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A Labor Lawyer's Guide to the Americans with Disabilities Act of 1990*

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Abstract

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KEYWORDS: guide, disabilities, labor

A Labor Lawyer's Guide to the Americans with Disabilities Act of 1990*

Evan J. Kemp, Jr.**
and
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I. Introduction

On July 26, 1990, in a joyous ceremony on the south lawn of the White House, President George Bush signed the "Americans with Disabilities Act of 1990"¹ into law. Before over 2000 invited guests, the President declared:

The Americans with Disabilities Act represents the full flowering of our democratic principles, and it gives me great pleasure to sign it into law today It promises to open up all aspects of American life to individuals with disabilities—employment opportunities, government services, public accommodations, transportation and telecommunications.²

In signing the Americans with Disabilities Act (hereinafter "ADA") into law, President Bush fulfilled a campaign pledge to provide people with disabilities with the same civil rights protections applicable to women and minorities.³

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The views expressed in this article are the personal views of the authors. No official support or endorsement by the United States Equal Employment Opportunity Commission or any other agency of the United States Government is intended or should be inferred.

1. Americans With Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327-378 (codified at 42 U.S.C. § 12101 *et. seq.*; 47 U.S.C. § 225, 611).

2. Statement on Signing the American With Disabilities Act of 1990, 26 WEEKLY COMP. OF PRES. DOC 1165 (July 26, 1990).

3. See H.R. REP. NO. 485, 101st Cong., 2d Sess. Pt. 2 (1990) [hereinafter HOUSE REPORT] (quoting Statement of Vice President George Bush on Disabled

The Administration strongly supported enactment of the ADA because of the staggering social and economic cost of disability dependency and discrimination. As Vice President, George Bush stated:

On the cost side, the National Council on the Handicapped states that current [federal] spending on disability benefits and programs exceeds \$60 billion annually. Excluding the millions of disabled who want to work from the employment ranks cost[s] society literally billions of dollars annually in support payments and lost income tax revenues.⁴

A private economist recently estimated that in 1986 total federal, state, and private expenditures on disability exceeded \$169.4 billion annually.⁵ Discrimination undermines the governmental efforts at rehabilitation and education of disabled children and adults. The federal and state governments spend billions of dollars annually on such programs, the beneficiaries of which then find their entry or re-entry into the workforce barred by discrimination. The ADA, combined with simple self-interest, should begin to break down the barriers to opportunity for people with disabilities. A shrinking labor force caused by the aging baby boom generation compels business to turn to segments of society that have not participated fully in the labor force, including people with disabilities.⁶

The need for the ADA is clear. In enacting the Americans with Disabilities Act, Congress made the following findings:

- Historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;
- Discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;
- Individuals with disabilities continually encounter various forms

Americans, March 31, 1988 at 2).

4. *Id.* at 43 (quoting Statement by Vice President George Bush on Disabled Americans, March 31, 1988 at 2).

5. Berkowitz, Monroe, et al., *Enhanced Understandings of the Economics of Disability Final Report*, Grant No: NIDRR G008300151 submitted to the State of Virginia Department of Rehabilitative Services, August 31, 1988, p. II-1.

6. *Id.* at 44.

of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

- Census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severally disadvantaged socially, vocationally, economically, and educationally;
- The Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and
- The continued existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and non-productivity.⁷

As President Bush stated, "the statistics consistently demonstrate that disabled people are the poorest, least educated and largest minority in America."⁸ The Committee reports describe the appalling socio-economic status of individuals with disabilities. The House Committee on Education and Labor made the following comments in its report on the ADA:

According to a recent Louis Harris poll, "not working" is perhaps the truest definition of what it means to be disabled in America. Two-thirds of all disabled Americans between the age of 16 and 64 are [not] working at all; yet, a large majority of those not working say that they want to work. Sixty-six percent of working-age disabled persons who are not working, say that they would like to have a job.⁹

In 1988, men who reported a work disability earned 36 percent less than men with no disability; in the same year women with a work disa-

7. Americans With Disabilities Act §§ 2(a), (3), (5), (6), (8), (9).

8. HOUSE REPORT, *supra* note 3, at 32-33 (quoting Statement of Vice President George Bush on Disabled Americans, March 31, 1988 at 2).

9. *Id.* at 32 (citing Louis Harris and Associates, *The ICD Survey of Disabled Americans: Bringing Disabled Americans into the Mainstream* (March 1986)).

bility earned 38% less than women without a work disability.¹⁰ Americans with disabilities had a high school drop-out rate three times greater than that of other Americans.¹¹ Household income for persons with disabilities is also significantly below that of non-disabled persons. Fifty percent of all disabled adults had incomes of \$15,000 or less in 1984 as compared with only 25 percent of non-disabled adults.¹² A majority of the people with disabilities who are not working and are out of the labor force depend on insurance payments or government benefits for support.¹³

The ADA was crafted to respond to the principal barriers to equal opportunity facing people with disabilities. With respect to employment, the House Committee on Education and Labor identified the following:

[T]he major categories of job discrimination faced by people with disabilities include: use of standards and criteria that have the effect of denying such individuals equal job opportunities; failure to provide or make available reasonable accommodations; refusal to hire based on presumptions, stereotypes and myths about job performance, safety, insurance costs, absenteeism, and acceptance by others; placement into dead-end jobs; under-employment and lack of promotion opportunities; and use of application forms and other pre-employment inquiries that inquire about the existence of a disability rather than about the ability to perform the essential functions of a job.¹⁴

This article provides an overview of the employment provisions of the ADA, drawing on the statute, its legislative history, and pertinent regulations and case law under the Rehabilitation Act of 1973, as amended.

The employment provisions of the ADA become effective on July

10. *Id.* (citing U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, LABOR FORCE STATUS AND OTHER CHARACTERISTICS OF PERSONS WITH DISABILITIES: 1981-1988, Current Population Reports, Special Studies Series P-23, No. 160, Table D, at 5).

11. *Id.*

12. *Id.*

13. *Id.* at 33.

14. *Id.* (citing to *Hearings on H.R. 2273 Before the Subcommittee on Select Education and the Subcommittee on Employment Opportunities of the House Committee on Education and Labor*, 101st Cong., 2d Sess. 53-73 (1989) (testimony of Arlene Meyerson, Directing Attorney, Disability Rights Education and Defense Fund).

26, 1992, two years after the date of enactment.¹⁵ The substantive requirements of Title I are drawn directly, and in many cases word-for-word from regulations implementing section 504 of the Rehabilitation Act of 1973. These regulations, first promulgated by the Department of Health, Education and Welfare, defined terms such as "handicapped person," "qualified handicapped person," "reasonable accommodation," the definition of discrimination, and the prohibition against certain pre-employment inquiries.

The entities covered by the ADA and its enforcement scheme, on the other hand, are drawn from Title VII of the Civil Rights Act of 1964, sections of which are incorporated into the ADA by reference.¹⁶

II. Overview of the Act

A. *Who Must Comply*

Title I applies to an employer, employment agency, labor organization, or a joint labor-management committee, collectively referred to as "covered entities."¹⁷ The employment prohibitions are phased in over a four year period to give smaller employers more time to learn of their obligations.¹⁸ Beginning on July 26, 1992, the Act applies to employers with 25 or more employees; on July 26, 1994, this coverage is extended to employers with 15 to 24 employees.¹⁹

The term "employer" includes virtually every form of business organization, as well as state and local governments, that employs the requisite number of individuals for each working day for 20 or more calendar weeks in the current or preceding year.²⁰ Certain entities are exempted from coverage. The federal government, already covered by similar requirements under the Rehabilitation Act of 1973, is not covered.²¹ Indian tribes and tax-exempt bona fide private membership clubs are also exempt.²²

15. Americans With Disabilities Act § 108.

16. *Id.* at §§ 101(7), 107.

17. *Id.* at § 101(2).

18. *Id.* at § 101(5)(A).

19. *Id.*

20. *Id.*

21. *Id.* at § 101(5)(B)(i).

22. *Id.* at § 101(5)(B)(ii).

B. *What Employment Practices are Affected*

The ADA prohibits discrimination in all stages of employment, including "job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."²³ This statutory list of employment practices is not exclusive; Congress intended to regulate all of the employment practices covered by the regulations implementing section 504 of the Rehabilitation Act of 1973.²⁴

C. *Who is Protected from Discrimination by the ADA*

Instead of providing a list of conditions constituting a covered disability, the ADA utilizes a functional definition that is almost identical to the definition used in the Rehabilitation Act, as amended in 1974.²⁵ The term "disability" is defined broadly to include not only persons with actual handicaps but persons who have a history of or who are perceived as disabled.²⁶

1. Persons with actual disabilities

The first category of persons protected are those who have "a physical or mental impairment that substantially limits one or more of the major life activities of such individual."²⁷ Regulations implementing section 504 of the Rehabilitation Act provide a definition of several key terms used in the ADA's definition of disability and are cited with approval in the Committee reports. As in the section 504 regulations, the term "impairment" encompasses a wide range of diseases, conditions, infections and disorders,²⁸ including: HIV disease; orthopedic im-

23. *Id.* at § 102(a).

24. S. REP. No. 116, 101st Cong., 1st Sess., 25 (1989) [hereinafter SENATE REPORT]; see also HOUSE REPORT, *supra* note 3, pt. 3, at 35 (citing 45 C.F.R. § 84.11(b) (1988)).

25. 29 U.S.C. § 706(8) (B) (1988).

26. *Id.*

27. Section 3(2) of the Act defines "disability" as follows:

The term "disability" means, with respect to an individual—

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

28. The House Committee on Education and Labor states:

pairments; vision, speech, and hearing impairments; multiple sclerosis; muscular dystrophy; cerebral palsy; mental retardation; cancer; heart disease; diabetes; drug addiction and alcoholism; and many other conditions.²⁹ Certain personal characteristics, such as age or left-handedness, and economic or social disadvantages, such as illiteracy or conviction for a criminal offense, are not "impairments" and are therefore not covered by the Act.³⁰

The more difficult question is what it means for an impairment to "substantially limit one or more [of an individual's] major life activities." Neither the term "substantially limits" nor the term "major life activities" is defined in the statute. The Committee reports do, however, shed some light on the meaning of this phrase. The House Committee on Education and Labor noted in its report that not all impairments are substantially limiting:

A person with a minor, trivial impairment, such as a simple infected finger is not impaired in a major life activity. A person is considered an individual with a disability for purposes of the first prong of the definition when the individual's important life activities are restricted as to the conditions, manner, or duration under which they can be performed in comparison to most people. A person who can walk for ten miles continuously is not substantially limited in walking merely because on the eleventh mile, he or she begins to experience pain because most people would not be able to walk eleven miles without experiencing some discomfort.³¹

The Committee reports also sanction the list of major life activities provided in the section 504 regulations: "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking,

The first prong of the definition includes any individual who has a "physical or mental impairment." A physical or mental impairment means (1) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive; genitourinary; hemic and lymphatic; skin; and endocrine; or (2) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

HOUSE REPORT, *supra* note 3, at 51; SENATE REPORT, *supra* note 24, at 22.

29. *Id.*

30. *Id.*

31. HOUSE REPORT, *supra* note 3, at 52; SENATE REPORT, *supra* note 24, at 23.

breathing, learning, and working."³²

In most cases, it will not be difficult to determine whether a person is substantially limited in a major life activity. A paraplegic is substantially limited in walking; a person with mental retardation is substantially limited in learning; a person who is deaf is substantially limited in hearing; and a person with serious lung disease is substantially limited in breathing.³³

The Committee reports also indicate that mitigating measures such as reasonable accommodation, auxiliary aids or medication should not be considered when determining whether an individual has a disability. Thus, a person who is hard of hearing is substantially limited in hearing even if the hearing loss is corrected with hearing aids, and a person with epilepsy may be substantially limited in one or more major life activities even if the condition is controlled with medication.³⁴

Two other categories of the definition protect individuals for whom fears, myths and stereotypes rather than the impact of any impairment have proven to be the basis for discrimination. This subgroup includes persons who have a "record of" a substantially limiting impairment³⁵ and those who are "regarded as" having such an impairment.³⁶

2. Persons with a record of a disability

Persons who have a "record of" a disability include those who have recovered in whole or in part from a disability, such as cancer or mental illness, as well as persons who have been misclassified as having a disability that the individual in fact does not have.³⁷

3. Persons regarded as being disabled

More controversial, and difficult to analyze, is the third prong of the definition applying to persons being "regarded as" having a disability. As with the other two categories of the definition, the third category was adopted from the section 504 regulations:

32. SENATE REPORT, *supra* note 24, at 22.

33. *Id.* HOUSE REPORT, *supra* note 3, pt. 3, at 52.

34. SENATE REPORT, *supra* note 24, at 22; HOUSE REPORT, *supra* note 3, pt. 3.

35. Americans With Disabilities Act § 3(2)(B).

36. *Id.* at § 3(2)(C).

37. HOUSE REPORT, *supra* note 3, at 52-53; SENATE REPORT, *supra* note 24, at

"Is regarded as having an impairment" means (A) has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a limitation; (B) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (C) has none of the impairments defined in paragraph (j)(2)(i) of this section but is treated by a recipient as having such an impairment.³⁸

The "regarded as" part of the definition covers a person who does not have an actual disability. This includes a person who has no impairment. It also includes an individual with an impairment that does not substantially limit a major life activity if an employer treats the impairment as imposing greater limitations on an individual's activities than it does in fact. Finally, where an employer treats an individual adversely because of the possible negative reactions of third parties, such as customers, co-workers or insurers, an individual with a non-disabling impairment may also be protected.³⁹ Being regarded as disabled focuses on the intent and state of mind of others rather than the self-perception of the person with an impairment.⁴⁰

Congress recognized that "disability" was not simply defined by physiology but also by the reaction of others to a person's impairment. Persons with stigmatizing impairments that do not limit a person's activities may be victims of discrimination because of widespread fears or stereotypes about the impairment or its effect on others. The Committee reports cite severe burn victims as one example of such discrimination.⁴¹ As the Committee reports discuss, the need to define the definition of disability broadly to protect against societal discrimination also was recognized by the Supreme Court in interpreting section 504.

The rationale for this third prong was clearly articulated by the U.S. Supreme Court in *School Board of Nassau County v. Arline*.⁴² The Court noted that Congress included this third prong because it was as concerned about the effect of an impairment on others as it was

38. SENATE REPORT, *supra* note 24, pt. 3, at 29 (quoting 45 C.F.R. §84.3 (j)(2)(iv)); *see also* HOUSE REPORT, *supra* note 3, pt. 2, at 53.

39. Burgdorf, *Legal Analysis*, BUREAU OF NATIONAL AFFAIRS, AMERICANS WITH DISABILITIES ACT: A PRACTICAL AND LEGAL GUIDE TO IMPACT, ENFORCEMENT, AND COMPLIANCE 93-96 (1990).

40. HOUSE REPORT, *supra* note 3, at 30.

41. *Id.*

42. 480 U.S. 273 (1987).

about its effect on the individual. As the Court noted, the third prong of the definition is designed to protect individuals who have impairments that do not in fact substantially limit their functioning.⁴³ The Court explained: "Such an impairment might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment."⁴⁴

The Court went on to conclude:

By amending the definition of "handicapped individual" to include not only those who are actually physically impaired but also those who are regarded as impaired and who, as a result, are substantially limited in a major life activity, Congress acknowledged that society's accumulated myths and fears about disability and diseases are as handicapping as are the physical limitations that flow from actual impairment.⁴⁵

4. Denial of a single job for a single employer

Significant conceptual difficulties are raised when the definition of disability is applied to an individual claiming to be disabled only in the major life activity of working as a result of being denied an employment opportunity because of an actual or perceived impairment. It is possible to argue that any adverse employment action taken on the basis of a person's impairment means that such person was substantially limited in the major life activity of working or regarded as such by the employer.⁴⁶ Commentators have attacked this interpretation as expanding the definition of disability to the point of being meaningless,⁴⁷ a conclusion reached by at least one court.⁴⁸

The legislative history is unclear and inconsistent on this issue. The House Judiciary Committee acknowledged that factors unique to a particular job or job site that prevented a person from performing a

43. *Id.* at 283.

44. *Id.*

45. *Id.*

46. *Jasany v. United States Postal Service*, 755 F.2d 1244, 1248 n.2 (6th Cir. 1985).

47. Note, *The Rehabilitation Act of 1973: Focusing the Definition of a Handicapped Individual*, 30 WM. & MARY L. REV. 149, 170 (1988).

48. *Tudyman v. United Airlines*, 608 F. Supp. 739, 746 (C. D. Cal. 1984).

particular job because of an impairment did not render the person substantially limited in working, but then noted:

However, if a person is employed as a painter and is assigned to work with a unique paint which caused severe allergies, such as skin rashes or seizures, the person would be substantially limited in a major life activity, by virtue of the resulting skin disease or seizure disorder.⁴⁹

It is not clear from the Committee's example whether the individual with the skin rash is substantially limited in working or some other unspecified major life activity. The Committee also noted: "A person with an impairment who is discriminated against in employment is also limited in the major life activity of working."⁵⁰

Cases arising under section 504 have grappled with this question as more and more persons with minor impairments have sought the protection of the Rehabilitation Act after being denied employment or discharged from a job. The weight of judicial authority under the Rehabilitation Act indicates that denial of one job for one particular employer does not establish that a person is substantially limited in working.⁵¹ While a clearly defined legal standard has not yet emerged under the Rehabilitation Act, several courts have looked to the number and

49. HOUSE REPORT, *supra* note 3, pt. 3, at 29. It is worth noting that the original version of the bill, the "Americans With Disabilities Act of 1988," S. 2345, 100th Cong., 2d Sess. (1988), prohibited discrimination because of a physical or mental impairment, perceived impairment or record of impairment, regardless of whether an impairment substantially limited a major life activity.

50. *Id.*

51. See, e.g., *Forrisi v. Bowen*, 794 F.2d 931, 933 (4th Cir. 1986); *Jasany v. U.S. Postal Service*, 755 F.2d 1244, 1249 (6th Cir. 1985); *Miller v. AT&T Network Systems*, 722 F. Supp. 633, 639 (D. Or. 1989), *Trembczynski v. Calumet City*, LEXIS, Genfed library, Dist. file, 8117 (N.D. Ill. 1987); *Elstner v. Southwestern Bell Tel. Co.*, 659 F. Supp. 1328, 1343 (S.D. Tex. 1987), *aff'd without opinion*, 863 F.2d 881 (5th Cir. 1988); *Wright v. Tisch*, 45 Fair Empl. Prac. Cas.(BNA) 151, 153 (E.D. Va. 1987); *McCleod v. City of Detroit*, 39 Fair Empl. Prac. Cas.(BNA) 225, 228 (E.D. Mich. 1985); *Tudyman v. United Airlines*, 608 F. Supp. 739, 746 (C.D. Cal. 1984); *E.E. Black, Ltd. v. Marshall*, 497 F. Supp. 1088, 1099-1100 (D. Haw. 1980), *vacated*, *E.E. Black, Ltd. v. Donovan*, 26 Fair Empl. Prac. Cas.(BNA) 1183 (D Haw. 1981). However, one commentator directly involved in the drafting of the legislation pointed to certain parts of the legislative history and the minority judicial view under the Rehabilitation Act, and interpreted the definition broadly to cover any individual who is denied a job because of any impairment, no matter how minor the disability. See *Burgdorf*, *supra* note 39.

types of jobs from which the individual is excluded, the geographical area to which the individual has reasonable access, and the individual's job expectations and education in order to establish whether a person's employment opportunities are seriously affected by an impairment.⁵²

The legislative history is only slightly more helpful in determining whether a person is always "regarded as" disabled when denied an employment opportunity by an employer because of an impairment. One committee stated broadly:

A person who is excluded from any basic life activity, or is otherwise discriminated against, because of a covered entity's negative attitudes toward that person's impairment is treated as having a disability. Thus, for example, if an employer refuses to hire someone because of a fear of the "negative reactions" of others to the individual, or because of the employer's perception that the applicant has an impairment which prevents that person from working, that person is covered under the third prong of the definition of disability.⁵³

Another Committee noted:

Thus, a person who is rejected from a job because of the myths, fears and stereotypes associated with disabilities would be covered under this third test, whether or not the employer's perception was shared by others in the field and whether or not the person's physical or mental condition would be considered a disability under the first or second part of the definition.

Sociologists have identified common barriers that frequently result in employers excluding disabled persons. These include concerns regarding productivity, safety, insurance, liability, attendance, cost of accommodation and accessibility, and acceptance by workers and customers.

This list of frequent workplace concerns is not exhaustive. It illustrates, however, the attitudinal barriers that Congress clearly intended to include within the meaning of "regarded as" having a

52. See *Forrisi v. Bowen*, 794 F.2d 931, 933 (4th Cir. 1986); *Jasany v. U.S. Postal Service*, 755 F.2d 1244, 1249 (6th Cir. 1985) (following the analysis set forth in *E. E. Black, Ltd. v. Marshall*, 497 F. Supp. 1088, 1099-1100 (D. Haw. 1980), *vacated*, *E.E. Black, Ltd. v. Donovan*, 26 Fair Empl. Prac. Cas.(BNA) 1183 (D. Haw. 1981)).

53. HOUSE REPORT, *supra* note 3, pt. 3, at 53 (citing *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 284 (1987)); *Thornhill v. Marsh*, 866 F.2d 1182 (9th Cir. 1989); *Doe v. Centenela Hosp.* LEXIS, Genfed library, Dist. file, 8401 (C.D. Cal. 1988).

disability under the Rehabilitation Act and now under the ADA.

It is not necessary for the covered entity to articulate one of these concerns. In the employment context, if a person is disqualified on the basis of an actual or perceived physical or mental condition, and the employer can articulate no legitimate job-related reason for the rejection, a perceived concern about employing persons with disabilities could be inferred and the plaintiff would qualify for coverage under the "regarded as" test. A person who is covered because of being regarded as having an impairment is not required to show that the employer's perception is inaccurate, e.g., that he will be accepted by others, or that insurance rates will not increase, in order to be qualified for the job.

For example, many people are rejected from jobs because a back x-ray reveals some anomaly, even though the person has no symptoms of a back impairment. The reasons for the rejection are often the fear of injury, as well as increased insurance or worker's compensation costs. These reasons for rejection rely on common barriers to employment for persons with disabilities and therefore, the person is perceived to be disabled under the third test.⁵⁴

Case law arising under the Rehabilitation Act has not always interpreted this aspect of the definition as broadly. For example, in *Forrisi v. Bowen*,⁵⁵ the U.S. Court of Appeals for the Fourth Circuit rejected the claim of a utility systems engineer who asserted that he was regarded as handicapped when he was denied a job because his acrophobia prevented him from climbing a ladder. The court, however, concluded that "[f]ar from being regarded as having a substantial limitation in employability, Forrisi was seen as unsuited for one position in one plant—and nothing more."⁵⁶ Said the court, "[t]he Rehabilitation Act seeks to remedy perceived handicaps that, like actual disabilities, extend beyond this isolated mismatch of employer and employee."⁵⁷ Most other courts have reached similar conclusions.⁵⁸

54. SENATE REPORT, *supra* note 24, at 30-31.

55. 794 F.2d 931 (4th Cir. 1986).

56. *Id.* at 935

57. *Id.*

58. *Lekelt v. Bd. of Comm'rs*, 714 F. Supp. 1377 (E.D. La. 1989), *aff'd*, 909 F.2d 820 (5th Cir. 1990); *Mahoney v. Ortiz*, 645 F. Supp. 22, 23 (S.D.N.Y. 1986); *De La Torres v. Bolger*, 610 F. Supp. 593 (N.D. Tex. 1985), *aff'd*, 781 F.2d 1134 (5th Cir. 1986); *Tudyman v. United Airlines*, 608 F. Supp. 739 (C.D. Cal. 1984); *E.E. Black, Ltd. v. Marshall*, 497 F. Supp. 1088 (D. Haw. 1980), *vacated*, *E.E. Black, Ltd. v. Donovan*, 26 Fair Empl. Prac. Cas.(BNA) 1183 (D.Haw. 1981); *Wright v. Tisch*, 45 Fair Empl. Prac. Cas.(BNA) 151 (E.D. Va 1987). *But see Thornhill v. Marsh*, 866

5. Persons with a known association with a disabled person

In addition to protecting persons with disabilities, the ADA also prohibits discrimination against a person who is known to associate with a disabled person.⁵⁹ The provision is limited to persons who are qualified and who suffer discrimination because of their known association with a person whose disability is also known to the employer.⁶⁰ Efforts to limit the scope of the provision to relationship by blood, marriage, guardianship or adoption were twice rejected.⁶¹ The provision is intended to prohibit employers from denying employment to a qualified applicant with a disabled spouse because the employer is under the mistaken assumption that the applicant will miss too much work caring for the spouse with a disability. Of course, if the applicant is hired and misses work in violation of the employer's policy on attendance or tardiness for this reason, the employer is free to discharge the employee for poor attendance and need make no allowance even if the cause of the poor attendance or tardiness is because the employee is caring for the disabled spouse.⁶²

6. Exclusions from the definition of disability

Excluded from the definition is any person who currently engages in the illegal use of drugs if the employer acts on the basis of such illegal use.⁶³ Also excluded as not constituting impairments are homosexuality and bisexuality. Additionally, transvestitism, transsexualism, voyeurism, pedophilia and certain other gender identity disorders are not covered. Persons who are compulsive gamblers, have kleptomania or pyromania, and persons with psychoactive substance use disorders resulting from current illegal use of drugs are also not protected from discrimination by the Act.⁶⁴

D. *Who is a "Qualified Individual with a Disability?"*

The ADA protects only those persons with a disability who are

F.2d 1182 (9th Cir. 1989); *Doe v. New York Univ.*, 666 F.2d 761 (2d Cir. 1981).

59. Americans With Disabilities Act § 102(b)(4).

60. HOUSE REPORT, *supra* note 3, pt. 3, at 38.

61. *Id.*, pt. 2, at 60-61.

62. *Id.* at 61-62.

63. Americans With Disabilities Act §§ 104(a),(b), & 510.

64. *Id.* at §§ 508, 511.

qualified to perform a particular job in spite of their disability.⁶⁵ The statute defines the term to mean "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."⁶⁶ The individual with a disability must possess the necessary knowledge, skills and physical and mental ability to perform the essential job functions, with or without reasonable accommodation.⁶⁷

Congress provided little guidance on the distinction between essential and non-essential job functions except to indicate:

As the 1977 regulations issued by the Department of Health, Education, and Welfare pointed out "inclusion of this phrase is useful in emphasizing that handicapped persons should not be disqualified simply because they may have difficulty in performing tasks that bear only a marginal relationship to a particular job." 42 Fed. Reg. 22686 (1977). For example, many employers have a policy that, in order to qualify for a job, an employee must have a driver's license even though the job does not involve driving. The employer may believe that someone who drives will be on time for work or may be able to do an occasional errand. This requirement, however, would be marginal and should not be used to exclude persons with disabilities who can do the essential functions of the job that do not include driving.⁶⁸

In determining what functions of a job are essential rather than marginal, Congress directed that a job description, prepared in advance of advertising or interviewing for a job, be considered as evidence of what the employer considers to be essential, and that the employer's judgment must be considered. However, both the legislative history of the ADA⁶⁹ and case law under the Rehabilitation Act indicate that an employer's judgment is subject to challenge and rebuttal by a

65. *Id.* at §§ 101(8), 102(a). "[T]his legislation does not undermine an employer's ability to choose and maintain qualified workers. This legislation simply provides that employment decisions must not have the purpose or effect of subjecting a qualified individual with a disability to discrimination on the basis of his or her disability."

66. *Id.* at § 101(8).

67. HOUSE REPORT, *supra* note 3, pt. 2, at 64-65; SENATE REPORT, *supra* note 24, at 33-34.

68. HOUSE REPORT, *supra* note 3, pt. 2, at 55.

69. 136 CONG. REC. H2469-70 (daily ed. May 17, 1990); HOUSE REPORT, *supra* note 3, pt. 2, at 55; pt. 3, at 33.

plaintiff.⁷⁰

The definition of "qualified individual with a disability" also indicates that if an individual is not qualified because a disability prevents performance of essential job functions, the individual may become qualified with a reasonable accommodation. That an unqualified person may become qualified through an employer provided reasonable accommodation is a central requirement of disability nondiscrimination law.⁷¹ The U.S. Supreme Court adopted a similar two step analysis in *School Board of Nassau County v. Arline*.⁷² First, an employer must determine whether an applicant with a disability can perform the essential functions of the position in spite of the disability and, if not, whether the employer can provide a reasonable accommodation that would permit the individual to perform those functions.⁷³ In order to avoid "deprivations based on prejudice, stereotypes, or unfounded fear," courts and administrative agencies "will need to conduct an individualized inquiry and make appropriate findings of fact."⁷⁴

E. *Qualification Standards and Selection Criteria*

The ADA provides that it is discriminatory to:

us[e] qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria as used by the covered entity is shown to be job-related for the position in question and consistent

70. See, e.g., *Hall v. United States Postal Service*, 857 F.2d 1073, 1079-80 (6th Cir. 1988); *Davis v. Frank*, 711 F. Supp. 447, 454 (N.D. Ill. 1989).

71. Burgdorf, *supra* note 39, at 109.

72. 480 U.S. 273 (1987).

73. *Id.* at 287 n.17.

74. *Id.* at 287. Although recognizing that blanket criteria that exclude an entire class of disabled persons are disfavored because they preclude an individualized assessment of ability, some courts have approved blanket exclusions in particular circumstances: *Davis v. Meese*, 692 F. Supp. 505 (E.D. Pa. 1988), *aff'd*, 865 F.2d 592 (3rd Cir. 1989) (insulin-dependent diabetics excluded from being FBI special agents); *Local 1812, American Fed. of Gov't. Employees v. Dep't of State*, 662 F. Supp. 50 (D.D.C. 1987) (persons with HIV disease excluded from State Department Foreign Service positions); *Sharon v. Larson*, 650 F. Supp. 1396 (E.D. Pa. 1986) (visually-impaired persons with bioptic lenses excluded from obtaining drivers license); *Anderson v. USAir*, 619 F. Supp. 1191 (D.D.C. 1985), *aff'd*, 818 F.2d 49 (D.C. Cir. 1987) (prohibiting blind persons next to emergency plane exits).

with business necessity⁷⁵

Drawn from section 504 regulations, this standard is intended to ensure that persons with disabilities are not excluded from jobs by selection criteria that are not in fact necessary for effective job performance. While this limitation on selection criteria bears a distant relationship to the disparate impact theory of discrimination developed by the courts under Title VII of the Civil Rights Act of 1964,⁷⁶ it is quite different in several important details. First, unlike Title VII, a statistical showing that a class of individuals has been disparately affected by a neutral standard is not required. The neutral selection criteria need only screen out "an individual with a disability or a class of individuals with disabilities" As the analysis to the original section 504 regulations indicated, "the small number of handicapped persons taking tests would make statistical showings of 'disproportionate, adverse effect' difficult and burdensome."⁷⁷

Second, the ADA appears to place the burden of proving that a selection criteria is job related and consistent with business necessity on the employer rather than the claimant, as is currently the case under Title VII. The Committee reports indicate that the burden of proof should be assigned as it is under section 504 implementing regulations which explicitly required employers to justify challenged selection criteria.⁷⁸ Section 504 case law similarly required employers to show that qualifications and selection criteria were reasonable, necessary and legitimate.⁷⁹ The Committee reports make clear that employers may still establish physical ability criteria so long as they are job-related:

Under this standard, employers may continue to establish legitimate, job-related physical requirements for a particular position. Thus, for example, an employer may adopt a physical criterion that an applicant be able to lift fifty pounds, if that ability is

75. Americans With Disabilities Act § 102(b)(6).

76. *Wards Cove Packing Co. v. Atonio*, 109 S.Ct. 2115 (1989); *Watson v. Ft. Worth Bank & Trust*, 487 U.S. 977 (1987); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

77. 45 C.F.R. pt. 84, app. A, at 352 (1988).

78. HOUSE REPORT, *supra* note 3, pt. 2, at 72; pt. 3, at 42.

79. *Southeastern Community College v. Davis*, 442 U.S. 397, 409 (1979); *Strathie v. Dep't of Transportation*, 716 F.2d 227 (3rd Cir. 1983) *Simon v. St. Louis County*, 656 F.2d 316 (8th Cir. 1981) *cert. denied*, 455 U.S. 976 (1982); *Bentivegna v. United States Dep't of Labor*, 694 F.2d 619 (9th Cir. 1982); *Prewitt v. United States Postal Service*, 662 F.2d 292, 306, 321 (5th Cir. 1981).

necessary to an individual's ability to perform the essential functions of the job in question. Or, for example, security concerns may constitute valid job criteria. For example, jewelry stores often employ security officers because of the frequency of "snatch and run" thefts. Mobility and dexterity may be essential job criteria in such jobs.⁸⁰

Formal job validation studies were not required under the Rehabilitation Act to demonstrate job-relatedness.⁸¹

The Committee reports also instruct how the legitimacy of selection criteria and qualification standards relate to an employer's determination whether an applicant with a disability is qualified with or without a reasonable accommodation:

The three pivotal provisions to assure a fit between job criteria and an applicant's actual ability to do the job are:

(1) the requirement that individuals with disabilities not be disqualified because of their inability to perform non-essential or marginal functions of the job;

(2) the requirement that any selection criteria that screen out or tend to screen out individuals with disabilities be job-related and consistent with business necessity; and

(3) the requirement to provide a reasonable accommodation to assist individuals with disabilities to meet legitimate criteria.

These three legal requirements . . . work together to provide a high degree of protection to eliminate the current pervasive bias against employing persons with disabilities in the selection process.

The interrelationship of these requirements of the selection process procedure is as follows: If a person with a disability applies for a job and meets all selection criteria except one that he or she cannot meet because of a disability, the criterion must concern an essential, non-marginal aspect of the job, and be carefully tailored to measure the person's actual ability to do this essential function of the job. If the criterion meets this test, it is nondiscriminatory on its face and it is otherwise lawful under the legislation. However,

80. HOUSE REPORT, *supra* note 3, pt. 2, at 56; *see also* SENATE REPORT, *supra* note 24, at 27.

81. 45 C.F.R. pt. 84, app. A, at 352 states: "A recipient is no longer limited to using predictive validity studies as a method for demonstrating that a test or other selection criterion is in fact job-related. Nor, in all cases, are predictive validity studies sufficient to demonstrate that a test or criterion is job-related." The Uniform Guidelines on Employee Selection Procedures (UGESP) do not apply to cases arising under the Rehabilitation Act of 1973. 29 C.F.R. § 1607.2(d) (1990).

the criterion may not be used to exclude an applicant with a disability if the criterion can be satisfied by the applicant with a reasonable accommodation. A reasonable accommodation may entail adopting an alternative, less discriminatory criterion.⁸²

The Committees' explanation of the interplay was embodied in the statute, which provides that an employer is not liable if a person with a disability is adversely affected in employment because of the application of a qualification standard that is job-related and consistent with business necessity and the person with a disability cannot satisfy the standard with a reasonable accommodation.⁸³

F. *Qualifications Relating to the Safety of Others*

The ADA also provides that employers may require, as a qualification standard, that an individual not "pose a direct threat to the health or safety of other individuals in the workplace."⁸⁴ The term "direct threat" means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.⁸⁵ The ADA's legislative history indicates that this provision codifies the Supreme Court's decision in *Arline*.⁸⁶ In remanding the case back to the district court to determine whether a school teacher who had tuberculosis would pose a risk of harm to her school children, the district court was instructed to make:

[findings of] facts, based on reasonable medical judgments given the state of medical knowledge, about (a) the nature of the risk . . . (b) the duration of the risk . . . (c) the severity of the risk and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm.⁸⁷

82. HOUSE REPORT, *supra* note 3, pt. 2, at 71; SENATE REPORT, *supra* note 24, at 62.

83. Americans With Disabilities Act § 103(a).

84. *Id.* at § 103(b).

85. *Id.* at § 101(3).

86. 480 U.S. 273 (1987).

87. *Id.* at 288. On remand, the district court concluded that plaintiff Arline was discharged illegally from her employment in violation of section 504 and the school board was ordered to reinstate her or offer her front pay. *Arline v. School Bd. of Nassau County*, 692 F. Supp. 1286 (M.D. Fla. 1988). The Conference Report also provides that an employer may:

take action to protect the rights of its employees and other individuals in

As in the ADA, the court concluded that if a significant risk of harm was found to exist as a result of the individualized inquiry, the district court must then inquire as to the availability of a reasonable accommodation.⁸⁸ The court indicated that “[a] person who poses a significant risk of communicating an infectious disease to others in the workplace will not be . . . qualified for his or her job if reasonable accommodation will not eliminate that risk.”⁸⁹

The ADA also provides that the Secretary of the Department of Health and Human Services (HHS) shall publish and update annually a list of communicable and infectious diseases which are transmitted by handling food. Any individual having a communicable disease contained on the HHS list may be denied a job involving food handling unless the risk can be eliminated by reasonable accommodation.⁹⁰

G. *Reasonable Accommodation and Undue Hardship*

The reasonable accommodation requirement is a key element in disability nondiscrimination law. First mandated by Department of Labor regulations issued in 1976 to implement section 503 of the Rehabilitation Act of 1973, the requirement has been a controversial one since its inception. The rationale for such a requirement was clearly articulated by the U.S. Commission on Civil Rights in its 1983 report, *Accommodating the Spectrum of Individual Abilities*:

Discrimination against handicapped people cannot be eliminated if programs, activities and tasks are always structured in the ways people with “normal” physical and mental abilities customarily undertake them. Adjustments or modifications of opportunities to per-

the workplace. Such employer action would include not assigning an individual to a job if such an assignment would pose a direct threat to individuals in the workplace and such a threat could not be eliminated by reasonable accommodation In determining what constitutes a significant risk, the Conferees intend that the employer may take into consideration such factors as the magnitude, severity or likelihood of risk to other individuals in the workplace and that the burden would be on the employer to show the relevance of such factors in relying on the qualification standard.

H.R. CONF. REP. NO. 596, 101st Cong., 2d Sess. 60 (1990) [hereinafter HOUSE CONFERENCE REPORT].

88. *Arline*, 480 U.S. at 288.

89. *Id.* at 287 n.16.

90. Americans With Disabilities Act § 103(d); see also HOUSE CONFERENCE REPORT, *supra* note 87.

mit handicapped people to participate fully have been broadly termed reasonable accommodation.⁹¹

The concept of reasonable accommodation as individualizing employment opportunities is applied in the ADA. The ADA defines as prohibited discrimination:

(A) not making reasonable accommodation to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless the covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant.⁹²

The Committee reports make clear that determining what accommodation is required necessitates a highly fact specific inquiry.⁹³ As the House Judiciary Committee stated: "A reasonable accommodation should be tailored to the needs of the individual and the requirements of the job."⁹⁴ Reasonable accommodation, however, is defined in the statute only by a list of examples:

The term "reasonable accommodation" may include—

(A) making existing facilities used by employers readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.⁹⁵

91. U.S. Commission on Civil Rights, *Accommodating the Spectrum of Individual Abilities*, 102 [hereinafter *Civil Rights*].

92. Americans With Disabilities Act § 102(b)(5).

93. SENATE REPORT, *supra* note 24, at 31; HOUSE REPORT, *supra* note 3, pt. 2, at 62; pt. 3 at 39.

94. HOUSE REPORT, *supra* note 3, pt. 3, at 39.

95. Americans With Disabilities Act § 101(9).

The statutory list of examples is taken from regulations implementing section 504 of the Rehabilitation Act of 1973,⁹⁶ and is not intended to be exhaustive.⁹⁷

The addition of "reassignment to a vacant position" settles a dispute that arose in the courts under section 501 of the Rehabilitation Act where a majority of courts had held that reassignment was not a form of reasonable accommodation.⁹⁸ The Committee reports indicate, however, that efforts should be made to accommodate the employee in his or her current position before reassignment to a vacant position is considered and that bumping another employee to create a vacant position is not required.⁹⁹

96. See 45 C.F.R. § 84.12(b)(regulation implementing § 504).

97. See Civil Rights, *supra* note 91.

98. *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 289 n.19 (1987) ("Employers have an affirmative obligation to make a reasonable accommodation for a handicapped employee. Although they are not required to find another job for an employee who is not qualified for the job he or she was doing, they cannot deny an employee alternative employment opportunities reasonably available under the employers existing policies."); *Carter v. Tisch*, 822 F.2d 465 (4th Cir. 1987); *Davis v. United States Postal Service*, 675 F. Supp. 225 (M.D. Pa. 1987); *Dancy v. Kline*, 639 F. Supp. 1076 (N.D. Ill. 1986); *Carty v. Carlin*, 623 F. Supp. 1181 (D. Md. 1985); *Alderson v. Postmaster General of the United States*, 598 F. Supp. 49 (W.D. Okla. 1984); *Jasany v. United States Postal Service*, 33 Fair Empl. Prac. Cas. (BNA) 1115 (N.D. Ohio 1983), *aff'd on other grounds*, 755 F.2d 1244 (6th Cir. 1985); *Wright v. Tisch*, 45 Fair Empl. Prac. Cas. (BNA) 151 (E.D. Va. 1987). *But see* *Coley v. Secretary of the Army*, 689 F. Supp. 519 (D.Md. 1987); *Rhone v. United States Dep't of the Army*, 665 F. Supp. 734 (E.D. Mo. 1987). *Accord* *American Federation of Government Employees Local 51 v. Baker*, 677 F. Supp. 636 (N.D. Cal. 1987).

99. SENATE REPORT, *supra* note 24, at 32; HOUSE REPORT, *supra* note 3, pt. 2, at 63. The Equal Employment Opportunity Commission is proposing to address the issue of reassignment as part of its restructuring of the federal government's equal employment opportunity complaint process. Under proposed 29 C.F.R. § 1614.203(g) (1990), reassignment is considered an affirmative action obligation of federal agencies pursuant to section 501(b) of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 791(b) (1988), rather than a part of an agency's reasonable accommodation obligation. The proposal limits the affirmative duty to reassign to non-probationary employees who are unable to perform satisfactorily in their current positions even with reasonable accommodation. When a non-probationary employee becomes unable, because of a disability, to perform his or her current position, an agency is obligated to reassign the employee to a funded vacant position within the same appointing authority for which the person is qualified, with or without reasonable accommodation. The vacant position should be within the same commuting area and at the same pay level or at the next highest pay level available below the employee's current pay level. If the vacant position has already been announced at the time the agency determined the individual to be incapable of performing in his or her current position, however, the individual need

With respect to alterations to existing facilities, the employment title does not appear to require employers to undertake the wholesale retrofitting of existing buildings in order to provide full accessibility for people with disabilities generally, in advance of an individual's request and without regard to a particular person's needs. Accessibility requirements applicable to public accommodations, on the other hand, focus on barrier removal for mobility-impaired and sensory-impaired persons as a class. The public accommodation title requires differing degrees of accessibility for new construction major renovations, and readily achievable modifications to existing facilities. The focus of barrier removal as a reasonable accommodation under Title I is on the needs of a specific applicant or employee with a disability and is subject to the undue hardship limitation, not the much lower "readily achievable" standard applicable to modifications made to an existing facility of a public accommodation to provide access for customers.¹⁰⁰

With respect to job-restructuring, the Committee reports indicate that "[j]ob restructuring means modifying a job so that a person with a disability can perform the essential functions of the position," and that this legislation does not require an employer to make any adjustment, modification or change in the job description or policy that an employer can demonstrate would fundamentally alter the essential functions of the job in question.¹⁰¹ Case law under the Rehabilitation Act is clear that job restructuring does not require the elimination of essential job functions nor the creation of a new job by combining essential job tasks from other jobs.¹⁰² Similarly, an employer is not required to lower performance standards relating to the quantity or quality of an employee's work.¹⁰³ Technological advances have produced a wide array of prod-

not be reassigned but must be allowed to compete on an equal basis for the position. Reassignment is not applicable to employees of the U.S. Postal Service if such reassignment would conflict with the terms of an applicable collective bargaining agreement.

100. HOUSE REPORT, *supra* note 3, pt. 2, at 109; pt. 3, at 59-62. Of course, an employer in a large metropolitan area where there is likely to be a large number of mobility-impaired persons may well wish to make its existing facilities accessible based on the likelihood that it will receive such a request.

101. HOUSE REPORT, *supra* note 3, pt. 2, at 109; pt. 3, at 59-62.

102. *Hall v. United States Postal Service*, 857 F.2d 1073 (6th Cir. 1988); *Wallace v. Veterans Admin.*, 683 F. Supp. 758 (D. Kan. 1988); *Dancy v. Kline*, 44 Fair Empl. Prac. Cas. (BNA) 380 (N.D. Ill. 1987).

103. *Jasany v. United States Postal Service*, 755 F.2d 1244, 1250-51 (6th Cir. 1985)(section 504 did not require recipients to lower or substantially modify their standards) (citing *Southeastern Community College v. Davis*, 442 U.S. 397, 413 (1979));

ucts that enable individuals with disabilities to compete successfully in the workplace. The provisions of such assistive devices are a common form of reasonable accommodation. Committee reports refer to adaptive computer hardware and software, electronic visual aids, talking calculators, magnifiers, audio or braille material for blind and visually impaired persons. Deaf persons can also benefit from the use of technological devices including Telecommunication Devices for the Deaf (TDDs), telephone headset amplifiers, and telephones compatible with hearing aids. However, hearing aids, eyeglasses or other personal use items are not considered reasonable accommodations.¹⁰⁴

Appropriate adjustment of examinations and training materials may be required; training should be offered in accessible locations and material should be offered in an accessible format.¹⁰⁵ In addition, the

see also *Dexler v. Tisch*, 660 F. Supp. 1418 (D. Conn. 1987) (agency not required to provide stool or platform to person with dwarfism as that would reduce efficiency below a tolerable level). *But see* *Carter v. Bennett*, 840 F.2d 63 (D.C. Cir. 1988) (assuming that lowering an employee's quantity of work standard was an accommodation); *Bruegging v. Burke*, 696 F. Supp. 674 (D.D.C. 1988) (reduction in volume of work is a reasonable accommodation but lowering the high degree of accuracy required as a critical element of position is not an accommodation), *cert. denied*, *Bruegging v. Wilson*, 488 U.S. 1009 (1989).

104. SENATE REPORT, *supra* note 24, at 32-33; HOUSE REPORT, *supra* note 3, pt. 2, at 64.

105. *Id.* The obligation to make training accessible to all employees without regard to disability, like other ADA obligations, applies whether the training is provided by the employer directly or by contract with third parties. *See* Americans With Disabilities Act § 102(b)(2). The report of the House Committee on Education and Labor explains:

For example, assume that an employer is seeking to contract with a company to provide training for the first entity's employees. Whatever responsibilities and limitations of reasonable accommodation that would apply to the employer if it provided the training itself would apply as well in the contractual situation. Thus, if the training company were planning to hold its program in a physically inaccessible location, thus making it impossible for an employee who used a wheelchair to attend the program, the employer would have a duty to consider various reasonable accommodations. These could include, for example, (1) asking the training company to identify other sites for the training that are accessible; (2) identifying other training companies that use accessible sites; (3) paying to have the training company train the disabled employee (either one on one or with other employees who may have missed the training for other reasons), or any other accommodation that might result in making the training available to the employee.

If no accommodations were available that would make the training

ADA explicitly requires that employers select and administer examinations in a manner calculated to measure the knowledge, skills, and abilities of the applicant or employee, rather than his or her impaired manual, sensory or speaking skills.¹⁰⁶

The provision of qualified readers and interpreters has been included as a form of reasonable accommodation since the section 504 regulations were first issued in 1977.¹⁰⁷ The committee reports also indicate that provision of an attendant may also be an appropriate

program accessible, or if the only options that were available would impose an undue hardship on the employer, the employer would then have met its requirements under the Act. The Committee anticipates, however, that certainly some form of accommodation could be made such that the disabled employee would not be completely precluded from receiving training that the employer may consider necessary.

As a further example, assume that an employer contracts with a hotel for a conference held for the employer's employees. Under the Act, the employer has an affirmative duty to investigate the accessibility of a location that it plans to use for its own employees. Suggested approaches for determining accessibility would be for the employer to check out the hotel first-hand, if possible, or to ask a local disability group to check out the hotel. In any event, the employer can always protect itself in such situations by simply ensuring that the contract with the hotel specifies that all rooms to be used for the conference, including the exhibit and meeting rooms, be accessible in accordance with applicable standards. If the hotel breaches this accessibility provision, the hotel will be liable to the employer for the cost of any accommodation needed to provide access to the disabled individual during the conference, as well as for any other costs accrued by the employer. Placing a duty on the employer to investigate accessibility of places that it contracts for will, in all likelihood, be the impetus for ensuring that these types of contractual provisions become commonplace in our society.

HOUSE REPORT, *supra* note 3, pt. 2, at 60.

106. Americans With Disabilities Act § 102(b)(7); *see, e.g.*, HOUSE REPORT, *supra* note 3, pt. 2, at 71-72 (discussing *Stutts v. Freeman*, 694 F.2d 666 (11th Cir. 1983)).

107. 45 C.F.R. § 84.12(b)(1989). *See, e.g.*, *Nelson v. Thornburgh*, 567 F. Supp. 369 (E.D. Pa. 1983) (readers), *aff'd mem.*, 732 F.2d 146 (3rd Cir. 1984), *cert. denied*, 469 U.S. 1188 (1985); *Carter v. Bennett*, 840 F.2d 63 (D.C. Cir. 1988) (readers); *United States v. Bd. of Trustees of Univ. of Alabama*, 908 F.2d 740 (11th Cir. 1990) (University obligated by section 504 to provide interpreters for deaf students); *Rothschild v. Grottenthaler*, 907 F.2d 286 (2d Cir. 1990) (school district obligated by section 504 to provide interpreter for deaf parents of pupil); *Bonner v. Lewis*, 857 F.2d 559 (9th Cir. 1989) (state corrections agency obligated to provide an interpreter for deaf blind prisoner).

accommodation.¹⁰⁸

1. Who is eligible for reasonable accommodation

An employer's obligation to provide a reasonable accommodation may arise at any stage in the employment process, including applicant testing and interviewing, hiring and placement, training, promotion, transfer, and discharge or retirement. Any time a person's job or disability changes, a new accommodation may be required or an existing accommodation may have to be adjusted. The statute is clear that an applicant or employee must be an individual with a disability in order to qualify for an accommodation.

Second, as the statutory language indicates, the duty to accommodate is to the "known" physical or mental limitations of a person with a disability.¹⁰⁹ This provision codifies section 504 case law which indicated that an employer is not obligated to accommodate a person's physical or mental limitations of which it had no knowledge.¹¹⁰ This usually means that an employee must make his or her disability known and request an accommodation before an employer has a duty to provide one.¹¹¹ Since it is a stereotype that all people with disabilities will need accommodation, an employer should not assume, in the absence of a request, that a particular individual will require an accommodation,¹¹² and it is discriminatory to force an accommodation on a disabled person who does not need one.¹¹³ Indeed, the ADA specifically provides that "[n]othing in this Act . . . require[s] an individual to accept an accommodation, aid, service, opportunity or benefit which such individual chooses not to accept."¹¹⁴

108. SENATE REPORT, *supra* note 24, at 33; HOUSE REPORT, *supra* note 3, pt. 2, at 64; pt. 3, at 39.

109. Americans With Disabilities Act § 102(b)(5)(A).

110. The employer's obligation to accommodate is triggered only when the employer has actual knowledge of the impairment and the need for accommodation. *Lutter v. Fowler*, 41 Fair. Empl. Prac. Cas. (BNA) 1227 (D.D.C. 1986), *aff'd*, 808 F.2d 137 (D.C. Cir. 1986); *Walker v. Atty. Gen. of the United States*, 572 F. Supp. 100 (D. D.C. 1983).

111. SENATE REPORT, *supra* note 24, at 34; HOUSE REPORT, *supra* note 3, pt. 2, at 65; pt. 3, at 39. Of course, if an individual with a known disability is having difficulty performing on the job, an employer may wish to inquire whether an accommodation would be of assistance. *Id.*

112. HOUSE REPORT, *supra* note 3, pt. 3, at 39.

113. *See, e.g., Chalk v. Dist. Court*, 840 F.2d 701 (9th Cir. 1988).

114. Americans With Disabilities Act § 501(d).

Third, only an "otherwise qualified" individual with a disability is entitled to accommodation. The term "otherwise qualified" should not be confused with that term as used in section 504, where it meant "qualified in spite of a handicap." Rather, the legislative history indicates that "otherwise qualified" refers to an applicant or employee who is able to meet all of an employer's job-related selection criteria except the criterion the individual cannot meet because of a disability. Thus, the individual must be able to satisfy all legitimate knowledge, education, and experience requirements in order to be considered for an accommodation.¹¹⁵ Providing a reasonable accommodation then permits the individual to satisfy the remaining criterion by enabling the individual to perform the essential functions of the job.¹¹⁶

2. The reasonable accommodation process

Because the reasonable accommodation requirement responds to the unique abilities and limitations of an applicant or employee in relation to specific job duties, it is not possible to set out specific rules dictating what accommodations are required for specific disabilities and specific jobs. Employers must have the flexibility to make accommodation decisions that reflect both the employee's needs and the particulars of the job to be performed. The House Committee on Education and Labor and the Senate Committee on Labor and Human Resources analyze reasonable accommodation as a process:

The Committee believes that the reasonable accommodation requirement is best understood as a process in which barriers to a particular individual's equal employment opportunity are removed. The accommodation process focuses on the needs of a particular individual in relation to problems in performance of a particular job because of a physical or mental impairment. A problem-solving approach should be used to identify the particular tasks or aspects of the work environment that limit performance and to identify possible accommodations that will result in a meaningful equal opportunity for the individual with a disability.¹¹⁷

Frequently, the applicant or employee will know exactly what ac-

115. SENATE REPORT, *supra* note 24, at 33-34; HOUSE REPORT, *supra* note 3, pt. 2, at 64-65; *see also* 45 C.F.R. § 84.12(a) (1990).

116. *Id.*

117. *Id.*

accommodation is needed from prior experience in similar employment or in coping with the disability on a daily basis. The Committee reports recognize, however, that this will not always be the case. Where an individual with a disability is unable to identify an accommodation that will enable successful job performance without imposing undue hardship on the employer, the Committees suggest that the employer undertake "four informal steps" to identify and provide an appropriate accommodation.

The first step is to identify the barriers to the employment opportunity. An employer must distinguish between essential and marginal functions of the job. Next, with the cooperation of the disabled person, the employer must identify the abilities and limitations of the applicant or employee. The employer is then in a position to identify the essential functions of the job or aspects of the work environment that the disabled person cannot satisfy because of his or her disability.

The second informal step is to identify possible accommodations. The disabled person should be consulted first and throughout the accommodation process. The Committee reports indicate that, where necessary, an employer may need to consult the state vocational rehabilitation services agency, the Job Accommodation Network of the President's Committee on Employment of People with Disabilities, or other employers.

The degree of an employer's affirmative duty to find possible accommodations is not clear. A majority of the case law under section 504 has held that once a plaintiff makes a facial showing that reasonable accommodation is possible, the burden shifts to the defendant to demonstrate that no accommodation was available that would enable the plaintiff to perform the essential functions of the job or that the only accommodations would impose an undue hardship. Then the burden shifts back to the plaintiff to rebut the employer's evidence.¹¹⁸ A number of courts interpreting the Rehabilitation Act have indicated that employers have a duty to use experts to identify possible accommodations. For example, the U.S. Court of Appeals for the Ninth Cir-

118. *Arneson v. Heckler*, 879 F.2d 393 (8th Cir. 1989); *Gardner v. Morris*, 752 F.2d 1271, 1280 (8th Cir. 1985); *Jasany v. United States Postal Service*, 755 F.2d 1244, 49-50 (6th Cir. 1985); *Prewitt v. United States Postal Service*, 662 F.2d 292, 307 (5th Cir. 1981); *see also Carter v. Bennett*, 840 F.2d 63 (D.C. Cir. 1988); *Mantolete v. Bolger*, 767 F.2d 1416 (9th Cir. 1985); *Simon v. St. Louis County*, 735 F.2d 1082, 84 (8th Cir. 1984); *Treadwell v. Alexander*, 707 F.2d 473, 475 (11th Cir. 1983).

cuit stated that, "an employer has a duty under the [Rehabilitation] Act to gather sufficient information from the applicant and from qualified experts as needed to determine what accommodations are *necessary* to enable the applicant to perform the job safely."¹¹⁹

On the other hand, it is clear that an employer's duty to investigate possible accommodations is not limitless. A court recently ruled that an employer had made sufficient efforts to accommodate an employee allergic to dust and chemical fumes when it transferred him five times and gave him a respirator which he refused to wear.¹²⁰

The third informal step is to assess the possible accommodations identified in terms of their effectiveness, reliability, and ability to be provided without undue delay. The Committees emphasized that a reasonable accommodation is to provide a "meaningful equal employment opportunity," which the committees defined as "an opportunity to attain the same level of performance as is available to non-disabled employees having similar skills and abilities."¹²¹

The final step in the accommodation process is selection and implementation of the appropriate accommodation. The Committees note that although the employee's preferred accommodation is to be given "primary consideration," the ultimate choice is the employer's. An employer is free to choose among effective accommodations and to select the accommodation that is less expensive or easier to implement as long as the selected accommodation provides a meaningful equal employment opportunity.¹²²

3. Undue hardship

A particular reasonable accommodation is not required if an em-

119. *Mantolite v. Bolger*, 767 F.2d 1416, 1423 (9th Cir. 1985) (emphasis in original); *see also* *AFGE Local 51 v. Baker*, 43 Fair Empl. Prac. 1393(BNA) (N.D. Cal. 1987).

120. *Rosiak v. U.S. Dep't of the Army*, 679 F. Supp. 444 (M. D. Pa. 1987).

121. HOUSE REPORT, *supra* note 3, pt. 2, at 66.; SENATE REPORT, *supra* note 24, at 35.

122. *Id.* The United States Court of Appeals for the District of Columbia Circuit affirmed a district court's statement of the legal standard under the Rehabilitation Act: "[A]lthough the government is not obligated under the statute to provide plaintiff with every accommodation he may request, the government must, at a minimum, provide reasonable accommodation as is necessary to enable him to perform his essential functions." *Carter v. Bennett*, 840 F.2d 63, (D.C. Cir. 1988) (quoting *Carter v. Bennett*, 651 F. Supp. 1299, 1301).

ployer can demonstrate that it would impose an undue hardship on the operation of its business.¹²³ The ADA defines "undue hardship" as "an action requiring significant difficulty or expense" when viewed in light of four factors.

The House Committee on the Judiciary indicates that a definition of "undue hardship" was provided in order to distinguish it from the *de minimis* undue hardship standard applicable to religious reasonable accommodation under Title VII of the Civil Rights Act of 1964 and to differentiate the employment limitation from the definition of "readily achievable" applicable to the removal of structural barriers in existing facilities of public accommodations.¹²⁴ The Senate Committee on Labor and Human Resources and the House Committee on Education and Labor indicate that "significant difficulty or expense" means an action "that is unduly costly, extensive, substantial, disruptive, or that will fundamentally alter the nature of the program."¹²⁵ A specified dollar figure or numerical formula was not provided by Congress. Efforts to create a presumption that an accommodation costing 10% of an employee's annual salary would constitute undue hardship, were rejected by the House Judiciary Committee¹²⁶ and on the floor of the House of Representatives as arbitrary and unduly restrictive.¹²⁷

The statutory language and legislative history also indicate that what constitutes a "significant difficulty or expense" is relative rather than absolute and will depend on the particular employer's operation and resources in relation to the nature and cost of the accommodation. Accordingly, whether an accommodation would impose an undue hardship on a covered entity must be made on a case-by-case basis, by applying four statutory factors:

- (i) the nature and cost of the accommodation needed . . . ;
- (ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;
- (iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number

123. Americans With Disabilities Act §§ 105, 101(10).

124. HOUSE REPORT, *supra* note 3, pt. 3 at 40.

125. *Id.*

126. HOUSE REPORT, *supra* note 3, pt. 3, at 41.

127. 136 CONG. REC. H2470-2475 (daily ed. May 17, 1990).

of its employees; the number, type, and location of its facilities; and (iv) the type or types of operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative or financial relationship of the facility or facilities in question to the covered entity.¹²⁸

While the factors indicate that larger employers may be required to accept a greater level of cost for a needed accommodation than smaller employers, the resources of the employer alone are not necessarily determinative. The House Judiciary Committee report explained why Congress adopted factors permitting the EEOC and the courts to consider the impact of an accommodation on the facility providing it, as well as the effects on the overall employer:

The ADA also sets forth additional factors which are specifically addressed to entities which operate more than one facility. Concerns were expressed that a court would look only at the resources of the local facility involved, or only at the resources of the parent company, in determining whether an accommodation imposed an undue hardship. The Committee believes that both of these alternatives are unsatisfactory. Instead, the Committee intends that the resources of both the local facility involved and of the parent company as well as the relationship between the two, be relevant to the undue hardship determination.

The Committee is responding particularly to concerns about employers who operate in depressed or rural areas and are operating at the margin or at a loss. Specifically, concern was expressed that an employer may elect to close a store if it is losing money or only marginally profitable rather than undertake significant investments to make reasonable accommodations to employees with disabilities. The Committee does not intend for the requirements of the Act to result in the closure of neighborhood stores or in loss of jobs. The Committee intends for courts to consider in determining "undue hardship," whether the local store is threatened with closure by the parent company or is faced with job loss as a result of the requirements of this Act.¹²⁹

The House Education and Labor Committee report also notes that additional factors may be considered in determining whether an accom-

128. Americans With Disabilities Act § 101(10)(B).

129. HOUSE REPORT, *supra* note 3, pt. 3, at 40-41.

modation imposes an undue hardship. These factors include whether an accommodation may be shared by or used by other applicants and employees with disabilities and whether external funding, e.g., a tax credit, tax deduction,¹³⁰ or payment from a vocational rehabilitation agency, is available to pay for all or a part of the cost of an accommodation. Only the net cost to the employer should be used in determining undue hardship where external funding is received or could be received.¹³¹

H. *Illegal Use of Drugs and Alcohol*

While persons who are addicted to the use of illegal drugs have a "disability" as that term is defined under the ADA,¹³² the illegal use of drugs¹³³ removes a person from the protection of the Act when an employer discharges or fails to hire a person because of such drug usage.¹³⁴ However, an individual who has successfully completed a drug rehabilitation program or who is erroneously regarded as illegally using drugs or who is successfully rehabilitated and is no longer using drugs illegally is not excluded from the definition of a "qualified individual with a disability."¹³⁵ Congress was concerned that the ADA not be

130. As amended in 1990, the Internal Revenue Code allows a deduction of up to \$15,000 per year for expenses associated with the removal of qualified architectural and transportation barriers. The 1990 amendment also permits eligible small businesses to receive a tax credit for certain costs of compliance with the ADA. An eligible small business is one whose gross receipts do not exceed \$1,000,000 or whose workforce does not consist of more than 30 full-time workers. Qualifying businesses may claim a credit of up to 50 percent of eligible access expenditures that exceed \$250 but do not exceed \$10,250. Examples of eligible access expenditures include the necessary and reasonable costs of removing barriers, providing readers and interpreters, and acquiring or modifying equipment or devices.

131. HOUSE REPORT, *supra* note 3, pt. 2, at 69.

132. *Id.* at pt. 2, at 51; pt. 3, at 28.

133. A "drug" is defined in section 101(6)(B) as a "controlled substance" as defined in schedules I through V of the Controlled Substance Act. In general, these schedules include drugs with varying degrees of potential for addiction and abuse, some of which also have legitimate medical uses and which may be prescribed by a physician.

134. Americans With Disabilities Act § 104(a). In addition, such an individual is also removed from the definition of an individual with a disability pursuant to section 510(a). A similar provision was made applicable to Title V of the Rehabilitation Act of 1973 by amending the latter act's definition of an "individual with handicaps." See 29 U.S.C. § 706(8).

135. Americans With Disabilities Act § 104(b).

used as a weapon by persons using illegal drugs against an employer who was trying to rid its workplace of drugs and drug users. The Conference Committee made this point plainly:

The provision excluding an individual who engages in the illegal use of drugs from protection is intended to ensure that employers may discharge or deny employment to persons who illegally use drugs on that basis, without fear of being held liable for discrimination. The provision is not intended to be limited to persons who use drugs on the day of, or within a matter of days or weeks before, the employment action in question. Rather, the provision is intended to apply to a person whose illegal use of drugs occurred recently enough to justify a reasonable belief that a person's drug use is current.¹³⁶

In order to protect employers, the ADA specifically provides that an employer may prohibit the use of illegal drugs or alcohol in the workplace and to prohibit employees from being under the influence of illegal drugs or alcohol while on the job. An employer may hold an employee who is an alcoholic or drug user to the same standards of performance and conduct that it requires of all its employees even if performance or behavior problems result from the illegal use of drugs or the use of alcohol. Employers may comply with the requirements of the Drug Free Workplace Act of 1988,¹³⁷ and otherwise comply with any regulations pertaining to drug or alcohol use by employees in industries regulated by the Department of Defense, the Department of Transportation, and the Nuclear Regulatory Commission.¹³⁸ Finally, the ADA explicitly permits employers to utilize drug tests to screen applicants and employees and to take action based upon the results of such a test.¹³⁹

136. HOUSE REPORT, *supra* note 3, at 64.

137. 41 U.S.C. § 701 *et. seq.*

138. Americans With Disabilities Act § 104(c).

139. *Id.* at § 104(d)(2). A drug test is not considered a medical examination under the ADA. § 104(d)(1). A person with a positive drug test that indicates the illegal use of drugs still may challenge the accuracy of the test and allege that he or she is being "erroneously regarded" as an illegal user of drugs pursuant to section 104(b)(3). The ADA itself does not provide any standard by which the accuracy or validity of a drug test result is to be determined. H.R. REP. NO. 101-596, 101st Cong., 2d Sess. 65 (1990).

I. *Medical Examinations and Inquiries About Disability*

Historically, job applications and medical examinations frequently inquired about an applicant's general health and fitness and were used as screening devices to exclude persons with disabilities from positions without any inquiry into an applicant's capacity to perform the position in question.¹⁴⁰ The ADA strictly regulates such inquiries. An employer may not, in a job application or in an interview, ask whether an applicant has a disability or about the nature or severity of a disability. The Act permits employers to inquire of an applicant's ability to do essential job functions. An employer may require post-offer, pre-entry medical examinations if required of all new employees for a particular job classification (e.g., firefighters, and police officers) regardless of disability. The medical examination is allowed if conducted prior to assuming job duties and if the results of the examination are used in compliance with the legislation, including provisions for a reasonable accommodation for an applicant whose medical examination reveals an inability to perform an essential function of the job. The results of such an examination must be kept confidential and in separate medical files, except where it is necessary to inform supervisors or managers of work restrictions or needed accommodations, safety personnel if the disability might require emergency treatment or government officials investigating compliance with the ADA.¹⁴¹

Inquiries concerning an employee's health or disability status must be job-related and consistent with business necessity.¹⁴² Examinations and inquiries permitted under this standard include those mandated by federal, state or local law applicable to the transportation industry and other industries where public safety is a paramount concern.¹⁴³ Also explicitly permitted are voluntary medical examinations offered by an employer as part of an employee health program.¹⁴⁴ Examinations and inquiries of current employees are subject to the same confidentiality restrictions and the same prohibition against discriminatory use of the information that are applicable to pre-employment inquiries.¹⁴⁵

140. SENATE REPORT, *supra* note 24, at 37; HOUSE REPORT, *supra* note 3, pt. 2, at 73.

141. Americans With Disabilities Act § 102(c)(2).

142. *Id.* at § 102(c)(4)(A).

143. *Id.*

144. *Id.* at § 102(c)(4)(B).

145. *Id.* at § 102(c)(4)(C).

J. Enforcement and Administration

The ADA incorporates the powers, remedies and procedures of Title VII of the Civil Rights Act of 1964 for its enforcement scheme. The Equal Employment Opportunity Commission is charged with responsibility for implementing and enforcing the ADA's employment provisions, except with respect to litigation against state and local governments, which is granted to the Attorney General.¹⁴⁶ The Commission must issue substantive regulations by July 26, 1991.¹⁴⁷ An individual who believes he or she has been discriminated against in employment on the basis of disability may file an administrative charge of discrimination with the Equal Employment Opportunity Commission or with state or local fair employment agencies having work-sharing agreements with the Commission. In addition to possible litigation by the Commission, a charging party may institute a private action in federal or state court after receiving a right to sue letter from the Commission. The remedies available for violations of the ADA are the same as under Title VII: equitable and injunctive relief including hiring or reinstatement, backpay, restoration of benefits¹⁴⁸ and attorneys' fees for the prevailing party.¹⁴⁹ The ADA also prohibits any covered entity from retaliating against any individual who opposes a practice he or she believes is unlawful under the Act or who files a charge or participates in any proceeding under the ADA. Also prohibited is any attempt to coerce, intimidate or threaten any person from the enjoyment of any right provided by the ADA.¹⁵⁰

146. Section 107(a) incorporates by reference §§ 705, 706, 707 and 710 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, -4,-5,-6,-8,-9 (1988).

147. Americans With Disabilities Act § 106.

148. Section 706(g) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g) (1988).

149. Curiously, the ADA has two different attorneys' fees provisions, applicable to employment litigation. Section 706(k) of Title VII, provides for attorneys' fees to the prevailing party other than the government as part of the award of court costs. Section 505 provides for attorneys' fees for administrative and judicial proceedings and specifically authorizes the award of "litigation expenses." Americans With Disabilities Act § 505.

150. *Id.* at § 503.