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I. INTRODUCTION

Professor Mikochik's paper sets forth in detail the major provisions of the employment discrimination aspects of the ADA with the congressional history and comments concerning the ADA.[1] While this is not a rebuttal, it is offered from the employer's perspective.

A. Another Set of Rules

Employers are subject to a number of federal statutes, with accompanying regulations, which regulate the employment arena. The statutes began with the labor protective statutes enacted in the early 1900's, and continued through the New Deal statutes, which included the Wage and Hour Act (FLSA) and the National Labor Relations Act (NLRA), then to Title VII, Occupational Safety & Health Act (OSHA), the Age Discrimination in Employment Act (ADEA), and now to the Americans with Disabilities Act (ADA). It is often noted that American employers are less regulated than their European counterparts, but this is of little comfort to an employer trying to cope with the vast array of laws and regulations regarding employment.

Laws against handicap discrimination is nothing new to many employers. The Rehabilitation Act of 1973[2] had prohibited essentially the same acts set forth in the

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* Watkins Ludlam & Stennis, Jackson, Mississippi.

1. Mikochik, *Employment Discrimination Against Americans With Disabilities*, 11 MISS. C. L. REV. 255 (1991) [hereinafter Mikochik].

2. 29 U.S.C. §§ 701-796 (1988).

ADA by employers who were direct recipients of federal funds and/or government contractors and subcontractors.

It would be easy to engage in a point/counterpoint concerning legislation which will array the full power of the federal government against an employer if the regulators feel the accommodations offered for a disabled individual were not sufficient. However, such comments should be left to the editorial writers and are not the subject of this article.

B. The Need for the ADA

Certain employers are said to have a preconceived notion that handicapped individuals are less productive than non-handicapped individuals. Advocates have argued that those employers reduce employment opportunities for handicapped individuals both in terms of offering positions and in terms of rates of pay, advancement, etc. However, most employers have learned that individual performance is and should be the basis on which employees are hired and advanced. Most disputes arise regarding the differing perspectives of the employer and the government or individual as to how "performance" is judged.

The unemployment rate among the disabled is not a certain figure. The figures have ranged from ten percent or less to fifty percent. Thus, the expected number of persons within the protected group under the ADA who might seek employment opportunities will be either less than 4,000,000 or up to 20,000,000 nationwide. These numbers are difficult, if not impossible, to reconcile, and illuminate the inherent difficulty in assessing the impact of legislation such as the ADA.

C. The Cost of the Rules

What will be the cost of accommodation? Both a major manufacturer or a retail business with twenty employees may find it easy or impossible to accommodate as far as shift changes, work schedules, etc. It should be obvious that the smaller the business, the more difficult it would be to spend any significant amount of money on physical accommodation. One study has suggested that one-half of all accommodations are made at no cash cost. Further, it is estimated that eighty percent of all accommodations cost less than $500. Thus, while it is unlikely that many employers would be faced with cash outlays of significant size in order to accommodate disabled individuals, the assessment of each case may be made more difficult.

What is the threshold? Neither the ADA nor any proposed regulation has a "bright line" dollar figure as to when an employer must or must not engage in a cash outlay for a physical accommodation. As noted in Professor Mikochik's article, an undue hardship exists where the accommodation would require "significant" expense.[3] Obviously the weight given to each factor will vary depending upon the facts peculiar to a particular employer as to the cost in relation to an employer's resources and operations. One can foresee that litigation will ensue and

3. Mikochik, *supra* note 1, at 258.

continue until some general parameters are established concerning what "significant" expense is for particular employers.

D. Planning Ahead

Since the ADA does not become effective until July, 1992, for employers with more than twenty-five employees and July, 1994, for employers with more than fifteen employees, there is time for some pre-planning by employers.

If a little knowledge is dangerous, a complete lack of knowledge may be explosive. Every employer should know its workforce. First, it is a good employee relations policy. Second, the more the employer knows, the more effectively it may act or react to grievances or problems in the workforce.

One of the initial things employers can do is attempt to identify any person already employed who would fall within the definition of disabled for purposes of the ADA. Attached as an appendix is a form which some employers have used as part of an affirmative action plan for both current employees and applicants being offered employment. As with medical testing, these questions should not be asked until after an offer of employment is made.[4]

Further, all employers should prepare or review and update their job descriptions. The employer's decision as to the necessary functions of a job will go far in determining whether an individual is considered "otherwise qualified."[5]

II. WHAT IS "DISABLED?"

The persons protected by the ADA are those who are considered a "qualified individual with a disability." It is further defined as anyone who can perform the "essentials" of the employment position that the individual may hold or desire with or without reasonable accommodation.[6] Disability means that the individual has a "physical or mental impairment that substantially limits one or more of the major life activities," "a record of such impairment" or is "regarded as having such an impairment."[7]

Congress did specifically exclude individuals currently engaging in the illegal use of drugs,[8] but included individuals who have successfully completed or are participating in a supervised rehabilitation program or are "erroneously regarded" as being a drug user.[9] Further, Congress specifically excluded homosexuality, bisexuality, transvestism, transsexualism, pedophilia, voyeurism, gender identity disorders not resulting from physical impairment, "other" sexual behavior disor-

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4. *See* 42 U.S.C. § 12112(c) (1990).

5. *See* 56 Fed. Reg. 8578-01 (1991) (to be codified at 29 C.F.R. pt. 1630.2(n)(3)(i)(ii) and 1630.10) (proposed Feb. 28, 1991).

6. 42 U.S.C. § 12111(8) (1990).

7. 42 U.S.C. § 12102(2) (1990).

8. 42 U.S.C. § 12114(a) (1990).

9. 42 U.S.C. § 12114(b)(1)-(3) (1990). *See also* 42 U.S.C. § 12111(6) (1990).

ders, compulsive gambling, kleptomania, pyromania, and psychoactive substance use disorders from the definition of disability.[10]

The Rehabilitation Act of 1973 defines "an individual with handicaps" as any person who (i) has a physical or mental impairment which substantially limits one or more of such persons major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.[11] Not included within this definition are persons who are current abusers of alcohol or drugs and whose use prevents the individual from performing the job duties and whose employment would constitute a direct threat to property or the safety of others.[12] Under the Rehabilitation Act, courts were called upon to determine whether an individual was, in fact, handicapped. The courts considered a number of factors as to whether an individual was impaired. For example, what was the nature and expected duration of any claimed impairment, did the impairment disqualify the individual from one job or a number of different jobs, did the individual have reasonable access to different areas of a work place, and what was the individual's prior education and training.[13] However, even if a physical or mental impairment exists, it must also "substantially limit" the "major life activities" or there would be no finding of handicap.[14]

From the above, it will be necessary for an individual to show that a physical or mental impairment substantially limits the ability to work in more than one job or group of jobs and that, but for the impairment, he or she would have been hired, and would have received the promotion or would not have been terminated.

III. If Disabled, What Is "Otherwise Qualified?"

If an individual meets the definition of disabled or handicapped the question turns to whether the individual would be "otherwise qualified" to perform the task with or without accommodation.[15] Under the Rehabilitation Act, an otherwise qualified individual is one who is handicapped and "who, with reasonable accommodation, can perform the essential functions of the job in question."[16] Further, the Supreme Court has stated that an otherwise qualified person is an employee

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10. 42 U.S.C. §§ 12208, 12211 (1990).

11. 29 U.S.C. § 706(8)(B) (1988).

12. *See* 28 C.F.R. § 41.31 (1990) (Department of Justice regulations defining handicap).

13. *See, e.g.*, Daley v. Koch, 892 F.2d 212 (2d Cir. 1989); Harris v. Adams, 873 F.2d 929 (6th Cir. 1989); Reynolds v. Brock, 815 F.2d 571 (9th Cir. 1987); Forrisi v. Bowen, 794 F.2d 931 (4th Cir. 1986); de la Torres v. Bolger, 781 F.2d 1134 (5th Cir. 1986); Fields v. Lyng, 705 F. Supp. 1134 (D. Md. 1988); Tudyman v. United Airlines, 608 F. Supp. 739 (C.D. Cal. 1984). *See* 56 Fed. Reg. 8578-01 (1991) (to be codified at 29 C.F.R. pt. 1630.2(h)(i)(j)(k)(l)) (proposed Feb. 28, 1991).

14. Elstner v. Southwestern Bell Tel. Co., 659 F. Supp. 1328, 1342-43 (S.D. Tex. 1987), *aff'd*, 863 F.2d 881 (5th Cir. 1987); *Forrisi;* 794 F.2d at 935; *Tudyman*, 608 F. Supp. at 745.

15. 42 U.S.C. § 12111(8) (1990).

16. School Bd. of Nassau County v. Arline, 480 U.S. 273, 287 (1987) (adopting Department of Justice regulations, 28 C.F.R. § 41.32 (1990)).

who is able to meet the requirements of a job *in spite* of the handicap.[17] There are a number of cases decided in the "otherwise qualified" area.[18]

As litigated under the Rehabilitation Act, reasonable accommodation was not required if it imposed undue financial and administrative burdens on the employer or required a fundamental alteration of the nature of the program.[19] It did not require an employer to violate a collective bargaining contract or the contractual rights of other employees to have job assignments awarded on the basis of seniority.[20] However, a claim or possibly even proof that accommodation may undermine the morale of other employees does not constitute undue hardship.[21] Further, employers were not required to create new positions or move supervisors who allegedly were causing an employee to suffer from psychological stresses.[22]

A district court finding on reasonable accommodation, although essentially a finding of fact, may be reviewable de novo on the theory that a finding of reasonable accommodation involves an application of the law to other factual determinations made by the court.[23]

IV. Litigation and Remedies

The ADA borrows from Title VII the remedies and procedures available under Title VII. Thus, the equitable concepts of reinstatement, backpay, frontpay, etc. will all be available under the ADA.[24] Further, since the procedures are to be the same as Title VII, an individual alleging handicap discrimination must file an administrative charge with the EEOC within 180 days of the occurrence.[25] The EEOC will conduct its investigation and will decide whether there is reasonable cause to believe the truth of the allegations. Of course, if the EEOC finds cause, then it may either initiate a suit, or issue a "right to sue" letter to the aggrieved

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17. Southeastern Community College v. Davis, 442 U.S. 397, 406 (1979). *See* 56 Fed. Reg. 8578-01 (1991) (to be codified at 29 C.F.R. pt. 1630.2(m)) (proposed Feb. 28, 1991).

18. *See* Lussier v. Dugger, 904 F.2d 661 (11th Cir. 1990) (material issues of fact existed whether a dentist with chronic hepatitis is "otherwise qualified" for other jobs when actively contagious); Carter v. Casa Cent., 849 F.2d 1048 (7th Cir. 1988) (multiple sclerosis victim still otherwise qualified for director of nursing position where only physical limitation was the inability to stand for long periods which position did not require); Davis v. Frank, 711 F. Supp. 447 (N.D. Ill. 1989) (deaf employee considered otherwise qualified although unable to answer telephone where job description did not include answering of telephone as a function of the job); Davis v. Meese, 692 F. Supp. 505 (E.D. Pa. 1988) (insulin dependent diabetes sufferer cannot safely perform the essential functions of a special agent of the FBI).

19. *Arline*, 480 U.S. at 287 n.17. *See* 42 U.S.C. § 12111(10)(B)(ii) (1990).

20. Shea v. Tisch, 870 F.2d 786 (1st Cir. 1989).

21. Davis v. Frank, 711 F. Supp. 447 (N.D. Ill. 1989).

22. Adams v. Alderson, 723 F. Supp. 1531 (D.D.C. 1989).

23. Arneson v. Heckler, 879 F.2d 393, 397 (8th Cir. 1989).

24. The Rehabilitation Act of 1973 also provides for equitable remedies although the court decisions are not abundantly clear. *See* 42 U.S.C. § 2000e-5(g). *See generally* Alexander v. Choate, 469 U.S. 287 (1985); Consolidated Rail Corp. v. Darrone, 465 U.S. 624 (1984); Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582 (1983); Manecke v. School Bd. of Pinellas County, 762 F.2d 912 (11th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1985); Shuttleworth v. Broward County, 649 F. Supp. 35 (S.D. Fla. 1986).

25. *See* 42 U.S.C. § 2000e-5(e) (1990).

party which would trigger the ninety day limitation period in which the individual may file suit.[26]

Currently, the adjudication of cases arising under Title VII is by trial to the court without a jury. If Title VII remains in its current form then the same factors would apply to the ADA. However, the Civil Rights Act of 1990, which was vetoed by President Bush and not overridden by Congress, has been reintroduced for this new session of Congress. There are various theories as to the final form of this legislation and the date of passage. Among other things, the 1990 Act provided for a trial by jury and the imposition of compensatory and punitive damages.[27] In whatever form the new Civil Rights Act becomes law, then the remedies, procedures and enforcement of claims under the ADA will follow the new statute.

Litigation of handicap discrimination claims under the Rehabilitation Act have followed a modified version of the Title VII allocations established by *McDonnell Douglas Corp. v. Green.*[28] In general, a plaintiff alleging handicap discrimination must establish a prima facie case based upon the following elements:

1. That the plaintiff is an individual with a handicap (is "disabled");
2. That the individual is otherwise qualified for the job; and[29]
3. That the denial of the job, the promotion, or the termination of employment occurred solely because of the handicap.[30]

The employer will then be required to come forward with legitimate non-discriminatory reasons for its actions.[31]

Disparate impact cases should follow the rationale of *Griggs v. Duke Power Co.*[32] and its progeny ("any tests used must measure the person for the job and not the person in the abstract"), although some have argued that the new Civil Rights Act, if passed, would require an employer to prove that a disparate impact did not exist. As any trial lawyer can attest, proving a negative is often difficult.

V. CONCLUSION

We would all like to be able to say we are certain that the ADA will be easily and fairly enforced. However, this is unlikely. It is difficult to find a proper analogy for the ADA with any of the previous regulatory statutes. The FLSA and the NLRA came about in a time of political turmoil during the Great Depression and Title VII came out of the civil rights struggle of the 1960's.

Since the passage of Title VII we have seen the passage of OSHA, the ADEA, the Polygraph Protection Act, and other acts regulating employment. It is logical

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26. *See* 42 U.S.C. § 2000e-5(f)(1) (1990).

27. As in some Title VII cases, plaintiffs may attempt to join an ADA claim with other claims. *See generally* 42 U.S.C. §§ 1981, 1983 (1990). Both compensatory and punitive damages are available pursuant to sections 1981 and 1983. *See generally* Hernandez v. Hill Country Tel. Coop. Inc., 849 F.2d 139, 143 (5th Cir.), *reh'g denied*, 853 F.2d 925 (5th Cir. 1988); Walters v. City of Atlanta, 803 F.2d 1135 (11th Cir. 1986).

28. 411 U.S. 792 (1972).

29. *Compare Arneson*, 879 F.2d at 396 (plaintiff not required to prove he was otherwise qualified).

30. *See* Prewitt v. United States Postal Serv., 662 F.2d 292, 306-09 (5th Cir. 1981).

31. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254-55 (1981).

32. 401 U.S. 424, 436 (1971).

to assume that with: (1) the enforcement agency already in place; (2) many existing court decisions regarding agency procedure; and (3) existing court decisions interpreting identical or similar provisions regarding the substantive provisions of the ADA, that there will not be a substantial period of time in ADA litigation taken up with procedural issues.

However, it is likely that substantial litigation will be required in order to "flesh out" the parameters of the ADA. Until such time, employers should hope that the government and the courts will be realistic in their assessment of the ADA's requirements.

APPENDIX

HANDICAPPED IDENTIFICATION FORM

It is the policy of _____ to employ and advance in employment qualified handicapped or disabled individuals. If you wish to be considered as a handicapped or disabled individual, you should complete the information sought below. Submission of this information is voluntary and if you choose not to identify yourself in this regard you will not be penalized in any manner. Information obtained concerning your status shall be kept confidential, except that: (1) supervisors and managers may be informed regarding restrictions on the work or duties and any necessary accommodation; (2) first aid and safety personnel may be informed when and to the extent appropriate, if the condition requires emergency treatment; and (3) appropriate government officials may be informed.

_____ _____

DATE NAME

_____

_____

ADDRESS

_____

TELEPHONE NUMBER

_____

SOCIAL SECURITY NUMBER

1. I would like to be considered as a handicapped or disabled individual. Yes _____ No _____ . If yes, please identify the nature of your handicap:

_____

_____

2. If you checked yes above, please furnish information about any special methods, skills, or procedures which might qualify you for positions that you might not otherwise be able to perform because of your handicap or disability:

_____

_____

3. Please furnish information concerning any accommodations which we could make which would enable you to perform a job properly and safely including special equipment, changes in the physical layout of the job, elimination of certain duties relating to the job or other accommodations: _____

_____

_____

4. Please furnish information to assist first aid or emergency personnel concerning any medical problem, including allergies to medicines, and prescription medication you are taking: _____

_____