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Recommended Citation

Brian J. Linn, *Uncle Sam Doesn't Want You: Entering the Federal Stronghold of Employment Discrimination against Handicapped Individuals*, 27 DePaul L. Rev. 1047 (1978)
Available at: <https://via.library.depaul.edu/law-review/vol27/iss4/6>

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UNCLE SAM DOESN'T WANT YOU: ENTERING THE FEDERAL STRONGHOLD OF EMPLOYMENT DISCRIMINATION AGAINST HANDICAPPED INDIVIDUALS

Brian J. Linn*

Handicapped individuals have traditionally experienced great difficulty in gaining employment. In this Article, Mr. Linn, of the National Center For Law and The Handicapped, examines the congressional intent behind Title V of the 1973 Rehabilitation Act. The author postulates that it was the Congress' intent to set up the federal government as a model employer of the handicapped and concludes that it is the responsibility of the judiciary to insure that this purpose is fulfilled.

Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example.¹

Title V² of the Rehabilitation Act of 1973 has been lauded as a civil rights act for the handicapped. With an expressed goal of promoting and expanding employment opportunities for handicapped individuals,³ Title V includes four statutes which are designed to accomplish this impressive goal.

Section 501⁴ requires Executive Departments and Agencies to file affirmative action program plans with the United States Civil Service Commission and the Interagency Committee on Employment of the Handicapped. Section 502⁵ creates the Architectural and Transportation Barriers Compliance Board, whose mission it is, in part, to ensure that access to certain employment sites exists for handicapped

* B.A., University of Washington; J.D., Gonzaga University, former staff attorney at The National Center for Law and the Handicapped; Mr. Linn is presently engaged in private practice in Seattle, Washington.

1. *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J. dissenting).

2. See 29 U.S.C. §§ 790-794 (Supp. V 1975) [hereinafter cited as Title V].

3. 29 U.S.C. § 701(8) (Supp. V 1975).

4. See 29 U.S.C. § 791 (Supp. V 1975) [hereinafter cited as Section 501].

5. See 29 U.S.C. § 792 (Supp. V 1975) [hereinafter cited as Section 502].

employees and applicants.⁶ Section 503⁷ mandates affirmative action by federal contractors and subcontractors. Section 504⁸ prohibits discrimination against otherwise qualified handicapped individuals in programs and activities receiving federal financial assistance.

Although Title V appears to offer handicapped individuals a comprehensive system for combatting employment discrimination in the public and private sectors,⁹ careful analysis of the legislative scheme suggests that its weakest link is found in Section 501.

This Article explores problem areas in federal employment policies and analyzes the potential effectiveness of various causes of action designed to rectify discriminatory employment practices. Emphasizing the important focal point of Section 501, this Article also explores other statutory and regulatory provisions with the hope of furthering the effectiveness of remedies for individuals who experience employment discrimination in federal agencies by reason of their handicapping conditions.

THE FEDERAL GOVERNMENT AS A MODEL EMPLOYER OF HANDICAPPED INDIVIDUALS

While the number of handicapped individuals in the United States is not adequately documented, there is no question that such indi-

6. The Architectural and Transportation Barriers Compliance Board has, as a primary function, the obligation to insure compliance with federal statutes prohibiting architectural barriers in federally occupied and funded buildings and facilities. The Board enforces the Architectural Barriers Act of 1968, §§ 1-6, 42 U.S.C. §§ 4151-56, (1970). The Board has promulgated regulations outlining practice and procedures for compliance hearings. 36 C.F.R. § 1150 (1977).

The importance of the Board's mandate in the context of employment discrimination cannot be underestimated. Congress recognized that the existence of public transportation systems and employment sites which are accessible to and usable by handicapped individuals is a prerequisite to the full implementation of its goal of expanding and promoting employment opportunities. S. REP. NO. 1139, 93d Cong., 2d Sess. 32 (1974); S. REP. NO. 319, 93d Cong., 1st Sess. 8 (1973). Effective implementation of federal law prohibiting barriers is inextricably intertwined with the Congressional goals of Section 501. Although the Board does not have the authority to review complaints of discrimination in employment under Section 501, complaints alleging violations of the Architectural Barriers Act can be filed with the Board at the following address:

Architectural and Transportation Barriers Compliance Board
Washington, D.C. 20201.

7. 29 U.S.C. § 793 (Supp. V 1975) [hereinafter cited as Section 503].

8. 29 U.S.C. § 794 (Supp. V 1975) [hereinafter cited as Section 504].

9. The restricted ambit of the coverage of Title V is justifiable reason for continuing to advocate the need to amend Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to e-15 (1970), as amended, 42 U.S.C. §§ 2000e to e-17 (Supp. V 1975), to include handicapped individuals. See, e.g., Comment, *Potluck Protections For Handicapped Discriminatees: The Need to Amend Title VII to Prohibit Discrimination on the Basis of Disability*, 8 LOY. CHI. L.J. 814 (1977).

viduals are severely under-represented in federal employment.¹⁰ The Civil Service Commission's most recent Annual Report to the Congress¹¹ documents the failure of the federal government to provide equal employment opportunities for disabled individuals. As of December 21, 1976, the Commission estimates that only 2.8 percent of all employees in the federal government are handicapped.¹²

This statistical disparity is an indication of the problems which lie below the surface of the federal organizational structure. Although good intentions and favorable nondiscrimination policy statements abound, the federal bureaucracy has failed to implement effective nondiscriminatory employment practices. A dichotomy exists as a result. On the one hand, federal agencies have set high standards for conduct for federal contractors and federally assisted programs. On the other hand, the federal government has continued to blatantly discriminate against disabled individuals seeking employment.

For example, the Immigration and Naturalization Service of the United States Department of Justice recently circulated a sheet entitled "Information About the Requirements for the Position of General Attorney (Nationality)."¹³ The circular set out "physical requirements" for attorney applicants which would clearly be illegal under

10. In a survey based upon the 1970 United States Census, the President's Committee on Employment of the Handicapped reports that 9.3 percent of the work force is handicapped. PRESIDENT'S COMMITTEE ON EMPLOYMENT OF THE HANDICAPPED, ONE IN ELEVEN: HANDICAPPED ADULTS IN AMERICA 2 (1975). The work force ages reported are those between 16 and 64 years. *Id.*

Although the utilization of statistics to prove employment discrimination in cases involving handicapped plaintiffs may pose more complex problems than similar statistical proof in Title VII cases, the federal government employment statistics document the overall failure of the government to adequately integrate its work force. See generally Gitler, *Fair Employment And The Handicapped: A Legal Perspective*, 27 DEPAUL L. REV. 953 (1978).

11. UNITED STATES CIVIL SERVICE COMMISSION, EMPLOYMENT OF HANDICAPPED INDIVIDUALS INCLUDING DISABLED VETERANS IN THE FEDERAL GOVERNMENT (Sept. 30, 1977) [hereinafter referred to as 1977 CIVIL SERVICE COMMISSION REPORT]. This report was filed pursuant to the mandate of Section 501 that the Civil Service Commission make a complete report, at the end of each fiscal year, with respect to the "practices of and achievements in hiring, placements, and advancement of handicapped individuals by each department, agency, and instrumentality and the effectiveness of the affirmative action programs required by [Section 501]." 29 U.S.C. § 791(d) (Supp. V 1975).

12. 1977 CIVIL SERVICE COMMISSION REPORT at 11, vi. This figure indicates a negligible increase of .08 percent during 1976 in the percentage of handicapped employees in the federal work force. UNITED STATES CIVIL SERVICE COMMISSION, EMPLOYMENT OF HANDICAPPED INDIVIDUALS INCLUDING DISABLED VETERANS IN THE FEDERAL GOVERNMENT 17 (June 30, 1976) [hereinafter cited as 1976 CIVIL SERVICE COMMISSION REPORT].

13. Form CO-163 (Rev. 11-5-76).

Sections 503¹⁴ and 504.¹⁵ Applicants were required to meet certain criteria with respect to vision, hearing, speech, and ambulatory ability.¹⁶ In one broad sweep this federal agency has disqualified attorney applicants with wide and varied disabilities. This odious result reflects decades of paternalistic "selective placement"¹⁷ employment policies which have perpetuated broad presumptions concerning an individual's ability to perform the essential functions of a job, presumptions based exclusively upon the employer's narrow perception of the abilities of handicapped people.

This notion has combined with the inherent bureaucratic need to compile, classify and categorize and has resulted in Civil Service Commission *Handbooks X-118* and *X-118C*. The pounds of paperwork contained therein form the basis for the multitude of exclusionary job descriptions which emanate from the various federal agencies. Ounce for ounce, the *Handbooks* justify more discriminatory employment

14. Under Section 503, job qualification requirements which tend to screen out qualified handicapped individuals are proscribed unless the employer can meet the burden of demonstrating business necessity or safe performance of the job. 41 C.F.R. §§ 60-741.6(c)(2)-60-250.6(c)(2) (1977). The same requirement is imposed upon federal contractors and subcontractors under the Vietnam Era Veterans' Readjustment Assistance Act of 1974, 38 U.S.C. § 2012 (Supp. V 1975).

15. Under the regulations implementing Section 504 which govern programs and activities receiving federal financial assistance from the Department of Health, Education and Welfare, a recipient may not utilize selection criterion which screens out or tends to screen out handicapped persons unless job-related and alternative job-related tests which are not discriminatory do not exist. 45 C.F.R. § 84.13(a) (1977). In fact, a recipient is not even permitted to make pre-employment inquiries of an applicant concerning whether the applicant is a handicapped individual. *Id.* at § 84.14(a). Similarly, in the regulations implementing Executive Order 11941, which set forth guidelines to be followed by other federal agencies and instrumentalities in the implementation of Section 504, the Department of Health, Education and Welfare defines discriminatory practices to include the use of employment criteria which discriminate against handicapped individuals. *Id.* at § 85.54. Again, recipients may not conduct pre-employment inquiries concerning the handicapping disabilities of applicants for employment. *Id.* at § 85.55.

16. The circular provides:

Applicants must be physically able to perform efficiently the duties of the position. Good distance vision and ability to read without strain printed material the size of typewritten characters, are required. Ability to hear the conversational voice is required. Since the duties of the position are responsible and require extensive oral communication with the public, applicants must possess emotional and mental stability and unimpaired speech. Since some positions require considerable travel, applicants must be able to drive an automobile and to carry the necessary files, forms, and instruction manuals. Any physical condition which would cause the applicant to be a hazard to himself or to others is disqualifying.

Form CO-163 (Rev. 11-5-76).

17. "Selective placement" is defined as "[t]he careful matching of the abilities of handicapped persons with the duties of particular positions." 306 FEDERAL PERSONNEL MANUAL I, 1-1 (1969). The preoccupation with insuring that the handicapped worker is properly placed began in 1942 as a result of the impact of World War II upon the availability of workers. UNITED STATES CIVIL SERVICE COMMISSION, JOB ANALYSES FOR PHYSICAL FITNESS REQUIREMENTS, Handbook M-605 at 1 (1956). See also note 20 *infra*.

practices than any other government employment policies.¹⁸ Further, the Federal Personnel Manual is a labyrinth which may stymie any attempt to fairly treat a handicapped applicant or employee.¹⁹ Its damage does not stop with mere meandering confusion; this paper tower actually serves to disguise the discrimination which takes place under the guise of "selective placement."²⁰

18. The job description of the Immigration and Naturalization Service, *supra* note 16 and accompanying text, is derived from the Handbooks. While in some cases each particular job category has a specific, uniquely designed set of "physical requirements," in other cases a number of "standard paragraphs" are provided, one of which is then selected for each particular job description. CIVIL SERVICE COMMISSION HANDBOOK X-118 at 17-18. In this respect, the Handbooks are not dissimilar to potluck dinners in which participants choose one dish from each category (appetizers, entrees, desserts).

Thus, the Handbooks dictate that individuals with limbs amputated cannot be Quarantine Inspectors (GS-1864), and that individuals with large internal hemorrhoids (or any hemorrhoids accompanied by bleeding) cannot be employed in any of the Police Series positions available with the Federal Aviation Agency (GS-083, at 13).

19. For example, if a particular federal agency desired to modify the requirements of a particular job because the agency deemed the requirements to be unduly restrictive, it could waive the physical standards on a case by case basis. 271 FEDERAL PERSONNEL MANUAL 11 (1976). However, such an action would be of little consolation to those handicapped individuals who failed to apply because the job description appeared to unilaterally disqualify them from consideration.

If the federal agency desired to invite all qualified applicants to apply by removing an unnecessary disqualification based upon a particular handicapping condition, contradictory provisions of the Federal Personnel Manual would prevent an agency from comprehending its power to make such modifications. Chapter 271 indicates that "agencies must submit for prior Commission Approval proposals to modify existing physical standards or to establish new standards." *Id.* at 271-11. Elsewhere, the Federal Personnel Manual provides that the agency may disregard a physical requirement established for a particular position to ensure that "only the minimum physical abilities necessary" are required, without prior submission to the Civil Service Commission. FEDERAL PERSONNEL MANUAL SUPP. 339-31, at 1 (1975). The confusion generated concerning the agency's ability to independently lower qualification standards can only help to ensure that those archaic standards will remain.

20. The results of "selective placement" policies can tend to cloak the discriminatory practices of an agency. The United States Postal Service is a prime example. The Postal Service has been lauded for having hired 842 severely physically handicapped employees under a special appointing authority. UNITED STATES CIVIL SERVICE COMMISSION, A CHAIN OF COOPERATION: SEVERELY PHYSICALLY HANDICAPPED EMPLOYEES IN THE FEDERAL SERVICE 3 (1976) [hereinafter cited as A CHAIN OF COOPERATION]. The Postal Service's record under this particular appointing authority nearly doubles the amount of placements made by the next closest federal agency. The perceived success of the Postal Service in this program is consistent with former Postmaster General Benjamin Bailar's recent statement: "For many years, the Postal Service has pursued an aggressive program designed to assure handicapped persons the opportunity for employment commensurate with their abilities." 1 DISABLED USA 1 (1978). However, further examination of the Postal Service's record discloses that their hiring practices under this particular program were indeed "selective." Of the 842 individuals hired, 739 were deaf or hearing impaired. A CHAIN OF COOPERATION at 6. Of these individuals with auditory impairments, 91 percent were hired as Distribution Clerks. *Id.* at 3. The rationale behind these hirings is that "because of constantly high noise level sound in this type of job, the deaf are ideally suited for it." *Id.*

Under such a scheme, the federal government becomes the subject of ridicule and distain rather than a model of fair employment practices. In examining the importance of the Equal Employment Opportunity Act of 1972,²¹ the Court of Appeals for the District of Columbia eloquently stated the social importance of fair and effective equal employment practices by the federal government. The court intimated that Congress was concerned with equality when it passed the 1972 Act and that the federal government must take the role of a leader in insuring equal employment opportunity.²²

While not rising to the level of a legitimate defense for Section 503 and 504 employers, federal employment practices stand to thwart the

Although the individuals hired as Distribution Clerks cannot be faulted for seeking employment in a job where their particular disability was viewed as an asset, the Postal Service can hardly be viewed as a model employer on the basis of these placements. Clearly, the individuals were indeed qualified to perform the particular job, and their hiring does not reflect upon the overall performance of the Postal Service in fairly treating handicapped individuals. In fact, the statistics provided as of December 31, 1976, indicate that the aggregate percentage of handicapped employees in the Postal Service is merely 1.42 percent. 1977 CIVIL SERVICE COMMISSION REPORT at vi. Indeed, the Postal Service has been required to defend substantially more litigation alleging discrimination on the basis of disability than any other federal agency. *See, e.g.,* Martel v. Brassard, No. C78-30 (D.N.H. filed January 26, 1978); Nocho v. United States Postal Service, Civ. No. 78-291 PHX/WPC (D. Ariz. filed, April 10, 1978); Gibson v. United States Postal Service, Civil Action No. 77-2453 (W.D. Tenn. Consent Order April 27, 1978); Roberts v. United States Postal Service, 78 Civ. 1214 (CLG) (S.D.N.Y. filed March 17, 1978); Henry v. United States Postal Service, Civil Action No. 77-1490 (D.D.C. filed August 31, 1977); Counts v. United States Postal Service, No. 77-0028 (N.D. Fla. filed June 21, 1977); Atkinson v. United States Postal Service, 12 Empl. Prac. Dec. 5208 (S.D.N.Y. 1976); Smith v. United States Postal Service, Civil Action No. 76-2452-S (D. Mass. August 10, 1977); Snow v. Lawrence, No. C-75-1173 SW (SJ) (N.D. Cal. filed Nov. 15, 1977).

The Civil Service Commission vociferously asserts that "selective placement" programs are designed to assist qualified handicapped individuals, arguing that: "emphasis is on ability rather than disability." FEDERAL PERSONNEL MANUAL, Chapter 306 at 3, subchapter 1, 1-2 (1969). However, "selective placement" results in limiting the range of job opportunities which are available to any given individual. Over time, the prodigious emphasis placed upon the need for accurate matching of handicapped individuals with job requirements also perpetuates existing stereotypes. In describing the appropriate placement of individuals who are mentally retarded, the Civil Service Commission's inbred conceptions of mentally retarded individuals have led to the following conclusion: "The secret of employing the retarded successfully lies in the identification of jobs that can be matched to the skill or talent that a particular individual has developed. It is not necessary, nor even wise, to use a bulldozer where a shovel would do the job nicely." UNITED STATES CIVIL SERVICE COMMISSION, HANDBOOK OF SELECTIVE PLACEMENT IN FEDERAL CIVIL SERVICE EMPLOYMENT 31 (1975).

Whether the Civil Service Commission intended a "humorous" metaphor or whether the decreased use of mechanization was actually contemplated is uncertain. What is certain is that concepts of "selective placement" have sometimes grown to be detrimentally paternalistic and segregationist.

21. *See* 42 U.S.C. § 2000e (Supp. V 1975) (amending Title VII to prohibit employment discrimination in the Federal government).

22. *Hackley v. Roudebush*, 520 F.2d 108 (D.C. Cir. 1975). The court noted specifically: Equality is the touchstone of a democratic government, and Congress in 1972 finally

beneficent purposes of the Rehabilitation Act.²³ The continuing failure of the federal government to provide equal employment opportunities for disabled individuals indicates that the legal system must begin to support individuals adversely affected by employment discrimination in federal agencies.

CAUSES OF ACTION UNDER FEDERAL STATUTES AND REGULATIONS

While generally considered newcomers to the status of a "protected class," handicapped individuals theoretically have been afforded statutory protection from employment discrimination in the federal government since 1948.²⁴ Thus the protections afforded in Section 501, unlike the rights granted under Sections 503 and 504, are neither the first nor the exclusive federal statutory protection for disabled employees. The express public policy of prohibiting employment discrimination against handicapped individuals in the federal government precedes, by nearly two decades, the equal employment opportunity procedures which were established for the protection of individuals from discrimination on the basis of race, color, religion,

perceived the injustice and hypocrisy of a system that demanded more from private employers than it was willing to give itself, that sought to establish a regime of equality for the private sector of the economy while leaving its own house in disarray, rife with discrimination.

Nor was the actuality of equal employment opportunity alone sufficient. The federal government plays a vital role in all aspects of our society, it is a model for all and exercises a significant educative force by its example. As a Senate Report opined, because the "policies, actions, and programs [of the federal government] strongly influenced the activities of all other enterprises, organizations and groups, in no area is government action more important than in the area of civil rights.

Id. at 136.

23. In several cases brought by the United States against private employers under Title VII, defendants have unsuccessfully contended that such suits may not be maintained against them when the United States permits employment discrimination in its own practices. These cases illustrate that the defense of "unclean hands" in an action in equity will not be permitted to frustrate the purpose of protective legislation.

Even if the instances suggested by the Company of Employment Discrimination by departments of the United States are possible, or even likely occurrences, a recognition of that by this Court could rise to a level that may justify criticism or official concern but certainly not to the level that could be the basis of a bar for the enforcement of the applicable laws enacted by Congress to alleviate employment discrimination.

United States v. Philadelphia Electric Co., 351 F. Supp. 1394, 1398 (E.D. Pa. 1972). *See also United States v. City of Milwaukee*, 395 F. Supp. 725, 727 (E.D. Wis. 1975). "This Court is not permitted to allow the strong public interest and Congressional policy in this area to be frustrated by such logic and manipulation of 'equitable' defenses." *Id.*

24. 5 U.S.C. § 7153 (1966) replaced 5 U.S.C. § 633(2)9 (1948) during the 1966 recodification of Civil Service Law. The first executive proclamation of a fair employment policy for handicapped individuals came in a memorandum from Harris Ellsworth to heads of executive departments and agencies (May 16, 1957).

national origin and sex.²⁵ Despite this long standing policy, there currently exists no clear judicial remedy for handicapped individuals.

The following discussion will explore the maze of potential causes of action based upon the newly enacted equal opportunity procedures, Section 501 and the plethora of regulations contained in federal civil service law.

A. Utilizing The Appeals System For Complaints Of Discrimination

After three decades of forbearance, the angelic statements of the federal government were transformed into action this year with the establishment of an appeals system for hearing complaints of discrimination based upon physical or mental handicap.²⁶ These procedures, however, are not a panacea for ensuring that federal agencies will be held accountable for discriminatory actions. The authority for bringing private litigation is left in doubt by the regulations²⁷ and a number of substantive provisions are less than satisfactory.

In response to the publication of proposed rules by the Civil Service Commission²⁸ a number of organizations representing handicapped individuals filed formal comments protesting the lack of substantive regulations defining discrimination.²⁹ The final regulations took a more substantive approach by defining "qualified handicapped

25. Equal employment opportunity procedures were first established for individuals alleging discrimination on the basis of race, color, religion and natural origin in 1966. 31 C.F.R. § 3069 (1966). In 1967, similar protections were granted for individuals alleging sex discrimination. *See* 32 Fed. Reg. 15631 (1967).

26. 5 C.F.R. § 713 (G) (1978). Implementation of these regulations is furthered by Federal Personnel Manual Letter 713-43 (Advance Edition March 30, 1978).

27. While the regulations incorporate complaints of discrimination on the basis of handicapping condition into the existing equal employment opportunity procedures contained in 5 C.F.R. § 713(B) (1978), the Civil Service Commission specifically excludes incorporation of such complaints into 5 C.F.R. §§ 713.281-283, 43 Fed. Reg. 12294 (1978). According to the Civil Service Commission, court actions must necessarily proceed under "general jurisdictional statutes." 43 Fed. Reg. 12293 (1978).

28. 5 C.F.R. § 713.701, 42 Fed. Reg. 46541 (1978).

29. *See, e.g.*, Comments of the Institute for Public Interest Representation (filed December 15, 1977); Comments of the National Center for Law and the Handicapped, Inc. (filed December 12, 1977); Comments of the Ad Hoc Coalition on Employment of Handicapped Individuals in the Federal Government (filed December 7, 1977). *See also* LEADERSHIP CONFERENCE ON CIVIL RIGHTS, THE CARTER ADMINISTRATION AND CIVIL RIGHTS: AN ASSESSMENT OF THE FIRST YEAR (1978) which noted:

Finally, the [Civil Service] Commission while acting last September to issue a long promised rule to protect handicapped persons from job discrimination in the federal government, did not take adequate action. Its proposed rule, apart from establishing a complaint procedure, amounted to little more than a policy declaration against discrimination, failing to specify practices that constitute discrimination

person,"³⁰ expanding upon the definition of "reasonable accommodation,"³¹ prohibiting discriminatory selection criteria,³² and adding a new section on physical access to buildings.³³ The final regulations, however, on the issue of pre-employment inquiries,³⁴ provide for only limited retroactivity³⁵ and contain no affirmative action requirements.³⁶

Reflecting its traditional indolence in attacking employment discrimination against handicapped individuals,³⁷ the equal employment opportunity procedures are insufficient to implement Congressional goals. Although they augment the substantive and procedural rights of handicapped individuals, they are but another component of an increasingly complex regulatory scheme. Because they do not define the sole mechanism available to aggrieved individuals, ultimate relief

or to give guidance to employers on the reasonable accommodation they must make in hiring and promoting handicapped persons.

Id. at 18.

30. 5 C.F.R. § 713.702(f) 43 Fed. Reg. 12295 (1978).

31. *Id.* § 713.704.

32. *Id.* § 713.705.

33. *Id.* § 713.707.

34. *Id.* § 713.706. This section is considerably weaker, if not more confusing, than the parallel sections in the Section 503 and 504 regulations. See 41 C.F.R. § 60-741.6 (1977); 45 C.F.R. § 84.14 (1977). The Civil Service Regulation begins in a manner similar to the Section 504 approach by prohibiting pre-employment inquiries concerning an individual's handicapping condition. See 5 C.F.R. § 713.706(a) (1978). The regulation then permits the agency to make pre-employment inquiries "to meet the medical qualification requirements," *Id.* The Civil Service Commission equates the "medical qualifications requirements" with the "minimum abilities necessary for safe and efficient performance of the duties of the position. . . ." *Id.* However, this equation is not likely to be adhered to in practice because of reliance upon HANDBOOKS X-118 and X-119 which unduly screen out qualified handicapped individuals. See notes 13-18 *supra*.

35. See 5 C.F.R. § 713.709(b) (1978). Instead of requiring agencies to process complaints of discrimination based on acts or actions which occurred subsequent to September 26, 1973, the effective date of the Rehabilitation Act, the Civil Service Commission compromised the intent of Congress by only requiring retroactivity for one year prior to the effective date of the regulations. *Id.* Even this limited retroactivity will not comprehensively permit all such complaints to be heard. The new regulations require coverage only when a complaint is brought to the attention of the agency within 30 days of the discriminatory act and only if the complaint was not adjudicated under some internal procedure. *Id.* Partial relief from this arbitrary decision is sought in a Petition for Rulemaking which is now pending with the Civil Service Commission. *Petition of Juanita Parker*, (filed April 7, 1978). The Petition, filed pursuant to 5 U.S.C. § 553(e) (1976), seeks retroactive application of the procedural regulations to all pending complaints. *Id.* at 14.

36. Unlike the regulations implementing Section 503, the Civil Service did not outline similar affirmative action responsibilities of employers such as outreach, positive recruitment, external dissemination of policy, internal dissemination of policy, and responsibility for implementation. See 41 C.F.R. § 60-741.6(f)-(h) (1977).

37. Continuing evidence of the lack of commitment by the federal government to a policy of stringent enforcement of equal employment opportunity principles for handicapped individuals is provided by the specific refusal of the Civil Service Commission, the Equal Employment

from discriminatory practices, in many cases, may only result from simultaneous reliance upon other causes of action.

*B. Implying A Private Cause Of Action
Under Section 501*

There has been a long standing public policy of promoting equal employment opportunities for handicapped individuals. Nevertheless, the lack of procedural mechanisms and the inefficiencies of the federal bureaucracy have led many handicapped individuals to consider Section 501 as a means of vindicating their rights. Although the statute lacks an express enunciation of a private cause of action, disabled individuals have begun to enter the federal courts alleging a right to litigate claims of employment discrimination under that statute. Despite the lack of effective alternative mechanisms for pursuing their grievances, the judiciary, thus far, has been reluctant to accept these claims.³⁸

However, an analysis of the legislative history of Section 501, in the context of the established Supreme Court test for implying a private cause of action,³⁹ suggests that future decisions may recognize an implied private right of action under Section 501. As with Sections 503 and 504, the implied cause of action test enunciated by the Supreme Court in *Cort v. Ash*,⁴⁰ is the focal point for assessing whether Section 501 should be judicially interpreted to create a private cause of action.⁴¹ In *Cort*, four standards were established against which the particular statute must be measured:

1. Is the Plaintiff "one of the class for whose especial benefit the statute was enacted" that is, does the statute create a federal right in favor of the plaintiff?
2. Is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one?

Opportunity Commission, the Department of Justice and the Department of Labor to include handicapped individuals within the ambit of the proposed uniform guidelines on employee selection procedures. See 42 Fed. Reg. 65542 (1977) proposing to amend 5 C.F.R. § 300 (1978); 29 C.F.R. § 1607 (1978); 28 C.F.R. § 50 (1978); 41 C.F.R. § 60-3 (1978).

38. See *Coleman v. Darden*, 13 Empl. Prac. Dec. 6788 (D. Colo. 1977), rejecting an implied cause of action under Section 501. *Coleman* is the first case to directly address the issue.

39. The Supreme Court first enunciated the concept of an implied cause of action in *Texas & Pac. Ry. Co. v. Rigsby*, 241 U.S. 33 (1916). In *Texas & Pac. Ry.*, the Court relied heavily upon reasoning which was later to become the first of the integral tests set forth in *Cort v. Ash*, 422 U.S. 66 (1975): "A disregard of the command of this statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied." 241 U.S. at 39.

40. 422 U.S. 66 (1974).

41. The leading case implying a private cause of action under Section 504, *Lloyd v. Regional Transp. Auth.*, 548 F.2d 1277 (7th Cir. 1977), relies heavily upon *Cort*. Similarly, the major

3. Is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?

4. Is the cause of action one traditionally relegated to state law, in an area basically the concern of the states, so that it would be inappropriate to infer a cause of action based solely on federal law?⁴²

A careful analysis of Section 501, in the context of the standards enunciated in *Cort*, strongly supports the judicial creation of a private cause of action.

1. *Finding a Federal Right in Favor of Handicapped Individuals.*

Section 501 specifically requires the promulgation of affirmative action programs for handicapped individuals in each department, agency and instrumentality of the federal government.⁴³ Additionally, the Congressional "Declaration of Purpose" section of the Rehabilitation Act specifically provides that the purpose of the Act is to "promote and expand employment opportunities in the public and private sectors for handicapped individuals and to place such individuals in employment."⁴⁴

In addition to the explicit statutory requirements, the legislative history clearly outlines a Congressional desire to ensure nondiscriminatory employment policies in the federal government and establish the duties of federal agencies to provide for the special needs of

decisions under Section 503, although inconsistent in their holdings, rely upon the tests established in *Cort*. See *Moon v. Roadway Express, Inc.*, 15 Empl. Prac. Dec. 6508 (N.D. Ga. 1977) (no private cause of action); *Rogers v. Frito-Lay, Inc.*, 433 F. Supp. 200 (N.D. Tex. 1977) (no private cause of action found); *Drennon v. Philadelphia Gen. Hosp.*, 428 F. Supp. 809 (E.D. Pa. 1977) (private cause of action found). While *Drennon* was not appealed, *Moon* and *Rogers* were both appealed to the Fifth Circuit. *Moon* and *Rogers* were consolidated on appeal by the United States Court of Appeal for the Fifth Circuit on December 14, 1977. The briefs filed by the parties rely heavily upon *Cort*.

42. 422 U.S. at 78.

43. 29 U.S.C. § 791(b) (Supp. V 1975), provides:

Each department, agency and instrumentality (including the United States Postal Service and the Postal Rate Commission) in the executive branch shall, within one hundred and eighty days after September 26, 1973, submit to the Civil Service Commission and to the Committee an affirmative action program plan for the hiring, placement, and advancement of handicapped individuals in such department, agency or instrumentality. Such plan shall include a description of the extent to which and methods whereby the special needs of handicapped employees are being met. Such plans shall be updated annually, and shall be reviewed annually and approved by the Commission, if the Commission determines, after consultation with the Committee, that such plan provides sufficient assurances, procedures and commitments to provide adequate hiring, placement, and advancement opportunities for handicapped individuals.

44. 29 U.S.C. § 701(8) (Supp. V 1975).

handicapped individuals.⁴⁵ The proposition that such individuals form a class "for whose especial benefit the statute was enacted" seems undeniable, and the first standard established in *Cort* is clearly met.⁴⁶

2. Analyzing the Legislative History.

The second factor enunciated by the Supreme Court in *Cort* is whether there is an "indication of legislative intent, either explicit or implicit, either to create such a remedy or to deny one."⁴⁷ Although the Rehabilitation Act contains no explicit or implicit reference to a

45. See notes 48-56 and accompanying text *infra*.

46. See *Lloyd v. Regional Transp. Auth.*, 548 F.2d 1277, 1285 (7th Cir. 1977); *Rogers v. Frito-Lay, Inc.*, 433 F. Supp. 200, 202 (N.D. Tex. 1977); *Duran v. City of Tampa*, 430 F. Supp. 75, 78 (M.D. Fla. 1977); *Drennon v. Philadelphia Gen. Hosp.*, 428 F. Supp. 809, 815 (E.D. Pa. 1977).

47. 422 U.S. at 78. In its discussion of the second factor, the Supreme Court recognized that the absence of an explicit or implicit indication of legislative intent would not necessarily preclude an implied private cause of action. Justice Brennan, writing for the unanimous Court, explained that:

in situations in which it is clear that federal law has granted a class of persons certain rights, it is not necessary to show an intent to create a private cause of action . . . an explicit purpose to deny such a cause of action would be controlling.

Id. at 82.

Drennon v. Philadelphia Gen. Hosp., 428 F. Supp. 809 (E.D. Pa. 1977) relied heavily upon the language in *Cort* to the effect that the lack of an explicit or implicit approval of a private cause of action would not necessarily negate the possibility of finding such a private cause of action. *Id.* at 815. *Drennon* held that Section 503 creates a private cause of action, despite the fact that the legislative history which anticipated and approved the inclusion of a private right of action as a means of enforcement for Section 504 did not mention Section 503. *Id.*

The Congressional Record suggests that Congress specifically intended the inclusion of a private right of action under Section 504:

This approach to implementation of Section 504 which closely follows the models of the above cited antidiscrimination provisions [i.e. Section 601 of the Civil Rights Act of 1964, 42 U.S.C. 2000d(1), and Section 901 of the Education Amendments of 1972, 42 U.S.C. 1683], would ensure administrative due process (right to hearing, right to review) provide for administrative consistency with the Federal government as well as relative ease of implementation and permitting judicial remedy through a private action.

120 CONG. REC. 30534 (1973).

Section 501, like Section 503, does not have a legislative history which specifically anticipates the "judicial remedy through a private action" which was contemplated for Section 504. Thus, the rationale of the *Drennon* court is particularly germane to the analysis under Section 501.

Although not as detailed, the decision in *Duran v. City of Tampa*, 430 F. Supp. 75 (N.D. Fla. 1977) is also significant. In *Duran*, the court considered the plaintiff's motion for preliminary injunction under a complaint alleging violations of Section 503, Section 504 and the Fourteenth Amendment. In considering whether the plaintiff had met his burden of proof with regard to showing a substantial likelihood of prevailing upon the merits, the court said: "a thorough analysis of the sparse case law in this area indicates that the plaintiff does have substantial likelihood he will prevail on the merits. . . ." *Id.* at 77. While treating the plaintiff's claims under Sections 503 and 504 as one, the court held that "the plaintiff's second claim . . . is meritorious." *Id.* at 78.

private cause of action, the legislative history,⁴⁸ when read as a whole, evidences an intent to provide handicapped individuals with "the right to employment which compliments their abilities and which represents avenues of restitution for previous societal neglect."⁴⁹ Having taken substantial evidence concerning the extent of employment discrimination facing handicapped individuals,⁵⁰ Congress clearly intended that the required affirmative action program plans would provide a working mechanism for combatting employment discrimination.

Thus, while Section 501, by its express statutory language, might be interpreted to require only the filing of affirmative action program plans, the legislative history makes clear that Congress intended that Section 501 create strong substantive rights for handicapped employees and applicants for employment. The Senate Committee on

48. Undoubtedly, the legislative history under Section 501 should play an important role in determining whether a private cause of action is to be implied under the statute. Traditionally, committee reports, statements of committee members, and statements of the sponsors or drafters of legislation are utilized in determining the meaning of legislation. See *generally* *National Woodwork Mfgs. Ass'n. v. NLRB*, 386 U.S. 612 (1967); *Mitchell v. Kentucky Finance Co.*, 359 U.S. 290 (1959); *United States v. United Mineworkers*, 330 U.S. 258 (1947); *United States v. American Trucking Ass'ns.*, 310 U.S. 534 (1940); *United States v. Dickerson*, 310 U.S. 554 (1940).

The lack of any apparent reference to the legislative history in *Coleman v. Darden*, 13 Empl. Prac. Dec. 6788 (D. Colo. 1977), renders that decision negating a private cause of action under Section 501 somewhat questionable.

49. S. REP. NO. 48, 93d Cong., 1st Sess. 16 (1974). Elsewhere in the legislative history, the Senate Committee states that:

For those millions of handicapped individuals who pay taxes and have the right to expect that their tax money will go toward making their environment more accessible and employment easier, the creation of a compliance mechanism to eliminate architectural barriers and of an affirmative action program to insure that they have the right to employment which compliments their abilities represents overdue avenue of restitution for previous societal neglect.

S. REP. NO. 48, 93d Cong., 1st Sess. 16 (1974).

The Senate Committee on Labor and Public Welfare concluded its report by emphasizing that: "The bill requires that there be established a committee which will initiate an affirmative action plan for and seek to insure that there is no discrimination in the employment of handicapped individuals by and within the agency of the Federal Government in hiring, placement, or advancement." *Id.* at 51.

50. In detailing the "History of H.R. 8395 and S. 7," the Senate Committee on Labor and Public Welfare Report indicates that extensive testimony was taken. In highlighting the particular problems which were raised during the hearings, the Committee found one problem to be "the lack of action in areas related to rehabilitation which limit a handicapped individual's ability to function in society. E.g., employment discrimination. . . ." S. REP. NO. 93-318, 93d Cong., 1st Sess. 4, *reprinted in* [1973] U.S. CODE CONG. AND AD. NEWS 2078.

Elsewhere in the legislative history, the Senate Committee on Labor and Public Welfare noted that:

Individuals with handicaps are all too often excluded from schools and educational programs, barred from employment or are under-employed because of archaic attitudes and laws, denied access to transportation, buildings and housing because of

Labor and Public Welfare enunciated its clear expectation that the Civil Service Commission "carry out vigorously"⁵¹ its responsibilities.⁵²

Perhaps the most incisive statement of the legislative purposes behind Title V of the Rehabilitation Act was made by Senator Williams during the 1976 Oversight Hearings:⁵³

The Rehabilitation Act of 1973 was the first major step to change what had gone on before to bring the force of the Federal Government to bear in remedying discrimination against handicapped persons.

There are three important provisions of this law which were designed to correct some of the major problems: . . .

[T]o require that the Federal Government itself act as the model employer of the handicapped and take affirmative action to hire and promote the disabled, we enacted Section 501 of the Act. . . .⁵⁴

architectural barriers and lack of planning, and are discriminated against by public laws which frequently exclude individuals with handicaps or fail to establish appropriate enforcement mechanisms.

S. REP. NO. 1139, 93d Cong., 2d Sess. 32 (1974).

51. S. REP. NO. 93-318, 93d Cong., 1st Sess. 8 (1973).

52. The Senate Committee concludes one Report by stating:

Hearings in the 92nd Congress on Vocational Rehabilitation pointed out that despite the Civil Service Commission's experience and actions in this area, Federal employment policies with regard to handicapped individuals continue to be found wanting. The Committee emphasized that the Federal Government must be an equal opportunity employer, and that this equal opportunity must apply fully to handicapped individuals. The Committee, therefore, expects the CSC to insure that there is no discrimination in employment for handicapped individuals within the Federal Government, and to make all necessary steps to insure that the special needs of handicapped individuals are met.

Id. at 49.

53. Senator Williams also eloquently described the extent of discrimination traditionally experienced by disabled Americans:

Abraham Lincoln once characterized America as "a nation conceived in liberty and dedicated to the proposition that all men are created equal"

And it was not until 1964 that the Congress finally enacted legislation to remedy this denial of rights—the right to a job; the right to a decent educational opportunity; the right to be served in a restaurant or ride in a bus; the right to participate on an equal basis in federally assisted programs of every kind.

Three years ago the Congress acted to protect the rights of yet another minority group in our society—the disabled.

For here, too, throughout the history of the United States, our approach was to treat handicapped individuals either as helpless or hopeless—or both.

Rehabilitation of the Handicapped Programs 1976: Hearings Before the Subcommittee on the Handicapped of the Comm. on Labor and Public Welfare, 94th Cong., 2d Sess. 1502 (1976) (hereinafter cited as Oversight Hearings).

54. *Id.*

Senator Williams' concept of the federal government as a "model employer" of the handicapped is consistent with Senator Stafford's interpretation of his amendment to the original Senate bill which brought about the inclusion of Section 501 in the Rehabilitation Act. Noting that the original purpose of the Rehabilitation Act amendments was to increase rehabilitation services, Senator Stafford indicated that "[t]he hearings left a distinct impression on all members of the committee that even with the training this bill provides, a more affirmative approach was needed to assist the handicapped individual."⁵⁵ This "distinct impression" formed the basis for the amendment—"to give special emphasis to the employment of handicapped individuals within the programs of the Federal Government."⁵⁶

Further evidence of the favorable Congressional intent may be inferred by the legislative decision to impose by statute, in Sections 501 and 503, affirmative action requirements rather than mere nondiscrimination requirements.⁵⁷ Congress specifically went beyond the nondiscrimination protections afforded other "protected classes" by requiring *affirmative action*⁵⁸ under Section 501.⁵⁹ Undeniably, af-

55. 119 CONG. REC. 8070 (1973). Senator Stafford's remarks were made in the context of a proposed amendment to Section 503 which would have given the President the power to waive the affirmative action requirements of Section 503 when such a waiver was in the national interest. Although 29 U.S.C. § 793(c) ultimately granted a limited waiver, Senator Stafford's remarks are germane to the Congressional intent in Section 501. Senator Stafford concluded his statement with the following comment:

Quite frankly, if we in Congress are going to pass laws to help the handicapped participate in society and believe that they can with the training that we will provide, then we do have the obligation to make sure that there is adequate and equal opportunity for them to participate.

Id.

56. *Id.* Senator Stafford also indicated that "[w]e also established an Interagency Committee on Employment of the Handicapped to help him better gain entry to the federal system." *Id.*

57. Although Title VII of the Civil Rights Act of 1964 authorized courts to enjoin unlawful employment practices and "order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees . . . or any other equitable relief as the court deems appropriate," Title VII did not mandate the full use of affirmative action concepts for all employers subject to the protective legislative. Compare 42 U.S.C. § 2000e-5(g) (1975) with 29 U.S.C. §§ 791 and 793 (Supp. V 1975).

58. The Department of Labor's interpretation of Section 503 and the judicial interpretations of Executive Order 11,246, 3 C.F.R. § 169 (1974), support the proposition that the term "affirmative action" is a legal concept which goes beyond a neutral nondiscriminatory policy.

The Department of Labor has described the affirmative action duty as having "more extensive an impact than the obligation to refrain from employment discrimination." U.S. DEPT. OF LABOR, OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAM, TASK FORCE, PRELIMINARY REPORT ON THE REVITALIZATION OF THE FEDERAL CONTRACT COMPLIANCE PROGRAM 15 (1977). Weldon Rogeau, Director of the Office of Contract Compliance programs stated in a speech on June 8, 1977 that: "Under Section 503, we differentiate between non-discrimination and affirmative action. The law requires affirmative action and non-discrimination, of course, as part of it. But affirmative action is more than non-discrimination." 2 Empl. Prac. Guide (CCH) 3096 (1977).

firmative action has traditionally required a more active and extensive effort than that required by non-discrimination. As a result, courts have frequently imposed affirmative action obligations to eradicate the past injustices of an employer's discrimination under Title VII.⁶⁰ There can be no question that Congress was aware of past interpretations and implementations of the term "affirmative action" when it enacted Section 501.

Despite the lack of an explicit intent to deny a private cause of action, it has been argued that the numerous attempts to amend Title VII to include handicapped individuals within the ambit of the protected class⁶¹ should be construed as evidence of a legislative intent to deny such a private cause of action under the Rehabilitation Act.⁶² There is, however, no indication that these proposed Title VII

In interpreting Executive Order 11,246, former Attorney General John Mitchell expressed the view that affirmative action substantively proscribes more than a concept of nondiscrimination. 42 OP. ATT'Y GEN. 37 (1969). The judiciary has interpreted Executive Order 11, 246 to require the contractor to "do more than simply refrain from discrimination." *Mele v. United States Dept. of Justice*, 395 F. Supp. 592, 594 (D. N.J. 1975), *aff'd and appeal dismissed sub nom. Mele v. E.E.O.C.*, 532 F.2d 747 (3d Cir. 1976). The affirmative action concept "mandates that employers go beyond passive non-discrimination, by taking positive steps toward elimination of employment barriers to minorities." *Id.* at 595. See also *Contractors Ass'n. of Eastern Pennsylvania v. Secretary of Labor*, 442 F.2d 159 (3d Cir. 1971), *cert. denied* 404 U.S. 854 (1971); Note, *Executive Order 11,246: Anti-Discrimination Obligation in Government Contracts*, 44 N.Y.U. L. REV. 590 (1969).

59. The emphasis of Section 501 on "affirmative action" as distinguished from the Section 504 statutory language of non-discrimination, again demonstrates the conscious exercise of legislative intent by the Congress in its selection of statutory language. However, it should be noted that there is legislative history to the effect that Section 504 requires, where necessary, that affirmative action be taken. "Where applicable, Section 504 is intended to include a requirement of affirmative action as well as a prohibition against a discrimination." S. REP. NO. 93-1270, 93d Cong., 2d Sess. 27 (1974); H.R. REP. NO. 93-1457, 93d Cong., 2d Sess. 27 (1977).

60. Under Title VII, "the obligation to take affirmative action imports more than the negative obligation not to discriminate." *Southern Ill. Builders Ass'n. v. Ogilvie*, 471 F.2d 680, 684 (7th Cir. 1972). See also *Castro v. Beecher*, 459 F.2d 725 (1st Cir. 1972); *Myers v. Gilman Paper Corp.*, 544 F.2d 837 (5th Cir. 1977); *Morrow v. Crisler*, 491 F.2d 1053 (5th Cir. 1974); *Local 53 Asbestos Workers v. Vogler*, 407 F.2d 1047 (5th Cir. 1969); See generally Note *Developments in the Law—Employment Discrimination in Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109 (1971). Affirmative action concepts under Title VII have included the power of the federal courts to mandate that minority persons be hired on a specific ratio to non-minorities until a requisite number of minority persons are hired. See, e.g., *Carter v. Gallagher*, 452 F.2d 315 (8th Cir. 1971), *modified on rehearing en banc*, 452 F.2d 327, *cert. denied*, 406 U.S. 950 (1972).

61. In *Rogers v. Frito-Lay, Inc.*, 433 F. Supp. 200 (N.D. Tex. 1977), the district court lists 33 proposed amendments which "have never mustered sufficient support for passage." H.R. 264, 461, 1107, 1200, 1995, 95th Cong., 1st Sess. (1977); S. 1311, 1757, H.R. 1346, 1886, 2515, 3497, 4624, 4625, 5016, 7061, 7754, 7758, 7946, 8028, 8417, 12,541, 94th Cong., (1975-75); S. 1780, H.R. 1120, 3685, 10,960, 11,986, 11,987, 12,654, 12,916, 13,199, 13,200, 93d Cong., (1973-74); H.R. 10,962, 92d Cong., (1972). 433 F. Supp. at 202.

62. In *Rogers* the district court held that the existence of numerous unsuccessful efforts to amend Title VII, when considered with the explicit grant of a private administrative remedy in

Amendments are evidence of such an intent. Conceptually, these proposed amendments may be designed to accomplish any number of Congressional policies which are unrelated to the issue of a private cause of action.⁶³

There is some evidence that the amendments to Title VII were proposed in order to extend the prohibitions against employment discrimination to a substantially broader class of employers than those covered under the Rehabilitation Act. Whereas the Rehabilitation Act, in its entirety, reaches only federal agencies, federal contractors and subcontractors, and federally assisted programs, an amendment to Title VII would proscribe employment discrimination against the handicapped by a substantially larger number of employers.⁶⁴

Senator Humphrey, a sponsor of the original attempt to amend Titles VI and VII of the Civil Rights Act to include protections for handicapped individuals, made clear that his primary concern was the prohibition against employment discrimination found in the legislation rather than the specific mechanisms provided for remedying such discrimination.⁶⁵ Senator Humphrey later reemphasized his approval of

Section 503, calls for the conclusion "that Congress did not intend to bestow a private right to bring suit in court upon qualified handicapped employees." *Id.* at 202. This reasoning was followed in *Moon v. Roadway Express, Inc.*, 15 Empl. Prac. Dec. 6508 (N.D. Ga. 1977).

63. For example, the proposed amendments may represent nothing more than a predominant objective of centralizing the civil rights statutes under the ambit of the Equal Employment Opportunity Commission.

64. Under Title VII the term "employer" means "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person." However, the term employer does not include "(1) the United States, a corporation wholly owned by the Government of the United States, an Indian Tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in Section 2102 of Title V), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under Section 501(c) of Title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers." 42 U.S.C. § 2000e(b) (Supp. V 1975).

65. In his statement with regard to the placement of these rights in the Rehabilitation Act, as opposed to the Civil Rights Act of 1964, Senator Humphrey stated:

[T]his bill correctly emphasized the need to serve more severely handicapped individuals, to make services responsive and to make every effort to enable handicapped persons to lead a productive and financially independent life.

I welcome the additional requirement in this bill for an affirmative action program under which Federal contractors shall undertake to employ and advance in employment qualified handicapped individuals. Moreover, another section of this bill specifically prohibits discrimination against an otherwise qualified handicapped or severely handicapped individual, solely by reason of his or her handicap, resulting in that person being excluded from participation in, or denied the benefits of, any program or activity receiving Federal financial assistance.

the placement of substantive rights in the Rehabilitation Act, in lieu of the Civil Rights Act, again stressing that the primary objective of his original bill was to prohibit employment discrimination.⁶⁶

The proposition that subsequent attempts to amend Title VII are primarily designed to prohibit private discrimination, which remains unregulated by the Rehabilitation Act, is supported by Congressman Dodd's testimony during the 1976 Oversight Hearings. In explaining his purpose in proposing an amendment to Title VII, Congressman Dodd related his concern for the expansion of the substantive obligations to private employers.⁶⁷ Thus, the argument that proposed Title

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

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

Although the original bills did not include a parallel to Section 501, it is clear from Senator Humphrey's statement that his primary intent in proposing amendments to Title VII revolved around the substantive protections from employment discrimination which would be granted. No mention is made of the issue of a private cause of action, and no legitimate inference can be made that the failure of Senator Humphrey's original bills to "muster sufficient support for passage" implies a negative intent on the part of the Congress.

66. Senator Humphrey referred to the proposed Rehabilitation Act Amendments as "an important step toward fulfilling the intent of my bill to prohibit discrimination in employment solely on the basis of handicaps and in the absence of a bona fide occupational qualification. 119 CONG. REC. 6145 (1973). With regard to the amendment which was later to become Section 504, Senator Humphrey commented: "The bill which I sponsored would have amended Title VI of the Civil Rights Act of 1964 to establish this protection." *Id.* As shown in his earlier statement, Senator Humphrey's overriding concern continued to be for the substantive protections, rather than for the procedural mechanisms. Again, no reference is made to the issue of a private cause of action.

67. It is my belief that we as a nation have been grossly negligent in failing to eradicate the barriers of discrimination which the mentally and physically handicapped face in the public and private sectors in our society. The Rehabilitation Act of 1973 stands as an affirmative step by the Congress to remove these discriminatory barriers at least from the federal government, the Federal Contractors and recipients of federal financial assistance.

However, we must go beyond the protections afforded the handicapped in the Rehabilitation Act and prohibit private discrimination in the areas of employment, architectural barriers, housing and transportation.

To this end, last year I introduced legislation to prohibit discrimination against the mentally and physically disabled in the House in employment; and last fall I conducted extensive hearings on private employment discrimination to develop a background on the problems the handicapped face in this area.

Oversight Hearings, supra note 53, at 321-22.

VII amendments evidence a Congressional intent to exclude private causes of action under the Rehabilitation Act is too speculative because it ignores more palpable possibilities for explaining legislative purpose.

Even assuming that the legislative history of the attempted amendments to Title VII had shown that a primary purpose was to provide handicapped individuals with a private cause of action, that showing would not bear upon the issue of whether the court should imply a private cause of action under Section 501. Since such a showing would not be based upon specific legislative history in the Rehabilitation Act disapproving of a private cause of action, no legitimate inference could be drawn concerning the legislative intent behind Section 501.

Although there is no specific indication of a legislative intent to allow a private cause of action under Section 501, there is, more importantly, no indication of a disapproval of such private actions. When viewed in its entirety, the legislative history calls for the establishment of forceful, affirmative rights for handicapped individuals. Moreover, the very purpose of the judicially-created policy of implied causes of action is to provide individuals with the full benefit of the statutory rights afforded by Congress.⁶⁸

Where there is no clear indication of legislative intent to deny or allow a private remedy, the decision of a federal court should be based upon the three remaining *Cort* considerations.⁶⁹ The concept of an implied cause of action has been developed by the judiciary, specifically as a means of providing aggrieved individuals with a process for obtaining relief in the absence of an enunciated private remedy in the statute.

3. *Considering the Legislative Scheme*

The third *Cort* consideration, requiring an assessment of whether the creation of an implied private cause of action is consistent with the underlying purposes of the legislative scheme, is perhaps the most important of the four *Cort* considerations. In *J.I. Case Company*

68. See notes 94-97 *infra*.

69. *Mason v. Belieu*, 543 F.2d 215, 221 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 852 (1976).

v. Borak,⁷⁰ the Supreme Court created an implied private cause of action under the Securities Exchange Act of 1934.⁷¹ In that case, the Court held that although the Act did not expressly provide for a private right of action, permitting such relief was appropriate when necessary to achieve the legislative purposes.⁷² In creating an implied cause of action, *Borak* established that "it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the Congressional purpose."⁷³ *Borak* was recently followed in *Piper v. Chris-Craft Industries*⁷⁴ in which the Court, citing *Borak* and *Superintendent of Insurance v. Bankers Life & Casualty Company*,⁷⁵ held that the essential test for determining whether a private cause of action should be implied to a particular statute is the determination of whether such an implication is necessary to effectuate the Congressional purposes.⁷⁶

Given the legislative history of the Rehabilitation Act, which is replete with strong indications of the prevailing public policy to prohibit employment discrimination, an obligation is placed on the judiciary to insure that the intended objectives of Congress are realized through the implication of a private cause of action under Section 501. Notwithstanding the enactment of the Civil Service Commission's appeals system for handicapped individuals,⁷⁷ the need for a private cause of action continues. That need is based upon the tremendous extent to which employment discrimination against dis-

70. 377 U.S. 426 (1964).

71. 15 U.S.C. § 78n(a) (1976).

72. 377 U.S. at 432.

73. *Id.* at 433.

74. 430 U.S. 1 (1977).

75. 404 U.S. 6 (1971).

76. 430 U.S. at 26. Prior to the further explanation of *Borak* by the *Piper* Court, Justice Harlan analyzed the *Borak* decision in *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971).

The *Borak* case is an especially clear example of the exercise of federal judicial power to accord damages as an appropriate remedy in the absence of any expressed statutory authorization of a federal cause of action. There we "implied"—from what can only be characterized as an "exclusively procedural provision" affording access to a federal forum . . . a private cause of action for damages. . . . We did so in an area where federal regulation has been singularly comprehensive and elaborate administrative enforcement machinery had been provided. The exercise of judicial power involved in *Borak* simply cannot be justified in terms of statutory construction . . . nor did the *Borak* Court purport to do so. . . . The notion of "implying" a remedy, therefore, as applied to cases like *Borak*, can only refer to a process whereby the federal judiciary exercises a choice among *traditionally available* judicial remedies according to reasons related to the substantive social policy embodied in an act of positive law.

Id. at 402 n.4 (citations omitted).

77. See notes 26-37 and accompanying text *supra*.

abled individuals has interwoven itself into the very fabric of federal employment practices. Even with the availability of these equal employment opportunity procedures, the application of the maxim *expressio unis est exclusio*⁷⁸ to deny a private cause of action would be improper.⁷⁹

One additional factor which is relevant to the determination of the third *Cort* test is the need for consistency in decisions interpreting the various provisions of Title V of the Rehabilitation Act. The finding of an implied cause of action under Section 501 is clearly consistent with the majority of courts which have found such implied causes of action under Sections 503 and 504 of the Act.⁸⁰ If a private remedy is not implied under Section 501, federal agencies, departments and instrumentalities will be permitted to continue their undaunted practice of discriminatory actions, while federal contractors and federally assisted programs will be subject to judicially mandated compliance with the law.

78. One source gives the following definition: "Expression of one thing to the exclusion of another. . . . Under this maxim, if a statute specifies one exception to a general rule or assumes to specify the effects of a certain provision, other exceptions or effects are excluded. . . ." BLACK'S LAW DICTIONARY 692 (4th ed. 1968) (citations omitted).

79. In *Rogers v. Frito-Lay, Inc.*, 433 F. Supp. 200, 202 (N.D. Tex. 1977) the court relied upon *National R.R. Passenger Corp. v. National Ass'n. of R.R. Passengers*, 414 U.S. 453 (1974), in applying this maxim to Section 503. In *National*, however, the maxim was applied because of the existence of explicit legislative history denying a cause of action. Because no intent to deny a private cause of action is indicated in the legislative history of Section 503, the maxim was improperly applied to Section 503 in *Rogers*.

In light of *National* and the doctrine expressed in *Cort*, it is apparent that the maxim is also inapplicable to Section 501. See also *Allen v. State Board of Election*, 393 U.S. 544 (1969).

80. An expanding number of courts have either explicitly recognized a private cause of action under Section 504 or have afforded the plaintiff relief under the statute. See *Davis v. Southeastern Community College*, 574 F.2d 1158 (4th Cir. 1978), *rehearing denied*, No. 77-1237 (4th Cir. June 29, 1978); *Leary v. Crapsey*, 566 F.2d 863 (2d Cir. 1977); *United Handicapped Fed'n. v. Andre*, 558 F.2d 413 (8th Cir. 1977); *Kampmeier v. Nyquist*, 553 F.2d 296 (2d Cir. 1977); *Lloyd v. Regional Transp. Auth.*, 548 F.2d 1277 (7th Cir. 1977); *Duran v. City of Tampa*, 430 F. Supp. 75 (M.D. Fla. 1977); *Bartels v. Biernat*, 427 F. Supp. 226 (E.D. Wis. 1977); *Drennon v. Philadelphia Gen. Hosp.*, 428 F. Supp. 809 (E.D. Pa. 1977); *Hairston v. Drosick*, 423 F. Supp. 180 (S.D. W. Va. 1976); *Sites v. McKenzie*, 423 F. Supp. 1190 (N.D. W. Va. 1976); *Rhode Island Soc'y for Autistic Children v. Board of Regents*, C.A. No. 5081 (D.R.I. August 1, 1975); *Silverstein v. Sisters of Charity of Leavenworth*, 559 P.2d 716 (Colo. App. 1976).

Although there is less uniformity on the implied private right of action issue under Section 503, even those cases finding no private right of action address only the issue of the individual's right to proceed in court either concurrently with or in lieu of exhausting the available administrative remedies, and they do not necessarily restrict an individual's private right of action once the administrative proceedings have been completed. Compare *Duran*, 430 F. Supp. 75 (N.D. Fla. 1977) and *Drennon*, 428 F. Supp. 809, (E.D. Pa. 1977) finding a private right of action, with *Wood v. Diamond State Tel. Co.*, 440 F. Supp. 1003 (D. Del. 1977); *Moon v. Roadway Express*, 15 Empl. Prac. Dec. 6508 (N.D. Ga. 1977); *Rogers v. Frito-Lay, Inc.*, 433 F. Supp. 200 (N.D. Tex. 1977).

Not only would such a situation be contrary to the legislative scheme, but the federal government would become the antithesis of the "model employer of the handicapped" which Congress intended. The necessity for implying a private cause of action under Section 501 is evidenced by the defense posited by the Equal Employment Opportunity Commission (EEOC) in *Coleman v. Darden*.⁸¹ In *Coleman*, the defendants argue that, while Section 504 probably can be held to create an implied private cause of action,⁸² Section 501 should not.⁸³ By then arguing that federal agencies are not "federally assisted programs" within the meaning of Section 504,⁸⁴ the defendants were able to assert that they are without any adjudicable responsibility to handicapped individuals.

Two ironies evolve from the defense posited by the EEOC. The first is that this super-agency, whose mission is the enforcement of nondiscrimination legislation for other "protected classes," seeks insulation from the charges of employment discrimination asserted by handicapped individuals. The EEOC, which during the pendency of this lawsuit reported a total of only 15 handicapped individuals out of 2,290 total employees,⁸⁵ has taken a position which is facially inconsistent with its *raison d'être*.

The second irony is that the EEOC, which has frequently applauded imaginative judicial approaches taken to support and expand the legislative design of eliminating employment discrimination for other "protected classes," argues in *Coleman* for a narrow approach which is diametrically opposed to that legislative design.⁸⁶

81. 13 Empl. Prac. Dec. 6788 (D. Colo. 1977), *appeal pending*, No. 77-133 (10th Cir. 1978).

82. Brief for Appellee, *Coleman v. Darden*, No. 77-1133 (10th Cir. 1978) at 15 n.6.

83. *Id.* at 17-20.

84. The weight of authority on this issue appears to support the proposition that federal agencies, departments and instrumentalities are not recipients of federal financial assistance as that term is used in the Rehabilitation Act. The term "federal financial assistance," as defined by those federal agencies administering 42 U.S.C. § 2000d-1, does not include federal agencies. *See, e.g.*, 7 C.F.R. § 15.2 (1977) (Department of Agriculture), 28 C.F.R. § 42.101 (1977) (Department of Justice). *See also* *Dossen v. United States Department of Housing and Urban Development*, 428 F. Supp. 328 (N.D. Ga. 1976). The definition of "federal financial assistance" promulgated by the Department of Health, Education, and Welfare for the implementation of Section 504 is consistent with the approaches taken with regard to 42 U.S.C. § 2000d-1 in that it implicitly excludes federal agencies. 45 C.F.R. § 84.3(h) (1977).

85. 1977 CIVIL SERVICE COMMISSION REPORT Appendix D, at ix (1976).

86. In an address given at the Symposium sponsored by the Equal Employment Opportunity Commission in Observance of the 10th Anniversary of the agency at Rutgers School of Law November 28, 1975, Professor Cornelius J. Peck summarized this position.

From an administrative point of view, the most significant development in the 10-year history of the Equal Employment Opportunity Commission (EEOC) has been the demonstration that, at least with regard to certain subjects, courts may be trusted to give novel legislation an extensive and favorable development which tra-

Concededly the defendants should not be foreclosed from raising any justiciable defense. Nevertheless the employment practices of the EEOC, with regard to handicapped individuals, when juxtaposed against the express purpose of the agency, serve to highlight the critical need which handicapped individuals have for a judicial forum in which to pursue their grievances.

4. *The Applicability of State Law*

The fourth *Cort* test requires an assessment of whether the cause of action is one traditionally relegated to state law.⁸⁷ Because the federal government is supreme within its proper sphere,⁸⁸ there can be little question that Section 501 meets the fourth test for determining whether a private cause of action should be implied. The states are unquestionably without constitutional power to regulate employment discrimination by the federal government.

5. *The Need for Judicial Intervention Under Section 501.*

Although *Cort* has served as the focal point for the analysis of the private right of action issue, the Supreme Court's more recent emphasis in *Piper* upon the interrelationship between the private right of action and the Congressional goals must not be overlooked.⁸⁹ The courts must be called upon to effectuate the intent and purpose of Section 501.⁹⁰

ditional learning suggests can be obtained only through the administrative process. Courts in this traditional view are neutral, uncommitted, and bereft of the passion required to proliferate creatively the policies of legislation which depart from the status quo. They insist upon technicalities which frustrate the purpose of the new law. Creative development of legislative policies requires, therefore, an unjudicial sympathy, enthusiasm, and a commitment to extension of statutory language to achieve its maximum affect. Courts have demonstrated that in the field of equal employment opportunities they may rival if not excel the administrative process and the sensitive and creative treatment of statutory language. Moreover, instead of hostility, EEOC has received support from the judiciary which greatly strengthens the effectiveness of the administrative process.

Peck, *The Equal Employment Opportunity Commission: Development in the Administrative Process 1965-1975*, 51 WASH. L. REV. 831 (1976).

87. 422 U.S. at 84.

88. See *Mayo v. United States*, 319 U.S. 441 (1943); *Johnson v. Maryland*, 254 U.S. 51 (1920); *United States v. Weiserbloom*, 168 F.2d 698 (2d Cir. 1948); 81 C.J.S. *Social Security and Public Welfare* § 7 (1977).

89. See notes 70-76 and accompanying text *supra*.

90. Justice Douglas has poetically described the injustice which occurs when the judiciary fails to fulfill its responsibility of protecting and furthering the Congressional goals through the implication of necessary private causes of action:

The Court is in the mood to close all possible doors to judicial review so as to let the existing bureaucracies roll on to their goal of administrative absolutism. When

The necessity for favorable judicial action is based upon the entrenched nature and pervasive extent of discrimination in federal agencies. Senator Williams has forcefully expressed the severity of the problem:

We are concerned that there has been little progress in hiring and promoting disabled persons by federal contractors and *by the Federal Government itself*; . . . and that the rights of millions of handicapped individuals have been allowed to suffocate as a result of inadequate public educational programs about these rights.

. . .⁹¹

Frankly, I think that the time for excuses has now passed, we don't have the time to listen to why it is so difficult to enforce the basic rights of American people—whether or not they happen to have the handicapping condition.⁹²

Handicapped individuals are a valuable resource to our nation, but the full and fair utilization of their skills cannot occur until discrimination ceases. As a recent commentator has noted, protective legislation has not been a panacea for handicapped individuals because the recent legislation has seen little or no effective enforcement.⁹³

It is not uncommon for federal courts to fashion federal law where federal rights are concerned.⁹⁴ The courts which hear cases under Section 501 should take cognizance of the familiar canon of statutory interpretation that remedial legislation should be construed broadly to effectuate its purposes.⁹⁵ By definition, the very nature of implied

victims of administrative banality or administrative caprice are not allowed even to be heard, the abuses of the monsters we have created will become intolerable. The separation of powers was designed to provide, not for judicial supremacy, but for checks and balances.

National Railroad Passenger Corp. v. National Ass'n. of Railroad Passengers, 414 U.S. 453 (1974) (Douglas J. dissenting).

91. Courts, in considering the issue of an implied cause of action under Section 501, should assess not only the affect of an adverse decision upon the access of handicapped individuals to judicial relief, but also as to the potential affect for retarding the use of agency complaint procedures. Senator Williams is properly concerned over the inadequacy of public educational programs about the rights intended under Section 501. The lack of such programs has an incaluable negative effect upon the Congressional goals. The implication of a private right of action under Section 501 would clearly enunciate judicial support for the public policy and would increase not only the viability, but the visability, of the statute.

92. *Oversight Hearings*, *supra* note 53, at 1502-03. During the Oversight Hearings, Congressman Dodd also testified that, despite the existence of Title V, "there has been little elimination against discrimination against the handicapped. This is a result of . . . a lack of enforcement by the Federal Government of these sections." *Id.* at 321-22.

93. Achtenberg, *Legal Aid for the Disabled: an Overview*, SAN FERN. L. REV. 161, 171 (1975).

94. *Textile Workers Union of America v. Lincoln Mills of Alabama*, 353 U.S. 448, 457 (1957).

95. *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967).

causes of action calls upon the judiciary to respond to a social problem which has been legislatively defined, but for which Congress has failed to establish procedures that insure full compliance with its goals. With regard to Section 501, the courts are in an excellent position to assess the need for supplemental relief. Moreover, they should not hesitate to imply a cause of action under the statute which will increase the likelihood of compliance with the Congressional purpose.⁹⁶ The judiciary not only has the power, but also the duty, to provide such remedies as are necessary to effectuate the statute's goals.⁹⁷

C. Other Statutory and Regulatory Causes of Action

Thus far, Section 501 has not been addressed frequently⁹⁸ nor authoritatively by the federal courts. Nevertheless, a number of courts have analyzed the rights of physically and mentally handicapped individuals under both Section 7153 of the United States Code and the maze of regulations and procedures outlined in the Administrative Title of the Code of Federal Regulations⁹⁹ and the Federal Personnel Manual.

Although the case law in this area is by no means uniform, there is a cognizable trend of giving a liberal construction to the relevant provisions of the regulatory scheme in order to further the rights of handicapped individuals in federal employment. The achievement of the Congressional goal of prohibiting employment discrimination can perhaps best be pursued through an implied cause of action under Section 501 and through the development of consistent case law under that statute. Nevertheless, the generally favorable case law arising under the federal regulations will continue to play an impor-

96. See generally Note, *Implying Civil Remedies From Federal Regulatory Statutes*, 77 HARV. L. REV. 285, 291 (1963).

97. J. I. Case Co. v. Borak, 377 U.S. at 433, cited with approval in Cort v. Ash, 422 U.S. at 84.

98. The lengthy periods of time required to litigate claims under the facts of several of the cases helps to explain why there has been a relatively small number of decisions under Section 501 when compared with the amount of litigation decided under Section 504. Compare note 38 *supra* with note 80 *supra*. The relative inactivity of aggrieved federal employees and applicants should not be misconstrued as evidencing non-discriminatory federal employment practices. Rather, the paucity of litigation more appropriately reflects the attempts which aggrieved individuals have made to work within the agency structure. If the judiciary ultimately responds favorably to cases filed under Section 501, it should be anticipated that handicapped individuals will correspondingly increase their utilization of that statute to escape the frequently unworkable administration structure.

99. 5 C.F.R. §§ 1.1 -2515.20 (1977).

tant part in the development of substantive rights for handicapped individuals. A major drawback, however, in placing primary emphasis upon the federal regulations is the sheer complexity of these bureaucratic inventions.¹⁰⁰ Moreover, inconsistencies in the case law add to the confusion, and lengthy periods of time have been required for exhaustion of administrative processes. Additionally the ultimate role of the courts has been limited frequently to judicial review.

Ryan v. Federal Deposit Insurance Corp.,¹⁰¹ *Smith v. Fletcher*,¹⁰² and *McNutt v. Hills*,¹⁰³ illustrate the difficulties encountered when courts rely upon administrative procedures to effectuate relief for handicapped individuals alleging federal employment discrimination. The *Ryan* court found that the plaintiff's allegations of employment discrimination on the basis of physical handicap under Section 7153, Section 501 and federal regulations and policies¹⁰⁴ failed to state a cause of action.¹⁰⁵ Although also holding that the plaintiff had failed to exhaust available administrative procedures,¹⁰⁶ the trial court, in dismissing the plaintiff's complaint, directed the federal defendant to make available all applicable administrative processes to the plaintiff.¹⁰⁷ Thus, while granting the defendant's motion to dismiss, the District Court sought to insure that the plaintiff's substantive rights were not totally ignored as a result of the adverse decision.

On appeal, the United States Court of Appeals for the District of Columbia Circuit specifically refused to decide whether Section 501, Section 7153 or Section 713.401 of the Code of Federal Regulations afford a basis for the implication of a private right of action. Nevertheless, the Court stated "it is clear to us that the quoted provisions impose a duty upon federal agencies to structure their procedures

100. See, e.g., discussion of *Doe v. Hampton*, 556 F.2d 265 (D.C. Cir. 1977), at notes 130-140 and accompanying text *infra*.

101. No. 75-1904 (D.D.C. May 5, 1976) *aff'd* 565 F.2d 762 (D.C. Cir. 1977).

102. 393 F. Supp. 1366 (S.D. Tex. 1975), *aff'd and modified* 559 F.2d 1014 (5th Cir. 1977).

103. 426 F. Supp. 990 (D.D.C. 1977).

104. In addition to statutory and constitutional causes of action, the plaintiffs' Amended Complaint for Injunction sought relief under "the regulations of the United States Civil Service Commission: the regulations and Affirmative Action plan of the F.D.I.C. and Executive Orders 11480 and 11758." *Ryan v. F.D.I.C.*, No. 75-1904 (D.D.C. May 5, 1976).

105. *Id.*

106. The court specifically noted the failure of the plaintiff to exhaust existing F.D.I.C. employee grievance procedures. The agency would have permitted the plaintiff to pursue her allegations of discrimination on the basis of physical handicap. *Id.*

107. The court specifically referred to those administrative processes afforded by 5 C.F.R. § 713.401 (1978), the F.D.I.C. Employee Grievance Procedures and the F.D.I.C. Circular 2000.10).

and programs to insure that handicapped individuals are afforded equal opportunity in both job assignment and promotion.”¹⁰⁸

Although essentially affirming the trial court’s decision, the court of appeals was careful to more fully assure the availability of an administrative process by indicating that, if the current procedures in the Federal Deposit Insurance Corporation did not ultimately provide a remedy for discrimination in promotion because of physical handicap, the defendants “should” amend their procedures to so provide.¹⁰⁹ Although the court issued neither injunctive nor mandamus relief, it indicated that an agency’s failure to comply with its duty would permit the aggrieved individual to seek judicial review of the agency action.¹¹⁰

In *Smith* the trial court went substantially further than the *Ryan* decision by actually adjudicating the plaintiff’s substantive claims and ordering individual relief under Section 713.401¹¹¹ and specifically requiring the Civil Service Commission to abide by the applicable statutes and regulations.¹¹² On appeal, the Fifth Circuit affirmed the relief granted by the trial court.¹¹³ The appellate court, however,

108. *Ryan v. F.D.I.C.*, 565 F.2d 762, 763 (D.C. Cir. 1977).

109. *Id.* at 764.

110. *Id.* at 763. The Court of Appeals cited as jurisdictional authority 28 U.S.C. § 1331(a) (1976) and 5 U.S.C. §§ 701-06 (1966). In the final sentence of its Order, the Court of Appeals also indicated that “if appellant is aggrieved by the action taken by the agency, she may seek judicial review at that point.” *Id.* at 764.

The Court of Appeals seems to be indicating that the right to seek judicial review would arise in either of two situations: (1) if the Federal Deposit Insurance Corporation failed to provide the plaintiff with an appropriate mechanism; or (2) after the plaintiff exhausted the available mechanism. This interpretation would be consistent with Judge Gesell’s specific finding that the plaintiff had failed to exhaust. Had Judge Gesell’s Order dismissing the plaintiff’s cause of action been based upon a theory that she would, under no circumstances, have been entitled to judicial review once an internal administrative process were made available, the issue of exhaustion would not have been material to that holding.

111. 393 F. Supp. at 1369 (Finding of Fact No. 5). As in the *Ryan* appellate decision, the trial court in *Smith* based its jurisdiction upon the Administrative Procedure Act, 5 U.S.C. § 702 (1966). *Id.* (Conclusion of Law No. 4).

112. The trial court would have specifically enjoined the Commissioners of the Civil Service Commission from:

- a. [F]ailing to order separate and independent investigation of any complaint of discrimination.
- b. [R]efusing to include the issue of discrimination because of physical handicap in the investigation of complaints of discrimination under Chapter 713 of the Federal Personnel Manual, 5 C.F.R. Part 713.
- c. [F]ailing to instruct the hearing examiner to enforce all applicable regulations.
- d. [F]ailing, upon review of the examiner’s and agency’s decisions, to enforce its own regulation pertaining to discrimination on the basis of physical handicap.

Id. at 1370, (Conclusion of Law, No. 12).

113. *Smith v. Fletcher*, 559 F.2d 1014, 1019 (5th Cir. 1977).

based its decision on a finding of sex discrimination under Title VII rather than employment discrimination on the basis of disability.¹¹⁴ As a result, the trial court's far-reaching holding was diluted by the Fifth Circuit's modification.¹¹⁵ The action taken by the trial court, however, remains as a standard by which to measure the exercise of judicial power.

Somewhere on the continuum between the decision in *Ryan* and the trial court determination in *Smith* is the decision in *McNutt* which also involved the denial of promotional opportunities on the basis of handicap. The *McNutt* court fell short of the lower court's determination in *Smith* by remanding the plaintiff's claim to the administrative tribunal for an assessment of the relief to be granted rather than merely ordering appropriate relief.¹¹⁶ However, *McNutt* does go further than the *Ryan* decision by establishing that the federal government has the burden of proving by "clearly convincing evidence" that the individual would not have received the promotion he or she applied for absent discrimination.¹¹⁷ *McNutt* further ordered that the plaintiff's grievance be expedited.¹¹⁸

The Court in *McNutt* was obviously affected by the plaintiff's allegations of blatant discrimination, which the government conceded to be "inexcusable."¹¹⁹ The relief granted was tantamount to class in-

114. The appellate court refused "the opportunity to create unnecessary dictum . . ." with regard to the plaintiff's "interesting theory that federal employees claiming physical handicap discrimination are in a position akin to that of federal employees claiming racial discrimination . . ." prior to the 1972 Amendments to Title VII. *Id.* at 1018 n.9.

115. The Fifth Circuit was probably not incorrect in finding that the sex and physical handicap discrimination were "inexplicably entwined" under the facts presented. *Id.* at 1017. Clearly one of the "key statements" evidencing discrimination which was made by one of the plaintiff's supervisors highlights the dual illegality of the way in which she was perceived and treated by her employer. "I know it would be very difficult for a young woman to travel all over the country, getting in cabs, and airplanes, with a wheelchair." *Id.* at 1017. However, the Fifth Circuit did not overrule any of the reasoning of the trial court, and the lower court's determination stands as an example of the judiciary's desire to effectuate relief for handicapped individuals who are met with discrimination by federal employment practices.

116. 426 F. Supp. 990, 1005 (D.D.C. 1977).

117. *Id.*

118. *Id.* The Court ordered that the administrative proceedings be completed within 120 days. Having found that the plaintiff was entitled only to prospective relief, the court sought to insure that the plaintiff not be further prejudiced by administrative delay.

119. *See id.* at 994. For example, the grievance examiner found that the Director of the Office of Congressional Services had said that he did not want McNutt, who was blind, to be "wandering and stumbling around the halls of Congress." *Id.* at 1004-05 n.32. Additional evidence of the overall lack of commitment to federal non-discrimination policies in the Department of Housing and Urban Development which may have spurred the court to provide liberal relief was the statement of the Department's Director of Personnel to the effect that he was not aware of the substance of the various regulations affecting handicapped employees in federal service. *Id.* at 1006-07 n.38.

junctive relief in that the court required the Department of Housing and Urban Development to submit a comprehensive report specifying the plans for implementing the statutory and regulatory prohibitions against employment discrimination on the basis of handicap.¹²⁰

Although specifically stating the jurisdictional basis for the plaintiff's action,¹²¹ the *McNutt* decision is less than clear with regard to the basis of the plaintiff's substantive rights. The court appears to rely upon the "variety of overlapping of federal statutes, regulations and personnel directives."¹²² Although it is difficult to delineate a specific holding with regard to any particular statutory or regulatory provision, *McNutt* is evidence of the judicial attitude which seeks to effectuate relief for handicapped individuals who allege discrimination in federal employment.

While a number of courts have seemingly been influenced by repeated instances of employment discrimination, which exist despite strong expressions of federal policy to the contrary, other courts have found further impetus to provide disabled individuals with judicial relief from the sheer inadequacy, if not hypocrisy, of the particular agency's internal procedural mechanisms. Such a case is *Watson v. Mason*¹²³ which arose out of plaintiff's initial filing of a grievance against the Veterans Administration alleging improper service of evaluations¹²⁴ and two subsequent complaints alleging discrimination on the basis of race, religion, sex, and physical handicap.¹²⁵ The court found that although a formal complaint of discrimination on the basis of disability was filed, the federal defendants specifically instructed the administration's grievance investigator to disregard that claim.¹²⁶ Moreover, the court held that the administration's findings and recommendations concerning the initial grievance were "ambiguous and unintelligible,"¹²⁷ even though they were issued more than

120. *Id.* at 1007. On the issue of the breadth of the injunctive relief, *McNutt* actually went further than the lower court's decision in *Smith*. The *Smith* court later amended its order with regard to injunctive relief to only require relief vis-a-vis the individual plaintiff.

121. The court based subject matter jurisdiction upon 5 U.S.C. § 702 (1966) and 28 U.S.C. § 1361 (1962). *Id.* at 997-999.

122. *Id.* at 996. The court's discussion of the various federal policies places significance upon 5 U.S.C. § 7153 (1966), 5 C.F.R. § 713.401 (1976) and provisions of the Federal Personnel Manual. *Id.* at 996-97. The court also finds that Section 501 "was obviously designed to increase agencies' responsibilities toward physically handicapped employees." *Id.* at 997.

123. *Watson v. Mason*, No. CV 76-322-WMB (C.D. Ca. filed April 2, 1976).

124. *Id.* at 3 (Finding of Fact No. 9).

125. *Id.* at 6 (Finding of Fact No. 21). Finding that the plaintiff had not exhausted administrative remedies in the processing of a reprisal grievance, the court denied relief under that cause of action. *Id.* at 6, 8 (Finding of Fact No. 24, Conclusion of Law No. 8).

126. *Id.* at 6 (Finding of Fact No. 22).

127. *Id.* at 4 (Finding of Fact No. 15).

one year after the filing of the original grievance.¹²⁸ As a result of its findings, the court remanded the case, ordering that the plaintiff's claim of employment discrimination on the basis of physical disability be processed pursuant to Section 753, even though no such remedy was then specifically provided for under that section.¹²⁹

In another case, *Doe v. Hampton*,¹³⁰ the United States Court of Appeals for the District of Columbia Circuit issued an opinion which may have far-reaching consequences for handicapped individuals who allege violations of the Federal Personnel Manual. In *Doe*, the court described the Manual as a "massive thesaurus of rules, guidelines, suggestions and secular imprecations,"¹³¹ and remanded the cause to the district court to determine whether a provision of the Federal Personnel Manual, suggesting that federal agencies should make "every reasonable effort" to assist disabled employees in adapting to their jobs,¹³² is binding upon the Department of the Treasury's Bureau of Engraving and Printing.¹³³ The court in *Doe* held that a sufficient nexus existed to affirm the agency's decision to remove the plaintiff from her original employment.¹³⁴ The court

128. *Id.* (Finding of Fact No. 14(c)).

129. *Id.* at 7-8 (Conclusion of Law No. 7). In its accompanying judgment, the court expanded upon the constitutional basis for its holding by declaring the defendant's failure to process the plaintiff's claims of handicap discrimination to be a denial of equal protection, as well as a denial of due process. The court went on to say that: "To hold otherwise would be to deprive one discriminated against on account of physical handicap of the due process afforded those discriminated against on account of race, religion, sex, national origin or age." Of course, the newly enacted appeals procedure for complaints of handicap discrimination would now be available to the plaintiff in *Watson*, except for its limited retroactivity. *Id.* see discussion, *supra* notes 26-36, and accompanying text.

130. 566 F.2d 265 (D.C. Cir. 1977).

131. *Id.* at 273 n.21.

132. 339 FEDERAL PERSONNEL MANUAL 1-3(b)(1) (1972). This provision provides in relevant part:

When an employee no longer can perform the duties of his or her position efficiently and safely because of his physical or mental condition, the agency may separate him on the basis of disability In view, however, the policy of the Executive branch on utilization of employees who are handicapped or who develop handicaps . . . every reasonable effort should be made to reassign the employee to duties he can perform efficiently and safely Specifically, the following alternatives should be considered:

(1) A liberal grant of leave without pay when pay leave is exhausted and the disability is of a remedial nature and likely to respond to treatment and hospitalization. Many mental and emotional disorders formerly considered completely disabling, now fall in this category in view of the dramatic medical advance made in treatment and rehabilitation of these conditions in recent years.

133. *Doe v. Hampton*, 556 F.2d at 284.

134. The court, in a heavily cited portion of its opinion, set forth its understanding of the role of the federal courts vis-a-vis the review of federal personnel decisions.

In passing upon appellant's claims, we must remain cognizant of the confines of our review. While transition from unreviewability to reviewability of adverse per-

found, however, that the information contained in her fitness-for-duty examination¹³⁵ was not sufficient to determine whether the agency had made sufficient attempts to provide accommodations such as a transfer or an extended leave.¹³⁶

Despite its adverse holding with regard to the plaintiff's dismissal from her original employment, the court firmly established that the Federal Personnel Manual requires a showing that the physical or mental disability of the individual sought to be terminated must be specifically related to job performance.¹³⁷ More importantly, *Doe*

sonnel actions against federal employees has left a legacy of some disagreement and confusion in the reported cases, it is at least reasonably well-settled, that whatever its exact scope, judicial review in the federal courts is necessarily limited. Federal judges do not sit as ombudsman for government employment relations, nor do we indulge in the conceit of substituting our own judgment ad libitum for that of the agency. Rather, we concern ourselves in the personnel business only insofar as is necessary to insure that the action challenged (1) is not arbitrary or capricious; (2) was reached in conformity with relevant procedural requirements; and (3) was not otherwise unconstitutional.

Id. at 271-72 (Footnotes omitted).

135. The court takes care to adequately explain the purpose of the fitness-for-duty examination. *Id.* at 282-84. The examination is required whenever the federal employer seeks to justify an adverse personnel action upon the physical or mental capacity of an employee. 752-1 FEDERAL PERSONNEL MANUAL S1-3(a)(5)(b) (Feb. 1972). The fitness-for-duty examination may also be utilized for counseling the employees and for assessing the feasibility of various personnel actions. In this context, it need not necessarily relate to an adverse personnel action.

Where an agency seeks to terminate an employee who is physically or mentally handicapped for reasons related to the handicapping condition, "the agency should obtain a complete and detailed report of physical examination without cost to the employee." 752-1 FEDERAL PERSONNEL MANUAL S1-3(a)(5)(d) (1972). The medical examination is designed to assess "the particular demands of the position" in relationship to "how the employee's performance or behavior fails to meet these demands." *Id.*

136. Judge Robinson, in his dissent, presents a persuasive argument that because the majority opinion found the results of the fitness-for-duty examination to be not sufficiently related to the failure to seek reassignment, this same examination, "with its implicit suggestion of nexus," was not sufficient to rationalize the majority's decision with regard to the plaintiff's ability to perform the actual job from which he was discharged. 556 F.2d at 11 (Robinson, J. dissenting).

137. 556 F.2d at 14. The court's holding stresses the requirement of a causal relationship between the disability and the individual's job performance, thus strengthening the mandate of the Federal Personnel Manual. 752-1 FEDERAL PERSONNEL MANUAL S1-3(a)(5)(f) (1972) provides:

The agency must not rely solely upon a showing that the employee has a disabling condition, even when the agency has obtained a medical opinion of incapacity.

Neither the placement of limitations on the duties which an employee is permitted to perform or medical conclusions about the employee's physical condition is sufficient cause for taking adverse action. *The agency must establish a link between the medical conclusion and (i) observed deficiencies in work performance or employee behavior or (ii) high probability of hazard when the disabling condition may result in injury to the employee or others because of the kind of work the employee does.* When an agency can clearly show high probability of serious hazard for example, an agency has indisputable evidence that a truck driver with epilepsy is subject to *grande mal* seizures the agency does not have to wait for the employee to have a serious accident on the job before taking adverse action. The medical evidence

symbolizes the extent of the judiciary's power to effectuate the "strong expressions of Congressional, Executive and [Civil Service] Commission policy favoring a liberal employment of the mentally and physically handicapped."¹³⁸ In remanding to the district court for an assessment of the agency's legally cognizable responsibilities under a specific provision of the Federal Personnel Manual, the court of appeals opinion contains favorable language concerning the potential for pursuing substantive rights granted in the Manual.¹³⁹

The *Doe* approach provides yet another potential source of relief from discriminatory practices. Furthermore, it presents problems which illustrate the need for further reliance upon Section 501. First, the holding in *Doe* depends upon the existence of jurisdiction under the Administrative Procedure Act which requires the aggrieved individual to first process his or her grievance through the cumbersome administrative process.¹⁴⁰ Second, the particular question at is-

linked with the showing of potential hazard would be sufficient cause for taking adverse action. *In all other cases, however, the agency must link the Medical conclusion with observed deficiencies in work performance or employee behavior.*

Id. (Court's emphasis).

As a parenthetical note, the statement in this provision with regard to the "truck driver with epilepsy" proceeds upon the assumption that the individual has been shown to be "subject to grande mal seizures." Clearly, it would not be sufficient for the federal agency to show that the individual has a history of epilepsy, or even that the individual currently has epilepsy. In order to show that the individual "is subject to" seizures, the agency must show that the individual's seizures are not controlled or controllable by medication. *See, e.g.,* *Duran v. City of Tampa* 430 F. Supp. 75 (M.D. Fla. 1977); *Drennon v. Philadelphia Gen. Hosp.* 428 F. Supp. 809 (E.D. Pa. 1977); *see also* discussion of safety in note 150 *infra*.

138. *Doe v. Hampton*, 556 F.2d at 31.

139. The court held that:

Although the *Manual's* numerous regulations, instructions, and suggestions relating to adverse actions based on medical disabilities, taken together, are something considerably less than a paradigm of clarity, we are of the conviction that to remain consistent with the evident spirit of Commission policies towards the physically and mentally handicapped, an employing agency must exercise an *informed* discretion in determining whether the assignment or leave-without-pay are feasible alternatives to removal.

Id. at 34. The court also notes that "[i]f the *manual* provision to which appellant now refers us is indeed a binding regulation and if the agency has failed to comply with its mandate to the prejudice of its employee, then an essential predicate to a valid removal will have been wanting." *Id.* at 30.

140. If the district court, on remand, holds that the particular provision of the Federal Personnel Manual is mandatory, rather than precatory, the court notes that a further remand to the Civil Service Commission will be required in order to obtain the medical evidence necessary to determine whether reassignment or extended leave are feasible. *Id.* at 33. Although the court indicates that reviewing courts would then assess whether the agency abused its discretion in a decision not to reassign or extend leave-without-pay, in a footnote to that statement the court seemingly vasculates by predicating the standard of review upon the *assumption* that an agency's effort are reviewable at all. *Id.* at 33-34.

sue—the agency's duty, if any, to seek alternatives to complete removal from employment—becomes substantially clearer under Section 501.¹⁴¹ Although the implication of a private right of action under Section 501 would not do away with the need to interpret the Congressional intent in the context of specific substantive issues, the availability of a generous amount of legislative history would assist the judicial decision-making process. More importantly, actions under Section 501 would lead to a greater degree of uniformity. Rather than

141. Despite parting dictum that "good indications" are contained in the existing record which support a finding that "at least, a liberal extension of leave-without-pay, coupled with continued medical treatment, may indeed have been both feasible and fruitful," *Id.* at 37, the court noted that "for what we consider a rather generous period of time," the employer did attempt "to accommodate and help ameliorate appellant's unfortunate emotional problems." *Id.* at 6. See also *id.* at 18 n.25.

The court also notes that "under no circumstance would an agency be required to search high and low throughout its own bureaus and the entire civil service system for a position in which a mentally or physically handicapped employee can satisfactorily perform despite his or her disabilities." *Id.* at 34. Thus, with regard to the extent of the employer's duty to accommodate, if the district court on remand finds that such a duty exists under the Federal Personnel Manual, the Court of Appeals concludes that the agency's "efforts need only be reasonable, gauged by the nature of the employee's disability and the availability of suitable alternative positions." *Id.*

However, the decision in *Doe* is not couched in terms of the technical concept of "reasonable accommodations" as that term has evolved from Title V of the Rehabilitation Act. Both the Department of Labor and the Department of Health, Education and Welfare, in fulfilling their respective responsibilities under Sections 503 and 504, have mandated a specific employer responsibility to provide "reasonable accommodations." 41 C.F.R. § 60-741.6(b) (1977); 45 C.F.R. § 84.12 (1977). Under Section 503, the contractors must make accommodation to the physical and mental limitations of an employee or applicant for employment unless the contractor can demonstrate an undue hardship on the conduct of the business. 41 C.F.R. § 60-741.6(b) (1977). The Department of Health, Education and Welfare has defined reasonable accommodations as requiring employers to make facilities used by employees readily accessible to and usable by handicapped persons, and the definition specifically includes such actions as job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, and the provision of readers or interpreters. 45 C.F.R. § 84.12(b). In its official Analysis of the Regulations implementing Section 504 in programs and activities receiving their federal financial assistance from the Department of Health, Education and Welfare, the Department explains that the concept of reasonable accommodations depends, to a great extent, upon balancing the size of the employer against the cost of the accommodation. 42 Fed. Reg. 22,688 (1977) *to be codified in* 45 C.F.R. § 84.12(b) (1977). This analysis provides substantial insight into the concept as it is defined in both Sections 503 and 504. In implementing its mandate under Exec. Order No. 11,914, 3 C.F.R. 117 (1976), to coordinate the implementation of Section 504 by all federal departments and agencies, the Department of Health, Education and Welfare continues its original definition of "reasonable accommodations." More important to this consideration is the decision of the Civil Service Commission to adopt the concept of "reasonable accommodations" as a substantive requirement in its recently enacted regulations.

These interpretations of the statutory mandates in Title V recognize that the principle of reasonable accommodations than do the provisions of Sections 503 and 504, the proposition that tunities for individuals with handicapping conditions, and that the concept of reasonable accommodations is inherent in the concept of non-discrimination in employment. The interpretations of the agencies charged with the enforcement of Sections 501, 503 and 504 are entitled to great deference. *Udall v. Tallman*, 380 U.S. 1, 16 (1965).

Under Section 501, the duty of federal employers to provide reasonable accommodations is even more clear in the legislation than it is under Section 503 and 504. Section 501 specifically mandates reasonable accommodations by requiring that each agency's Affirmative Action Program Plan "shall include a description of the extent to which and methods whereby the *special needs* of handicapped employees are being met." 29 U.S.C. § 791(b) (1973) (emphasis added). The legislative history to Section 501 further expresses the Congressional intent. The Senate Committee on Labor and Public Welfare enunciated its intention to "insure that the special needs of handicapped individuals are being met on the job." S. REP. NO. 48, 93d Cong., 1st Sess. 51 (1973). Similar language is also found in S. REP. NO. 318, 93d Cong., 1st Sess. 49 (1973). The specific recognition by the Congress that reasonable accommodations must be provided in federal employment is clear from this mandate to insure that the "special needs" of handicapped individuals are being met. The provision of reasonable accommodations is a prerequisite to the view which Congress had of the federal government as a "model employer" of the handicapped, and Section 501 contemplates that federal employers will go at least as far, if not further, in this area than federal contractors and federally assisted programs.

Additionally, several recent decisions of the Comptroller General of the United States have forcefully interpreted Section 501 to require the provision of reasonable accommodations to handicapped federal employees. In the Matter of Collins, Dr. Collins was a disabled individual who required the use of a wheelchair and who, by reason of his disability, also required a travelling companion. File B-186598 (May 26, 1977). In its decision to authorize reimbursement for the travel expenses of Dr. Collins' wife incurred during the fulfillment of his duties as a member of the Commerce Technical Advisory Board, the Comptroller General found that the appointment of Dr. Collins to the Board "was consistent with and in furtherance of the Federal Government Policies of non-discrimination and affirmative action in employment of the physically handicapped. . . ." *Id.* at 2. In reaching this decision, the Comptroller General relied upon Section 501 and reasoned that:

Requiring Dr. Collins to bear the additional expenses of an escort would cause him to suffer a financial loss as the result of traveling on official business, and, in the future, might prevent him from conducting official business. In the latter event, the Advisory Board would not be able to make use of Dr. Collins' technical expertise. Thus, denying the attendant's travel expenses could frustrate the above-cited government policies with regard to employment of the physically handicapped.

Id. at 3. See also In the Matter of Schultz, authorizing the payment of travel expenses for a companion to a blind consultant to the Energy Research and Development Administration. File B-187492 (May 26, 1977). See generally *In the Matter of National Advisory Committee on an Accessible Environment-Salanes of Attendants for Handicapped Members*, File B-189010 (August 15, 1977).

Although the statutory language in Section 501 more succinctly states the duty to provide reasonable accommodations than do the provisions of Sections 503 and 504, the proposition that Congress, intended to insure that reasonable accommodations were afforded handicapped employees and applicants through its enactment of Title V is further reinforced by the reaction of the Senate Committee on Labor and Public Welfare to the inclusion of the requirement of reasonable accommodations in the initial regulations promulgated pursuant to Section 503. 36 C.F.R. 20566 (1974). On August 21, 1974, shortly after the publication of these regulations on June 11, 1974, the Senate Committee, in reviewing the proposed amendment to the definition of "handicapped individual" under Title V wrote to then Secretary of Labor Peter J. Brennan asking: "What are the *business necessities, financial costs, and resulting personnel problems* which would mitigate against an employer's responsibilities to make reasonable accommodations to the physical and mental limitations of an employee?" S. REP. NO. 1139, 93rd Cong., 2nd Sess. 86 (1974) (emphasis in original). The matter-of-fact approach taken in this question evidences the legislative intent that the Congress expected to find the concept of reasonable accommodations provided for under the provisions of Title V.

Against this backdrop, the intent of 5 U.S.C. § 3102 (1966), which provides for the employment of reading assistance to serve without pay for blind employees of the federal government, has been clarified by the enactment of Section 501. This 1962 statute was an attempt to insure

having to decide on a case by case basis which of the multitude of provisions in the federal personnel scheme grant affirmative, adjudicable rights, Section 501 would reach any discriminatory act or omission, regardless of whether a specific provision of federal personnel policy addressed the issue.

Even without considering the private right of action issue under Section 501, that statute and its legislative history are germane both to the ultimate outcome of the remand in *Doe* and to future cases which will construe other Federal Personnel Manual provisions. The forceful statements of legislative intent under Section 501 support the finding of actionable claims based upon the pre-existing plethora of federal policy attempting to curb employment discrimination.

In *Shaposka v. United States*,¹⁴² the Court of Claims of liberally construed the federal regulatory scheme in order to afford relief to a deaf-mute employee who had been discharged from the National Archives and Records Service. This well-reasoned decision, in addition to continuing the favorable trend of cases affording substantive relief to aggrieved individuals, provides considerable insight into the potential for, and actuality of, abuses in federal personnel special procedures utilized for the hiring of handicapped individuals.

In *Shaposka*, the plaintiff argued that: (1) the procedural rights afforded to career-conditional status employees¹⁴³ were improperly denied to him at the time of his termination; (2) he had been terminated as a result of discrimination against him because of his handicapping condition; and (3) his termination was prompted by a letter written to his Congressman concerning his job situation.¹⁴⁴ In its decision granting summary judgment to the plaintiff, the Court of Claims reconstructed the defendant's hiring practices and found that the plaintiff had been improperly classified, thus foregoing any need to decide plaintiff's second and third claims.

Despite the fact that the plaintiff had previously been employed by the federal government through the normal hiring process, the de-

that blind individuals were neither denied initial employment nor denied subsequent promotions as a result of their utilization of readers. The statute originally sought to ensure that such readers were not treated as unauthorized individuals and to make clear the Congressional intent that the statute not be construed to authorize the payment for such readers. The subsequent enactment of Section 501 expresses the current federal policy on this latter issue—to ensure that equal employment opportunities are available to all handicapped individuals through the provision of reasonable accommodations, which would, of course, include the provision of readers at the expense of the federal employer.

142. 563 F.2d 1013 (Ct. Cl. 1977).

143. 5 U.S.C. § 7501 (1966).

144. 563 F.2d at 1018.

defendants based their hiring of the plaintiff upon separate procedures which would not have been used for individuals without handicaps. Had the defendants appropriately utilized the special hiring procedures, the plaintiff would not have been entitled to the extensive procedural protections which are afforded to career-conditional employees. However, the Court of Claims, by finding that the defendant had improperly utilized the special hiring procedures, held that because the plaintiff's original hiring should have been through the usual procedures, the plaintiff was entitled to all procedural protections granted to career-conditional employees.

In its attempt to utilize a separate system for the hiring of the plaintiff, the defendant made two fatal errors. First, the defendant recorded the plaintiff's original hiring as one of a temporary appointment.¹⁴⁵ However, the utilization of the temporary appointment was held to be clearly inapplicable because the defendant had intended to hire the plaintiff on a long-term basis.¹⁴⁶ Recognizing the error of this appointment, the defendant maintained that its actual intent was to have hired the plaintiff under the 700-hour appointment program available for the hiring of "severely handicapped persons."

The 700-hour program, as described in the Federal Personnel Manual, provides temporary employment limited to 700 hours for handicapped persons.¹⁴⁷ The purpose of this program is to provide a trial period of employment to enable an employer to determine whether a handicapped applicant is able to satisfy the job requirements.¹⁴⁸ This program is beginning to receive criticism from a number of handicapped individuals and advocacy groups. By its definition, the special program would permit the hiring of an individual who has the necessary training and qualifications to perform the job tasks. Clearly, under Sections 503 and 504, government contractors and federally assisted programs would not be permitted to develop separate hiring schemes, which entail a lower level of benefits and job security, for handicapped applicants who are "otherwise qualified" to perform the essential job tasks.¹⁴⁹ Under Sections 503 and 504, the employer

145. *Id.* at 1015.

146. The authorities for temporary appointments are set forth in 5 C.F.R. § 316.401 (1977). The purpose of temporary appointment is to forego the difficulties in dealing with the register where a specific administrative need can be filled by a limited appointment for a specific period of time which is less than one year. *Id.* at 316.401. *See also* 316 FEDERAL PERSONNEL MANUAL § 4-1(a).

147. 316 FED. PERSONNEL MANUAL § 4-7.

148. *Id.* at 4-2.

149. *See* 41 C.F.R. § 60-741.6 (1977); 45 C.F.R. § 84.11 (1977); 45 C.F.R. § 85.51 (1977).

would have the burden of showing that a particular individual was not capable of performing the job efficiently or safely. Failing to meet that burden, the employer could not base an adverse employment decision upon any presumptions arising out of the individual's handicap. Under the 700-hour program, the federal government is permitted to channel an individual into a less desirable employment status, even though he or she is "otherwise qualified."¹⁵⁰

Although the 700-hour temporary trial appointment may have some advantages for disabled individuals, especially when used to fulfill the affirmative action requirements contained in Section 501 by expediting the cumbersome hiring process, it does establish a separate system by which procedural and substantive benefits are decreased. By permitting federal employers to base their employment decision provision upon stereotyped notions concerning the abilities of handicapped job applicants and upon "fears" that a handicapped individual will not "fit in with and be accepted by the workforce,"¹⁵¹ the federal government has established a double standard—one for itself and the other for those employers it regulates.

Moreover, a provision which implicitly permits the employer to base a hiring decision upon the social or other non-job-related values of the existing work force is inapposite to any accepted concept of civil rights and equal employment opportunities. Although such a standard has been previously evidenced during our Nation's history, the past lines of demarcation and segregation based upon race, gender, national origin, and religion have been forcefully and completely removed from our official policies.

The recognition of the deficiencies in the 700-hour program prompted the court in *Shaposka* to describe the detrimental effect which would be achieved by adopting the defendant's argument that, although the temporary limited appointment was improperly used, the defendant's intent to place the plaintiff in the 700-hours appointment

150. The purpose of the 700-hour program is described in the Federal Personnel Manual: Many severely handicapped people need a trial appointment because they are unable to obtain competitive appointment even with examination modification or referral service, or both, through the Coordinator Program. One barrier to their employment may be inability to be selected competitively even though they have been trained and they are qualified to perform their job tasks. Another barrier may be employer reluctance to hire them for fear they will not be able to perform on the job efficiently or safely, or fit in with and be accepted by the work force. These obstacles can often be overcome by use of the 700-hour temporary trial appointment authority.

316 FEDERAL PERSONNEL MANUAL § 4-2.

151. *Id.*

should prevail.¹⁵² Because of the disparate treatment which results from being hired under the 700-hour program, the court rejected the defendant's argument, holding:

Where defendant is hiring a physically handicapped person, and chooses to restrict that appointment to a temporary limited appointment not to exceed 700 hours, it is incumbent upon the agency to make the nature of the appointment clear in the hiring process. Absent such specification, the presumption should be that the handicapped person is entitled to the same appointment status that a non-handicapped person would receive. Defendant should not be permitted to take a provision designed to aid the handicapped and turn it to plaintiff's detriment where the ground rules were not established at the time plaintiff was hired.¹⁵³

As in the other cases where the judiciary has sought to construe provisions of the Federal Personnel Manual in a manner favorable to the handicapped individual, the *Shaposka* court indicated that its holding was consistent with the Congressional intent expressed in Section 7153.¹⁵⁴ Thus, while not creating a private cause of action under that statute, *Shaposka* demonstrates the ability of a concerned federal judiciary to make real the Congressional intent, despite the existence of a judicial review policy which might lend itself to a more restrictive view of the courts' role.

Another similarity between *Shaposka* and other recent cases is that the court, while not basing its holding upon a finding of actual employment discrimination, was moved by the existence of discriminatory treatment by the employer. Although the defendant contended that "several incidents where plaintiff either exhibited displays of temper or wrote offensive notes to fellow employees" had resulted in the plaintiff's temporary reassignment after his initial hiring,¹⁵⁵ the defendant admitted that it "found his editorial work to be very satis-

152. 563 F.2d at 1018. The court noted:

If we were to hold for defendant in this case, we would effectively be placing plaintiff in a less than beneficial employment status, on the basis of his physical handicap, than the erroneous temporary limited appointment not to exceed one classification in which he was of ostensibility hired. The temporary limited appointment not to exceed 700 hours is designed to aid the severely handicapped by actually giving them a chance to demonstrate on a temporary basis, that they are capable of performing a job, where otherwise they might not receive such an opportunity. FPM ch. 306, subch. 4-2(c). The interpretation defendants seek would discriminate against, rather than aid, the physically handicapped.

Id.

153. *Id.*

154. *Id.*

155. *Id.* at 1016.

factory.”¹⁵⁶ The court concluded that, under the facts presented, if the plaintiff were afforded the procedural protections provided to career-conditional employees, the federal defendant probably could not have met its substantive burden of proving that the removal of the individual from competitive service would “promote the efficiency of the service.”¹⁵⁷

Despite some judicial reluctance to move beyond the traditional role of restraint in administrative law,¹⁵⁸ and despite those decisions which fail to recognize the existence of discriminatory employment practices,¹⁵⁹ the lower court’s decision in *Smith* and the decisions in

156. *Id.* at 1018.

157. *See* 5 U.S.C. § 501 (1970). Specifically, the court found that:

The problem seemed to be more a communications difficulty with his fellow workers than anything else. In view of plaintiff’s particular physical handicap, it is not surprising that certain communications problems would arise. The nature of the charges brought against plaintiff, the handicap involved, and the commitment of Congress . . . to avoid discrimination based on physical handicap in government employment would place a heavy burden upon the agency. . . .

563 F.2d at 1018-19.

158. *E.g.*, *Jones v. Rumsfeld*, Civil Action No. 76-4-S (M.D. Ala. August 13, 1976). In granting the defendants’ motion for summary judgment, the court disposed of the plaintiff’s claim that his discharge was due to discrimination based upon handicapping condition in violation of 5 C.F.R. § 315.806(b)(2) (1977). The court refused to review the Civil Service Commission’s decision and rejected the plaintiff’s substantial claim, because the particular regulations specifically provided that the Commission’s decision is final. *Id.* at 315.806(e). “No exception is made for district court review. Thus it appears and this court now holds that plaintiff cannot maintain an action in this court based solely on one paragraph of § 315.806 while another paragraph bars this court’s right of review.” *Jones v. Rumsfeld*, *supra* at 2. The Court’s reluctance to break any new ground is further illustrated by its reasoning that, even under more liberal interpretations in other circuits, the Commission’s decision would not have been deemed to be arbitrary. *Id.* at 2-3.

159. *Smith v. United States Postal Service*, Civil Action No. 76-2452-S (D. Mass. August 10, 1977), is the most disappointing decision of this genre. In *Smith*, two pseudonymous plaintiffs brought a class action against the United States Postal Service and the four national postal workers unions asserting constitutional, statutory (5 U.S.C. § 7153 (1966), 39 U.S.C. § 61003(b), 1208(b) and Section 501 and regulatory (5 C.F.R. § 713.401(a) (1969)) causes of action *Id.* at 1 n.2.

The plaintiffs were hired in 1966 and 1967 respectively as “public policy employees” under “excepted service” provisions of the civil service law permitting the appointment of certain individuals, including physically and mentally handicapped individuals, under an allegedly “social remedial employment program.” *See generally* 5 U.S.C. § 2103 (1966); 5 C.F.R. Part 212(A) & (C) (1977). After the Postal Reorganization Act, 39 U.S.C. §§ 101-5605, the Postal Service negotiated a new collective bargaining agreement with the postal workers unions which specifically excluded “public policy employees” from the contractual agreement. *Id.* at 2. As a result of these developments, the plaintiffs were made members of the specific national craft unit for their particular craft and, by the express terms of the contract, they only began accruing seniority rights after one additional year of satisfactory service. *Id.* at 2-3.

As a result of these various maneuvers, the plaintiffs were adversely affected when the Postal Service reassigned them to part-time status prior to reassigning other employees who had entered the craft through the normal hiring process subsequent to the actual dates when the plaintiffs began working. Thus, although the plaintiffs began working in 1966 and 1967 respec-

tively, their seniority did not begin to accrue until 1973, and they were treated as junior to some postal workers who began employment after 1967 but before 1973. *Id.* at 3.

In holding that the plaintiff's Complaint was barred by the provisions of the grievance-arbitration provisions of the contract and that "the complaint fails to identify any conduct of the unions that would even arguably amount to a breach of the duty of fair representation," the court then dismissed the plaintiffs' claim of discrimination:

The plaintiffs' claim of discrimination, however, is without merit. The remedial program pursuant to which the plaintiffs were hired was designed to alleviate appointments in the Civil Service. The plaintiffs could not otherwise have obtained their positions as mail handlers. Their employment status remained unchanged by the 1971 Agreement. The 1973 Memorandum of Understanding obviously improved the security of their position, although it did not grant the plaintiffs retroactive seniority. Unions and employers were vested with considerable discretion to balance the competing interest of various employees and to reach compromisal solutions. *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337-38 (1953). The fatal defect in the plaintiffs' argument is that they lost no seniority by virtue of the 1971 and 1973 National Agreements.

Id. at 4-5.

At the risk of presumptuous analysis, it could be said that perhaps the "fatal defect" in the court's reasoning is that it fails to recognize the express Congressional intent to prohibit employment discrimination. Regardless of the nomenclature given to the paternalistic system developed for "helping" the handicapped, the fact remains that the plaintiffs were employed for a considerable length of time along side other workers who performed the same job functions. The court's opinion cites no evidence of decreased work capacity, less consistent work product, or any other indication that the plaintiffs' employment responsibilities varied in any significant respect from those who were hired through the competitive process. In fact, the plaintiffs successfully completed the additional year of probationary status which was imposed upon them by the 1973 Memorandum of Understanding.

The court in *Smith* dismissed the plaintiff's claim of discrimination because of the "remedial" nature of the "public policy" program which "was designed to alleviate the condition" of those unable to secure competitive appointments in the Civil Service." Although not defining the "condition" which was to be alleviated, the "condition" was probably less their mental retardation than the Postal Service's unwillingness to disregard their handicapping conditions and focused on their job skills. By failing to inquire concerning why they were unable to secure competitive appointments, despite their ability to perform the essential job functions, the court fails to make the inquiry which is essential to the proper adjudication of the legal issue. "Considerable discretion to balance the competing interest of various employees and to reach compromised settlements" does not justify disparate treatment which is otherwise proscribed by law.

Another case which fails to go beyond the initial assumption that a program designed to assist handicapped individuals actually succeeds in its purpose is *Atkinson v. United States Postal Service*, 12 Empl. Prac. Dec. 5208 (S.D.N.Y. 1976). In *Atkinson*, the plaintiff, who represented himself *pro se*, was also hired under the "public policy program." After commencing employment as a mail handler, the plaintiff applied for a transfer to the transportation platform; his request was denied on the basis that the work environment "would expose plaintiff to an unnecessarily dangerous working situation." *Id.* at 5208. After failing to obtain the sought-after transfer, plaintiff voluntarily resigned, and he indicated on his resignation form: "[N]o one with a handicap is allowed to work in G.P.O. Transportation where I tried to get assigned for two years." *Id.*

While not reaching the issue of what effect the plaintiff's voluntary resignation might have upon his cause of action, the court indicated that decisions regarding the non-transfer of employees involve agency discretion and are not subject to judicial review. "Plaintiff has a heavy burden of showing that the failure of defendant to approve his transfer, constituted improper agency action." *Id.* at 5209. In finding that the plaintiff had made no such showing, the court held that: "[t]here is no sound reason for this court to substitute its discretion for the discretion of the Postal Service." *Id.*

Doe, Watson, McNutt, Ryan, and Shaposka are evidence that the bureaucratic entanglement can be overcome. However, few, if any, established rules emerge from the pattern of these cases. While a prediction concerning the future course of judicial events might seem premature and unwise, there is sufficient precedent to infer that the federal courts are becoming receptive to the existence of tremendous inconsistencies of the federal bureaucracy.

CONCLUSION

In *Coleman v. Darden*,¹⁶⁰ the federal district court for the District of Colorado quickly swept away the plaintiff's constitutional claims¹⁶¹ and the potential for judicial redress under Section 501. In so doing, the court upheld the federal agency's job description which excluded from consideration for the position of research assistant or paralegal specialist any individual not possessing "the ability to read printed material the size of typewritten characters."¹⁶² The court's decision unashamedly supports the theory that blind individuals should not aspire to white collar positions within the federal government.

As the Supreme Court recognized in this decade, "Government is the social organ to which all in our society look for the promotion of liberty, justice, fair and equal treatment, and the setting of worthy norms and goals for social conduct."¹⁶³ Unless the judiciary is willing to shoulder its share of the responsibility for insuring that the federal government operates in a nondiscriminatory manner, this lofty

Again, the court's reasoning gives too much credence to agency discretion. The granting of summary judgment as a matter of law seems inappropriate in light of the plaintiff's allegation. If the plaintiff could have shown at trial that the Postal Service uniformly prohibited all handicapped individuals, including the plaintiff, from work on the transportation platform, that practice would have constituted a clear violation of the federal government's frequently expressed policy of non-discrimination.

Even the existence of "safety" considerations must place unfettered discretion with the employer, and certainly the courts must look behind the bare assertion of such considerations. The elevation of concepts of safety to "the status of a sacred cow," in whose name all must be sacrificed, cannot justify the existence of job criterion which is based upon an irrefutable presumption concerning the abilities of individuals with particular disabilities to perform a particular job. *In re Samuel Bingham Co.*, 67 L.A. 76 (1976). See also *Chrysler Outboard Corp. v. Dept. of Industry, Labor and Human Relations*, 13 Empl. Prac. Dec. 6883 (Cir. Ct. 1976).

160. 13 Empl. Prac. Dec. 6788 (D. Colo. 1977).

161. While it is beyond the scope of this Article to discuss possible causes of action under the constitution, such claims should certainly be brought in conjunction with employment discrimination litigation. See generally Note, *Developing A More Objective Means of Ex Post Facto Law Analysis*, 27 DE PAUL L. REV. 191 (1977); Note, *Applying the Constitutional Doctrine of Irrebuttable Presumption to the Handicapped—Gurmankin v. Costanzo*, 27 De Paul L. Rev. 1199 (1977).

162. 13 Empl. Prac. Dec. at 6789.

163. *Adickes v. Kress*, 398 U.S. 144, 190 (1970).

standard, which the Rehabilitation Act seeks to obtain, will wither and die. A sensitive, enlightened judicial approach to resolving claims of discrimination by the federal government may be emerging. Preconceived leanings toward judicial restraint, however, threaten to thwart the congressional purpose of forbidding discrimination on the basis of a handicap. Unless a strong body of case law solidifies the substantive and procedural rights of handicapped individuals, idealistic notions of equal employment opportunities will remain a hollow echo with neither substance nor form. The ultimate response of the judiciary to the employment discrimination which occurs within the federal government will be the dispositive determination of whether Section 501 remains a mockery of justice or becomes a monument to equal treatment under the law.