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RECONCILING REHABILITATION ACT CLAIMS:

A PROPOSED BEST PRACTICE FOR FILING FEDERAL EMPLOYMENT DISCRIMINATION CLAIMS UNDER SECTION 501 OR 504 OF THE REHABILITATION ACT

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I. INTRODUCTION

Under the Federal Rehabilitation Act of 1973 (Rehabilitation Act), federal employees may bring claims against their employer for discrimination.[1] Since 1978, the Act in its amended form has generously, yet often interpreted as confusingly, provided two separate provisions under which a claimant may bring a claim—section 501 and section 504.[2] Section 501 "is aimed at preventing agencies of the federal government from discriminating against applicants and employees with disabilities,"[3] whereas section 504 applies to programs conducted by *private* entities receiving federal financial assistance in addition to programs conducted by executive agencies.[4] Both provisions, however, intend to prohibit discrimination against individuals with disabilities and increase the opportunities of disabled persons within society.[5] Several United States Supreme Court cases address aspects of Rehabilitation Act claims, such as whether section 504 provides a private right of action for employment discrimination,[6] the availability of damages under section 504,[7] or whether a condition qualifies as a "handicap" under section 504.[8] None of these cases, however, specifically address whether section 501 or section 504 is the more appropriate section for discrimination claims brought by federal employees. Federal circuit courts and several district courts, on the other hand, have varying opinions

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[1] Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified as amended at 29 U.S.C. §§ 701–794 (2020)).
[2] *Id.*
[3] 1 ADA: Emp. Rights § 2.01 (2020).
[4] *Id.*
[5] *Id.*
[6] Consol. Rail Corp. v. Darrone, 465 U.S. 624 (1984) (rejecting plaintiff's argument that section 504 does not create a private right of action for employment discrimination).
[7] Barnes v. Gorman, 536 U.S. 181 (2002) (holding that punitive damages are not available in private suits under section 504 of the Rehabilitation Act since punitive damages could not be awarded in private suits brought under Title VI, which is the relevant regulation of remedies for claims brought under section 504 of the Rehabilitation Act).
[8] Sch. Bd. of Nassau Cty. v. Arline, 480 U.S. 273 (1987), *superseded by statute*, 29 U.S.C. § 794, as recognized in Shiring v. Runyon, 90 F.3d 827 (3d Cir. 1996).

about which section is appropriate for a federal employee's disability discrimination claim and the requirements therein, with some declining to address the issue or allowing a case to proceed under one provision or the other without explanation as to why.[9]

A solution is therefore needed to identify a best practice, and consequently, a more uniform system of applying the intent of the legislature to Rehabilitation Act claims. By identifying and memorializing such a solution, Rehabilitation Act claimants may select the appropriate section of the Act from the point of their initial filing, carry out the specific requirement of that section, have greater clarity in their expectation for relief, and aid in the conservation of judicial resources, while honoring the legislative intent of the Rehabilitation Act.

To find and propose the most appropriate solution to this problem, this note will first review the background of the Rehabilitation Act and its relationship to the Americans with Disabilities Act (ADA). Then, it will explain the provisions in question, including how section 501 and section 504 came into existence, their amendments, legislative intent, causation standards, and remedies, which will shed light on the importance of identifying the correct provision under which to file. Next, this note will offer an overview of the "provision camps" formed by various interpretations throughout the federal circuit courts. Finally, this note will present a best practice that naturally flows from a deeper understanding of the combined background, legislative intent, and historical usage of each provision.

A. BACKGROUND AND RELATIONSHIP TO THE AMERICANS WITH DISABILITIES ACT (ADA)

What we know as the Rehabilitation Act today began in 1917 with the Smith-Hughes Act. This act created the Federal Board of Vocational Education to address vocational rehabilitation needs of veterans with disabilities.[10] Over

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[9] *See infra* Section III.

[10] Smith-Hughes Nat'l Vocational Educ. Act of 1917, Pub. L. No. 64-347, 39 Stat. 929 (1917); *see also* The history of vocational rehabilitation, VOCATIONAL REHABILITATION, https://scvrd.net/history (last visited Mar. 14, 2021).

time, those services were expanded to civilians with disabilities and broadened in their types of assistance and services provided, with architectural, employment, and transportation barriers finally being eliminated to allow for equal access for people with disabilities by way of the Rehabilitation Act of 1973.[11]

The Federal Rehabilitation Act of 1973, "[a]n Act to replace the Vocational Rehabilitation Act"[12] and predecessor of the Americans with Disabilities Act of 1990 (ADA),[13] was enacted to establish the Rehabilitation Services Administration and authorize programs for the furnishing of vocational and rehabilitative services to "handicapped persons."[14] The Act, as passed in 1973, did not contain a specific provision for a private right of action under section 501, and contained a more limited version of section 504.[15] However, the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978 added section 505(a)(1) (codified as 29 U.S.C. § 794a(a)(1)) and created a private cause of action under section 501, in addition to other important changes.[16] The Senate Report for those amendments states that the purpose of the amendment was to provide "for individuals aggrieved on the basis of their handicap the same rights, procedures, and remedies provided individuals aggrieved on the basis of race,

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[11] 29 U.S.C. §§ 701–794 (2020).

[12] *Id.*

[13] Am. with Disabilities Act of 1990, 42 U.S.C. 12101 et seq. (2020) (revising the Rehabilitation Act to explain that the newly added terms "drugs" and illegal use of drugs" were to be interpreted consistent with the principles of the Controlled Substances Act, 21 U.S.C. §801, and excluded individuals currently engaged in illegal drug use from coverage).

[14] Pub. L. No. 93-112, 87 Stat. 355 (1973).

[15] Rehabilitation Act of 1973.

[16] 1 ADA: Emp. Rights § 2.01 (citing Spence v. Straw, 54 F.3d 196 (3d Cir. 1995); Barth v. Gelb, 2 F.3d 1180 (D.C. Cir. 1993), *cert. denied sub. nom.*, Barth v. Duffy, 511 U.S. 1030 (1994) ("private cause of action added to Rehabilitation Act because 'Congress decided that stronger measures were needed on behalf of persons subjected to handicap discrimination by government agencies"); *see infra* Section II for a detailed discussion of other important amendments.

creed, color, or national origin."[17] The Rehabilitation Act Amendments of 1992 then changed the term "handicapped person" to "individual with a disability" and applied the standards of Title I of the ADA to determinations of employment discrimination under section 504 of the Rehabilitation Act.[18] Finally, the ADA Amendments Act of 2008 aligned the meaning and interpretation of the definition of "disability" under section 504 with the ADA.[19]

In regard to the protections granted under the Rehabilitation Act and the ADA, the Supreme Court of the United States held that "the ADA must be construed to be consistent with regulations issued to implement the Rehabilitation Act"[20] and "grant at least as much protection as provided by the regulations implementing the Rehabilitation Act."[21] In practice, "cases addressing the ADA are generally relevant for purposes of resolving claims brought under the Rehabilitation Act."[22] Although the two acts have "two distinct causation standards,"[23] the ADA is a direct descendant of the Rehabilitation Act—it tracks its concepts while updating its terminology. Thus, each act can inform the other in a case analysis.[24]

B. RELEVANT PROVISIONS TO CLAIMS UNDER THE REHABILITATION ACT

Section 504 of the Rehabilitation Act, as amended, broadly guarantees that

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[17] S. REP. NO. 890, 95th Cong., 2d Sess. at 18 (1978); *see also* 124 CONG. REC. S15,591 (Daily ed. Sept. 20, 1978) (remarks of Senator Cranston).
[18] Rehabilitation Act Amends. of 1992, Pub. L. No. 102-569, 106 Stat. 4344 (1992).
[19] ADA Amends. Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008).
[20] Bragdon v. Abbot, 524 US. 624, 638 (1998).
[21] *Id.* at 632.
[22] Hale v. Johnson, 245 F.Supp.3d 979, 985 (E.D. Tenn. 2017) (citing Doe v. Salvation Army in U.S., 531 F.3d 355, 357 (6th Cir. 2008).
[23] *See* Lewis v. Humbolt Acquisition Corp., 681 F.3d 312, 315 (6th Cir. 2012).
[24] *See* appendix to this note.

> [n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or activity conducted by any Executive agency or by the United States Postal Service.[25]

Section 501, alternatively, prohibits employment discrimination by federal departments and agencies, including the U.S. Postal Service and Postal Rate Commission, against individuals with disabilities and requires affirmative action in the hiring, placing, and advancing of individuals with disabilities in the federal sector.[26] "Section 501's provision for affirmative action in addition to section 504's prohibition of discrimination against the disabled indicates that federal employers are charged with a greater duty to ensure the employment of disabled workers than are federal grantees or private employers."[27] The similarity of intent paired with the provisions' intermingling tendencies, as described above, creates potential for confusion in an analysis of whether one provision is more proper than the other when filing a claim. Additionally, each provision has its own causation standard—section 504 explicitly states a "sole" causation standard whereas section 501 only implies a "but for" causation standard.[28] Finally, the remedies available to an aggrieved employee differ depending on the chosen provision as well—section 501 relies on Title VII of the Civil Rights Act of 1964 whereas section 504 relies on Title VI of the same act, and those titles have their own inherent differences to boot.[29]

II. LEGISLATIVE HISTORY AND AMENDMENTS

The United States Supreme Court succinctly explained that the basic purpose of the Rehabilitation Act is

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[25] 29 U.S.C. § 794 (2020).
[26] 29 U.S.C. § 791 (2020).
[27] Woodman v. Runyon, 132 F.3d 1330, 1338 (10th Cir. 1997).
[28] 29 U.S.C §§ 701, 794 (2020).
[29] 29 U.S.C. § 794a (2020); *see infra* Section II.B.

to "promote and expand employment opportunities for the handicapped."[30] The original Rehabilitation Act—The Rehabilitation Act of 1972—contained only brief verbiage representing what would later become section 501 of the Rehabilitation Act of 1973 and no verbiage of the later enacted section 504.[31] President Nixon killed the original legislation, however, by way of pocket veto after letting it sit on his desk until the 92nd Congress was out of session.[32] When the bill was re-introduced in the House of Representatives on January 3, 1973, still no language correlating to the enacted section 504 existed. The "clean bill" was then referred to the House Committee on Education and Labor on January 29, 1973.[33] Again, the "clean bill" contained the same language described above, without any language relating to the prohibition of discrimination toward handicapped persons by any program receiving federal financial assistance.[34]

When the measure was laid on the table on March 8, 1973, and S.7 passed in lieu, text had finally been added to state that "no otherwise qualified handicapped individual in the United States shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance."[35] This took the Rehabilitation Act from an action to provide protection

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[30] *Consol. Rail Corp.*, 465 U.S. at 634 (quoting 29 U.S.C. § 701(8)).

[31] *Rehabilitation Act of 1972: Hearings on H.R. 8395 Before the Subcomm. on the Handicapped of the Comm. on Labor and Pub. Welfare*, 92nd Cong. 92 (1972).

[32] Rehabilitation Act of 1972 (H.R. 8395), 8 WEEKLY COMP. PRES. DOC. 1579 (Oct. 30, 1972). *See also* dsteffen, *How regulation came to be: The Rehabilitation Act of 1973*, DAILY KOS (Dec. 12, 2010), https://www.dailykos.com/stories/2010/12/12/928271/-.

[33] CONG. RSCH. SERV., Summary: H.R. 3064—93rd Congress (1973–1974), Introduced in House (01/29/1973), available at Congress.gov (digital text of H.R. 3064 is not available).

[34] The language remained the same when reported to the house with amendments on March 2, 1973. CONG. RSCH. SERV., Summary: H.R. 17—93rd Congress (1973–1974), Reported to House with amendment(s) (03/02/1973), available at Congress.gov (the actual digital text of H.R. 17 is not available).

[35] CONG. RSCH. SERV., Summary: S.7—93rd Congress (1973–1974), Introduced in Senate (01/04/1973), available at Congress.gov (digital text of S.7 is not available).

for both federal employees, by way of section 501, to an action that also provided for non-federal employees with disabilities who participate in or seek the benefits of a program or activity funded through the federal government. The Committee Report accompanying S.7 provided explanation that the bill was intended to remain "vocationally oriented," while still providing for "individuals whose handicap is so severe, or because of circumstances, such as age, that they may never achieve employment."[36] Additionally, this report recognized the need for a committee "which will initiate an affirmative action plan for and seek to insure [sic] that there is no discrimination in employment of handicapped individuals by and within the agencies of the Federal Government in hiring, placement, or advancement . . . and that the special needs of handicapped individuals are being met on the job,"[37] which appears to be language that would later become section 501. However, very little documentation exists on the discussion of section 504's meaning or importance in Senate Report accompany S.7 or even when it was eventually enacted.[38] The most detailed discussion comes from a congressional debate through Senator Humphrey's remarks:

> I am deeply gratified at the inclusion of these provisions which carry through the intent of original bills which I introduced, jointly with the Senator from Illinois (Mr. Percy), earlier this year, 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

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[36] S. REP. NO. 93-48, at 19 (1973).

[37] *Id.* at 51.

[38] *Id.* at 53 (stating only that "The bill further proclaims a policy of nondiscrimination against otherwise qualified handicapped individuals with respect to participation in or access to any program which is in receipt of Federal financial assistance"); *Id.* at 80 (referring to the same simple language without explanation).

> 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.[39]

President Nixon again vetoed the Act on March 27, 1973,[40] describing it as one "which mask[s] bad legislation beneath alluring labels."[41] The President justified his decision by explaining that although the bill might "further an important social cause," it "neglect[ed] to warn the public that the cumulative effect of a Congressional spending spree would be a massive assault upon the pocket books of millions of men and women in this country" along with other unintended consequences.[42]

The Senate failed to override the veto, but after negotiations between the Committee on Education and Labor and the Administration, the Senate introduced S. 1875 on March 29, 1973.[43] By June 27, the full Committee made a unanimous vote to order S. 1875 to be favorably reported to the Senate.[44] President Nixon finally signed the bill (eventually, H.R. 8070) into law on September 26, 1973, enacting the Rehabilitation Act of 1973.[45]

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[39] 118 CONG. REC. 32,310 (1972) (remarks of Sen. Humphrey).
[40] CONG. RSCH. SERV., Actions Overview: S.7—93rd Congress (1973–1974), available at Congress (veto exists in S. Doc. 93-10 (03/27/1973).
[41] S. Doc. No. 93-10, at 1 (1973), available at https://www.senate.gov/legislative/vetoes/messages/NixonR/S7-Sdoc-93-10.pdf.
[42] *Id.* at 1–2.
[43] S. REP. NO. 93-318, at 5 (1973) (Conf. Rep.).
[44] *Id.* at 6.
[45] CONG. RSCH. SERV., Actions Overview: H.R. 8070—93rd Congress (1973–1974), available at Congress.gov. *See also* DAILY KOS (Dec. 12, 2010) (explaining the delay in passage of the bill due to the initial failure of Congress to compromise on the elimination of independent-living funding provisions).

A. PRIVATE RIGHT OF ACTION AND REMEDIES

Since its 1973 enactment, the Rehabilitation Act has been amended six times,[46] but the most important amendments to this discussion are the 1978 and 1988 amendments. Before these amendments, section 501 "merely required federal agencies to submit affirmative action plans,"[47] and there was no explicit private right of action under section 501 or 504, although some courts held that there was an implied right of action.[48] The 1978 amendments provided a response to this confusion by adding a private right of action under section 501, an extension of section 504, and remedies for both under section 505. The same year, the then Department of Health, Education, and Welfare (HEW)[49] also promulgated regulations to implement section 504 after the District Court for the District of Columbia held that it was necessary to do so in *Cherry v.*

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[46] SIDATH V. PANANGALA AND CAROL O'SHAUGHNESSY, CONGR. RSCH. SERV., RS22068, REHABILITATION ACT OF 1973: 109TH CONGRESS LEGISLATION AND FY2006 BUDGET REQUEST 1–2 (2005).

[47] Prewitt v. United States Postal Serv., 662 F.2d 292, 302–03 (5th Cir. 1981).

[48] Smith v. United States Postal Serv., 742 F.2d 257, 259 (6th Cir. 1984) (listing a "confusing series of cases" showing an implied right of action in some cases but not others). In *Smith*, the Sixth Circuit did not discuss whether Congress intended section 501 to be the exclusive remedy for federal employees, but it did find that the Supreme Court's rejection of the view that section 504 did not apply to discrimination left only the question of whether a federal employee suing under section 504 was required to meet the same exhaustion requirement as one suing under section 501; *see also* Rogers v. Frito-Lay, Inc., 611 F.2d 1074, 1096–98 (5th Cir. 1980) (Goldberg, J. dissenting) (citing legislative history that "shows that the 1978 Congress had no quarrel with the near-unanimous judicial interpretation of section 504" that a private right of action had been created by section 504); *see also* Prewitt, 662 F.2d at 301.

[49] HEW is now the Department of Health and Human Services (HHS) and the Department of Education (ED). CYNTHIA BROUGHER, CONG. RSCH. SERV., SECTION 504 OF THE REHABILITATION ACT OF 1973: PROHIBITING DISCRIMINATION AGAINST INDIVIDUALS WITH DISABILITIES IN PROGRAMS OR ACTIVITIES RECEIVING FEDERAL ASSISTANCE, 2 (2010).

Mathews,[50] an impetus that was assisted by lengthy demonstrations at the HEW offices.[51]

When section 504 was originally enacted in 1973 under the header, "Nondiscrimination under Federal Grants," it simply read,

> No otherwise qualified handicapped individual in the United States, as defined in section 7 (6), shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.[52]

However, the 1978 amendments to section 504 extended the heading to "Nondiscrimination under Federal grants and programs" and struck out the period at the end thereof, inserting "or under any program or activity conducted by any Executive agency or by the United States Postal Service . . . ."[53] In comments on the 1978 amendments, Senator Cranston, one of the principal authors of section 501, stated,

> I can say with some authority that it was enacted in large part, as a result of the belief, on the part of Congress, that it was the responsibility of the Federal Government to be an "equal opportunity employer." The legislative history of the section 501 illustrates that with respect to the employment of

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[50] Cherry v. Mathews, 419 F. Supp. 922 (D.D.C. 1976) (action filed to compel the Secretary of HEW to promulgate regulations implementing section 504 of the Rehabilitation Act of 1973).
[51]National Council on Disability, "Rehabilitating Section 504" (Feb. 12, 2003), available at https://ncd.gov/publications/2003/Feb122003.
[52] Rehabilitation Act of 1973, Pub. L. No. 93-112, tit. V, § 504, 87 Stat. 355, 394 (1973) (codified at 29 U.S.C. § 794(a)).
[53] Amends. to the Rehabilitation Act of 1973, Pub. L. No. 95-602, 92 Stat. 2955, 2982 (1978).

> handicapped individuals, Congress expected the Federal Government should be a leader.[54]

Additionally, in a 1976 congressional hearing, Senator Williams stated that the reason Congress enacted section 501 was "to require that the Federal Government itself act as the model employer of the handicapped and take affirmative action to hire and promote the disabled."[55]

B. REMEDIES AND RELIEF

In response to the disagreement among courts regarding whether there was an implied right of action under section 501, the 1978 amendments specifically added section 505 (a)(1) (codified as 29 USC 794a) to make Title VII of the Civil Rights Act of 1964 (codified as 42 U.S.C. 2000e-16) available to any complainant filing under section 501.[56] These amendments additionally inserted section 505(2), making Title VI of the Civil Rights Act of 1964 available "to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 504 of this Act."[57]

In essence, Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of race, color, religion, sex, or national origin and allows for civil actions by aggrieved employees or job applicants,[58] which is triggered by final agency or EEOC action, or failure to act

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[54] CONG. REC. S15591 (Sept. 20, 1978); *see also Prewitt*, 662 F.2d at 301.

[55] *Prewitt*, 662 F.2d at 301 (citing Rehabilitation of the Handicapped Programs 1976: Hearings Before the Subcommittee on the Handicapped of the Committee on Labor and Public Welfare, 94th Cong., 2d Sess., at 1502 (1976), quoted in Linn, *Uncle Sam Doesn't Want you: Entering the Federal Stronghold of Employment Discrimination Against Handicapped Individuals*, 27 DEPAUL L. REV. 1047, 1060 (1978).

[56] *Id.*

[57] *Id.*

[58] 42 U.S.C. § 2000e-16(c) (2020) (providing for a civil action to be brought in the same manner as an action against a private employer under 42 U.S.C. § 2000e-5).

within a set time period.[59] Title VII also provides the administrative remedies process and exhaustion of those remedies requirement.[60] Title VI of that act prohibits discrimination on the basis of race, color or national origin under *any program or activity receiving federal financial assistance* and connects to employment discrimination when "the primary objective of the financial assistance is the provision of employment or where employment discrimination causes discrimination in providing services under such programs."[61] Title VI lays out an administrative procedure that essentially causes the withholding of federal funds from recipients that discriminate.[62] In other words, Title VI enforcement appears to provide "no relief to the individual victim of discrimination."[63]

C. DEFINITION OF "PROGRAM OR ACTIVITY"

By 1984, the terms "program" and "activity" (as in "any program or activity receiving Federal financial assistance" seen in section 504) had not been defined by any amendments. However, based on the Supreme Court's

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[59] 42 U.S.C. § 2000e-5(f) (2020) (giving aggrieved persons the right to bring suit if the EEOC does not sue, after failing to secure voluntary compliance, but otherwise gives them only the right to intervene in the EEOC suit); *see also* 42 U.S.C. § 2000e-16(c) (2020) (requiring suit to be brought within 90 days of notice of final agency or EEOC action and permitting suit after a lapse of 180 days without final agency action).

[60] 42 USC § 2000e-5 (2020).

[61] *Title VI & VII*, Office of Institutional Equity & Diversity, BROWN UNIVERSITY, https://www.brown.edu/about/administration/institutional-diversity/oversight/discrimination-and-harassment/title-vi-vii.

[62] 42 U.S.C. §§ 2000d-1 (2020).

[63] James Lockhart, Annotation, *To What Extent are Federal Entities Subject to Suit Under § 504(a) of Rehabilitation Act (29 U.S.C.A.§ 794(a)), Which Prohibits any Program or Activity Conducted by any Executive Agency or the Postal Service from Discriminating on Basis of Disability*, 146 A.L.R. Fed. 319, *2 (2020).
(citing e.g., Mercadel v. Runyon, 6 A.D.D. 232 (E.D. Pa. 1994); Tuck v. HCA Health Services of Tennessee, Inc., 7 F.3d 465, (6th Cir. 1993), *reh'g and suggestion for reh'g en banc denied* (Nov. 19, 1993)).

"narrow interpretation" of the phrase "program or activity" in Title IX of the Education Amendments of 1972, Public Law 100-259 encouraged the addition of subsection (b) to section 504 in 1988.[64] Importantly, this amendment clarified the term "program or activity" and "program" to mean:

> all of the operations of–
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> (1)(A) a department, agency, special purpose, district, or other instrumentality of a *State or of a local government*; or
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> (B) the entity of such *State or local government* that distributes such assistance and each such department or agency (and each other *State or local government* entity) to which the assistance is extended, in the case of assistance to a *State or local government*;
>
> (2)(A) a college, university, or other postsecondary institution, or public system of higher education; or
>
> (B) a local educational agency (as defined in section 198(a)(10) of the Elementary and Secondary Education Act of 1965), system of vocational education, or other school system;
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> (3)(A) an entire corporation, partnership, or *other private organization*, or an entire sole proprietorship–
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> (i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or
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> (ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or
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> (B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation,

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[64] BROUGHER, *supra* note 49, at 3 (citing Grove City College v. Bell, 465 U.S. 555 (1984) and *Consol. Rail Corp.*, 465 U.S. 624 (1984).

> partnership, private organization, or sole proprietorship; or
>
> (4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3) . . . . [65]

Section 501, as first passed in the Rehabilitation Act of 1973, has experienced less change compared to section 504. Although the original wording in the Rehabilitation Act of 1972 did not contain the wording meant to establish the Interagency Committee on Handicapped Employees with the "purpose and function" to "provide a focus for Federal and other employment of handicapped individuals" as the current section 501 provides, the general focus of the words that eventually developed into section 501 were always centered on a Federal purpose, with no mention of "State or local governments," either in 1972 or today,[66] as the 1988 amendment to section 504 provided.

III. THE PROVISION CAMPS

Regardless of whether the claimant brings a claim under section 501 or section 504 of the Rehabilitation Act (or both), the claimant must show that (s)he was "otherwise qualified" for the position.[67] However, the burden of proof differs depending on the chosen provision. Section 501 requires only that the employee prove (s)he was

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[65] Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (emphasis added).

[66] *Compare Rehabilitation Act of 1972: Hearings on H.R. 8395 Before the Subcomm. on the Handicapped of the Comm. on Labor and Public Welfare*, 92nd Cong. 2, 92 (1972) *with* Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified as amended at 29 U.S.C. §§ 701–794 (2020)).

[67] 29 U.S.C. §794 (2020) (covering "[n]o otherwise qualified individual with a disability . . ." in its protections); 29 U.S.C. § 791 (2020) (referencing Title I of the ADA, 42 U.S.C. 12111 *et seq.*, which defines "qualified individual" and prohibits any covered entity from discriminating against one). *See* Belasco v. Warrensville Heights City Sch. Dist., 634 F. App'x 507, 517 (6th Cir. 2015) (including "otherwise qualified" in the elements for a disability discrimination claim); Lai Ming Chui v. Donahoe, 580 F. App'x 430, 434 (6th Cir. 2014) (including "otherwise qualified" in the elements of a failure to accommodate claim).

discriminated against *because of* her or his disability.[68] Section 504, on the other hand, requires the claimant to show that her or his disability was the *sole reason* for the discrimination.[69] When courts stray from utilizing the section that appropriately applies to the cause-of-action-at-hand, the standard the court relies upon may also be called into question.[70]

The circuits are divided on whether section 501 and section 504 overlap with each other, allowing federal employees to sue under either or both, and whether one or the other should be the exclusive remedy.[71] However, it is important to determine which section governs a federal employee's cause of action because the chosen section determines the level of burden for proving elements of the claimant's *prima facie* case.[72] By narrowing the focus to cases dealing with federal employee claims against a federal employer and separating the courts into "camps" based on the provision under which they allowed the claimant to bring her or his claim, followed by the application of legislative intent to the provisions, greater clarity may be had for determining the correct approach in situations that have been previously muddled or simply unaddressed.

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[68] 29 U.S.C. § 791 (2020). *See* Babb v. Maryville Anesthesiologists P.C., 942 F.3d 308, 319 (6th Cir. 2019) ("[E]ven if an employee establishes that their employer "regarded" them as disabled . . . the employee must still show that their employer discharged them (or took some other form of adverse employment action against them) *because of*, or "but-for," their actual or perceived physical or mental impairment") (citing Lewis v. Humboldt Acquisition Corp., 681 F.3d 312, 321 (6th Cir. 2012) (en banc)).

[69] 29 U.S.C. § 794 (2020); Stanciel v. Donahoe, 570 F. App'x 578, 581 (6th Cir. 2014) ("An employer makes a termination decision solely because of its employee's disability when the employer has no reason left to rely on to justify its decision other than the employee's disability." (internal quotation marks omitted)).

[70] *See infra* Section IV.

[71] Lockhart, *supra* note 63.

[72] *Id.*

A. COURTS ALLOWING FEDERAL EMPLOYEE CLAIMS UNDER SECTION 504

When the list of what defines a program or activity covered under section 504 is boiled down, section 504 covers three major classes of recipients of federal funds: (1) public school systems; (2) colleges and other institutions of higher learning; and (3) health, welfare and social service providers.[73] Although this list does not explicitly include federal employees, some circuits have still recognized a private right of action for federal employees under section 504, which is likely a confusion caused by the 1978 amendments that added the words "or under any program or activity conducted by any Executive agency or by the United States Postal Service" to section 504.[74]

In *Taub v. Frank*, for example, the First Circuit allowed a postal worker's claim to proceed under section 504, although it determined that Taub was ultimately not covered because he was not discharged "solely by reason of" his disability, drug addiction, but rather for distributing drugs, which is criminal and cannot be accommodated regardless of this fact.[75] Additionally, the Fourth Circuit allowed an FBI agent's claim under both section 501 and 504 for an alcoholism disability, but focused on whether the claimant was "otherwise qualified"—a testament to section 504, and the regulations implementing section 504 that qualify an alcoholic or drug addict as a "handicapped individual"—

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[73] 1 ADA: Emp. Rights § 2.01 (2020).

[74] *See supra* Section II.

[75] Taub v. Frank, 957 F.2d 8 (1st Cir. 1992); *see also* Roy v. Runyon, 954 F. Supp. 368 (D. Me. 1997) (entertaining a section 504 suit without ruling on the issue of whether suit under this section is proper, leading district courts to conclude that suit under section 504 is proper, and assuming that the stricter "sole causation" provision applied whether the cause of action was under section 501 or section 504); Leary v. Dalton, 58 F.3d 748 (1st Cir. 1995) (deciding the case under 504 standards even though suit was brough under section 501, and noting that in Taub v. Frank, the appellate court had permitted suit under section 504); Sedor v. Frank, 42 F.3d 741 (2d Cir. 1994) (noting that section 504 applied to federal executive agencies and the Postal Service, but not specifically considering whether suit under section 504 or section 501 is more proper).

rather than investigating which section was proper for the claim.[76] Ultimately, the court decided that Little failed to state a claim under the Rehabilitation Act in general.[77]

Prewitt v. United States Postal Service is also a crucial case to this discussion, as it was the first case in a federal circuit since the 1978 amendments applied to the Act.[78] The Fifth Circuit, having no comparison on how the 1978 amendments applied in context, investigated the legislative history, and made the finding that

> [B]y its 1978 amendments to the Rehabilitation Act, Congress clearly recognized both in section 501 and in section 504 that individuals now have a private cause of action to obtain relief for handicap discrimination on the part of the federal government and its agencies. The amendments to section 504 were simply the House's answer to the same problem that the Senate saw fit to resolve by strengthening section 501. The joint House-Senate conference committee could have chosen to eliminate the partial overlap between the two provisions, but instead the conference committee, and subsequently Congress as a whole, chose to pass both provisions, despite the overlap. "When there are two acts upon the same subject, the rule is to give effect to both if possible." By this same principle, in order to give effect to both the House and the Senate 1978 amendments finally enacted, we must read the exhaustion of administrative remedies requirement of section 501 into the private remedy recognized by both section 501

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[76] Little v. FBI, 1 F.3d 255, 257–58 (4th Cir. 1993); *see also* Spence v. Straw, 54 F.3d 196 (3d Cir. 1995) ("Because of the less than artful manner in which Congress amended the Rehabilitation Act, the statutory provisions produce an apparently incongruent enforcement scheme.").

[77] *Id.* at 259.

[78] *Prewitt*, 662 F.2d at 292.

> and section 504 for federal government handicap discrimination.[79]

Like the *Taub*, *Little*, and *Prewitt* courts, the Sixth and Eighth Circuits also allowed claims by federal employees under section 501 or section 504. In *Hall v. United States Postal Service*, the Sixth Circuit referenced the *Smith* cases from 1984 and 1985 to hold that

> While it has not always been so, it is now clear, at least in this circuit, that federal employees, including Postal Service employees, alleging handicap discrimination in employment may maintain private causes of action against their employers under *both* sections 501 and sections 504 of the Rehabilitation Act.[80]

That court viewed Hall's allegations of violations of section 504 of the Act and of the administrative regulations, which were adopted under section 501, to be a complaint applicable to both sections.[81]

Finally, in *Morgan v. United States Postal Service*, the Eighth Circuit allowed a section 504 claim to be filed by a federal employee but insisted on exhaustion of administrative remedies, comparing the case that was before that court to other cases where exhaustion was not required when the defendant was not the federal government.[82] The

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[79] *Id.* at 304 (citing United States v. Borden Co., 308 U.S. 188, 198 (1939)). *But see Johnston*, 875 F.2d 1415 (disagreeing with the Fifth Circuit's interpretation and holding that section 504 does *not* create a private cause of action against a federal employer by a federal employee).

[80] Hall v. United States Postal Serv., 857 F.2d 1073, 1077 (6th Cir. 1988) (relying on Smith v. United States Postal Serv., 766 F.2d 205, 206 (6th Cir. 1985) (per curiam); *Smith*, 742 F.2d at 259–60.

[81] *Id.*

[82] Morgan v. United States Postal Serv., 798 F.2d 1162, 1165 (8th Cir. 1986); *see also* Oliver v. United States Army, 758 F. Supp. 484 (E.D. Ark. 1990) (holding that the Army and Air Force Exchange Services is a federal employer because they were listed in EEOC regulations, making administrative remedies available

Eighth Circuit simply stated, "The difference appears to lie with the identity of the defendant."[83] Although *Morgan* was decided several years before *Johnston*, the Eighth Circuit was starting to touch on important aspects of the amendments that provided explicit private rights of action and the reasons why section 501 and section 504 do not necessarily "overlap," as the *Prewitt* court had decided.

Although it was only decided at the district court level, the court in *Mackay v. U.S. Postal Service* also provided an important opinion surrounding the remedies pertaining to section 501 and section 504 claims.[84] The Eastern District of Pennsylvania noted that section 504 does not expressly require exhaustion of administrative remedies, and the express provisions of 505(a)(2) entitle a section 504 claimant to the remedies of Title VI, which also does not require exhaustion of administrative remedies.[85] The critical issue, in that case, was whether in a suit brought under section 504, the private cause of action against the federal government is provided under section 505(a)(1) or 505(a)(2). This must be clarified, because if a section 504 claim was subject to 505(a)(1), which incorporates Title VII, or if a federal employee discrimination claim could only be brought under section 501, exhaustion of administrative remedies would be a prerequisite to court action.[86] The district court found that although section 504 prohibits handicap discrimination by executive agencies or the Postal Services, section 505(a)(2) only furnishes a remedy to persons

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to them, yet expressly allowing suit under section 504 with exhaustion of administrative remedies requirement); *Cf. Johnston*, 875 F.2d 1415 (explicitly holding that federal employees do not have a cause of action under section 504, but adding that even if the appellate court were to allow a section 504 claim, it would read into it the same Title VII procedural requirements that applied under section 501).

[83] *Id.* (referencing *Comment, Section 504 of the Rehabilitation Act: Analyzing Employment Discrimination Claims*, 132 U. PA. L. REV. 867, 873 & n.48 (1984) (explaining that "plaintiffs suing the federal government may need to exhaust, whereas those suing a federally funded party need not exhaust")).

[84] *See* Mackay v. United States Postal Serv., 607 F. Supp. 271 (E.D. Pa. 1985).

[85] *Id.* at 274.

[86] *Id.*

aggrieved by the actions of a recipient of federal assistance or a federal provider of such assistance and does not specifically refer to a federal entity such as the Postal Service, which is neither a recipient nor a provider of federal assistance.[87] Furthermore, that court noted that the omission of postal employees in relation to a Title VI remedy is "consistent with the Supreme Court's decision in *Brown*, where the Court held the district court had no jurisdiction over a federal employee's discrimination claim under 42 U.S.C. § 1981 because Title VII provides the exclusive remedy for claims of discrimination in federal employment."[88] Ultimately, the district court found that the differences between section 505(a)(1), which supplies Title VII remedies, and section 505(a)(2), which supplies Title VI remedies to a limited group not specifically including Postal Service employees, demonstrates that Postal Service employees as well as other federal employees must use the "exclusive, preemptive administrative and judicial scheme of Title VII to remedy public job-related handicap discrimination."[89]

This selection of cases shows that when courts were faced with needing to interpret sections 501 and 504 and their requisite remedies as they apply to federal employees, Title VII remedies seemed to be a more logical solution. This conclusion therefore points to section 501 as the more appropriate provision for federal employee discrimination claims.

B. COURTS DISALLOWING CLAIMS UNDER SECTION 504

Courts that disallowed a claim under section 504 seem to have generally done so when the defendant was not considered a federal entity, a receiver of federal funds, or when it did not fit the definition of "program or activity." In *Community Television of Southern California v. Gottfried*, for example, the Supreme Court of the United States rejected the argument that a television station's license should be denied on the ground that it had not complied with section

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[87] *Id.*
[88] *Id.* (citing Brown v. General Services Administration, 425 U.S. 820, 832–33 (1976)).
[89] *Id.* (citing *Brown,* 425 U.S. at 829).

504 and found that the Federal Communications Commission (FCC) was not required to comply with section 504 in its licensing activities.[90] The Court found that section 504 was not intended to impose new enforcement obligations on the FCC, which was not a funding agency, and stated that, absent some specific direction in the Rehabilitation Act, the Court was unwilling to conclude that a public television station owed a duty to comply with section 504 and that the FCC had a duty to evaluate a public television station's service to the handicapped community by a stricter standard than that applicable to commercial stations in determining whether to renew a public station's license.[91]

The Southern District of New York in *DePompo v. West Point Military Academy*, like the court in *Mackay*, held that since section 505(a)(2) made section 504 enforceable through Title VI remedies, which were intended to police federally funded programs, it presumably was intended to reach the federal government only as a direct provider of services or a funder of other providers.[92] Another district court, the Eastern District of Virginia, held that an insurance company was not a recipient of federal financial assistance, and therefore, was not subject to suit under section 504.[93] Additionally, in *Williams v. Meese*, the Tenth Circuit held that a federal prison inmate, who claimed he had been denied certain prison job assignments based on his handicap, failed to state a claim under section 504 of the

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[90] Cmty. Televisions of S. Cal. v. Gotfried, 459 U.S. 498 (1983); *see also* Cal. Ass'n of the Physically Handicapped, Inc. v. FCC, 840 F. 2d 88 (D.C. Cir. 1988), *reh'g denied*, 848 F.2d 1304 (D.C. Cir. 1988) (holding that commercial broadcasters who did not receive federal financial assistance were not subject to section 504 and this conclusion was unaffected by the 1978 amendment extending the reach of 504 by adding the clause "any program or activity conducted by any Executive agency," as this phrase referred to the FCC"s own activities and not those of the entities licensed or certified by the FCC).

[91] *Id.*

[92] DiPompo v. W. Point Military Acad., 708 F. Supp. 540 (S.D.N.Y. 1989).

[93] Dodd v. Blue Cross and Blue Shield Ass'n, 835 F. Supp. 888 (E.D. Va. 1993).

Rehabilitation Act, since the Bureau of Prisons did not fit the definition of "program or activity" governed by section 504.[94]

These cases show that section 504 is not appropriate for entities not directly receiving federal funds, and more importantly, that courts faced with these claims did not consider section 501 as an option. These outcomes further highlight section 501's exclusivity for federal employees alone.

C. COURTS ALLOWING CLAIMS UNDER SECTION 501 ONLY

Some courts have recognized a private right of action for federal employee disability discrimination claims under section 501 only, discounting section 504 as an option. In *McGuinness v. United States Postal Service*, for example, the Seventh Circuit held that the claimant failed to exhaust administrative remedies and the outcome of his case would have been the same even if he filed under section 504 because exhaustion of administrative remedies is required either way.[95] That court noted that "it would make no sense for Congress to provide (and in the very same section–505(a)) different sets of remedies, having different exhaustion requirements, for the same wrong committed by the same employer; and there is no indication that Congress wanted to do this—as of course it could do regardless of what might seem sensible to us—when it added section 505 in 1978."[96]

The court in *Johnston v. Horne*, held that "no private cause of action exists for a federal employee against a federal employer under § 794."[97] That case dealt with the accusation of a forced medical retirement from a shipyard claimant filing under both sections 501 and 504. The Ninth Circuit explained that section 504 does not create a private cause of action against a federal employer by a federal employee, while acknowledging the circuit split of opinions and stating,

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[94] Williams v. Meese, 926 F. 2d 994 (10th Cir. 1993) (failing to consider whether the Bureau of Prisons was separately subject to Section 504 as an executive agency).

[95] *See* McGuinness v. United States Postal Serv., 744 F.2d 1318 (7th Cir. 1984).

[96] *Id.* at 1321.

[97] *Johnston*, 875 F.2d at 1418 (utilizing the codified version (§ 794) of the Rehabilitation Act's section 504).

"It is unlikely that Congress, having specifically addressed employment of the handicapped by federal agencies (as distinct from employment by recipients, themselves nonfederal, or federal money) in section 501, would have done so again a few sections later in section 504."[98] The D.C. Circuit also "strongly" suggested that federal employees proceed with discrimination claims under section 501, rather than section 504, recognizing that the statutes are duplicative and some courts have limited claims against the government as the employer to actions brought under section 501, while others have allowed litigants to proceed under either provision.[99]

These opinions plainly and decisively provide logical explanations of the 1978 amendments and how those amendments apply to federal employee claims while respecting the legislative intent of sections 501 and 504.

D. COURTS SPECIFICALLY REQUIRING EXHAUSTION OF ADMINISTRATIVE REMEDIES IN SECTION 504 SUITS

In *Smith v. United States Postal Service*, the claimant attempted to argue that section 504 of the Rehabilitation Act does not require exhaustion of administrative remedies because section 504 actions are to be governed by Title VI rather than Title VII of the Civil Rights Act of 1964, an argument "based upon imaginative reading of the Supreme Court's opinion in *Cannon v. University of Chicago*."[100] He argued that "since the Supreme Court recognized in *Cannon*

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[98] *Id.* at 1420 (quoting Boyd v. United States Postal Serv., 752 F.2d 410, 413 (9th Cir. 1985); *McGuiness*, 744 F.2d at 1321). *See also* Johnson v. United States Postal Serv., 861 F.2d 1475 (10th Cir. 1988), cert. denied, 110 S. Ct. 54 (1989) (agreeing with the Ninth Circuit that "section 501 is the exclusive remedy for discrimination in employment discrimination on the basis of handicap and that section 501, not section 504, provides for a private cause of action for federal employees).

[99] Barth v. Gelb, 2 F.2d 1180 (D.C. Cir. 1993), *cert. denied sub nom.*, Barth v. Duffy, 511 U.S. 1030 (1994); *see also* Milbert v. Koop, 265 U.S. App. D.C. 206 (D.C. Cir. 1987) (collecting cases describing the split and showing cases that expressly found suit is proper only under section 501).

[100] *Smith*, 742 F.2d at 260 (referencing Cannon v. University of Chicago, 441 U.S. 677 (1979)).

the kinship between Titles IX and VI held that a private right of action could be maintained in advance of exhaustion under the former by analogy to the latter, and since Title VI is closely tied to Section 504 through Section 505(a)(2) of the Rehabilitation Act, it follows that exhaustion is not required under Section 504."[101] The Sixth Circuit rejected this argument stating,

> [T]here are significant differences between this employment discrimination action brought by a Postal Service employee against his federal employer under a statute which provides him with extensive administrative procedures to remedy the alleged wrong, and the situation in *Cannon*, which involved a sex discrimination action brought by a rejected applicant to a private medical school under a statute which provided no such recourse.[102]

The Sixth Circuit went on in *Smith* to investigate the legislative history of the Rehabilitation Act and its 1978 amendments, applying the principal set forth in *Patsy v. Board of Regents*, 457 U.S. 496 (1982), that explained, "in determining whether exhaustion is required, court[s] should first examine legislative intent."[103] When examining the legislative intent of the 1978 amendments, the Sixth Circuit highlighted that

> In amending the statute to incorporate expressly the "remedies, procedures, and rights" set forth in Title VII to redress handicap discrimination by federal agency employers, it is evident that Congress intended to invoke the legal principles applied in Title VII actions based on allegations of race, sex and national origin discrimination in employment, including the requirement that a

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[101] *Id.*
[102] *Id.*
[103] *Id.* at 261.

> claimant exhaust administrative remedies before filing suit in federal court.[104]

Additionally, "[t]he exhaustion requirement is part of a longstanding congressional policy favoring resolution of claims of employment discrimination through administrative conciliation rather than a formal adversary process whenever possible."[105]

To further make its point, the Sixth Circuit relied on the Supreme Court case of *Smith v. Robinson*, where the claimant, a child with cerebral palsy, brought claims under the Education of the Handicapped Act (EHA), section 504 of the Rehabilitation Act, and 42 U.S.C. §1983.[106] In that case, the Supreme Court held exhaustion of administrative remedies under the EHA, which was established to clarify and enforce the educational rights of handicapped children, should not be circumvented by utilizing the "more general antidiscrimination provisions of Section 504."[107] Thus, the Sixth Circuit similarly held that the 1978 amendments to the Rehabilitation Act require exhaustion of administrative remedies whether the claim is brought under section 501 or section 504 because "Congress has not enacted one set of principles excusing exhaustion in handicap cases and another set of principles requiring exhaustion in sex, race, national origin, and age discrimination cases."[108]

The Sixth and Eleventh Circuits have also allowed federal employee discrimination claims under both sections but maintain that the Title VII exhaustion of administrative remedies requirement exists for both. In addition to *Hall v. U.S. Postal Service*, where the Sixth Circuit stated that federal employees may maintain a private cause of action against their employers under either section, but must exhaust administrative remedies,[109] the Eleventh Circuit

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[104] *Id.* (relying on 42 U.S.C. § 2000e-16(c) (1982) (Title VII exhaustion requirement).
[105] *Id.* (citing e.g., Ostapowicz v. Johnson Bronze Co., 541 F.2d 394 (3d Cir.), *cert denied*, 429 U.S. 1041 (1976).
[106] *Id.* (relying on Smith v. Robinson, 468 U.S. 992 (1984)).
[107] *Id.* at 262.
[108] *Id.*
[109] *Hall*, 857 F.2d 1073; *see also Smith*, 742 F.2d at 262; Nighswander v. Henderson, 172 F. Supp. 2d 951, 955–56 (N.D. Ohio 2001).

considered a "handicap" discrimination claim by an employee of the Army Corps of Engineers under both section 501 and section 504. The Eleventh Circuit found it unnecessary to discuss whether such a claim was actionable under only one or the other,[110] and held that whether the action is brought under section 501 or 504, the employee must satisfy the Title VII exhaustion of administrative remedies requirement.[111]

Again, these types of holdings, which allow a claim by a federal employee under section 504, yet still require the exhaustion of administrative remedies, points to section 501, which clearly requires exhaustion of administrative remedies, as the appropriate provision for federal employee claims.

IV. THE IMPORTANCE OF APPLYING THE APPROPRIATE CAUSATION STANDARD

The standards of causation differ depending on the selected section for filing a federal employee disability discrimination claim—section 501 only requires a "but for" causation standard while section 504 requires a "sole" causation standard.[112] Historically, courts have confused these standards, sometimes relying on the "sole" causation standard when the statute only required the "but-for" standard.[113] The Sixth Circuit made the existence of this error evident in *Lewis* when it stated:

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[110] Treadwell v. Alexander, 707 F.2d 473 (11th Cir. 1983) (explaining that the 1978 amendments of the Rehabilitation Act extended the proscription of section 504 to activities of the federal government and created a private right of action under section 501 in favor of persons subjected to "handicap" discrimination by federal employing agencies).

[111] Doe v. Garrett, 903 F.2d 1455 (11th Cir. 1990) (noting that, like other circuits who have adopted this interpretation of Rehabilitation Act amendments, it was necessary to recognize that section 504 affords a private right of action to federal employees while imposing the section 501 and Title VII exhaustion requirement on federal employees bringing suit under section 504 in order to accommodate Congress's intent).

[112] *See supra* Section IV.

[113] *Lewis*, 681 F.3d at 314.

> For the past seventeen years, our court has required district courts to instruct juries that ADA claimants may win only if they show that their disability was the "sole" reason for any adverse employment action against them. The term crept into our ADA jurisprudence in *Maddox v. University of Tennessee*, 62 F.3d 843 (6th Cir. 1995), which involved claims under the ADA *and* the Rehabilitation Act of 1973, a happenstance that may explain why we blurred the distinction between the laws in the first place . . . Our interpretation of the ADA not only is out of sync with the other circuits, but it also is wrong. Since *Maddox*, Congress has amended the Rehabilitation Act and the ADA several times, but the distinction between the causation standards used by the two laws persists.[114]

The Sixth Circuit's discussion was focused on the importance of not importing the "sole" causation standard from section 504 of the Rehabilitation Act to an ADA-only claim. However, it also spoke to the importance of not intermingling the "sole" causation standard of section 504 with the "but-for" standard of section 501, especially given that section 501 has never been amended to include the words "solely by reason of" and because it directly references Title I of the ADA.

For claims filed under section 501 of the Rehabilitation Act, courts have also held that a claimant must show that her or his disability was a "motivating" or "substantial factor" in the employer's adverse action to meet the "but-for" or "because of" standard.[115] Under section 504, on the other hand, a claimant must show that her or his disability was the *sole* reason for the employer's adverse action.[116] To explain the complexities involved in these

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[114] *Id.* at 313–15.

[115] *Id.* at 317.

[116] *Id.* ("Courts must refrain from 'apply[ing] rules applicable under one statute to a different statute without careful and critical examination,' . . . an examination that in this instance reveals distinct causation tests." (citing Gross v. FBL Fin. Servs., 557 U.S. 167, 174 (2009)).

standards, the *Lewis* court pointed to *Price Waterhouse v. Hopkins*, where the U.S. Supreme Court analyzed the "because of" standard within "mixed-motive cases."[117] The Court decided that "if a Title VII plaintiff shows that discrimination was a 'motivating' or a 'substantial' factor in the employer's action, the burden of persuasion should shift to the employer to show that it would have taken the same action regardless of that impermissible consideration."[118] However, the Court in *Gross* refused to extend the "motivating factor" rationale (taken from Title VII amendments that were added by the Civil Rights Act of 1991) to the Age Discrimination in Employment Act (ADEA), which "does not allow a plaintiff to prove discrimination merely by showing that her disability was a *motivating factor* behind her adverse employment action; the ADEA requires discrimination to be *because of* a disability, which means "but-for" causation."[119] The *Lewis* court held that *Gross* resolved its case, explaining, "No matter the shared goals and methods of two laws, it explains that we should not apply the substantive causation standards of one anti-discrimination statute to other anti-discrimination statutes when Congress uses distinct language to describe the two standards."[120] This reasoning can be used to resolve discrepancies in causation standards under the Rehabilitation Act in the same manner.

Therefore, logic dictates that in order to apply the correct substantive causation standard of section 501 claims and section 504 claims, it is necessary to utilize the appropriate provision for the claimants as indicated by both statutory direction and legislative intent.

V. A PRIVATE RIGHT OF ACTION FOR FEDERAL EMPLOYEES EXISTS ONLY UNDER SECTION 501

The caselaw above, paired with the legislative history of the Rehabilitation Act, and courts' interpretations of that legislative history points to the result that a private right of

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[117] *Lewis*, 681 F.3d at 317 (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 232 (1989)).
[118] *Id.* (citing *Gross*, 557 U.S. at 171).
[119] *Id.* at 318 (citing *Gross*, 577 U.S. at 174, 177–78).
[120] *Id.* at 318–19.

action for federal employees bringing claims against federal employers exits only under section 501.

A. LEGISLATIVE HISTORY POINTS TO SECTION 501 AS THE EXCLUSIVE PROVISION FOR FEDERAL EMPLOYEES

First, the legislative history of the Rehabilitation Act, albeit scarce, provides justification for federal employees to exclusively rely on section 501 for claims against their federal employers. In Senator Humphrey's remarks pertaining to S.7, for example, the "virtual isolation of millions of children and adults from society," which he mentions in regard to the rights of handicapped persons' participation in programs receiving federal assistance,[121] is unlikely to refer simply to federal employees, but rather refers to the general members of society that have been impacted by discrimination within these programs. This remark shows that the addition of section 504 was not meant as another means for federal employee protection from federal employers, but rather for others (i.e., private citizens) in addition to the protections that already existed in section 501 for federal employees.

Furthermore, the 1984 amendments defining "program or activity" contain the specific adjectives "State" and "local" placed before the word "government" throughout the new section, and there is no mention of the "federal" government therein. This emphasis of "State and local government," coupled with the mention of private organizations at subsection (3) in defining what section 504 intended to cover, contrasts section 501's emphasis on the federal government. The Ninth Circuit was inclined to agree with this interpretation in *Vinieratos v. U.S. Department of Air Force Through Aldridge*.[122] Although it did not specifically discuss section 504, the Ninth Circuit held that Title VII (the remedy provided in relation to section 501) is the exclusive channel for federal employee disability-based

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[121] 118 CONG. REC. 32,310 (1972) (remarks of Sen. Humphrey).

[122] Vinieratos v. United States Dep't. of Air Force *ex. rel.* Aldridge, 939 F.2d 762 (9th Cir. 1991) (holding that Title VII is the exclusive channel for federal employee disability employment-based discrimination claims to be heard in federal court, and failure to exhaust Title VII administrative remedies forecloses any claim to jurisdiction under the Rehabilitation Act).

discrimination claims to be heard in federal court, and failure to exhaust Title VII administrative remedies forecloses any claim to jurisdiction under the Rehabilitation Act.[123]

Perhaps the most telling sign that section 501 was intended for federal employees while section 504 was intended for others is the method in which section 501 is enforced. In 1979, the Equal Employment Opportunity Commission (EEOC) took over responsibility for section 501 and was charged with "coordinating and enforcing all the equal employment opportunity programs throughout the federal government."[124] The laws under EEOC's authority are numerous and include sections 501 and 505 of the Rehabilitation Act, which makes discrimination against a qualified person with a disability in the federal government unlawful, and Title I of the ADA, which protects the rights of employees and job seekers against discrimination.[125] However, the EEOC does not enforce sections 503, 504, or 508 of the Rehabilitation Act, which pertain to federal contractors, programs and activities receiving federal financial assistance, and the accessibility of electronic information used by the government for people with disabilities, respectively.[126] The EEOC also does not enforce Title II of the ADA, which relates to the public programs, services, and activities that protect people with disabilities.[127] Thus, in charging the EEOC with the authority to enforce federal laws prohibiting discrimination in the workforce, it is clear that the charge was not intended for implementation of sections not specifically intended for federal employees bringing claims against federal employers.

Moreover, the Department of Labor (DOL) clearly differentiates between sections 501 and 504 by listing section 501 as a prohibition of "federal agencies from discriminating against qualified individuals with disabilities in employment

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[123] *Id.*
[124] 1 ADA: Emp. Rights at 3.
[125] *Laws Enforced by EEOC*, EEOC.GOV, https://www.eeoc.gov/statutes/laws-enforced-eeoc (last visited July 10, 2020).
[126] *Workplace Laws Not Enforced by the EEOC*, EEOC.GOV, https://www.eeoc.gov/workplace-laws-not-enforced-eeoc (last visited July 10, 2020).
[127] *Id.*

[and] . . . take[s] affirmative action in hiring, placing and advancing individuals with disabilities," while listing section 504 as a prohibition against "recipients of federal financial assistance from discriminating against qualified individuals with disabilities in employment and in their programs and activities."[128] The DOL points out that it has a Civil Rights Center (CRC) to enforce section 504 as it relates to recipients of financial assistance,[129] while pointing to the EEOC for requirements under section 501.[130] Even more importantly, the DOL openly states, "Individuals do not have to exhaust administrative procedures under section 504 of the Rehabilitation Act. They may file suit in federal district court against a private employer receiving federal financial assistance, without filing a complaint with the administrative agency."[131]

Similarly, the National Council on Disability (NCD), the "independent federal agency charged with advising the President, Congress, and other federal agencies regarding policies, programs, practices, and procedures that affect people with disabilities"[132] stated, "Section 504 of the 1973 Rehabilitation Act is acknowledged as the first national civil rights law to view the exclusion and segregation of people with disabilities as discrimination and to declare that the Federal Government would take a central role in reversing and eliminating discrimination."[133] This statement points to the federal government's role in protecting disabled citizens, but does not point to federal employees when mentioning the

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[128] DEP'T. OF LABOR, LAWS AND REGULATIONS, available at https://www.dol.gov/general/topic/disability/laws (last visited Nov. 21, 2020).

[129] *Id.*; DEP'T. OF LABOR, OFFICE OF THE ASSISTANT SECRETARY FOR ADMINISTRATION & MANAGEMENT, available at https://www.dol.gov/agencies/oasam/centers-offices/civil-rights-center/about (last visited Nov. 21, 2020).

[130] *Id.*

[131] DEP'T. OF LABOR, OFFICE OF DISABILITY EMPLOYMENT POLICY, available at https://www.dol.gov/agencies/odep/publications/fact-sheets/employment-rights-who-has-them-and-who-enforces-them (last visited Nov. 21, 2020).

[132] National Council on Disability, "About Us," available at https://www.ncd.gov/about.

[133] National Council on Disability, "Rehabilitating Section 504" (Feb. 12, 2003), available at https://ncd.gov/publications/2003/Feb122003.

purpose of section 504, but rather to "people with disabilities" in general. With clear charges, such as those to the EEOC, and logical interpretations paired with overt public statements like those from the DOL and NCD, it is difficult to see how these sections could have ever become so intwined.

B. CASELAW POINTS TO SECTION 501 AS THE EXCLUSIVE PROVISION FOR FEDERAL EMPLOYEES

While some caselaw does not offer a thorough investigation of whether section 501 or section 504 is appropriate for a federal employee's disability discrimination claim, case law from courts that addressed the issue of whether a claimant appropriately brought a claim under section 501 or section 504 tends to point to the conclusion that federal employees should only bring their claim under section 501.

For example, the *Taub* court was not required to address the question in detail since Taub was not discharged for a reason covered by the Rehabilitation Act at all.[134] The *Little* court simply allowed the claimant to file under both sections while largely focusing on section 504 as a convenient way to discuss how Little may not have been "otherwise qualified" for his position.[135] The *Hall* and *Smith* courts made similar holdings based on vague interpretations of the sections and allowed claims by federal employees under both.[136] The *Morgan* court allowed a claim under section 504, yet still required the exhaustion of administrative remedies, a requirement of section 501, not section 504, since the defendant was the federal government.[137] The *Prewitt* court,

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[134] *Taub*, 957 F.2d. at 8.

[135] Little v. FBI, 1 F.3d 255, 257–58 (4th Cir. 1993); *see also* Spence v. Straw, 54 F.3d 196 (3d Cir. 1995) ("Because of the less than artful manner in which Congress amended the Rehabilitation Act, the statutory provisions produce an apparently incongruent enforcement scheme.").

[136] *Hall*, 857 F.2d at 1077; *Smith*, 766 F.2d at 206; *Smith*, 742 F.2d at 259–60.

[137] *Morgan*, 798 F.2d at 1165 (8th Cir. 1986); *see also Oliver*, 758 F. Supp. 484 (holding that the Army and Air Force Exchange Services is a federal employer because they were listed in EEOC

however, did delve into a legislative history discussion, coming to the conclusion that section 501 and section 504 overlap each other and justified applying the exhaustion of administrative remedies requirement to both sections,[138] only to be disagreed with by the Tenth Circuit a few years later in *Johnston*, which stated that section 504 does not create a private cause of action against a federal employer by a federal employee.[139]

Although not binding, several district court cases helped to shed light on the specific requirements of section 501 and section 504, differentiating the separate purposes of the two sections. The *Mackay* court explained that section 504, which specifically relies on section 505(a)(2) and Title VI for its remedies, and does not include the exhaustion of administrative remedies requirement, should be treated separately from section 501, which specifically relies on section 505(a)(1) and Title VII for its remedies (which *does* require the exhaustion of administrative remedies requirement).[140] That court also relied on the Supreme Court decision from *Brown* to hold that Title VII is the exclusive remedy for federal employees.[141] Likewise, the *DiPompo*[142] and *Dodd*[143] courts made similar differentiations between the two sections. Hence, claims by federal employees under the Rehabilitation Act should be filed under section 501.

Courts that disallowed claims under section 504 also help to clarify why section 501 should be reserved for federal employees and section 504 for other entities receiving federal funds. For example, in finding that the FCC was not required

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regulations, making administrative remedies available to them, yet expressly allowing suit under section 504 with exhaustion of administrative remedies requirement); *Cf. Johnston*, 875 F.2d 1415 (explicitly holding that federal employees do not have a cause of action under section 504, but adding that even if the appellate court were to allow a section 504 claim, it would read into it the same Title VII procedural requirements that applied under section 501).

[138] *Prewitt*, 662 F.2d at 304.

[139] *Johnston*, 875 F.2d 1415.

[140] *Mackay*, 607 F. Supp. 271.

[141] *Id.* (citing Brown, 425 U.S at 832–33).

[142] *DiPompo*, 708 F. Supp. 540.

[143] *Dodd,* 835 F. Supp. 888.

to comply with section 504 in its licensing activities,[144] the Supreme Court certainly did not suggest that claimants rely on section 501 of the Rehabilitation Act instead. These types of decisions further highlight the relation of section 501 specifically to federal employees.

Nonetheless, court decisions that explicitly allowed claims under section 501 offer the most useful clarification of section 501's purpose as compared to that of section 504. The Seventh Circuit came to the logical conclusion that it would be insensible for Congress to provide two different sets of remedies with different requirements within the same section for the same wrong committed by the same employer,[145] which seems to be a more believable interpretation than the one provided in *Prewitt*, which tolerated the idea that Congress actively made a decision to pass overlapping provisions.[146] The Ninth Circuit agreed with the Seventh Circuit's logic, addressing the unlikeliness of two closely-located sections of the same act addressing the same types of employment in regard to handicapped individuals.[147] Finally, the D.C. Circuit followed suit by recommending section 501 as the proper provision for federal employment discrimination claims.[148] Additionally, even when courts allowed suit by federal employees under section 504, the majority required the exhaustion of administrative remedies,[149] which speaks to the appropriateness of section 501 instead of section 504 for these claims.

VI. CONCLUSION AND PROPOSAL FOR BEST PRACTICE

Federal employees, such as employees of the Postal Service or legislative and judicial branches of the government, should file under section 501 of the

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[144] *Cmty. Televisions of S. Cal.*, 459 U.S. 498.
[145] *McGuinness*, 744 F.2d at 1318.
[146] *Prewitt*, 662 F.2d at 304.
[147] *Johnston*, 875 F.2d at 1418.
[148] *Barth*, 2 F.2d 1180.
[149] *Smith*, 742 F.2d at 260 (distinguishing that case from Cannon, 441 U.S. 677, a sex discrimination action) (relying on *Smith*, 468 U.S. 992 (explaining that Section 504 should not be used to circumvent the exhaustion requirements under Section 501); *see also Hall*, 857 F.2d 1073; *Nighswander*, 172 F. Supp. 2d at 955–56; *Treadwell*, 707 F.2d 473; *Garrett*, 903 F.2d 1455.

Rehabilitation Act when seeking redress for disability discrimination by their federal employer. The trends above show that even if a federal employee brings action under section 504, the courts are likely to hold that exhaustion of administrative remedies is required, nonetheless. Additionally, section 504 technically does not allow for damages personal to the claimant, but rather seeks to withhold funding from the entity receiving federal funding as recourse for their discriminatory actions.[150] Therefore, it may not financially benefit the claimant to bring her or his claim under section 504.

Employees of private entities that receive federal financial assistance, such as public-school systems, colleges and other institutions of higher learning, and health, welfare, and social service providers, should conversely rely on section 504. The legislative intent of section 504 and the amendments that followed speak to the intention of Congress to allow for federal employees and non-federal employee individuals alike to be protected by disability discrimination, but under two separate sections of the Rehabilitation Act. Section 501 shows that the federal government is the leader in this effort and opens the door to section 504 to hold all entities receiving federal funds, not just the federal government itself, to a higher standard of inclusion for disabled individuals.

Finally, applying a uniform standard of how claimants may file under the Rehabilitation Act based on their status as a federal employee allows for the appropriate causation standard to apply to the claimant's case, making for a less convoluted analysis by the court and ultimately saving personal and judicial resources.

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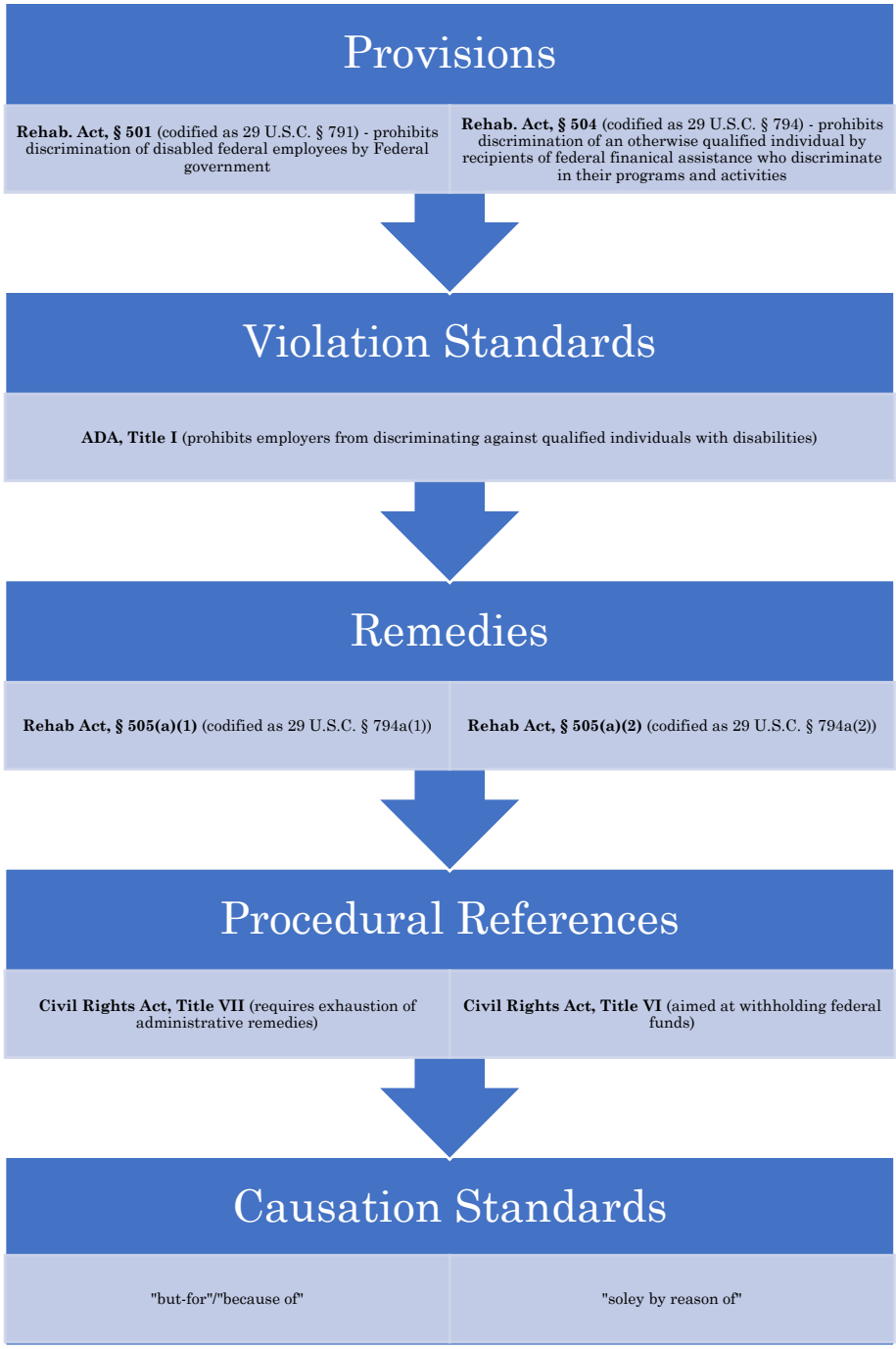
[150] However, most circuit and district courts have concluded that compensatory damages, such as pain and suffering, are available under section 504, mostly based on their reading of Franklin v. Gwinnett County Public Schools, where the Court held that compensatory damages were available to a student who brought a claim of sexual harassment against a teacher under Title IX of the Education Amendments of 1972. 1 ADA: Employee Rights § 2.01.

APPENDIX


Provisions
Rehab. Act, § 501 (codified as 29 U.S.C. § 791) - prohibits discrimination of disabled federal employees by Federal government
Rehab. Act, § 504 (codified as 29 U.S.C. § 794) - prohibits discrimination of an otherwise qualified individual by recipients of federal finanical assistance who discriminate in their programs and activities
Violation Standards
ADA, Title I (prohibits employers from discriminating against qualified individuals with disabilities)
Remedies
Rehab Act, § 505(a)(1) (codified as 29 U.S.C. § 794a(1))
Rehab Act, § 505(a)(2) (codified as 29 U.S.C. § 794a(2))
Procedural References
Civil Rights Act, Title VII (requires exhaustion of administrative remedies)
Civil Rights Act, Title VI (aimed at withholding federal funds)
Causation Standards
"but-for"/"because of"
"soley by reason of"