the handicapped would vitiate the effectiveness of section 504 of the Act. . . . Such considerations cannot provide the basis for discriminatory job qualifications unless they can be connected directly to 'business necessity or safe performance of the job.'" ¹⁶⁶

The Ninth Circuit followed this decision in *Mantolete v. Bolger*.¹⁶⁷ The United States Postal Service denied Mantolete a position as a machine distribution clerk because she suffered from epilepsy.¹⁶⁸ The postal service argued that working with a letter sorter machine could be dangerous to Mantolete if she were to suffer a seizure while working. They did not look at her employment history; she had worked with machinery as danger-

¹⁶⁰ See *Bentivegna v. United States Dep't of Labor*, 694 F.2d 619 (9th Cir. 1982); *Mantolete v. Bolger*, 767 F.2d 1416 (9th Cir. 1985).

¹⁶¹ 694 F.2d at 620.

¹⁶² *Id.*

¹⁶³ *Id.* at 621.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 622.

¹⁶⁶ *Id.* at 623.

¹⁶⁷ 767 F.2d 1416 (9th Cir. 1985).

¹⁶⁸ *Id.* at 1418.

ous as the letter sorter in the past.¹⁶⁹

The court held that in order to screen out qualified individuals with disabilities, an employer must show a reasonable probability of substantial harm.¹⁷⁰ The court stated the test as follows: “[I]s the applicant presently qualified to perform the essential requirements of the job without a reasonable probability of substantial injury to the applicant or others? If the answer to this question is affirmative, then employment cannot be denied based upon the handicap.”¹⁷¹ Although the majority included risk to the applicant among the employer’s considerations, the concurring opinion noted that this consideration is contrary to Title VII cases, where risk to the applicant is insufficient reason to deny employment.¹⁷²

Using these standards, a hypersusceptible individual would still be considered a qualified employee under the ADA. Genetic tests are not sufficiently adequate to show a reasonable probability of any harm resulting from hypersusceptibility, nor are the potential consequences necessarily a substantial harm. While each case of discrimination against a hypersusceptible individual would need to be judged on a case-by-case basis, the burden would be on the employer to prove that the test used was sufficiently reliable to meet the “reasonable probability of substantial harm” standard. Nonetheless, an individual who was denied a job because of hypersusceptibility would have a viable cause of action under the ADA.

c. *Exclusion Because of Business Necessity or Safety Concerns*

An employer may attempt to justify screening out applicants posing a special risk of future harm by asserting that such procedures are job-related and consistent with business necessity.¹⁷³ While the *Mantolite* standard examines the reasonable probability of substantial harm to the applicant or others, Title VII case law examining the bona fide occupational qualification

¹⁶⁹ *Id.* at 1419.

¹⁷⁰ *Id.* at 1422.

¹⁷¹ *Id.* at 1423.

¹⁷² *Id.* at 1425 n.1 (Rafeedie, J., concurring) (citing *Dothard v. Rawlinson*, 433 U.S. 321 (1972)). See text accompanying notes 174-78 *infra*.

¹⁷³ ADA §§ 102(c)(4)(A) & 103(a).

(bfoq) defense,¹⁷⁴ a defense similar to the business necessity defense of the ADA, does not consider either risk of harm to the plaintiff or the defendant's economic concerns sufficient to override Title VII's prohibition of discrimination.¹⁷⁵

Courts have consistently interpreted the bfoq defense narrowly. The Fifth Circuit interpreted the defense as requiring the employer to prove that "the essence of the business operation would be undermined" if the employer were prohibited from discriminating.¹⁷⁶ Earlier, the same court had stated that an employer needed to prove "that he had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job" in order to support a bfoq defense.¹⁷⁷ Where future harm is at issue, the question is not whether there is a threat of harm to the applicant, but whether there is "a substantial safety risk to the public at large, clients, or other employees."¹⁷⁸ Because the harm at issue is the hypersusceptibility or elevated risk of future injury to the applicant, the bfoq safety defense would fail in a Title VII case.¹⁷⁹

¹⁷⁴ 42 U.S.C. § 2000e-2(e). The bfoq defense applies "in those certain instances where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . ." *Id.*

Congress developed bfoq as a defense to disparate treatment, or facial discrimination, claims. Disparate treatment cases assert that an employer treated an applicant or employee differently because she is a member of a protected class. Disparate impact claims assert that an employer's practice, while not discriminatory against members of a protected class on its face, has the intended or unintended result of adversely affecting members of a protected class. Employers charged with discrimination based on a disparate impact theory may employ a different defense, as set forth in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). The *Griggs* business necessity defense states that in order to be legitimate, "any given requirement must have a manifest relationship to the employment in question." 401 U.S. at 432.

Because discrimination based on hypersusceptibility is of the disparate treatment/facially discriminatory variety, the ADA business necessity test would be best interpreted in a manner consistent with, if not more stringent than, Title VII's statutory defense to disparate treatment claims—the bfoq defense.

¹⁷⁵ See *Dothard v. Rawlinson*, 433 U.S. 321, 335 (1972) ("In the usual case, the argument that a particular job is too dangerous for women may appropriately be met by the rejoinder that it is the purpose of Title VII to allow the individual woman to make that choice for herself.").

¹⁷⁶ *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 388 (5th Cir.) (gender not bfoq for flight attendant), *cert. denied*, 404 U.S. 950 (1971).

¹⁷⁷ *Weeks v. Southern Bell Tel. and Tel. Co.*, 408 F.2d 228, 235 (5th Cir. 1969).

¹⁷⁸ Peirce, *supra* note 116, at 783.

¹⁷⁹ *Id.*

Looking to the legislative history of the ADA, it appears that Congress would support the less paternalistic Title VII approach over the *Mantolete* standard. As the House report stated:

[E]mployment decisions must not be based on paternalistic views about what is best for a person with a disability. Paternalism is perhaps the most pervasive form of discrimination for people with disabilities and has been a major barrier to such individuals. A physical or mental employment criterion can be used to disqualify a person with a disability only if [it] has a direct impact on the ability of the person to do their actual job duties without imminent, substantial threat of harm. Generalized fear about risks from the employment environment, such as exacerbation of the disability caused by stress, cannot be used by an employer to disqualify a person with a disability.¹⁸⁰

The House describes the limited situation in which one can be deemed "not qualified" as one where the examining physician found that there was a "high probability of substantial harm if the candidate performed the particular functions of the job in question . . . [and] the employer could [not] make a reasonable accommodation to the candidate's condition that would avert such harm [without causing] an undue hardship."¹⁸¹ The assessment must be based on valid medical analyses—the tests must actually and reliably predict the substantial, imminent degree of harm required.¹⁸² In addition, the determination may be challenged by the applicant's physician. "An employer is not shielded from liability merely by a statement from the employer's physician that a threat of imminent, substantial harm exists by hiring an applicant with a particular disability."¹⁸³ Finally, as the House report stated, the hazards to be avoided are hazards to other individuals in the workplace, not to the individ-

¹⁸⁰ EDUCATION AND LABOR REPORT, *supra*, note 58, at 74. See SENATE REPORT, *supra* note 23, at 40.

Paternalistic policies designed to protect the members of a specific group, even when well-intentioned, have been recognized as a means of rationalizing and even encouraging discrimination against the members of that group. As Justice Brennan stated in *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973): "Traditionally, [discrimination against women] was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage." The same could be said today for paternalistic policies designed to "protect" individuals with disabilities.

¹⁸¹ EDUCATION AND LABOR REPORT, *supra*, note 58, at 73. This standard is very similar to the standard set in *Mantolete*.

¹⁸² *Id.*

¹⁸³ *Id.* at 73-74.

ual with the disability.¹⁸⁴

In addition, the Supreme Court recently held that even potential injury to an as-yet unconceived fetus is not sufficient reason for an employer to refuse to hire fertile women.¹⁸⁵ In *Johnson Controls* the Supreme Court decided that this potential future harm was not sufficient to invoke Title VII's bfoq defense, stating "[n]o one can disregard the possibility of injury to future children; the BFOQ, however, is not so broad that it transforms this deep social concern into an essential aspect of batterymaking."¹⁸⁶ Since the Supreme Court is unwilling to allow discrimination to protect third parties from potential injury, it seems likely that they would prohibit discrimination based on the threat of injury to the plaintiff herself.

Similarly, it is not clear whether economic concerns—tort liability, reducing workers' compensation claims, or decreasing insurance costs—are business necessities under the ADA.¹⁸⁷ Given the goals Congress set forth in the ADA—"to assure equality of opportunity, full participation, independent living, and economic self-sufficiency" for individuals with disabilities—and the fact that employers are required to pay for physical accommodations, including auxiliary aids and services, for employees with disabilities, it would not be inconsistent to find that economic concerns not posing an "undue hardship" are insufficient to warrant excluding individuals with disabilities from certain positions.

Drawing on Title VII case law, the Supreme Court majority in *Johnson Controls* criticized the concurrences' attempt to extend the bfoq defense to cost and safety concerns;¹⁸⁸ Justice White's concurring opinion had argued that the risk of tort liability was a sufficient business concern to support a bfoq defense.¹⁸⁹ The *Johnson Controls* majority affirmed the belief that employers should have only a narrow bfoq defense to discrimination claims, one that is not justifiable by cost alone.¹⁹⁰ Accord-

¹⁸⁴ *Id.* at 74.

¹⁸⁵ International Union, United Auto., Aerospace and Agric. Implement Workers of Am., UAW v. Johnson Controls, Inc., 111 S. Ct. 1196 (1991).

¹⁸⁶ *Id.* at 1206.

¹⁸⁷ Peirce, *supra* note 116, at 787.

¹⁸⁸ 111 S. Ct. at 1208-09.

¹⁸⁹ *Id.* at 1211 (White, J., concurring); *id.* at 1216 (Scalia, J., concurring).

¹⁹⁰ *Id.* at 1209-10.

ingly, the possible cost of potential future harm should not be a viable defense under the ADA either.

CONCLUSION

The ADA is important not only because of the new prohibitions against discrimination it provides, but also because it clarifies an area of the law left unclear under Section 504 of the Rehabilitation Act. The question of job reassignment has been an area of intense dispute since 1973, causing grave anxiety for untold numbers of individuals with disabilities. In addition, as genetic technology improves, millions of individuals who are currently healthy but who carry a genetic trait that may put them at a higher risk for illness are being identified and excluded from industrial jobs. While not currently disabled, these individuals are being treated as if they were unqualified for jobs because of their potential disabilities. Because of the experience and foresight of the drafters of the Americans with Disabilities Act of 1990, such discrimination and injustice need never happen again.

Renée L. Cyr

