

EMPLOYMENT DISCRIMINATION AGAINST SUBSTANCE ABUSERS: THE FEDERAL RESPONSE

Since colonial times, employers in the United States have sought to control the use of alcohol and other drugs¹ by their employees.² Awareness of and concern over substance abuse dramatically increased during the late 1980s.³ The increase was fueled, in part, by the striking nature of several workplace incidents related to substance abuse.⁴ For example, in 1986, a string of Conrail locomotives collided with an Amtrak train, killing sixteen people; the Conrail employees who were operating the locomotives at the time of the accident tested positive for marijuana.⁵ Four years later, in 1990, three Northwest Airlines pilots were convicted of flying a jetliner while under the influence of alcohol.⁶

The response of the federal government to the problem of substance abuse in the workplace has been ambivalent. On the one hand, in 1988 Congress passed the Drug-Free Workplace Act, which requires federal contractors and grantees to adopt a policy prohibiting the possession or use of illegal drugs in the workplace and to sanction employees who violate that policy.⁷ On the other hand, in the mid-1970s the federal government recognized that, at least in some instances, the Rehabilitation Act of 1973 prohibited employers from discriminating against substance abusers.⁸

The Rehabilitation Act ("Act") prohibits discrimination on the basis of disability by federal employers, contractors and grantees.⁹

¹ Although alcohol is a drug, this note will distinguish, as courts and statutes typically have, between alcohol and other drugs.

² Genevieve M. Ames, *Alcohol-Related Movements and Their Effects on Drinking Policies in the American Workplace: An Historical Review*, 19 J. DRUG ISSUES 489, 491-93 (1989). Ames notes that colonial workers, whose wages were often alcoholic beverages supplied during the workday, fiercely resisted efforts by employers to limit workplace drinking. *Id.* at 491-92.

³ See Steven W. Gust & J. Michael Walsh, *Research on the Prevalence, Impact, and Treatment of Drug Abuse in the Workplace*, in DRUGS IN THE WORKPLACE: RESEARCH AND EVALUATION DATA, NATIONAL INSTITUTE ON DRUG ABUSE MONOGRAPH 91 1, 1 (Steven W. Gust & J. Michael Walsh eds., 1989).

⁴ See *id.*

⁵ N.Y. TIMES, Jan. 15, 1987, at A1. The tests did not indicate whether the employees had been using marijuana at the time of the accident or were longtime users. *Id.*

⁶ N.Y. TIMES, Aug. 21, 1990, at A1.

⁷ Pub. L. No. 100-690, 102 Stat. 4307 (1988) (codified at 42 U.S.C.S. §§ 701-706 (Law. Co-op. Supp. 1990)).

⁸ 29 U.S.C. §§ 701-796 (1988).

⁹ See *id.* §§ 791, 793, 794.

After the United States Attorney General and the judiciary interpreted the Act's definition of "individual with handicaps"¹⁰ to encompass substance abusers, Congress passed an amendment that expressly addresses the protection of substance abusers under the Act.¹¹ The amendment excludes from the Act's definition of "individual with handicaps" those individuals whose substance abuse impairs their performance or threatens public safety or property.¹² In determining which substance abusers the Act protects, some courts have concluded that, under the amendment, substance abusers must meet the same requirements for protection as individuals with other disabilities.¹³ Other courts have held that the amendment imposes an additional, and unique, requirement upon substance abusers seeking protection under the Act.¹⁴

Because substance abuse often differs from other types of disabilities, treating substance abusers and individuals with other disabilities similarly is sometimes difficult. In many instances, an employee who is a drug abuser is engaging in illegal activity.¹⁵ Also, detoxification and rehabilitation often entail extended absences from work.¹⁶ In addition, the high rate of relapse among recovering substance abusers means that a single, finite act by the employer, such as building a wheelchair ramp, will rarely solve the problem.¹⁷

In July, 1990, President Bush signed into law the Americans with Disabilities Act of 1990 ("ADA"), a comprehensive prohibition against discrimination on the basis of disability.¹⁸ In the employment

¹⁰ Except in discussions of the interpretation of the term "individual with handicaps" under the Rehabilitation Act, this note will use the phrase "individuals with disabilities" to refer to individuals potentially covered by federal legislation prohibiting discrimination on the basis of disability.

¹¹ See Pub. L. No. 95-602, § 122, 92 Stat. 2955, 2984-85 (1978) (codified at 29 U.S.C. § 706(8)(B) (1988)). See *infra* notes 106-42 and accompanying text for a discussion of the application of the Act's definition of "individual with handicaps" to substance abusers. See *infra* notes 143-60 and accompanying text for a discussion of the amendment and its history.

¹² 29 U.S.C. § 706(8)(B) (1988).

¹³ See, e.g., *Copeland v. Philadelphia Police Dep't*, 840 F.2d 1139, 1148-49 (3d Cir. 1988), *cert. denied*, 490 U.S. 1004 (1989); *Wallace v. Veterans Admin.*, 683 F. Supp. 758, 762-64 (D. Kan. 1988).

¹⁴ See, e.g., *Heron v. McGuire*, 803 F.2d 67, 68-69 (2d Cir. 1986); *Burka v. New York City Transit Auth.*, 680 F. Supp. 590, 596-601 (S.D.N.Y. 1988).

¹⁵ See Federal Controlled Substances Act, 21 U.S.C. § 812 (1988).

¹⁶ See Diana Chapman Walsh, *A Randomized Trial of Treatment Options for Alcohol-Abusing Workers*, 325 NEW ENG. J. MED. 775, 775 (1991); George E. Vaillant, *What Can Long-term Follow-up Teach Us About Relapse and Prevention of Relapse in Addiction*, 83 BRIT. J. ADDICTION 1147, 1149 (1988).

¹⁷ See Vaillant, *supra* note 16, at 1149.

¹⁸ Pub. L. No. 101-336, 104 Stat. 327 (1990).

area, the ADA prohibits private employers with fifteen or more employees from discriminating against qualified individuals with disabilities.¹⁹ Like the Rehabilitation Act, the ADA contains provisions that focus upon substance abusers.²⁰ For example, the ADA provides that both the Rehabilitation Act and the ADA protect only former users of illegal drugs.²¹ The ADA, however, leaves unclear whether courts should hold substance abusers to the same, or to a different, standard than they hold individuals with other disabilities.²²

This note will discuss the problem of substance abuse in employment and will explore the protections from employment discrimination available to substance abusers under both the Rehabilitation Act and the ADA. Section I of this note provides a brief overview of the scope of the problem of substance abuse in employment and the nature of recovery from substance abuse.²³ Section II reviews generally the anti-discrimination provisions of the Rehabilitation Act, the regulations implementing those provisions, and the theory underlying the prohibition of discrimination based on disability.²⁴ Section III explores the specific protections that the Rehabilitation Act's anti-discrimination provisions offer substance abusers.²⁵ This section includes a discussion of the courts' attempts to create guidelines delineating the duty of employers under the Rehabilitation Act to accommodate employees with substance abuse problems.²⁶ Section IV reviews the employment discrimination provisions of the ADA, with special emphasis upon the provisions concerning substance abuse.²⁷ Section V draws on the note's discussion of the Rehabilitation Act to analyze the degree of protection afforded substance abusers under the Rehabilitation Act, and to critique the ADA's attempt to address the problem of substance abuse in employment.²⁸ This note concludes that, although both the Rehabilitation Act and the ADA leave the courts free to hold substance

¹⁹ See *id.* §§ 101(5), 102(a). The ADA's prohibition on employment discrimination on the basis of disability takes effect on July 26, 1992. *Id.* § 108. Until July 26, 1994, the prohibition only applies to employers with twenty-five or more employees. *Id.* § 101(5)(a).

²⁰ See *id.* §§ 104, 510.

²¹ *Id.* §§ 104(a)-(b), 512.

²² See *infra* notes 334-37 and accompanying text.

²³ See *infra* notes 29-45 and accompanying text.

²⁴ See *infra* notes 50-105 and accompanying text.

²⁵ See *infra* notes 106-270 and accompanying text.

²⁶ See *infra* notes 203-63 and accompanying text.

²⁷ See *infra* notes 271-319 and accompanying text.

²⁸ See *infra* notes 320-52 and accompanying text.

abusers to a higher standard than individuals with other disabilities in order to receive protection under federal laws prohibiting employment discrimination, courts should hold substance abusers and individuals with other disabilities to the same standard.

I. SUBSTANCE ABUSE AND EMPLOYMENT

In a report submitted to Congress in 1990, Acting Surgeon General James O. Mason estimated that approximately 10.5 million adults in the United States showed signs of alcoholism.²⁹ A 1987 survey of treatment centers for substance abuse found that, during the year ending October 30, 1987, 830,000 individuals were treated for substance abuse.³⁰ For employers, the costs of substance abuse can be high. The value of lost employment and reduced productivity caused by alcoholism alone in 1986 was estimated at over \$64 billion.³¹

²⁹ James O. Mason, *Preface* to NATIONAL INST. ON ALCOHOL ABUSE AND ALCOHOLISM, U.S. DEPT. OF HEALTH AND HUMAN SERVICES, SEVENTH SPECIAL REPORT TO THE U.S. CONGRESS ON ALCOHOL AND HEALTH FROM THE SECRETARY OF HEALTH AND HUMAN SERVICES at ix (1990) [hereinafter SEVENTH SPECIAL REPORT]. As the report discusses, many diagnostic systems, including the World Health Organization's 1978 *International Classification of Diseases* and the American Psychiatric Association's 1987 *Diagnostic and Statistical Manual of Mental Disorders*, distinguish between alcoholism (alcohol dependence) and alcohol abuse. *Id.* at 3. Although alcohol dependence, unlike alcohol abuse, involves physical dependence on alcohol, both alcohol dependence and alcohol abuse impair the individual's ability to function socially and vocationally. *Id.* Most, if not all, of the cases and statutes discussed in this note refer to individuals with alcohol problems as alcoholics without discussion of the distinction between alcohol dependence and alcohol abuse.

³⁰ NATIONAL INST. ON DRUG ABUSE AND THE NAT'L INST. ON ALCOHOL ABUSE AND ALCOHOLISM, U.S. DEPT. OF HEALTH AND HUMAN SERVICES, NATIONAL DRUG AND ALCOHOLISM TREATMENT UNIT SURVEY: 1987 SPECIAL REPORT 24 (1987) [hereinafter TREATMENT UNIT SURVEY].

³¹ See SEVENTH SPECIAL REPORT, *supra* note 29, at ix; see also MARK A. ROTHSTEIN, MEDICAL SCREENING AND THE EMPLOYEE HEALTH COST CRISIS 98 (1989) (alcoholism and drug addiction cost American business ninety-nine billion dollars annually); BOSTON GLOBE, Sept. 12, 1991, at A1 (alcoholism costs U.S. economy more than forty-four billion dollars annually in diminished production and treatment costs). For a criticism of attempts to measure the cost in lost productivity of alcohol abuse, see Richard M. Weiss, *Determining the Effects of Alcohol Abuse on Employee Productivity*, 40 AM. PSYCHOLOGIST 578, 578 (1985).

In a survey conducted in New England during the 1980's, thirteen percent of the respondents reported that they had gone to work at least once in the previous month under the influence of alcohol or "hung over," and two percent reported that they went to work under the influence of alcohol or hung over at least once a week. Ralph W. Hingson et al., *Employee Drinking Patterns and Accidental Injury: A Study of Four New England States*, 46 J. STUD. ON ALCOHOL 298, 300 (1985). The same survey found that, even if employees do not drink while at work, those employees who average five or more drinks daily are significantly more likely than employees who do not drink to have an accident requiring medical attention. Other studies have found that employees who tested positive for drugs at the time of their

Although many substance abusers seek treatment,³² a significant majority of substance abusers relapse. Many substance abusers relapse several times.³³ One study found, for example, that ninety-five percent of the heroin addicts and alcoholics followed in the study had relapsed within two years of undergoing treatment, and that the average alcoholic in the study had been detoxified fifteen times in an eight-year period.³⁴ The same study noted, however, that the number of subjects who reached stable abstinence increased over time.³⁵

The author of that study theorized that, for substance abusers, avoiding relapse is related to the degree of structure in the substance abuser's life.³⁶ That structure may come from the close supervision of an employer or from other activities, such as Alcoholics Anonymous or Narcotics Anonymous membership.³⁷ A group of social scientists studying the relationship of the work environment to alcoholism have similarly suggested that a highly structured work environment helps prevent relapse.³⁸ For example, they argue that employment that does not include travel promotes recovery from alcoholism because it allows the individual to attend regularly meetings of a support group and reduces the number of times that the individual socializes with people unaware of his or her alcoholism.³⁹ The job characteristics that the authors list as conducive to recovery

application for employment had higher absenteeism rates than other employees, were more likely to be dismissed than other employees, and were involved in more on-the-job traffic accidents than other employees. See Dennis J. Crouch et al., *A Critical Evaluation of the Utah Power and Light Company's Substance Abuse Management Program: Absenteeism, Accidents and Costs*, in *DRUGS IN THE WORKPLACE*, *supra* note 3, at 181-86; Jacques Normand & Stephen Salyards, *An Empirical Evaluation of Preemployment Drug Testing in the United States Postal Service: Interim Report of Findings*, in *DRUGS IN THE WORKPLACE*, *supra* note 3, at 128-31.

³² See TREATMENT UNIT SURVEY, *supra* note 30, at 24 (surveyed treatment units reported treating over 830,000 individuals for substance abuse in year ending October 30, 1987); BOSTON GLOBE, Sept. 12, 1991, at A1 (1.4 million Americans are in alcoholism treatment at any given time).

³³ Vaillant, *supra* note 16, at 1148.

³⁴ *Id.* at 1148-49.

³⁵ *Id.* at 1149; see also Walsh, *supra* note 16, at 778 (alcoholics undergoing treatment all showed "substantial and sustained improvement" in job functioning, regardless of treatment type).

³⁶ Vaillant, *supra* note 16, at 1155-56.

³⁷ *Id.* at 1153-55.

³⁸ See Russel M. Newton et al., *The Role of Structured Work in Alcoholism Rehabilitation*, J. REHABILITATION, Oct.-Dec. 1988, 63, 63-64. The authors' theory is that a highly structured work environment rewards abstinence and punishes drinking and drinking-related behaviors more consistently than does a relatively unstructured work environment. *Id.* at 64.

³⁹ *Id.* at 65-66.

include set hours, required attendance and a high degree of accountability.⁴⁰

Additionally, a recent study suggests that substance abusers who start their treatment with intensive inpatient care are less likely to relapse.⁴¹ The study, which focused on alcoholic workers, found that individuals whose treatment began with three weeks of inpatient care, followed by compulsory attendance at Alcoholics Anonymous, were twice as likely to have been continuously abstinent for two years than individuals whose treatment consisted solely of participation in Alcoholics Anonymous.⁴² The group whose treatment began with inpatient care also had only a third the rate of subsequent alcoholism-related hospitalization as did the Alcoholics Anonymous group.⁴³ Those alcoholics in the study who also used cocaine similarly fared better when assigned initially to hospital treatment, rather than Alcoholics Anonymous or Narcotics Anonymous.⁴⁴ Because the individuals who received hospital treatment initially were less likely to relapse or need subsequent hospital care, the cost of treatment for those individuals was ultimately only ten percent more than the cost for individuals who initially participated only in Alcoholics Anonymous.⁴⁵

In sum, the effect of substance abuse upon employees is a costly problem for their employers. Even if employees with substance abuse problems seek treatment, the probability of relapse is high. Recent studies have suggested, however, that the rate of relapse may be lessened by adding structure to the employee's work environment and by beginning treatment for substance abuse with hospitalization.

II. THE REHABILITATION ACT OF 1973

Substance abusers seeking employment often confront significant social and psychological barriers.⁴⁶ Many employers refuse to hire employees who are substance abusers or who have a history of substance abuse due to the employer's belief that substance abusers

⁴⁰ *Id.* at 65.

⁴¹ Walsh, *supra* note 16, at 778.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 778-79.

⁴⁵ *Id.* at 779-80.

⁴⁶ Michael W. Forcier, *Employment Discrimination against Alcoholics and Drug Addicts: The Federal Response*, CONTEMPORARY DRUG PROBS., Spring 1982, at 39, 48.

are poor employment risks who are not worthy of any investment in job training.⁴⁷ During this century, however, a number of medical and psychological authorities have recognized substance abuse as a disease.⁴⁸ Relying in part upon those designations of substance abuse as a disease, Attorney General Griffin Bell declared, in 1977, that the anti-discrimination provisions of the Rehabilitation Act of 1973 protected substance abusers.⁴⁹

The primary purpose of the Rehabilitation Act is to authorize rehabilitative programs for individuals with disabilities.⁵⁰ These programs help individuals with disabilities find work, live independently and participate in their communities.⁵¹ To further the objectives of the programs, the Act includes provisions that grant individuals with disabilities some of the same protections accorded victims of sex and race discrimination by the Civil Rights Act of 1964.⁵²

Sections 501, 503 and 504 of the Rehabilitation Act contain its anti-discrimination provisions.⁵³ Section 501(b) requires federal executive agencies to take affirmative action to employ and advance individuals with disabilities; section 503(a) makes a similar requirement of contractors when performing federal contracts worth more

⁴⁷ *Id.*

⁴⁸ See, e.g., AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 165 (3d rev. ed. 1987) (continued use of psychoactive substances leading to social, occupational, psychological or physical problems is mental disorder); WORLD HEALTH ORG., MENTAL DISORDERS: GLOSSARY AND GUIDE TO THEIR CLASSIFICATION IN ACCORDANCE WITH THE NINTH REVISION OF THE INTERNATIONAL CLASSIFICATION OF DISEASES 43 (1978) (physical and psychological need to use alcohol or drugs continuously or periodically is mental disorder).

⁴⁹ 43 Op. Att'y Gen. No. 12, 6 (Apr. 12, 1977).

⁵⁰ See H.R. REP. NO. 244, 93d Cong., 1st Sess. 1 (1973), *reprinted in* 1973 U.S.C.C.A.N. 2076, 2076 (1973). Congress enacted the Rehabilitation Act to replace the Vocational Rehabilitation Act. *Id.*

⁵¹ 29 U.S.C. § 701 (1988).

⁵² *Id.* §§ 791, 793, 794; see also UNITED STATES COMM'N ON CIVIL RIGHTS, ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES, CLEARINGHOUSE PUBLICATION 81 49 (1983). Following the practice of the majority of the courts and commentators, textual references in this note to the anti-discrimination provisions of the Rehabilitation Act will use their session law section numbers. Citations will be to the United States Code.

Section 504 of the Act, which prohibits discrimination by federal grantees on the basis of disability, was initially proposed as an amendment to title VI of the Civil Rights Act. 118 CONG. REC. 9712 (1972) (remarks of Rep. Vanik); 118 CONG. REC. 525-26 (1972) (remarks of Sen. Humphrey). Both Representative Vanik and Senator Humphrey indicated that section 504 was equivalent to their proposed amendment to the Civil Rights Act. 119 CONG. REC. 7114 (1973) (remarks of Rep. Vanik); 119 CONG. REC. 6145 (1973) (remarks of Sen. Humphrey).

⁵³ 29 U.S.C. §§ 791(b), 793(a), 794(a) (1988).

than \$2,500.⁵⁴ Courts and administrative agencies have interpreted these affirmative action provisions as implicitly prohibiting discrimination.⁵⁵ Section 504(a) makes no reference to affirmative action, but it does prohibit any program or activity that receives federal financial assistance from discriminating against otherwise qualified individuals solely on the basis of their disabilities.⁵⁶ The Act's anti-discrimination provisions do not specifically apply to private employers. The federal contractors and grantees covered by the provisions, however, may comprise at least half of all private employers in the United States.⁵⁷

⁵⁴ Section 501(b) provides that:

Each department, agency and instrumentality (including the United States Postal Service and Postal Rate Commission) in the executive branch shall . . . submit to the [Equal Employment Opportunity] Commission and to the [Inter-agency Committee on Handicapped Employees] an affirmative action program plan for the hiring, placement, and advancement of individuals with handicaps in such department, agency, or instrumentality.

29 U.S.C. § 791(b).

Section 503(a) provides that:

Any contract in excess of \$2,500 entered into by any Federal department or agency for the procurement of personal property and nonpersonal services (including construction) for the United States shall contain a provision requiring that, in employing persons to carry out such contract, the party contracting with the United States shall take affirmative action to employ and advance in employment qualified individuals with handicaps

29 U.S.C. § 793(a).

⁵⁵ See UNITED STATES COMM'N ON CIVIL RIGHTS, *supra* note 52, at 54-55 (citing Shirley v. Devine, 670 F.2d 1188, 1200-04 (D.C. Cir. 1982)).

⁵⁶ Section 504(a) provides that:

No otherwise qualified individual with handicaps in the United States . . . shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any executive agency or by the United States Postal Service.

29 U.S.C. § 794(a).

The Supreme Court has held that, under section 504, individuals may bring employment discrimination claims against federally funded programs even if the primary objective of the federal assistance is *not* to provide employment. *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 635 (1984). The *Darrone* Court, relying on *Grove City College v. Bell*, 465 U.S. 555 (1984), also held that section 504 applied only to the specific program or activity that received the federal funds. *Id.* at 635-36. In 1988, Congress amended section 504 to add a definition of "program or activity" that overturned the *Darrone* Court's narrow interpretation of the term. 3 CHARLES A. SULLIVAN ET AL., *EMPLOYMENT DISCRIMINATION* § 26.1.1, at 2122 (2d ed. 1988) [hereinafter *EMPLOYMENT DISCRIMINATION*]. See 29 U.S.C. § 794(b) (1988) for the text of the amendment.

⁵⁷ One commentator has estimated that section 503 alone covers approximately half of all businesses in the United States. Forcier, *supra* note 46, at 40. Judicial construction of the statute, however, has limited the coverage of the Act's anti-discrimination provisions in some instances. See generally *EMPLOYMENT DISCRIMINATION*, *supra* note 56, at §§ 26, 27, 29. For

A commentator writing several years after the passage of the Rehabilitation Act noted that the courts had yet to explore the unique problems of prohibiting discrimination on the basis of disability.⁵⁸ Because an individual with a disability is often unable to perform certain tasks, the models of discrimination developed in response to discrimination based on sex, race or ethnic group do not always readily transfer to instances of discrimination based on disability.⁵⁹ In the case of sex, race or ethnic group discrimination, the characteristic provoking the discrimination has no bearing on the individual's ability to perform the duties of the job.⁶⁰ Where individuals with disabilities are victims of discrimination, however, the characteristic that leads to discrimination—the disability—does sometimes impair the individual's ability to perform job duties.⁶¹

In response to the difference between discrimination based on disability and discrimination based on sex, race or ethnic group, the administrative agencies and courts that implemented and interpreted the Rehabilitation Act developed the concept of "reasonable accommodation."⁶² A reasonable accommodation is a modification in the way that a job is performed that allows an individual with a disability to perform the job duties.⁶³ Examples of reasonable accommodations include making facilities readily accessible, restructuring jobs, modifying work schedules, acquiring or modifying equipment or devices, and hiring readers or interpreters.⁶⁴

example, the Supreme Court has held that section 504 applies only to direct recipients of federal funds because only those recipients are in a position to decide whether to accept the federal funds. *United States Dep't of Transp. v. Paralyzed Veterans*, 477 U.S. 597, 605-06 (1986).

⁵⁸ See Mark E. Martin, Note, *Accommodating the Handicapped: The Meaning of Discrimination Under Section 504 of the Rehabilitation Act*, 55 N.Y.U. L. REV. 881, 888 (1980).

⁵⁹ *Id.* at 883-84.

⁶⁰ See *id.* at 883.

⁶¹ See *id.* In his preface to regulations proposed to implement section 504, the Secretary of the Department of Health, Education and Welfare made the same point:

The premise of both title VI and title IX is that there are no inherent differences or inequalities between the general public and the persons protected by these statutes and, therefore, there should be no differential treatment in the administration of Federal programs. The concept of section 504, on the other hand, is far more complex. Handicapped persons may require different treatment in order to be afforded equal access to federally assisted programs and activities, and identical treatment may, in fact, constitute discrimination.

41 Fed. Reg. 20,296 (1976).

⁶² See generally UNITED STATES COMM'N ON CIVIL RIGHTS, *supra* note 52, at 102-14.

⁶³ MASSACHUSETTS COMM'N AGAINST DISCRIMINATION, MASSACHUSETTS COMM'N AGAINST DISCRIMINATION'S GUIDELINES: EMPLOYMENT DISCRIMINATION ON THE BASIS OF HANDICAP—CHAPTER 151B at 5 (1986); see also Martin, *supra* note 58, at 885-86.

⁶⁴ 45 C.F.R. § 84.12(b) (1989).

The concept of reasonable accommodation first appeared in the Department of Health, Education and Welfare ("HEW") regulations implementing section 504 of the Rehabilitation Act.⁶⁵ The 1977 regulation required that programs receiving federal funds make reasonable accommodation to the known disabilities of otherwise qualified applicants or employees.⁶⁶ One year later, the Equal Employment Opportunity Commission ("EEOC"), which was responsible for implementing section 501, and the Department of Labor ("DOL"), which was responsible for implementing section 503, issued similar regulations that required federal employers and federal contractors to make reasonable accommodations to the disabilities of employees and applicants.⁶⁷

Two years after HEW issued its reasonable accommodation regulation, the United States Supreme Court, in *Southeastern Community College v. Davis*, stated that the refusal of a federally funded program to make modifications to meet the needs of an individual with a disability might, in some circumstances, violate section 504 of the Rehabilitation Act.⁶⁸ In *Davis*, the Court held that a nursing program's refusal to admit a deaf applicant did not violate section 504.⁶⁹ The Court, noting that section 504, unlike sections 501 and 503, does not require affirmative action, concluded that section 504 does not require recipients of federal funds to modify their pro-

⁶⁵ UNITED STATES COMM'N ON CIVIL RIGHTS, *supra* note 52, at 102.

⁶⁶ 42 Fed. Reg. 22, 677 (1977) (codified at 45 C.F.R. § 84.12 (1989)). The regulation provides that "[a] recipient shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program." *Id.* See *infra* notes 77-80 and accompanying text for a discussion of the definition of "otherwise qualified." HEW was redesignated the Department of Health and Human Services by the Department of Education Organization Act. 20 U.S.C. § 3508 (1988).

⁶⁷ See 43 Fed. Reg. 49,278-79 (1978) (codified at 41 C.F.R. § 60-741.6(d) (1990)) (federal contractors covered by section 503 must make a reasonable accommodation to the disabilities of employees or applicants unless they can demonstrate that the accommodation would impose undue hardship on their business); 43 Fed. Reg. 12,295 (1978) (codified at 29 C.F.R. § 1613.704 (1990)) (federal agencies covered by section 501 must reasonably accommodate known disabilities of qualified employees or applicants unless the agency can prove that the accommodation would impose undue hardship on the operation of the program). Although Congress never incorporated the reasonable accommodation regulations into the anti-discrimination provisions of the Rehabilitation Act, it did provide in a 1978 amendment to the Act that courts could consider the reasonableness of the cost of needed accommodations and the availability of any alternatives to the accommodation or other appropriate relief in order to achieve an equitable and appropriate remedy for violations of section 501. Pub. L. No. 95-602, § 120, 92 Stat. 2982 (1978) (codified at 29 U.S.C. § 794(a)(1) (1988)).

⁶⁸ See 442 U.S. 397, 412-13 (1979).

⁶⁹ *Id.* at 414.

grams to meet the needs of individuals with disabilities.⁷⁰ In light of evidence demonstrating that the school would have to modify the clinical component of its program to provide extensive personal supervision for the applicant if she was to satisfy the clinical requirement without endangering patients, the Court held that the school's refusal to admit the plaintiff was not discriminatory.⁷¹

Despite its assertion that section 504 did not impose a duty upon federal grantees to modify their programs to meet the needs of individuals with disabilities, the Court also stated that situations might exist where a refusal to modify requirements and practices would be discriminatory.⁷² The Court stated that if a program could obtain, without an undue financial or administrative burden, technological devices that would allow individuals with disabilities to participate in a program, refusal to obtain those devices might be discriminatory.⁷³ Although the Court couched its discussion of the possibility that section 504 requires modifications in affirmative action language, later commentators have concluded that the Court was addressing the issue of accommodation.⁷⁴ In subsequent cases, lower courts have recognized that the Rehabilitation Act imposes a duty upon employers to make a reasonable accommodation to the disabilities of employees and applicants.⁷⁵

Reasonable accommodation is integral to the determination of which individuals with disabilities are protected under the Rehabilitation Act's anti-discrimination provisions.⁷⁶ According to the language of those provisions and their implementing regulations, the Act protects only those individuals with disabilities who are qualified or otherwise qualified.⁷⁷ For example, section 504 prohibits federal grantees from discriminating against an "otherwise qualified" individual with a disability on the basis of his or her disability.⁷⁸ In

⁷⁰ *Id.* at 410-12.

⁷¹ *Id.* at 414.

⁷² *Id.* at 412-13.

⁷³ *Southeastern*, 442 U.S. at 412.

⁷⁴ See UNITED STATES COMM'N ON CIVIL RIGHTS, *supra* note 52, at 110-11; Martin, *supra* note 58, at 885.

⁷⁵ UNITED STATES COMM'N ON CIVIL RIGHTS, *supra* note 52, at 106.

⁷⁶ *Id.* at 117.

⁷⁷ See 29 U.S.C. §§ 793(a), 794(a) (1988); 29 C.F.R. § 1613.703 (1990). See generally UNITED STATES COMM'N ON CIVIL RIGHTS, *supra* note 52, at 114-18.

⁷⁸ 29 U.S.C. § 794(a). Section 503 of the Act prohibits discrimination by federal contractors against "qualified individuals with handicaps." *Id.* § 793(a). The EEOC regulations implementing section 501 prohibit federal agencies from discriminating against a "qualified physically or mentally handicapped person." 29 C.F.R. § 1613.703.

defining which individuals with disabilities are qualified or otherwise qualified, the regulations implementing the Rehabilitation Act employ the concept of reasonable accommodation.⁷⁹ HEW, for example, defines "otherwise qualified individuals with handicaps" as those who can perform the essential functions of a job *once the employer makes a reasonable accommodation*.⁸⁰ The anti-discrimination protections of the Act, therefore, extend only to individuals with disabilities who, given a reasonable accommodation, can perform the essential functions of the job.

In *Southeastern Community College v. Davis*, however, the United States Supreme Court suggested that the Rehabilitation Act does not require employers to provide an accommodation that would alter the fundamental nature of their business or would place an undue financial or administrative burden upon them.⁸¹ As noted above, the *Davis* Court stated that situations might exist where a refusal to modify requirements and practices to meet the need of an individual with a disability would be discriminatory.⁸² In discussing those situations, the Court implied that employers have no duty to make a modification that would alter the fundamental nature of their business or place an undue financial or administrative burden upon them. As an example of an accommodation that would alter the fundamental nature of a program, the Court cited a modification that would require an educational program to lower or substantially alter its academic standards.⁸³ Since *Davis*, the lower courts have similarly held that section 504 does not require accommodations that would irrevocably change the nature of the program.⁸⁴

The regulations implementing the Rehabilitation Act's anti-discrimination provisions further provide that employers have no duty to accommodate where they can show that the accommodation

⁷⁹ *Id.* § 1613.702(f); 45 C.F.R. § 84.3(k)(1) (1989); 41 C.F.R. § 60-741.2 (1990).

⁸⁰ 45 C.F.R. § 84.3(k)(1) (emphasis added). The EEOC regulations implementing section 501 use an almost identical definition. See 29 C.F.R. § 1613.702(f) ("qualified individuals with disabilities" are those able to perform essential functions of the job without endangering themselves or others once the employer makes a reasonable accommodation). The section 503 regulations define "qualified employees with handicaps" as those capable of performing a particular job, given a reasonable accommodation. 41 C.F.R. § 60-741.2; see also *Kohl v. Woodhaven Learning*, 865 F.2d 930, 936 (8th Cir.) ("... if a handicapped individual cannot be reasonably accommodated, then he cannot be otherwise qualified"), *cert. denied*, 110 S. Ct. 239 (1989).

⁸¹ See *Southeastern Community College v. Davis*, 442 U.S. 397, 412-13 (1979).

⁸² See *supra* text accompanying notes 68-73, for a discussion of this part of the opinion.

⁸³ *Southeastern*, 442 U.S. at 413.

⁸⁴ See UNITED STATES COMM'N ON CIVIL RIGHTS, *supra* note 52, at 125.

would impose undue hardship upon them.⁸⁵ According to the regulations, whether an accommodation would impose undue hardship depends upon the size of the employer, as reflected in its work force, facilities and budget; the type of the employer's operation, including the composition and structure of its work force; and the nature and cost of the accommodation.⁸⁶

In 1981, the United States Court of Appeals for the Fifth Circuit held in *Prewitt v. United States Postal Service* that, in regard to section 501, "undue hardship" requires more than de minimis cost.⁸⁷ The Postal Service had refused to hire the plaintiff in *Prewitt* on the grounds that his inability to lift his left arm above his shoulder would prevent him from performing some of the duties of a clerk/carrier, including heavy lifting.⁸⁸ The Fifth Circuit remanded the case for findings on the issue of the plaintiff's ability to perform the duties of a clerk/carrier once the Postal Service made a reasonable accommodation to his disability.⁸⁹ As it reviewed the principles to be applied on remand, the court discussed the definition of undue hardship.⁹⁰

In concluding that the section 501 definition of undue hardship means more than de minimis cost, the Fifth Circuit relied heavily on the congressional debate concerning a 1978 amendment to section 501 of the Rehabilitation Act that created a private right of action under section 501.⁹¹ The court noted that during the floor

⁸⁵ See 29 C.F.R. § 1613.704(a) (1990) (section 501 regulations); 41 C.F.R. § 60-741.6(d) (1990) (section 503 regulations); 45 C.F.R. § 84.12(a) (1989) (section 504 regulations).

⁸⁶ See 29 C.F.R. § 1613.704(c) (factors include number of employees, number and type of facilities, size of budget, type of operation and nature and cost of accommodation); 41 C.F.R. § 60-741.6(d) (factors include business necessity and financial cost and expenses); 45 C.F.R. § 84.12(c) (same as 29 C.F.R. § 1613.704(c)). The United States Commission on Civil Rights has interpreted the regulations to require consideration of non-financial factors, such as the purpose and nature of the business, as well as the employer's resources and the cost of the accommodation. UNITED STATES COMM'N ON CIVIL RIGHTS, *supra* note 52, at 127.

⁸⁷ 662 F.2d 292, 308 n.22 (5th Cir. Unit A Nov. 1981).

⁸⁸ *Id.* at 297, 299.

⁸⁹ *Id.* at 309-10.

⁹⁰ *Id.* at 305-10. The *Prewitt* court noted that the United States Supreme Court had, in *Trans World Airlines v. Hardison*, previously interpreted the term "undue hardship." *Id.* at 308 n.22. In *Hardison*, the Court construed a provision of the Civil Rights Act that requires employers to accommodate the religious practices of employees unless the accommodation would impose undue hardship. 432 U.S. 63, 84 (1977). The *Hardison* Court held that the provision obligated employers to accommodate religious practices of employees only if the cost of the accommodation was de minimis. *Id.* The *Prewitt* court expressly refused to apply the *Hardison* Court's definition of undue hardship to section 501. 662 F.2d at 308 n.22.

⁹¹ *Prewitt*, 662 F.2d at 302-04, 308 n.22. The *Prewitt* court also referred to the regulation issued under section 501 that lists factors important to the determination of whether an accommodation would impose undue hardship on the employer. *Id.* at 308. See 29 C.F.R.

debate on the amendment, Congress considered but rejected a suggestion that it limit the federal government's duty of reasonable accommodation under section 501.⁹² Specifically, Congress rejected a proposal limiting the duty of reasonable accommodation to situations where the cost of the reasonable accommodation would not disproportionately exceed the actual damages potentially available in a discrimination suit.⁹³ The Fifth Circuit concluded that if Congress was unwilling to eliminate the duty to accommodate even in circumstances where the cost of the accommodation might exceed the damages available in a lawsuit, Congress must have intended "undue hardship" to mean something more than *de minimis* cost.⁹⁴

Commentators have suggested various standards for undue hardship in section 504 cases.⁹⁵ One commentator suggested that an accommodation imposes an undue hardship on a federally funded program if providing the accommodation would severely impair the program's services.⁹⁶ For example, if the cost of making a public transportation system totally accessible to individuals with disabilities was high enough to endanger the survival of the public transportation system, such accommodation would impose undue hardship on the program.⁹⁷ This commentator argued that, in order to fulfill the Rehabilitation Act's goal of integrating persons with disabilities into society, a showing that an accommodation would be costly should be insufficient to demonstrate undue hardship; instead, the accommodation should be evaluated based on its effect on the program.⁹⁸ Another commentator claimed that undue hardship results if the accommodation prevents the employer from ben-

§ 1613.704(c) (1990) for the text of the regulations. The court stated that the EEOC regulation accurately expresses congressional intent concerning "undue hardship." *Prewitt*, 662 F.2d at 309.

⁹² *Id.* at 308 n.22.

⁹³ *Id.* Congress agreed to a compromise that allowed courts to consider the reasonableness of the cost of an accommodation and the availability of alternative accommodations or other appropriate relief when fashioning equitable or affirmative action remedies in section 501 actions. See 124 CONG. REC. 30,577-79 (1978). See 29 U.S.C. § 794(a)(1) (1988) for the text of the amendment that Congress ultimately adopted.

⁹⁴ *Prewitt*, 662 F.2d at 308 n.22.

⁹⁵ See UNITED STATES COMM'N ON CIVIL RIGHTS, *supra* note 52, at 127; Martin, *supra* note 58, at 900-01.

⁹⁶ Martin, *supra* note 58, at 900-01.

⁹⁷ *Id.* at 904.

⁹⁸ *Id.* at 900-01. Cf. *Nelson v. Thornburg*, 567 F. Supp. 369, 380 (E.D. Pa. 1983) (state agency required to provide blind welfare workers with accommodations including sighted readers and braille forms because total cost of accommodations was small percentage of agency's personnel budget); *aff'd*, 732 F.2d 146 (3d Cir. 1984), *cert. denied*, 469 U.S. 1188 (1985).

efiting from the employee's work.⁹⁹ This latter commentator acknowledged that a realistic assessment of the costs of accommodation should include an assessment of the benefits to persons with disabilities if the accommodation is made, as well as the costs to persons with disabilities if the accommodation is not made.¹⁰⁰

In sum, the Rehabilitation Act prevents federal employers, contractors and grantees from discriminating on the basis of disability. Because disabilities, unlike race, gender and ethnic origin, impair a individual's ability to work, the administrative agencies and courts that have implemented and interpreted the Act have prohibited employers from discriminating against only those individuals with disabilities who are qualified or otherwise qualified. Individuals with disabilities are qualified or otherwise qualified if they can perform the job duties once an employer makes a reasonable accommodation to their disability, such as purchasing Braille manuals for employees with visual impairments. Employers are not required to make accommodations, however, that alter the fundamental nature of their business or impose undue hardship upon the employer.

III. THE REHABILITATION ACT AND SUBSTANCE ABUSE

Typically, plaintiffs seeking to establish a prima facie case under the Rehabilitation Act's anti-discrimination provisions must show that they fall within the Act's definition of "individual with handicaps,"¹⁰¹ and that they are qualified or otherwise qualified.¹⁰² Plaintiffs must also show plausible reason to believe that a reasonable accommodation to their disability exists.¹⁰³ Once plaintiffs establish

⁹⁹ UNITED STATES COMM'N ON CIVIL RIGHTS, *supra* note 52, at 127; *see also*, Judith Welch Wegner, *The AntiDiscrimination Model Reconsidered: Enduring Equal Opportunity Without Respect to Handicap Under Section 504 of the Rehabilitation Act of 1973*, 69 CORNELL L. REV. 401, 481 (1984) (interpreting dicta of court in *Upshur v. Love*, 474 F. Supp. 332, 342 (N.D. Cal. 1979), that school district would not be required to accommodate blind teacher by hiring aide to perform virtually all teacher's administrative tasks as indication that court would not require accommodation where costs of accommodation would greatly exceed benefits of employing individual).

¹⁰⁰ *See* UNITED STATES COMM'N ON CIVIL RIGHTS, *supra* note 52, at 127-28.

¹⁰¹ *See, e.g.*, *Copeland v. Philadelphia Police Dep't*, 840 F.2d 1139, 1148 (3d Cir. 1988), *cert. denied*, 490 U.S. 1004 (1989); *Guerriero v. Schultz*, 557 F. Supp. 511, 513 (D.D.C. 1983).

¹⁰² *See, e.g.*, *Copeland*, 840 F.2d at 1148; *Pushkin v. Regents of Univ. of Colo.*, 658 F.2d 1372, 1387 (10th Cir. 1981).

¹⁰³ *See, e.g.*, *Crewe v. United States Office of Personnel Management*, 834 F.2d 140, 143 (8th Cir. 1987); *Prewitt v. United States Postal Serv.*, 662 F.2d 292, 310 (5th Cir. Unit A Nov. 1981).

a prima facie case, the burden of persuasion shifts to the employers to show that accommodation is unreasonable.¹⁰⁴ If employers present credible evidence that accommodation is not reasonable, the burden shifts back to the plaintiffs to come forward with more evidence that the accommodation is reasonable.¹⁰⁵

A. Substance Abusers as "Individuals with Handicaps"

To establish a prima facie case of discrimination under the Rehabilitation Act, therefore, substance abusers must first prove that they fall within the Act's definition of "individual with handicaps."¹⁰⁶ When passed in 1973, the Act defined "individual with handicaps" as an individual who had physical or mental impairments that constituted a substantial handicap to employment and who could reasonably be expected to benefit from the vocational rehabilitation programs provided for by the Act.¹⁰⁷ In 1974, Congress amended the Act's definition of "individual with handicaps" by adding a separate definition for the purposes of title V of the Act, which includes its anti-discrimination provisions.¹⁰⁸ In amending the definition, Congress intended to make clear that the Act's anti-discrimination provisions extend to all individuals with disabilities, not only those who required rehabilitation, and to all areas, not only employment.¹⁰⁹

The definition as amended provides that the Act's anti-discrimination provisions cover three types of individuals with disabilities: individuals with physical or mental impairments that substantially limit one or more of their major life activities, individuals who have a record of such an impairment, and individuals who are regarded

¹⁰⁴ See, e.g., *Prewitt*, 662 F.2d at 310; *Whitlock v. Donovan*, 598 F. Supp. 126, 137 (D.D.C. 1984), *aff'd mem. sub nom. Whitlock v. Brock*, 790 F.2d 964 (D.C. Cir. 1986).

¹⁰⁵ See *Prewitt*, 662 F.2d at 310. Courts have employed several variations of the allocation of the burden of proof outlined in the text. See, e.g., *Sisson v. Helms*, 751 F.2d 991, 992-94 (9th Cir. 1985); *Doe v. New York Univ.*, 666 F.2d 761, 776-77 (2d Cir. 1981); *Pushkin*, 658 F.2d at 1385; *Doe v. Centinela Hosp.*, No. CV 87-2514 PAR, 1988 WL 81776 (C.D. Cal. June 30, 1988). See generally *Wegner*, *supra* note 99, at 475-81; Kevin Baker-Kamalay, Note, *Employment Discrimination against the Handicapped: An Analysis of Statutory and Constitutional Protections in Massachusetts*, 21 NEW ENG. L. REV. 305, 329-34 (1985-86).

¹⁰⁶ See, e.g., *Copeland*, 840 F.2d at 1148; *Pushkin*, 658 F.2d at 1387.

¹⁰⁷ Pub. L. No. 93-112, § 7, 87 Stat. 359 (1973) (codified as amended at 29 U.S.C. § 706(8)(A) (1988)).

¹⁰⁸ Pub. L. No. 93-516, tit. I, § 111(a), 88 Stat. 1619 (1974) (codified as amended at 29 U.S.C. § 706(8)(B) (1988)).

¹⁰⁹ See S. REP. NO. 1297, 93d Cong., 2d Sess. 37-38, 64 (1974), *reprinted in* 1974 U.S.C.A.N. 6373, 6388-89.

as having such an impairment.¹¹⁰ The Act leaves undefined several of the definition's key terms. The agencies charged with enforcing the Act, however, have issued regulations that define the terms "physical or mental impairment,"¹¹¹ "substantially limits,"¹¹² "major life activities,"¹¹³ "have a record of,"¹¹⁴ and "regarded as."¹¹⁵

¹¹⁰ 29 U.S.C. § 706(8)(B) (1988). For a general discussion of the scope of the term "individual with handicaps," see David A. Larson, *What Disabilities Are Protected Under the Rehabilitation Act of 1973?*, 16 MEM. ST. U. L. REV. 229 (1986).

¹¹¹ "Physical or mental impairment" is defined for the purposes of section 504 as: 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, genito-urinary; hemic and lymphatic; skin and endocrine; or any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

45 C.F.R. § 84.3(j)(2)(i) (1989). The EEOC regulations implementing section 501 use the same definition. See 29 C.F.R. § 1613.702(b) (1990).

¹¹² Section 504 regulations do not define the phrase "substantially limits" because HHS does not believe a definition is possible at present. 45 C.F.R. §§ 4 app. A, § 3 (1989). In its regulations implementing section 503, the DOL describes "substantially limits" as a matter of degree. 41 C.F.R. § 60-741 app. A (1990). Under the DOL regulations, an individual with disabilities who is "likely" to experience difficulty in securing, retaining or advancing in employment has an impairment that substantially limits the major life activity of working. *Id.* See *Doe v. Centinela Hosp.*, No. CV 87-2154 PAR, 1988 WL 81776 (C.D. Cal. June 30, 1988), for a review of Rehabilitation Act cases discussing whether exclusion from a single job or program constitutes a substantial limitation on major life activities. Increasingly, courts have concluded that "substantially limits" requires more than adverse employment action by a single employer. See, e.g., *McCleod v. City of Detroit*, 39 Fair Empl. Prac. Cas. (BNA) 225, 227-28 (E.D. Mich. 1985) (dismissal of firefighters for marijuana use not violation of Rehabilitation Act because working as firefighter was not major life activity). But see *Andrew W. Haines, E.E. Black, Ltd. v. Marshall: A Penetrating Interpretation of "Handicapped Individual" for Sections 503 and 504 of the Rehabilitation Act of 1973 and for Various State Equal Employment Opportunity Statutes*, 16 LOY. L.A. L. REV. 527, 543-47 (1983) (arguing that "substantially limits" must be defined to include impairment of opportunity to obtain a specific job in order to fulfill the purposes of the Act).

¹¹³ Section 504 regulations define "major life activities" as functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working. 45 C.F.R. § 84.3(j)(2)(ii) (1989); see also 29 C.F.R. § 1613.702(c) (1990) (same definition used by EEOC under section 501); 41 C.F.R. § 60-741 app. A (1990) (DOL's section 503 regulations define major life activities to include activities such as communication, ambulation, self-care and employment).

¹¹⁴ Section 504 regulations define "has a record of" as "has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities." 45 C.F.R. § 84.3(j)(iii) (1989); see also 29 C.F.R. § 1613.702(d) (1990) (same definition under section 501); 41 C.F.R. § 60-741 app. A (1990) (under section 503, individuals who have a record of an impairment are those who are completely recovered from previous impairments and those who have been misclassified as having an impairment).

¹¹⁵ Section 504 regulations define "regarded as" as meaning that the individual:
(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;

Two years after Congress amended the Act's definition of "individual with handicaps," the Secretary of HEW requested comments from interested parties on proposed regulations intended to implement section 504.¹¹⁶ The proposed regulations expressly included substance abusers in the definition of "individual with handicaps" for the purposes of section 504.¹¹⁷ The comments submitted to HEW raised three arguments against the Secretary's inclusion of substance abusers within the definition.¹¹⁸ First, critics contended that substance abuse was not a disability, because it was self-inflicted.¹¹⁹ Second, the commentators worried that the inclusion of substance abusers would disturb the Act's focus on "traditional" disabilities.¹²⁰ Finally, commentators worried that drug abusers would disrupt programs administered by federal grantees.¹²¹

(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 [listed in the definition of 'physical or mental impairment'] but is treated by a recipient as having such an impairment.

45 C.F.R. § 84.3(j)(iv) (1989); *see also* 29 C.F.R. § 1613.631(a) (1990) (same definition under section 501); 41 C.F.R. § 60-741 app. A (1990) (under section 503, individuals regarded as having an impairment are those who are perceived by their employers as having an impairment).

¹¹⁶ 41 Fed. Reg. 20,296 (1976). Although section 504 did not authorize the promulgation of regulations to implement its provisions, the Senate suggested in a report that regulations were intended and that the President assign HEW the responsibility for coordinating the enforcement of section 504. *See* S. REP. NO. 1297, 93d Congress, 2d Sess. 40 (1974), *reprinted in* 1974 U.S.C.A.N. 6373, 6390-91. In April, 1976, President Ford issued Exec. Order No. 11,914, 41 Fed. Reg. 17,871 (1976), the first official action taken to implement section 504. *See* RICHARD B. CAPALLI, *FED GRANTS & CO-OP AGREEMENTS* § 20.07, at 20-19 (Callaghan 1982). The order required the Secretary of HEW to issue regulations to guide the determination of which individuals section 504 protected and which actions section 504 prohibited. 41 Fed. Reg. 17,871 (1976). The order also called for any federal department or agency providing federal financial assistance to issue regulations consistent with the regulations promulgated by HEW. *Id.* One month after Ford's order, HEW issued proposed regulations for its grantees. *See* 41 Fed. Reg. 20,295 (1976). The revision of those regulations followed two months later, 41 Fed. Reg. 29,548 (1976), and HEW issued the final regulations in May, 1977. 42 Fed. Reg. 22,676. In 1978, HEW, drawing heavily upon its regulations for its grantees, issued model regulations, 43 Fed. Reg. 2132, for other federal departments and agencies. CAPALLI, *supra*, § 20.08, at 20-20. That same year, President Carter transferred coordination of employment discrimination coverage under the Rehabilitation Act to the EEOC. Exec. Order No. 12,067, 43 Fed. Reg. 28,967 (1978). In 1980, President Carter again transferred the responsibility for coordinating employment discrimination coverage, this time to the Department of Justice. Exec. Order No. 12,250, 45 Fed. Reg. 72,995 (1980).

¹¹⁷ 41 Fed. Reg. 20,298 (1976).

¹¹⁸ *Id.* at 29,548-49 (1976).

¹¹⁹ *Id.* at 29,548. *Cf.* *Traynor v. Turnage*, 485 U.S. 535, 551 (1988) (upholding Veterans Administration determination that, at least in some instances, substance abuse is voluntary and thus not a disability for purpose of extending time limit to exhaust G.I. Bill benefits).

¹²⁰ 41 Fed. Reg. 29,548-49 (1976).

¹²¹ *Id.* at 29,549.

In 1977, Attorney General Griffin Bell, responding to a request from the Secretary of HEW, issued an opinion that concluded that the 1974 definition of "individual with handicaps" included alcoholics and other drug abusers.¹²² In the opinion, Attorney General Bell addressed the criticisms of the proposed regulation.¹²³ To rebut the contention that substance abuse was not a disability, the Attorney General pointed to the substantial body of medical and psychological authority asserting that substance abuse is a disease.¹²⁴ Second, the Attorney General cited the legislative history of the Rehabilitation Act to show that Congress intended to include substance abusers in the definition of "individual with handicaps."¹²⁵ Third, the Attorney General explained that recipients of federal funds would be able to exclude disruptive substance abusers from their programs, because the regulations only prohibited discrimination against otherwise qualified individuals with disabilities.¹²⁶ The Attorney General indicated that the Act did not prohibit federal grantees from excluding substance abusers if the manifestations of their substance abuse resulted in impaired performance or violations of reasonable rules established by the program.¹²⁷ After receiving the Attorney General's opinion, the Secretary of HEW issued the final regulations.¹²⁸ An explanatory statement that accompanied the final regulations stated that, for purposes of section 504, the definition of "individual with handicaps" included substance abusers.¹²⁹

In 1978, one year after the Secretary issued the regulations, the United States District Court for the Eastern District of Pennsylvania held in *Davis v. Bucher* that the Rehabilitation Act's definition of "individual with handicaps" encompassed individuals with histories of drug use.¹³⁰ In *Davis*, the City of Philadelphia rejected the plaintiffs' applications for various city jobs solely because they had previously used drugs.¹³¹ None of the plaintiffs was using illegal

¹²² 43 Op. Att'y Gen. No. 12, 2 (Apr. 12, 1977).

¹²³ See *id.* at 4-13.

¹²⁴ *Id.* at 6 & n.4 (citing statements made by the United States Public Health Service, the American Medical Association and the Vocational Rehabilitation Administration).

¹²⁵ *Id.* at 4-6. In particular, the Attorney General emphasized that Congress knew and expressly approved of HEW's provision of assistance to substance abusers under the Act's predecessor, the Vocation Rehabilitation Act. *Id.*

¹²⁶ *Id.* at 12-13. See *supra* notes 77-80 and accompanying text for a discussion of the definition of "otherwise qualified."

¹²⁷ 43 Op. Att'y Gen. No. 12, 12-13 (Apr. 12, 1977).

¹²⁸ 42 Fed. Reg. 22,677 (1977) (codified as amended at 45 C.F.R. § 84 (1989)).

¹²⁹ *Id.* at 22,685-86 (codified at 45 C.F.R. § 84 app. A).

¹³⁰ 451 F. Supp. 791, 795-97 (E.D. Pa. 1978).

¹³¹ *Id.* at 794.

drugs at the time they filed their job applications with the city.¹³² The plaintiffs claimed that the city's policy of excluding job applicants solely on the basis of past drug use violated section 504 of the Rehabilitation Act.¹³³

The district court began its analysis by considering whether the Act protects former drug users.¹³⁴ Turning first to the Act's definition of "individual with handicaps," the court concluded that drug addiction substantially impairs an individual's ability to engage in major life activities and thus was a disability.¹³⁵ Next, the court noted that the HEW regulations define "individual with handicaps" to include individuals who "have a record of such impairment."¹³⁶ The court concluded, therefore, that under the language of the Act, the term "individual with handicaps" encompassed former drug users.¹³⁷

The court then considered whether, for policy reasons, it might interpret the definition of "individual with handicaps" to exclude drug users.¹³⁸ The court ruled, however, that HEW's explanation of its regulations, which expressly included substance abusers in the definition of "individual with handicaps," foreclosed any argument that the Act did not encompass drug users.¹³⁹ When considering HEW's explanatory statement, the court emphasized the Secretary's assertions that many legal and medical authorities consider substance abuse a disease, and that the committees that studied the Rehabilitation Act knew that HEW had treated substance abusers as individuals with disabilities for purposes of the Vocational Rehabilitation Act, the Rehabilitation Act's predecessor.¹⁴⁰ The court held, therefore, that former drug abusers were included in the Rehabilitation Act's definition of "individual with handicaps."¹⁴¹

¹³² *Id.* One of the plaintiffs was enrolled in a methadone program at the time that he filed his application.

¹³³ *Id.* at 793.

¹³⁴ *Id.* at 795.

¹³⁵ *Davis*, 451 F. Supp. at 795.

¹³⁶ *Id.* at 795-96.

¹³⁷ *Id.*

¹³⁸ *Id.* at 796.

¹³⁹ *Id.*

¹⁴⁰ *Id.* See 45 C.F.R. § 84 app. A, subpt. A, § 4 (1989), for the explanatory statement. See *supra* notes 116-29 and accompanying text for a discussion of the history of the explanatory statement. The court suggested that absent the statement, it might have considered arguments that Congress did not intend that the Act protect drug addicts. See *Davis*, 451 F. Supp. at 796.

¹⁴¹ *Davis*, 451 F. Supp. at 796.

The court accordingly granted the plaintiff's motion for summary judgment on the ground that the city's policy violated section 504.¹⁴²

B. Substance Abusers as Otherwise Qualified Individuals with Disabilities

After *Davis*, most courts have summarily concluded that the Rehabilitation Act's definition of "individual with handicap" does encompass substance abusers.¹⁴³ The courts have instead focused on the second element of the *prima facie* case, whether the plaintiff is otherwise qualified for the position.¹⁴⁴ As noted above, the Act's anti-discrimination provisions generally protect only those plaintiffs who are qualified or otherwise qualified.¹⁴⁵ In his 1977 opinion, Attorney General Bell specifically noted that the Act's limitation of its protections to only qualified substance abusers allowed employers to refuse to hire individuals whose substance abuse prevented them from successfully performing the job.¹⁴⁶

1. The 1978 Amendment

A few months after the decision in *Davis*, Congress passed section 122 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978 ("1978 amendment").¹⁴⁷ The 1978 amendment, a compromise agreement between

¹⁴² *Id.* at 799. The court also held that the city's policy violated the equal protection and due process clauses of the fourteenth amendment. *Id.* at 801.

¹⁴³ See, e.g., *Rodgers v. Lehman*, 869 F.2d 253, 258 (4th Cir. 1989) (alcoholism is handicap under Rehabilitation Act); *Crewe v. United States Office of Personnel Management*, 834 F.2d 140, 141 (8th Cir. 1987) ("At the outset there can be little doubt that alcoholism is a handicap for the purposes of the Act."); *Wallace v. Veterans Admin.*, 683 F. Supp. 758, 761 (D. Kan. 1988) (alcoholism and drug addiction fall within definition of handicap for purposes of Rehabilitation Act). In theory, a defendant could prevail by rebutting the plaintiff's contention that substance abuse substantially impaired his or her major life activities. See 43 Op. Att'y Gen. No. 12, 8-9 (Apr. 12, 1977).

¹⁴⁴ See, e.g., *Butler v. Thornburgh*, 900 F.2d 871, 875-76 (5th Cir. 1990); *Anderson v. Univ. of Wis.*, 841 F.2d 737, 740-42 (7th Cir. 1988); *Wallace*, 683 F. Supp. at 761-66.

¹⁴⁵ See *supra* notes 77-80 and accompanying text.

¹⁴⁶ See 43 Op. Att'y Gen. No. 12, 11-12.

¹⁴⁷ Pub. L. No. 95-602, § 122, 92 Stat. 2955, 2984-85 (1978) (codified in part at 29 U.S.C. § 706(8)(B) (1988)). The amendment added the following provision to the Rehabilitation Act's definition of "individual with handicaps":

For purposes of sections 503 and 504 as such sections relate to employment, such term does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others.

Id. The Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments

the House of Representatives and the Senate, was the end result of a proposal by Representative Erlenborn to exclude from the definition of "individual with handicaps" all alcoholics and drug abusers in "need of rehabilitation."¹⁴⁸

The Senate was concerned that the Erlenborn amendment would exclude not only current, unrehabilitated substance abusers, but also former substance abusers participating in long-term treatment programs.¹⁴⁹ As an alternative, Senators Cannon and Williams offered an amendment excluding only those substance abusers whose condition prevented them from performing essential functions of the job.¹⁵⁰ Senator Cannon indicated that their amendment was a response to HEW's inclusion of substance abusers in the Rehabilitation Act's definition of "individual with handicaps," and the provisions of the Act that require affirmative action.¹⁵¹ That combination, according to Senator Cannon, forced employers to hire substance abusers without regard to the character or sensitivity of the position's duties.¹⁵² As an example of the flexibility of the Senate amendment, Senator Cannon suggested that the Rehabilitation Act, if so amended, would protect substance abusers applying for jobs as baggage handlers, but not substance abusers applying for jobs as airline pilots.¹⁵³

Senators Williams and Hathaway, on the other hand, both stated that although they supported the Senate amendment, it was redundant.¹⁵⁴ The senators noted that the purpose of the amendment was to allay the fear of employers that the Rehabilitation Act required them to employ individuals whose substance abuse impaired their job performance.¹⁵⁵ Both senators pointed out that

had several purposes: to extend the funding for programs established in the Rehabilitation Act; to establish community service employment programs for individuals with disabilities; to provide comprehensive services for individuals with disabilities living independently; and to revise and extend programs established under the Development Disabilities Services and Facilities Construction Act. 92 Stat. 2955. Section 122 of those Amendments contained several miscellaneous amendments to the Rehabilitation Act, including the addition to the definition of "individual with handicaps." *Id.* § 122.

¹⁴⁸ H.R. REP. NO. 1149, 95th Cong., 2d Sess. 22 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7312, 7333-34.

¹⁴⁹ 124 CONG. REC. 30,323 (1978) (remarks of Sen. Cannon and Sen. Williams).

¹⁵⁰ *Id.* (remarks of Sen. Cannon and Sen. Williams).

¹⁵¹ *Id.* (remarks of Sen. Cannon).

¹⁵² *Id.* at 30,322 (remarks of Sen. Cannon).

¹⁵³ *Id.* at 30,323 (remarks of Sen. Cannon).

¹⁵⁴ *Id.* at 30,323-24 (remarks of Sen. Williams and Sen. Hathaway).

¹⁵⁵ *Id.* (remarks of Sen. Williams and Sen. Hathaway).

Congress, in extending the protections of sections 503 and 504 only to *qualified* individuals with disabilities, had already addressed those concerns. The senators contended that, because the Act protected only qualified individuals, employers and programs could hold substance abusers to the same standards of performance and behavior as other employees or program participants, even if the unsatisfactory performance or behavior was related to the substance abuse.¹⁵⁶

Congress ultimately adopted the compromise amendment proposed by the Conference Committee.¹⁵⁷ The Conference Committee amendment excluded from the Rehabilitation Act's definition of "individual with handicaps" any alcoholic or drug abuser "whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to the property or the safety of others."¹⁵⁸ The Conference Committee report indicated that the amendment "clarifies that only those [substance abusers] who cannot perform the essential functions of a job in question" are excluded from the Act's protections.¹⁵⁹ Senator Williams, speaking in support of the adoption of the Conference Committee report, stated that the compromise agreement simply clarified the intent of the Congress, as reflected in the legislative history surrounding the passage of the Act in 1973, that the Act's anti-discrimination provisions protect only qualified substance abusers.¹⁶⁰

¹⁵⁶ *Id.* (citing 43 Op. Att'y Gen. No. 12 (Apr. 12, 1977)); see also Reese John Henderson, Jr., Note, *Addiction as Disability: The Protection of Alcoholics and Drug Addicts Under the Americans with Disabilities Act of 1990*, 44 VAND. L. REV. 713, 729 (1991) ("The 1978 Amendment essentially codified the interpretation of the United States Attorney General and the courts that addicts are individuals with handicaps, but may or may not be otherwise qualified depending on their degree of impairment.").

¹⁵⁷ Pub. L. No. 95-602, § 122, 92 Stat. 2984-85 (1978) (codified in part at 29 U.S.C. § 706(8)(B)(1988)).

¹⁵⁸ H.R. CONF. REP. NO. 1780, 95th Cong., 2d Sess. 102 (1978), reprinted in 1978 U.S.C.C.A.N. 7375, 7413; see also 124 CONG. REC. 37,509 (1978). According to the legislative history, employers may not assume that any individual with a history of alcoholism or drug abuse poses a threat to the safety of others or property. 124 CONG. REC. 35,710 (1978) (remarks of Sen. Williams). Only the demonstration that an employee's substance abuse poses a "direct threat" to the safety of individuals or property is sufficient to exclude the employee from the definition of "individual with handicaps." *Id.*

¹⁵⁹ H.R. CONF. REP. NO. 1780, 95th Cong., 2d Sess. 102 (1978), reprinted in 1978 U.S.C.C.A.N. 7375, 7413.

¹⁶⁰ 124 CONG. REC. 37,509-10 (1978) (remarks of Sen. Williams). Senator Williams remarked:

Again, the amendment in this regard simply makes explicit what prior interpreters of the act—including those of the Attorney General and the Secretary

2. Cases Applying the 1978 Amendment

In determining whether the Rehabilitation Act's anti-discrimination provisions protect a particular substance abuser, some courts have turned to the 1978 amendment.¹⁶¹ These courts have interpreted the amendment as imposing a unique standard that substance abusers must meet in order to receive protection under the Act.¹⁶² Other courts have instead treated substance abuse like other disabilities and simply focused on whether the substance abuser is otherwise qualified.¹⁶³ These courts have emphasized whether,

of Health, Education, and Welfare—have found: Where addiction or alcoholism prevents a person from successfully performing the job, the person need not be provided the employment opportunity in question.

Id. at 37,510 (remarks of Sen. Williams).

In 1988, Congress, during debate on an amendment concerning the exclusion of individuals with contagious diseases ("1988 amendment") from the Rehabilitation Act's definition of "individual with handicaps," again discussed the intent of the 1978 amendment. 134 CONG. REC. S1739-40 (daily ed. Mar. 2, 1988) (remarks of Sen. Harkin). The 1988 amendment, employing language very similar to that of the 1978 amendment, excludes from the Act's definition of "individual with handicaps," individuals with currently contagious diseases who, because of the disease, pose a direct threat to the health or safety of others or are unable to perform the duties of the job. Compare Pub. L. No. 100-259, § 9, 102 Stat. 31 (1988) (codified at 29 U.S.C. § 706(8)(C) (1988)) (1988 amendment) with 29 U.S.C. § 706(8)(B) (1988) (1978 amendment). Senator Harkin, a cosponsor of the 1988 amendment, stated that the amendment was intended to codify the Supreme Court's requirement, articulated in *School Board v. Arline*, 480 U.S. 273, 287-88 (1987), that courts consider the degree of risk and the availability of accommodations that would reduce the risk in determining whether individuals with contagious diseases are otherwise qualified. 134 CONG. REC. S1739 (daily ed. Mar. 2, 1988) (statement of Sen. Harkin); see also Stephen L. Mikochik, *Handicaps Which Threaten Others and the Prohibition of Discrimination Under the Rehabilitation Act*, 6 HOFSTRA L. REV. 199, 215-16 (1989). Senator Harkin noted that the 1988 amendment, like the 1978 amendment, was designed to clarify, rather than modify, the standards of section 504. 134 CONG. REC. S1739 (daily ed. Mar. 2, 1988) (statement of Sen. Harkin). Reviewing the history of the 1978 amendment, Senator Harkin emphasized that the 1978 amendment did not change the application of the standards of section 504 to substance abusers. *Id.* at S1739-40. But cf. *Hart v. United States*, 585 F.2d 1025, 1032 (Cl. Ct. 1978) ("The courts have consistently stated that expression of opinion by a subsequent Congress on the meaning of an Act adopted by an earlier Congress has little, if any, significance.").

¹⁶¹ See, e.g., *Heron v. McGuire*, 803 F.2d 67, 68-69 (2d Cir. 1986); *Burka v. New York City Transit Auth.*, 680 F. Supp. 590, 596-600 (S.D.N.Y. 1988).

¹⁶² See, e.g., *Heron*, 803 F.2d at 68-69; *Burka*, 680 F. Supp. at 596-600. But cf. *Henderson*, *supra* note 156, at 729-30 n.130 (arguing that *Burka* and *Heron* courts' interpretation of 1978 amendment is incorrect, because 1978 amendment simply clarifies definition of qualified under section 504).

¹⁶³ See, e.g., *Copeland v. Philadelphia Police Dep't*, 840 F.2d 1139, 1148-49 (3d Cir. 1988), *cert. denied*, 490 U.S. 1004 (1989); *Wallace v. Veterans Admin.*, 683 F. Supp. 758, 761-67 (D. Kan. 1988). See *supra* notes 77-80 and accompanying text for a discussion of "otherwise qualified."

given a reasonable accommodation, the substance abuser can perform the essential functions of the job.¹⁶⁴

In 1986, the United States Court of Appeals for the Second Circuit applied the former approach in *Heron v. McGuire* and held that the dismissal of a police officer who tested positive for heroin was not a violation of section 504.¹⁶⁵ In its analysis of the plaintiff's section 504 claim, the *Heron* court turned to the language of the 1978 amendment. The court reasoned that because the plaintiff's drug dependence required him to violate laws that he had sworn to uphold, his drug use interfered with his ability to perform his job duties.¹⁶⁶ The court therefore held that, because the 1978 amendment excluded individuals whose substance abuse impaired their performance, the plaintiff was not protected by section 504.¹⁶⁷

In 1988, the United States District Court for the Southern District of New York, relying on the legislative history of the 1978 amendment, held in *Burka v. New York City Transit Authority* that sections 503 and 504 of the Rehabilitation Act protect only rehabilitated or rehabilitating drug abusers.¹⁶⁸ The *Burka* plaintiffs were employees of the Transit Authority who either had been or could have been discharged based on their positive drug test results.¹⁶⁹ They challenged the legality of several Transit Authority rules mandating drug testing.¹⁷⁰ The plaintiffs in *Burka* argued that the testing

¹⁶⁴ See *Copeland*, 840 F.2d at 1149; *Wallace*, 683 F. Supp. at 766-67.

¹⁶⁵ 803 F.2d 67, 68-69 (2d Cir. 1986). Blood was drawn from the plaintiff after he fainted at work and was taken to the hospital. *Id.* at 68. Although the blood was taken shortly after the plaintiff fainted, the blood test was not administered until one week later, when the police department requested it. *Id.*

¹⁶⁶ *Id.* at 68-69.

¹⁶⁷ *Id.* at 69. The court accordingly found it unnecessary to consider whether the plaintiff was otherwise qualified.

¹⁶⁸ 680 F. Supp. 590, 600 (S.D.N.Y. 1988). Other courts have similarly interpreted the 1978 amendment to impose a requirement of rehabilitation upon substance abusers seeking protection under the Act. See *Teahan v. Metro-North Commuter R.R.*, No. 88 Civ. 5376, 1991 WL 60388 (S.D.N.Y. Mar. 29, 1991) (after 1978 amendment, Rehabilitation Act protects only alcoholics who are rehabilitated or rehabilitating); *Whitlock v. Donovan*, 598 F. Supp. 126, 129 n.3 (D.D.C. 1984) (plaintiff not protected under section 504 because 1978 amendment bars substance abusers in need of rehabilitation), *aff'd mem. sub nom.* *Whitlock v. Brock*, 790 F.2d 964 (D.C. Cir. 1986); see also *Railway Labor Executives Ass'n v. Burnley*, 839 F.2d 575, 591 (9th Cir. 1988) (section 504 protects only substance abusers whose problems are "under control" because 1978 amendment excluded substance abusers who pose threat to property or safety), *rev'd on other grounds sub nom.* *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989); *LeMere v. Burnley*, 683 F. Supp. 275, 276 n.1 (D.D.C. 1988) (after 1978 amendment, section 504 does not apply to individuals currently using alcohol).

¹⁶⁹ 680 F. Supp. at 594-96.

¹⁷⁰ *Id.* at 594. The plaintiffs did not challenge rules that required testing when a

violated the Rehabilitation Act because, under the 1978 amendment, an employer could not dismiss employees or refuse to hire applicants who were substance abusers unless the substance abuse impaired their performance or rendered their employment dangerous to property or public safety.¹⁷¹

The court first observed that it would be illogical for Congress to allocate millions of dollars to the war on drugs and simultaneously protect users of illegal drugs under the Rehabilitation Act.¹⁷² To support its opinion, the court focused on the legislative history of the 1978 amendment.¹⁷³ The court emphasized that the Senate's rejection of Representative Erlenborn's amendment, which would have excluded all substance abusers in need of rehabilitation from the definition of "individual with handicaps," was rooted not in the desire to protect substance abusers, but in the fear that the lack of any provision for employees currently undergoing rehabilitation would have discouraged employees with substance abuse problems from seeking or continuing treatment.¹⁷⁴ The court concluded that the intent of the 1978 amendment was to protect only rehabilitated and rehabilitating drug abusers.¹⁷⁵ Because the plaintiffs had not offered evidence that they were participating in a rehabilitation program, the court held that they were not protected by the Act.¹⁷⁶

3. Cases Examining Whether Substance Abusers Are Otherwise Qualified

Not all courts, however, resolve whether the Rehabilitation Act protects a particular substance abuser based upon the language or legislative history of the 1978 amendment.¹⁷⁷ Some courts have instead considered whether the substance abuser is qualified, that

supervisor had reason to believe that an employee's poor performance was due to drug use or when an employee had previously tested positive for drug use.

¹⁷¹ *Id.* at 597. The plaintiffs also claimed that the testing violated their rights to due process and protection against unreasonable search and seizure under both the federal and state constitutions. *Id.* at 594-96.

¹⁷² *Id.* at 597.

¹⁷³ *Id.* at 598-99. See *supra* notes 147-60 and accompanying text for a discussion of the 1978 amendment.

¹⁷⁴ *Burka*, 680 F. Supp. at 600-01.

¹⁷⁵ *Id.* at 600.

¹⁷⁶ *Id.* at 600-01.

¹⁷⁷ See, e.g., *Copeland v. Philadelphia Police Dep't*, 840 F.2d 1139, 1149 (3d Cir. 1988), *cert. denied*, 490 U.S. 1004 (1989); *Wallace v. Veterans Admin.*, 683 F. Supp. 758, 766-67 (D. Kan. 1988).

is, whether, given a reasonable accommodation, the individual is able to perform the essential functions of the job.¹⁷⁸

In the 1988 case of *Wallace v. Veterans Administration*, the United States District Court for the District of Kansas held that the Veterans Administration's ("VA") refusal to hire a rehabilitating drug abuser as a nurse in an intensive care unit ("ICU") was discriminatory under section 504 of the Act because the VA could have accommodated the plaintiff's disability through job sharing or patient assignment.¹⁷⁹ The plaintiff in *Wallace* was an experienced ICU nurse who, at the time of her application to the VA, had not used drugs for over nine months.¹⁸⁰ In a letter of recommendation submitted to the VA, her physician advised the VA to restrict the plaintiff's access to injectable narcotics for the first twelve to eighteen months of her employment.¹⁸¹ The VA refused to hire the plaintiff on the ground that her restricted access to narcotics impaired her ability to perform the duties of an ICU nurse.¹⁸²

The *Wallace* court held that the plaintiff was protected by the Rehabilitation Act because she could have performed the essential functions of the job if the VA had made a reasonable accommodation to her disability.¹⁸³ The *Wallace* court first stated that alcoholics and drug abusers are included in the section 504 definition of "individual with handicaps."¹⁸⁴ The court also declared that the possibility of reasonable accommodation must be considered when determining whether a particular substance abuser is otherwise qualified and thus protected under section 504.¹⁸⁵ The court then analyzed whether the VA had shown the absence of any reasonable accommodation that would have allowed the plaintiff to perform the essential functions of an ICU nurse without administering narcotics to patients.¹⁸⁶ Based on evidence that ICU nurses spend less than two percent of their time administering narcotics to patients and that many patients in ICU's do not receive narcotics, the court held that the VA could have accommodated the plaintiff's disability

¹⁷⁸ See, e.g., *Copeland*, 840 F.2d at 1148-49; *Wallace*, 683 F. Supp. at 764-67.

¹⁷⁹ 683 F. Supp. 758, 766-67 (D. Kan. 1988).

¹⁸⁰ *Id.* at 759.

¹⁸¹ *Id.* at 759-60.

¹⁸² *Id.* at 760.

¹⁸³ *Id.* at 766-67.

¹⁸⁴ *Id.* at 761.

¹⁸⁵ *Id.* at 761-63.

¹⁸⁶ *Id.* at 765-67. The *Wallace* court adopted the approach of the Fifth Circuit in *Prewitt v. United States Postal Service*, 662 F.2d 292 (5th Cir. Unit A Nov. 1981), in allocating the burden of proof. *Wallace*, 683 F. Supp. at 764.

by assigning her to patients who did not require narcotics or allowing her to trade off the duty of administering narcotics with other ICU nurses.¹⁸⁷ Thus, the court held that the plaintiff was otherwise qualified and entitled to protection under the Rehabilitation Act.¹⁸⁸

In 1988, the United States Court of Appeals for the Third Circuit similarly focused on whether the plaintiff was otherwise qualified in holding in *Copeland v. Philadelphia Police Department* that a police officer who tested positive for the presence of marijuana was not protected by the Rehabilitation Act.¹⁸⁹ The plaintiff argued that his dismissal was a violation of the Act because the department did not accommodate him by providing him the opportunity to undergo rehabilitation.¹⁹⁰

The court held that the plaintiff was not protected by the Act because he was not otherwise qualified for the position.¹⁹¹ In reaching its holding, the court emphasized the difficulty that a police department would face if forced to retain officers who violate the laws that they are hired to uphold.¹⁹² The court held that such an accommodation would be unreasonable, because it would necessarily require a substantial modification of the essential nature of a police department.¹ In light of the absence of any accommodation that would have allowed the plaintiff to work as a police officer, but would not have placed unreasonable demands on the department, the court held that the plaintiff was not otherwise qualified.¹⁹³ His dismissal, therefore, did not violate the Act.¹⁹⁴

In *Guerriero v. Schultz*, the United States District Court for the District of Columbia held, in 1983, that the dismissal of a Foreign Service Officer did not violate the Rehabilitation Act because the plaintiff's misconduct, not his alcoholism, was the basis for his dis-

¹⁸⁷ *Id.* at 765-67.

¹⁸⁸ *Id.* at 767.

¹⁸⁹ 840 F.2d 1139, 1149 (3d Cir. 1988), *cert. denied*, 490 U.S. 1004 (1989). The plaintiff in *Copeland* was tested for drug use after his former girlfriend, a fellow police officer, alleged that she had seen him use illegal drugs. *Id.* at 1142.

¹⁹⁰ *Id.* at 1148-49. The plaintiff also raised claims of unreasonable search and seizure, lack of due process, denial of equal protection and invasion of his liberty interest in his reputation. *Id.* at 1143-48.

¹⁹¹ *Id.* at 1148-49.

¹⁹² *Id.* at 1149. *See also* *Nisperos v. Buck*, 720 F. Supp. 1424, 1427-29 (N.D. Cal. 1989) (dismissal of INS attorney after he completed rehabilitation violated Rehabilitation Act because addiction did not affect work performance and because absence of history of drug use was not essential requirement for job).

¹⁹³ *Copeland*, 840 F.2d at 1149.

¹⁹⁴ *Id.*

missal.¹⁹⁵ The court also noted, however, that the plaintiff's need for therapy that was available only in the United States was incompatible with the Foreign Service requirement for overseas service.¹⁹⁶ Because the agency could have accommodated the plaintiff only by waiving an "essential condition of employment in the Foreign Service," the overseas duty requirement, the court concluded that he was not otherwise qualified under the Rehabilitation Act.¹⁹⁷

In sum, cases addressing the question of whether section 504 of the Rehabilitation Act protects a particular substance abuser demonstrate two approaches.¹⁹⁸ Some courts focus on the 1978 amendment to the Act that excludes substance abusers whose disability impairs their performance from the definition of "individual with handicaps."¹⁹⁹ These courts interpret the language of the amendment, then apply their interpretation to the facts of the case.²⁰⁰ For other courts, the determination of whether a substance abuser is entitled to protection under the Act turns solely on whether the individual is, according to the Act's definition, qualified.²⁰¹ These courts look to whether, given a reasonable accom-

¹⁹⁵ 557 F. Supp. 511, 513 (D.D.C. 1983). The Foreign Service dismissed the plaintiff for an off-duty incident in a Uruguay bar that involved sex acts between the plaintiff and three or four local prostitutes in the presence of at least one spectator. *Id.* at 512 n.2. In reaching its decision to dismiss the plaintiff, the Board of Foreign Service expressly proceeded on the assumption that he was not an alcoholic. *Id.* at 513.

Other courts have similarly denied Rehabilitation Act claims on the grounds that the challenged action was provoked by the plaintiff's conduct, rather than his or her substance abuse. *See, e.g.,* Anderson v. University of Wis., 841 F.2d 737, 741-42 (7th Cir. 1988) (law school's refusal to readmit student who claimed past poor performance was due to alcoholism was not violation of section 504 because law school's decision was based on its assessment of plaintiff's ability to handle the work, not his alcoholism); Butler v. Meese, Civ. A. No. 88-2924, 1989 WL 38723 (E.D. La. Apr. 19, 1989) (FBI's dismissal of employee after four incidents of misconduct was not violation of section 501 because discharge was for misconduct, not alcoholism); Richardson v. United States Postal Serv., 613 F. Supp. 1213, 1215-16 (D.D.C. 1985) (discharge of postal employee after he pled guilty to assault charge was not violation of sections 501 or 504 because criminal conduct was not entirely a manifestation of alcoholism). For a criticism of this approach, see David A. Larson, *Mental Impairments and the Rehabilitation Act*, 48 LA. L. REV. 841, 856-59, 870-72 (1988).

¹⁹⁶ *Guerriero*, 557 F. Supp. at 514.

¹⁹⁷ *See id.*

¹⁹⁸ Compare *Heron v. McGuire*, 803 F.2d 67, 68-69 (2d Cir. 1986) and *Burka v. New York City Transit Auth.*, 680 F. Supp. 590, 596-601 (S.D.N.Y. 1988) with *Copeland v. Philadelphia Police Dep't*, 840 F.2d 1139, 1148-49 (3d Cir. 1988), *cert. denied*, 490 U.S. 1004 (1989) and *Wallace v. Veterans Admin.*, 683 F. Supp. 758, 762-64 (D. Kan. 1988).

¹⁹⁹ *See, e.g., Heron*, 803 F.2d at 68-69; *Burka*, 680 F. Supp. at 596-600.

²⁰⁰ *See, e.g., Heron*, 803 F.2d at 68-69; *Burka*, 680 F. Supp. at 596-601.

²⁰¹ *See, e.g., Copeland*, 840 F.2d at 1148-49; *Wallace*, 683 F. Supp. at 764-67.

modation, the substance abuser can perform the essential functions of the job.²⁰²

C. Reasonable Accommodation for Substance Abusers

The third element of a prima facie case under the Rehabilitation Act is a showing that a reasonable accommodation is possible.²⁰³ Several cases brought under section 501 of the Rehabilitation Act, which prohibits discrimination by federal agencies, have discussed the nature of the reasonable accommodation that agencies must make for employees with substance abuse problems.²⁰⁴ In *Whitlock v. Donovan*, for example, the United States District Court for the District of Columbia held, in 1984, that section 501 requires federal agencies to provide employees with a firm choice between obtaining treatment or disciplinary action before dismissing an employee for performance problems related to substance abuse.²⁰⁵ The court also held that a federal agency could not automatically dismiss an employee who relapsed after obtaining treatment for substance abuse.²⁰⁶ Instead, the court required that the agency first offer the employee any alternatives to dismissal that would not unduly burden the agency, such as an unpaid leave of absence to obtain further treatment.²⁰⁷

²⁰² See, e.g., *Copeland*, 840 F.2d at 1149; *Wallace*, 683 F. Supp. at 766-67.

²⁰³ See *supra* note 103 and accompanying text for a discussion of the allocation of the burden of proof on the issue of reasonable accommodation. See also *Crewe v. United States Office of Personnel Management*, 834 F.2d 140, 143 (8th Cir. 1989); *Wallace v. Veterans Admin.*, 683 F. Supp. 758, 764 (D. Kan. 1988).

²⁰⁴ See, e.g., *Rodgers v. Lehman*, 869 F.2d 253, 258-59 (4th Cir. 1989); *Walker v. Weinberger*, 600 F. Supp. 757, 761-62 (D.D.C. 1985); *Whitlock v. Donovan*, 598 F. Supp. 126, 130-34 (D.D.C. 1984), *aff'd mem. sub nom. Whitlock v. Brock*, 790 F.2d 964 (D.C. Cir. 1986). The 1978 amendment excluding substance abusers whose disability impairs their performance from the definition of "individual with handicaps" does not apply to section 501. *Crewe*, 834 F.2d at 142 (1978 amendment does not extend to section 501 in light of plain meaning of amendment and congressional intent to make the federal government a model employer of people with disabilities). Several courts ruling on section 501 claims have considered the reasonableness of the accommodation made by employers to employees whose substance abuse impaired their performance without expressly finding that the employee met the Act's requirements for protection. See, e.g., *McElrath v. Kemp*, 714 F. Supp. 23, 27 (D.D.C. 1989); *Callicotte v. Carlucci*, 698 F. Supp. 944, 949 (D.D.C. 1988); *Whitlock*, 598 F. Supp. at 131. *But see LeMere v. Burnley*, 683 F. Supp. 275, 280 (D.D.C. 1988) (in dicta, court states that alternative ground for decision that dismissal did not violate section 501 was that plaintiff's absenteeism prevented her from doing her job, and that plaintiff was therefore not a qualified employee with a disability entitled to protection under section 501).

²⁰⁵ 598 F. Supp. at 134.

²⁰⁶ *Id.*

²⁰⁷ See *id.*

The plaintiff in *Whitlock*, a Department of Labor ("DOL") employee, frequently missed work between 1980 and 1983 due to his alcoholism.²⁰⁸ The plaintiff's supervisors responded to his absenteeism with various disciplinary actions, including formal reprimands, warnings of more serious sanctions and leave restrictions. The supervisors also actively encouraged the plaintiff to obtain counseling; they referred him to counseling several times and, in one instance, escorted him to an initial counseling meeting. Additionally, the supervisors adjusted the plaintiff's schedule to allow him to begin and leave work early and offered him reassignment to a less stressful position. Despite the actions of his supervisors, the plaintiff continued to miss work, and, in 1983, the agency discharged him for excessive absenteeism. The plaintiff brought an action charging that his dismissal violated section 501 of the Rehabilitation Act.²⁰⁹

The court began its analysis of the plaintiff's Rehabilitation Act claim by noting that Congress, in enacting section 501 and the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act of 1970 ("Alcohol Rehabilitation Act") intended that, where employees' alcoholism impaired their job performance, federal employers would make a significant effort to assist alcoholic employees before dismissing them.²¹⁰ The court further noted that those affirmative action efforts fell within the concept of reasonable accommodation.²¹¹ To ascertain the nature of the required accommodation, the court turned to guidelines issued by the Office of Personnel Management ("OPM") concerning employees with substance abuse problems and employees whose disabilities prevent them from performing their job duties.²¹²

The court reviewed a series of OPM guidelines that requires supervisors who suspect that alcoholism is the cause of an employee's poor performance to inform the employee of available coun-

²⁰⁸ See *id.* at 134-36.

²⁰⁹ *Whitlock*, 598 F. Supp. at 128-29.

²¹⁰ *Id.* at 131. The Alcohol Rehabilitation Act provides that a person may not be denied federal civilian employment or a federal license solely on the basis of prior alcoholism. 42 U.S.C. § 290dd-1(b)(1) (1988). Congress has also prohibited the denial of federal civilian employment or a federal license on the grounds of prior drug abuse. *Id.* § 290ce-1(b)(1).

²¹¹ *Whitlock*, 598 F. Supp. at 136. Because section 501 requires federal employers to take affirmative action toward individuals with disabilities, section 501 may impose a higher level of accommodation upon federal employers than section 504 imposes upon federal grantees. Henderson, *supra* note 156, at 731 n.144.

²¹² See *Whitlock*, 598 F. Supp. at 131-33.

selling.²¹³ If the employee does not obtain counseling and continues to perform poorly, the guidelines instruct the supervisor to provide the employee with a firm choice between obtaining treatment or facing disciplinary action.²¹⁴ The court also reviewed guidelines that direct agencies to consider granting employees an unpaid leave of absence when a disability that renders an employee unable to perform his or her job seems likely to respond to rehabilitation.²¹⁵ Relying on these guidelines, the court found that DOL's actions did not constitute a reasonable accommodation.²¹⁶ The court faulted the agency for not requiring the plaintiff, after his earlier attempts at rehabilitation failed, to enroll in another treatment program or face disciplinary action.²¹⁷ The court also noted that the agency decided to dismiss the plaintiff without considering the availability of alternative courses of action, such as an extended leave without pay, which would have allowed him to obtain intensive inpatient treatment.²¹⁸

In 1985, one year after the *Whitlock* decision, the United States District Court for the District of Columbia held in *Walker v. Weinberger* that reasonable accommodation of an employee with a substance abuse problem requires a federal employer to forgive past alcohol-induced misconduct in proportion to the employee's willingness to undergo, and his or her success in, treatment.²¹⁹ The plaintiff in *Walker*, an employee for the Department of Defense's Printing Service, was disciplined by the agency three times for absence without leave.²²⁰ He then revealed he was an alcoholic. The agency allowed him to obtain inpatient treatment, but, upon his return, initiated disciplinary proceedings for several violations of

²¹³ *Id.* at 131.

²¹⁴ *Id.* at 131-32.

²¹⁵ *Id.* at 132.

²¹⁶ *Id.* at 136.

²¹⁷ *Id.*

²¹⁸ *Id.* at 137. Several courts have similarly emphasized the employer's consideration of alternatives to dismissal in determining whether the employer made a reasonable accommodation to an employee with a substance abuse problem. *See, e.g.,* *McElrath v. Kemp*, 714 F. Supp. 23, 27-28 (D.D.C. 1989) (no reasonable accommodation where agency did not consider possibility of offering employee leave without pay to undergo treatment); *Callicotte v. Carlucci*, 698 F. Supp. 944, 949-50 (D.D.C. 1988) (no reasonable accommodation where agency did not offer plaintiff a second opportunity for treatment when she relapsed); *LeMere v. Burnley*, 683 F. Supp. 275, 278 (D.D.C. 1988) (agency did reasonably accommodate plaintiff's alcoholism where it provided two extended leaves of absence and was willing to arrange for third leave in lieu of termination).

²¹⁹ 600 F. Supp. 757, 762 (D.D.C. 1985).

²²⁰ *Id.* at 759-60.

the agency's leave policy.²²¹ Based on the plaintiff's pre- and post-treatment infractions, the agency discharged him.

Citing *Whitlock*, the court began its analysis of the plaintiff's claim of handicap discrimination by asserting that the Alcohol Rehabilitation Act and section 501 of the Rehabilitation Act require federal agencies to make reasonable accommodations for alcoholic federal employees.²²² The court reasoned that allowing an employer to consider pre-treatment misconduct not only was inconsistent with Congress's desire to treat alcoholism as a disease, but also would discourage employees with substance abuse problems from seeking treatment.²²³ Thus, the court held that the agency's consideration of the plaintiff's pre-treatment violations during the disciplinary proceedings was a breach of its duty to make a reasonable accommodation to the plaintiff's alcoholism.²²⁴ The case was remanded to the agency for reconsideration of the appropriate penalty, in light of the court's ruling.²²⁵

In *Rodgers v. Lehman*, a 1989 decision, the United States Court of Appeals for the Fourth Circuit held that reasonable accommodation of alcoholism requires that employers confront the employee with the consequences of continued drinking, but that they refrain from immediately dismissing employees who relapse during treatment.²²⁶ Rodgers, a Navy employee, missed hundreds of hours of work between 1979 and 1984 due to his alcoholism.²²⁷ The Navy responded with several disciplinary measures, including leave restrictions, formal reprimands and suspensions from work. The Navy also urged Rodgers to obtain counseling. Rodgers alternately refused to obtain counseling, dropped out of treatment, or resumed drinking shortly after completing the treatment program. After the Navy dismissed Rodgers in 1984, he brought suit, alleging that the dismissal violated section 501 of the Rehabilitation Act.²²⁸

The *Rodgers* court first stated that federal agencies have a duty to make a reasonable accommodation to employees suffering from

²²¹ *Id.* at 760.

²²² *Walker*, 600 F. Supp. at 761.

²²³ *Id.* at 762.

²²⁴ *See id.*; cf. *Callicotte v. Carlucci*, 731 F. Supp. 1119, 1121-22 (D.D.C. 1990) (personnel records of misconduct prior to treatment for alcoholism must be expunged because they were acquired by flawed procedures where the employer did not provide employee reasonable accommodation).

²²⁵ *Walker*, 600 F. Supp. at 762.

²²⁶ 869 F.2d 253, 259 (4th Cir. 1989).

²²⁷ *Id.* at 254-56.

²²⁸ *Id.* at 254.

alcoholism.²²⁹ Next, the court reviewed the OPM guidelines that direct supervisors who believe that alcoholism is causing an employee's poor performance to inform the employee of available counseling, provide the employee a firm choice between counseling and disciplinary measures, and, if necessary, consider granting the employee a leave without pay.²³⁰

In response to a request from the federal government for a clear standard of reasonable accommodation, the court then outlined a four-step standard for determining whether an agency has met its duty to accommodate an employee with a substance abuse problem.²³¹ The procedure requires federal employers to: inform the employee of available counseling services; provide the employee a "firm choice" between treatment and discipline; allow the employee to obtain outpatient treatment and, lastly, allow the employee to obtain inpatient treatment, unless the employee's absence would cause the agency undue hardship.²³² The court stated that the procedure was designed to balance the employee's need to obtain effective treatment, the employer's interest in maintaining an efficient work force and the probability that recovery would include relapses.²³³ Applying that standard to the facts, the court concluded that the Navy did not properly accommodate the plaintiff's alcoholism, because it discharged the plaintiff before providing him an opportunity to obtain inpatient treatment.²³⁴

²²⁹ *Id.* at 258.

²³⁰ *Rodgers*, 869 F.2d at 258-59.

²³¹ *Id.* at 259.

²³² *Id.*

²³³ *See id.* The court wrote:

On the one hand, the nature of the disease of alcoholism requires that there be a continuum of treatment and that the alcoholic be permitted some opportunity for failure in order to come to the acceptance of his disease which is the critical element of his cure. On the other hand, both effective treatment and the needs of the workplace require that an alcoholic employee be firmly confronted with the consequences of his drinking. Excessive sensitivity is no more conducive to a cure than is undue rigor, and in the final analysis "reasonable accommodation" is the establishment of a process which embodies the proper balance between the two.

Id. Many experts in the field of substance abuse agree that the threat of discipline by an employer, including the possibility of termination, is one of the most effective methods for forcing substance abusers to acknowledge the need for treatment. *See McLanahan, Annotated Checklist: Employer Programs to Control Drug and Alcohol Abuse*, in *EMPLOYMENT PROBLEMS IN THE WORKPLACE* 39, 68 (PLI Litig. Course Handbook Series No. 305, 1986); *see also* *BOSTON GLOBE*, Sept. 12, 1991, at A1 (employed alcoholics, who face possible loss of job, more motivated in treatment than alcoholics who have already lost their jobs and social supports).

²³⁴ *Rodgers*, 869 F.2d at 260; *see also* *Fuller v. Frank*, 916 F.2d 558, 561-62 (9th Cir. 1990) (court adopting *Rodgers* test for reasonable accommodation held that United States

At least one court has held that, to make a *prima facie* case, substance abusers must show that accommodations to their disability might be successful.²³⁵ In the 1987 case of *Crewe v. United States Office of Personnel Management*, the United States Court of Appeals for the Eighth Circuit held that a substance abuser who had offered no evidence that her future efforts at rehabilitation would be more successful than her several previous failed attempts had not established a *prima facie* case of discrimination.²³⁶ In *Crewe*, the Office of Personnel Management rejected the application of the plaintiff for federal employment based on its determination that her alcohol-related problems made her unsuitable for employment.²³⁷ The plaintiff's history of alcoholism and treatment dated back more than twenty years. No treatment had been successful, and the plaintiff had generally resisted all rehabilitative efforts.

In considering the plaintiff's claim that OPM's rejection of her application violated section 501, the court noted that OPM may reject any applicant in order to promote the efficiency of the Civil Service.²³⁸ Thus, the court concluded that OPM's reliance on the plaintiff's history of alcoholism in rejecting her application was legitimate.²³⁹ Next, acknowledging that federal agencies have a duty to accommodate applicants who are substance abusers, the court addressed the issue of reasonable accommodation.

The court stated that the plaintiff bears the initial burden of making a facial showing that reasonable accommodation is possible.²⁴⁰ Reviewing the plaintiff's history of unsuccessful efforts at rehabilitation, the court concluded that any future efforts by the plaintiff would be similarly unsuccessful. The court compared the plaintiff to a blind person who applies for a job that requires the reading of printed materials, but who has in the past consistently refused to use any accommodations, such as sighted readers, that would allow him or her to perform the job.²⁴¹ The court held that the plaintiff had failed to show the existence of any accommodation

Postal Service had reasonably accommodated alcoholic employee when it allowed him "an opportunity to obtain several different levels of treatment").

²³⁵ See *Crewe v. United States Office of Personnel Management*, 834 F.2d 140, 143 (8th Cir. 1987).

²³⁶ *Id.*

²³⁷ *Id.* at 141.

²³⁸ *Id.* at 142-43.

²³⁹ *Id.* at 143.

²⁴⁰ *Crewe*, 834 F.2d at 143.

²⁴¹ *Id.* at 143 n.7.

that would allow her to become an efficient employee and therefore had not established a prima facie case of discrimination.²⁴²

Thus, following *Whitlock* and subsequent cases, in order to make a reasonable accommodation to employees' substance abuse problems, federal employers must initially inform the employee of available treatment. If the employee obtains treatment, the employer cannot consider pre-treatment offenses when disciplining the employee. If the employee refuses to undergo treatment or resumes drinking or using drugs after treatment, the employer must provide the employee a firm choice between obtaining treatment and facing disciplinary measures. Finally, before dismissing the employee, the employer must offer alternatives to dismissal, such as a leave without pay to obtain inpatient treatment, if the alternatives do not impose undue hardship on the employer. At least one court has held that the employee has the burden of showing that a possibility exists that the accommodation would be successful.

D. Undue Hardship

If a plaintiff shows that a reasonable accommodation exists, the burden shifts to the employer to show that the accommodation would impose undue hardship on the employer.²⁴³ Two recent District of Columbia District Court cases, brought under section 501, have addressed the issue of undue hardship in the context of substance abuse.²⁴⁴ In 1988, the United States District Court for the District of Columbia held in *LeMere v. Burnley* that an accommodation requiring an employer to reinstate an alcoholic employee with a history of erratic conduct would impose undue hardship on the employer.²⁴⁵ The plaintiff in *LeMere* was a Federal Aviation Administration ("FAA") employee who had been unable to stop drinking despite twice taking leaves of absence to obtain treatment.²⁴⁶ During the periods when the plaintiff was drinking, she was frequently absent from work. While at work, she was often intoxicated and occasionally experienced seizures related to alcohol withdrawal.

²⁴² *Id.* at 143.

²⁴³ See, e.g., *Prewitt v. United States Postal Serv.*, 662 F.2d 292, 310 (5th Cir. Unit A Nov. 1981); *Whitlock v. Donovan*, 598 F. Supp. 126, 137 (D.D.C. 1984), *aff'd mem. sub nom. Whitlock v. Brock*, 790 F.2d 964 (D.C. Cir. 1986). See *supra* notes 85-100 and accompanying text for a discussion of the general standards of undue hardship under the Act.

²⁴⁴ See *McElrath v. Kemp*, 714 F. Supp. 23, 27-28 (D.D.C. 1989); *LeMere v. Burnley*, 683 F. Supp. 275, 279 & n.9 (D.D.C. 1988).

²⁴⁵ 683 F. Supp. 275, 279 & n.9 (D.D.C. 1988).

²⁴⁶ *Id.* at 276-77.

After deciding to dismiss the plaintiff, the FAA agreed to stay her dismissal and grant her a third leave to obtain treatment if she provided the agency documentation of her intended treatment and follow-up program.²⁴⁷ When the plaintiff failed to meet the deadline for submitting the documentation, the agency dismissed her. The agency refused to rescind the dismissal even though the plaintiff entered an inpatient program just two days after the deadline.²⁴⁸

In analyzing the plaintiff's claim that her dismissal violated section 501 of the Rehabilitation Act, the court first stated that the FAA had met its duty to accommodate the plaintiff's alcoholism.²⁴⁹ The court noted that the FAA had provided the plaintiff several firm choices between treatment and discipline.²⁵⁰ The court further noted that by staying the plaintiff's dismissal and providing her another leave to obtain treatment, the agency had met its duty to consider the availability of alternatives to dismissal that would not impose undue hardship on the agency.²⁵¹

The court then addressed the plaintiff's argument that the FAA was required to accommodate the plaintiff by rescinding her dismissal after she entered a treatment program.²⁵² The plaintiff contended that because the FAA had agreed earlier to grant her a leave, it must not have felt that her absence would impose undue hardship on the agency.²⁵³ The court explained that the plaintiff's irregular conduct, rather than her absence from work, constituted undue hardship for the FAA.²⁵⁴ The plaintiff's failure to supply the requested documentation by the deadline was, according to the court, an example of her irregular conduct.²⁵⁵ Requiring the FAA to reinstate the plaintiff after her failure to meet the deadline would, therefore, have imposed undue hardship on the agency.²⁵⁶

²⁴⁷ *Id.* at 277.

²⁴⁸ *Id.* at 277-78.

²⁴⁹ *Id.* at 278-79.

²⁵⁰ *Id.* at 279.

²⁵¹ *See id.*

²⁵² *Id.*

²⁵³ *Id.* at 279 n.9.

²⁵⁴ *Id.* at 279 & n.9.

²⁵⁵ *See id.* at 279.

²⁵⁶ *Id.* at 279 n.9. According to the Court: "[I]t was plaintiff's irregular conduct more than her absence from the worksite that was the undue hardship for the FAA. Therefore, plaintiff's reinstatement after her irregular conduct on April 22 [when she failed to meet the deadline] would amount to an undue hardship for the agency." *Id.* But see *Ferguson v. United States Dep't of Commerce*, 680 F. Supp. 1514, 1518 (M.D. Fla. 1988) (no undue hardship due to plaintiff's erratic work performance because agency had brought hardship on itself by tolerating plaintiff's chronic absenteeism for too long).

In 1989, the United States District Court for the District of Columbia held, in *McElrath v. Kemp*, that a leave of absence does not impose undue hardship on the employer where the employee's position is not critical to the employer.²⁵⁷ The plaintiff in *McElrath*, an employee in the Department of Housing and Urban Development's ("HUD") Office of Finance and Accounting, was a recovering alcoholic.²⁵⁸ HUD had previously granted the plaintiff two leaves to undergo treatment. Within a year of her second rehabilitation, the plaintiff suffered a relapse and frequently missed work or came to work intoxicated.²⁵⁹ One year after her relapse, HUD dismissed the plaintiff, who subsequently filed a claim under section 501 of the Rehabilitation Act.

The court declared that HUD, as a federal agency, had a duty to accommodate the plaintiff by determining whether actions, other than dismissal, were available that would not have imposed undue hardship on the agency.²⁶⁰ Examining the possibility that HUD could have granted the plaintiff a leave without pay, the court noted that her position was being phased out and that, after her discharge, a temporary employee had performed the plaintiff's duties.²⁶¹ The court concluded that the leave would not have imposed undue hardship on the agency.²⁶² Therefore, the court held that HUD had failed to make a reasonable accommodation to the plaintiff's alcoholism.²⁶³

In conclusion, substance abusers alleging that an employer has violated the Rehabilitation Act must first show that they are qualified for the job.²⁶⁴ Some courts simply require that substance abusers show the ability to do the job once the employer makes a reasonable accommodation.²⁶⁵ Other courts alternatively require that substance abusers meet the standard set forth in the 1978 amendment, although the courts vary in their interpretations of the amendment.²⁶⁶

²⁵⁷ 714 F. Supp. 23, 28 (D.D.C. 1989).

²⁵⁸ *Id.* at 24.

²⁵⁹ *Id.* at 25.

²⁶⁰ *Id.* at 27.

²⁶¹ *Id.* at 27-28.

²⁶² *Id.* at 28; see also *Fisher v. Walters*, No. 85-C-1201, 1988 WL 6946 (N.D. Ill. Jan. 26, 1988) (accommodation of plaintiff's frequent absences caused undue hardship where employer had already given employee leaves to obtain treatment for alcoholism and other employees had to make up for plaintiff's absences).

²⁶³ *McElrath*, 714 F. Supp. at 28.

²⁶⁴ See *supra* note 102 and accompanying text.

²⁶⁵ See *supra* notes 177-97 and accompanying text.

²⁶⁶ See *supra* notes 165-76 and accompanying text.

As part of their prima facie case, substance abusers must also show a plausible reason to believe that a reasonable accommodation for their disability exists.²⁶⁷ In a series of cases brought under section 501 of the Act, courts have held that a reasonable accommodation for substance abusers encompasses a referral to counseling, leave to obtain treatment and some tolerance of relapses.²⁶⁸ Once substance abusers show that reasonable accommodation to their disability is possible, the burden shifts to employers to demonstrate that the accommodation would impose undue hardship upon them.²⁶⁹ In determining where accommodation of a substance abuser would impose undue hardship on a federal employer, the courts have considered whether the substance abuser's position is essential to the agency and whether a substance abuser's inconsistent behavior at work unduly burdens the employer.²⁷⁰

IV. THE AMERICANS WITH DISABILITIES ACT OF 1990

As noted above, the Rehabilitation Act's provisions prohibiting discrimination by federal contractors and federal grantees apply to more than half of the private employers in the United States.²⁷¹ Individuals with disabilities subject to discrimination by those private employers not covered by the Act, however, formerly had recourse only through state law.²⁷² Although all fifty states have passed some sort of legislation designed to protect individuals with disabilities, the protection provided by those statutes varies.²⁷³ Some

²⁶⁷ See *supra* note 103 and accompanying text.

²⁶⁸ See *supra* notes 204-34 and accompanying text.

²⁶⁹ See *supra* note 104 and accompanying text.

²⁷⁰ See *supra* notes 244-63 and accompanying text.

²⁷¹ See *supra* note 57.

²⁷² See Maureen O'Connor, Note, *Defining "Handicap" for Purposes of Employment Discrimination*, 30 ARIZ. L. REV. 633, 649 (1988). The Supreme Court has indicated in dicta that individuals with disabilities are not a suspect class entitled to heightened scrutiny under the equal protection clause of the Constitution. *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973); see also *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 445-46 (1984) (heightened scrutiny not extended to mentally retarded individuals in part because Court reluctant to open the door to other groups, including "the aging, the disabled, the mentally ill, and the infirm"). See generally Marcia Pearce Burgdorf & Robert Burgdorf, Jr., *A History of Unequal Treatment: The Qualifications of Handicapped Persons as a "Suspect Class" Under the Equal Protection Clause*, 15 SANTA CLARA L. REV. 855, 902-08 (1975). Some federal courts have found that state action that discriminates against individuals with disabilities violates the due process clause of the Fourteenth Amendment of the Constitution, but this remedy does not apply to private employers. See Amy Jo Gittler, *Fair Employment and the Handicapped: A Legal Perspective*, 27 DEPAUL L. REV. 953, 954 n.5 (1978).

²⁷³ See O'Connor, *supra* note 272, at 651. Since the survey contained in O'Connor's

statutes, for example, do not prohibit discrimination, but simply assert that the state policy is to encourage the full and equal participation of individuals with disabilities in social and economic areas.²⁷⁴

State laws also vary in their approach to defining individuals with disabilities.²⁷⁵ As of 1988, twenty-four states had adopted definitions identical or substantially similar to the Rehabilitation Act definition.²⁷⁶ Other states, though, define disability by reference to the degree of employability, by listing conditions that qualify as disabilities, or by deferring to professional medical judgment.²⁷⁷ In 1990, Congress moved to fill in the gaps left by the Rehabilitation Act and state law by passing the Americans with Disabilities Act ("ADA").²⁷⁸ The ADA, which bans discrimination in several areas,

article, Delaware has enacted a law prohibiting discrimination on the basis of disability. See DEL. CODE ANN. tit. 19, § 724 (Supp. 1988).

²⁷⁴ See, e.g., LA. REV. STAT. ANN. § 46:1951 (West 1982); NEB. REV. STAT. § 20-126 (1987).

²⁷⁵ See O'Connor, *supra* note 272, at 651-55.

²⁷⁶ *Id.* at 649 n.94. See, e.g., MINN. STAT. ANN. § 363.01(13) (West Supp. 1991); N.C. GEN. STAT. § 168A-3(4) (1990). Some of the states that modeled their definitions upon the Rehabilitation Act definition deleted the provisions concerning individuals who have a record of a disability or are regarded as having a disability. O'Connor, *supra* note 272, at 652.

²⁷⁷ *Id.* at 653-54. Arizona and Wisconsin are examples of states that define individuals with disabilities by reference to their employability. See ARIZ. REV. STAT. ANN. § 41-1461(4) (1985) (a "handicap" is a physical impairment that substantially restricts an individual's general ability to obtain, retain or advance in employment); WIS. STAT. ANN. § 111.32(8)(a) (West 1988) ("handicapped individual" is an individual who has a physical or mental impairment that makes achievement unusually difficult or limits the ability to work). The definitions of both Maryland and Montana primarily list conditions that qualify as disabilities. See MD. ANN. CODE art. 49B, § 15(g) (1986) ("physical impairment" is any physical disability, disfigurement, infirmity or malformation caused by bodily injury, birth defect or illness, including, but not limited to, any degree of paralysis, amputation, lack of physical coordination, and speech, hearing or vision impairment); MONT. CODE ANN. § 49-2-101(16) (1989) (definition of "physical handicap" same as Maryland's). The statutes of Kentucky and South Carolina provide examples of legislative provisions that rely on medical expertise. See KY. REV. STAT. ANN. § 207.130 (Michie/Bobbs-Merrill 1982) (a "physical handicap" is a physical condition that constitutes a substantial disability and is demonstrable by medically accepted clinical or laboratory diagnostic techniques); S.C. CODE ANN. § 43-33-560 (Law. Co-op. 1985) (a "handicap" is a substantial physical or mental impairment that is verified by medical findings and that appears reasonably certain to continue throughout the individual's lifetime). See O'Connor, *supra* note 272, at 659-71 for a review of the definitions used by the states as of 1988.

²⁷⁸ See H.R. REP. NO. 485(II), 101st Cong., 2d Sess. 47-48 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 329-30 ("State laws are inadequate to address the pervasive problems of discrimination that people with disabilities are facing Current federal law is also inadequate."); H.R. REP. NO. 485(III), 101st Cong., 2d Sess. 26 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 448-49 ("The [ADA] completes the circle begun in 1973 with respect to persons with disabilities"). The ADA supplements, rather than preempts, the antidiscrimination provisions of the Rehabilitation Act. See Pub. L. No. 101-336, tit. V, § 501(b), 104 Stat. 369 (1990). See generally Kathleen D. Henry, Note, *Civil Rights and the Disabled: A*

including public transportation, public accommodations and services and telecommunications services, forbids most private employers from discriminating against employees and applicants with disabilities.²⁷⁹

A. *The ADA's Prohibition on Employment Discrimination*

Title I of the ADA contains the bulk of its provisions concerning employment discrimination.²⁸⁰ These provisions, which go into effect on July 26, 1992, will apply to all private employers with fifteen or more employees.²⁸¹ Under the ADA, employers may not discriminate against otherwise qualified employees or applicants on the basis of disability.²⁸² The ADA defines a "qualified individual with a disability" as "an individual with a disability who, with or without a reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."²⁸³ Disability, in turn, is defined as a physical or mental impairment that substantially limits one or more of an individual's major life activities, the record of such an impairment, or the perception of others that an individual has such an impairment.²⁸⁴

Comparison of the Rehabilitation Act of 1973 and the Americans with Disabilities Act of 1990 in the Employment Setting, 54 ALB. L. REV. 123 (1989).

To the extent that state law may provide a more generous or more rapid remedy, or that the state definition of individuals with disabilities encompasses individuals not covered by the ADA, individuals may continue to turn to state law. See O'Connor, *supra* note 272, at 649 (individuals protected under federal law may elect to pursue state remedies rather than face the delay involved in exhausting federal administrative remedies). But see EMPLOYMENT DISCRIMINATION, *supra* note 56, § 26.4.3, at 53 (most courts have held that, because available administrative remedies are inadequate, exhaustion is not required under section 504 of the Rehabilitation Act).

²⁷⁹ Pub. L. No. 101-336, § 1(b), 104 Stat. 327-28 (1990).

²⁸⁰ See *id.* tit. I, 104 Stat. 330-37.

²⁸¹ *Id.* §§ 101(5)(a), 102(a), 108, 104 Stat. 330, 331-32, 337. Until July 26, 1994, title I covers only employers with twenty-five or more employees. *Id.* § 101(5)(a), 104 Stat. 330.

²⁸² *Id.* § 102(a), 104 Stat. 331. The House Committee on Education and Labor noted that the ADA's definition of a qualified individual with a disability is comparable to the Rehabilitation Act's definition of qualified individuals with handicaps. H.R. REP. NO. 485(II) at 55, reprinted in 1990 U.S.C.A.N. at 337.

²⁸³ Pub. L. No. 101-336, tit. I, § 101(8), 104 Stat. 331 (1990). The definition indicates that courts should consider the employer's judgment when determining which functions of a job are essential. See *id.*

²⁸⁴ *Id.* § 3(2), 104 Stat. 229-30. The Rehabilitation Act similarly defines "individual with handicaps" as individuals having a physical or mental impairment that substantially impairs one or more major life activities, having a record of such an impairment, or being regarded as having such an impairment. 29 U.S.C. § 706(8)(A) (1988). See *supra* notes 110-15 and accompanying text for a discussion of the Rehabilitation Act definition. The ADA does not define the terms used in its definition of disability, but the legislative history of the ADA

The ADA specifically provides that employers may not refuse to make a reasonable accommodation to the known disability of an otherwise qualified applicant or employee unless they can show that the accommodation would impose an undue hardship upon their business.²⁸⁵ Similarly, employers may not deny jobs or advancements to otherwise qualified individuals because of the need to make a reasonable accommodation to a disability of the employee or applicant.²⁸⁶ The ADA does not define reasonable accommodation, but it includes a list of modifications that the term may encompass.²⁸⁷ The list includes making buildings wheelchair accessible, modifying work schedules and purchasing special equipment.²⁸⁸

The ADA defines undue hardship as "significant difficulty or expense."²⁸⁹ It further provides that the determination of whether an accommodation would require significant difficulty or expense should take into account the nature and cost of the accommodation, the effect of the accommodation upon the employer, the financial resources and facilities of the employer, and the size and structure of the employer's work force. The statute directs the individual making the determination to consider not only the employer's business as a whole, but also the particular facility that will make the accommodation and the relationship between that facility and the entire business.²⁹⁰

In its report on the ADA, the Committee on Education and Labor noted that Congress was basing the ADA's definition of "undue hardship" on the regulations implementing sections 501 and 504 of the Rehabilitation Act.²⁹¹ The Committee accordingly suggested that application of the ADA's definition of undue hardship should be consistent with the application of the Rehabilitation Act's

suggests that impaired ability to perform a *particular* job will not be considered a substantial limitation of the major life activity of working. See H.R. REP. NO. 485(III), 101st Cong., 2d Sess. 29 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 451.

²⁸⁵ Pub. L. No. 101-336, tit. I, § 102(a), (b)(5)(A), 104 Stat. 331-32 (1990); see also H.R. REP. NO. 485(II), 101st Cong., 2d Sess. 33 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 315 ("Reasonable accommodation is a key requirement of the Rehabilitation Act and the [Americans with Disabilities] Act").

²⁸⁶ Pub. L. No. 101-336, tit. I, § 102(b)(5)(B), 104 Stat. 332 (1990).

²⁸⁷ *Id.* § 101(9), 104 Stat. 331.

²⁸⁸ See *id.* The report of the Committee on Education and Labor indicates that a reasonable accommodation may also include providing additional unpaid leave days. H.R. REP. NO. 485(II) at 63, reprinted in 1990 U.S.C.C.A.N. at 345.

²⁸⁹ Pub. L. No. 101-336, § 101(10)(A), 104 Stat. 331.

²⁹⁰ *Id.*

²⁹¹ H.R. REP. NO. 485(II) at 67, reprinted in 1990 U.S.C.C.A.N. at 349.

regulations.²⁹² In its report on the ADA, the Committee on the Judiciary indicated that the ADA standard of "significant difficulty or expense" is greater than both a de minimis standard and the readily achievable standard of title III of the ADA, which addresses discrimination in privately-owned public accommodations.²⁹³ The Committee on the Judiciary also noted that it had considered, but rejected, an amendment fixing undue hardship at any cost greater than ten percent of the employee's salary.²⁹⁴ The Committee concluded that the flexible approach used under the Rehabilitation Act to determine undue hardship, rather than a set limit, was more appropriate under the ADA.²⁹⁵

B. Protection of Substance Abusers from Employment Discrimination under the ADA

Under the ADA, substance abusers bringing an employment discrimination claim must first show that they are otherwise qualified individuals with disabilities.²⁹⁶ The reports of the House Committee on Education and Labor and the House Committee on the Judiciary agree that the ADA's definition of "disability" encompasses alcoholism and drug abuse.²⁹⁷ Section 104 of the ADA, however,

²⁹² *Id.*

²⁹³ H.R. REP. NO. 485(III), 101st Cong., 2d Sess. 40 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 463. Section 301(9) of the ADA defines "readily achievable" as easily accomplishable and able to be carried out without much difficulty or expense. Pub. L. No. 101-336, § 301(9)(A), 104 Stat. 354 (1990). The list of factors to be considered in determining whether the removal of architectural, communication and transportation barriers is readily achievable is the same as the list of factors to be considered in determining whether the provision of an accommodation would impose undue hardship on an employer. See *id.* § 301(9)(B), 104 Stat. 354-55. See *supra* notes 87-94 and accompanying text for a discussion of the de minimis standard.

²⁹⁴ H.R. REP. NO. 485(III) at 41, reprinted in 1990 U.S.C.C.A.N. at 464.

²⁹⁵ See *id.* As an example of this flexible approach, the Committee cited the 1983 decision of the United States District Court for the Eastern District of Pennsylvania in *Nelson v. Thornburgh*, 567 F. Supp. 369 (E.D. Pa. 1983), *aff'd*, 732 F.2d 146 (3d Cir. 1984), *cert. denied*, 469 U.S. 1188 (1985). *Id.* In *Nelson*, the court held that because the total cost of providing accommodations for blind welfare workers, including sighted readers and braille forms, was a small percentage of the agency's personnel budget, the accommodation would not impose undue hardship on the agency. *Id.* at 380. The Committee stated that providing the same accommodations might impose undue hardship on a smaller employer, because the cost would be a larger percentage of the employer's resources. H.R. REP. NO. 485(III) at 41, reprinted in 1990 U.S.C.C.A.N. at 464.

²⁹⁶ See Pub. L. No. 101-336, tit. I, § 102(a), 104 Stat. 331 (1990).

²⁹⁷ See H.R. REP. NO. 485(II), 101st Cong., 2d Sess. 51 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 333; H.R. REP. NO. 485(III) at 28, reprinted in 1990 U.S.C.C.A.N. at 451. The ADA expressly excludes certain conditions, including transvestism, homosexuality and compulsive gambling, from the definition of disability. Pub. L. No. 101-336, tit. V, § 511, 104 Stat. 376 (1990).

states: "For purposes of [Title I], the term 'qualified individual with disability' shall not include any employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use."²⁹⁸ Although section 104(a) expressly refers only to users of illegal drugs, the legislative history suggests that at least some members of Congress intended the provision to apply to alcoholics as well as users of illegal drugs.²⁹⁹

The ADA limits its coverage of users of illegal drugs to individuals who are no longer engaging in the illegal use of drugs and who have completed rehabilitation programs or are participating in rehabilitation programs.³⁰⁰ In section 512(a) of the ADA, Congress amended the Rehabilitation Act's definition of "individual with handicaps" to exclude individuals currently engaging in the illegal use of drugs.³⁰¹ Paralleling the central ADA provision, the amendment provides that it does not encompass individuals who have been rehabilitated or are undergoing rehabilitation and who are no longer engaged in the illegal use of drugs.³⁰²

During the debate on the Conference Committee's report on the ADA, members of both the House and Senate expressed dismay over the ADA's treatment of users of illegal drugs.³⁰³ Representative DeLay, for example, argued that under the provision, an employer could legitimately dismiss an employee found with illegal drugs at work, only to have to rehire the employee once he or she enrolled in a rehabilitation program.³⁰⁴ Representative Bartlett responded to Representative DeLay by noting that the Conference Committee's report provides that "currently engaging in the illegal use of drugs"

²⁹⁸ Pub. L. No. 101-336, tit. I, § 104(a), 104 Stat. 334 (1990). The ADA defines "illegal use of drugs" as the use of drugs that, under the Federal Controlled Substances Act, 21 U.S.C. § 812 (1988), it is illegal to possess or distribute. *Id.* § 101(6)(A), 104 Stat. 330.

²⁹⁹ See 135 CONG. REC. S10,753 (daily ed. Sept. 7, 1989) (colloquy between Sen. Armstrong and Sen. Harkin); *id.* at S10,777 (daily ed. Sept. 8, 1989) (colloquy between Sen. Coats and Sen. Harkin). Several of section 104's other provisions expressly apply to both users of illegal drugs and alcoholics. See, e.g., Pub. L. No. 101-336, tit. I, § 104(c)-(e), 104 Stat. 334-36 (1990).

³⁰⁰ Pub. L. No. 101-336, tit. I, § 104(b), 104 Stat. 335 (1990).

³⁰¹ *Id.* § 512(a)(C)(i), 104 Stat. 376 (to be codified as 29 U.S.C. § 706(8)(C)). The Committee on Education and Labor stated that the amendment does change the treatment under the Rehabilitation Act of individuals who currently use illegal drugs, but does not change the Act's standard for alcoholics. H.R. REP. NO. 485(II), 101st Cong., 2d Sess. 142 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 425.

³⁰² Pub. L. No. 101-336, tit. V, § 512(a)(C)(ii), 104 Stat. 376-77 (1990).

³⁰³ See, e.g., 136 CONG. REC. H4618-19 (daily ed. July 12, 1990) (remarks of Rep. DeLay); 136 CONG. REC. S9694 (daily ed. July 13, 1990) (remarks of Sen. Armstrong).

³⁰⁴ 136 CONG. REC. H4618 (daily ed. July 12, 1990) (remarks of Rep. DeLay).

is not limited to the use of illegal drugs within days or weeks of dismissal.³⁰⁵ Instead, the report states that the phrase "currently engaging in the illegal use of drugs" encompasses any use of illegal drugs recent enough to support a reasonable belief that the individual is presently using drugs.³⁰⁶

The Conference Committee report further explains that, under the ADA, employers are allowed to seek reassurances that employees have not used illegal drugs recently.³⁰⁷ According to the report, the ADA provision concerning rehabilitation programs seeks to protect only *former* drug users who continue to participate in treatment programs.³⁰⁸ During the floor debate, Senator Armstrong expressed doubts that a test turning on a "reasonable belief" that an individual was currently using illegal drugs was sufficiently precise to serve as a guide for employers.³⁰⁹ He predicted that the resolution of which users of illegal drugs were entitled to protection under the ADA would be left to the courts.

At least one commentator believes that the ADA's "currently engaging in" standard strikes the correct balance between protecting employers and others from individuals whose substance abuse impairs their performance or renders them a threat to property and public safety and encouraging substance abusers to obtain treatment.³¹⁰ According to the commentator, the "currently engaging in" standard leaves employers free to rid their workforces of "recalcitrant addicts."³¹¹ By protecting individuals who have completed or are receiving treatment and are drug-free, however, the standard also encourages substance abusers to obtain treatment.³¹² The commentator acknowledges that the "currently engaging in" standard appears to exclude more substance abusers from the ADA than the 1978 amendment excluded from the Rehabilitation Act, because some current users of drugs may be able to adequately perform their jobs and not endanger property or public safety.³¹³ The commentator asserts, however, that because courts have interpreted the Rehabilitation Act to exclude unrehabilitated substance abusers and

³⁰⁵ *Id.* at H4619-20 (daily ed. July 12, 1990) (remarks of Rep. Bartlett). See H.R. CONF. REP. NO. 596, 101st Cong., 2d Sess. 64 (1990), reprinted in 1990 U.S.C.C.A.N. 565, 573.

³⁰⁶ H.R. CONF. REP. NO. 596 at 64, reprinted in 1990 U.S.C.C.A.N. at 573.

³⁰⁷ *Id.*

³⁰⁸ See *id.*

³⁰⁹ See 136 CONG. REC. S9694 (daily ed. July 13, 1990) (remarks of Sen. Armstrong).

³¹⁰ See Henderson, *supra* note 156, at 735-36.

³¹¹ *Id.*

³¹² *Id.* at 736.

³¹³ *Id.* at 737-38.

to allow drug testing, the ADA and the Rehabilitation Act will protect the same individuals.³¹⁴

The ADA also provides that employers may hold employees who engage in the illegal use of drugs or who are alcoholics to "the same qualification standards for employment or job performance and behavior that such [employer] holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee"³¹⁵ The committee reports do not discuss the basis or purpose of this provision.³¹⁶ The legislative history of the ADA, however, is replete with assertions that Congress drew heavily on the Rehabilitation Act and its implementing regulations during the drafting of the ADA.³¹⁷ The ADA also provides that, "[e]xcept as otherwise provided in this Act, nothing in this Act shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 or regulations issued by Federal agencies pursuant to such title."³¹⁸ The Committee on the Judiciary explained that, under this provision, where individuals are protected by both the Rehabilitation Act and the ADA, the courts should not interpret the ADA to provide less protection than the Rehabilitation Act unless the ADA expressly provides a different standard.³¹⁹

V. ANALYSIS OF THE PROTECTION AGAINST EMPLOYMENT DISCRIMINATION AFFORDED SUBSTANCE ABUSERS UNDER THE REHABILITATION ACT AND THE ADA

Commentators agree that substance abuse costs employers billions of dollars annually in lost time and reduced productivity.³²⁰

³¹⁴ *Id.*

³¹⁵ Pub. L. No. 101-336, § 104(c)(4), 104 Stat. 335 (1990). Section 104(c) also authorizes employers to prohibit the illegal use of drugs and use of alcohol in the workplace, to require that employees not be under the influence of alcohol while at work, and to require that employees comply with the standards of the Drug-Free Workplace Act of 1988, 41 U.S.C. §§ 701-707 (1989).

³¹⁶ See, e.g., H.R. REP. NO. 485(II), 101st Cong., 2d Sess. 78 (1990), *reprinted in*, 1990 U.S.C.C.A.N. 303, 360-61; H.R. REP. NO. 485(III), 101st Cong., 2d Sess. 47 (1990), *reprinted in*, 1990 U.S. CODE CONG. & ADMIN. NEWS 445, 470.

³¹⁷ The Committee on Education and Labor stated that the ADA incorporates many of the standards of discrimination set forth in regulations implementing section 504 of the Rehabilitation Act. H.R. REP. NO. 485(II) at 23, *reprinted in* 1990 U.S.C.C.A.N. at 304. The Committee on the Judiciary similarly noted that the employment discrimination prohibitions of the ADA borrow much of their "substantive framework" from section 504. H.R. REP. NO. 485(III) at 31, *reprinted in* 1990 U.S.C.C.A.N. at 454.

³¹⁸ Pub. L. No. 101-336, § 501(a), 104 Stat. 369 (1990).

³¹⁹ H.R. REP. NO. 485(III) at 69, *reprinted in* 1990 U.S.C.C.A.N. at 492.

³²⁰ See *supra* notes 29-31 and accompanying text.

Nonetheless, Congress has chosen to protect substance abusers under federal laws that prohibit discrimination in employment based upon disability. The Rehabilitation Act of 1973, as amended, prohibits federal employers, contractors and grantees from discriminating against substance abusers on the basis of their disability unless the substance abuse impairs their performance on the job or poses a threat to property or public safety.³²¹ The ADA will prohibit employers with fifteen or more employees from discriminating against substance abusers on the basis of their disability unless the individual is currently engaging in the illegal use of drugs or the individual's substance abuse prevents him or her from meeting standards that apply to all employees.³²²

The Rehabilitation Act and the ADA, however, both leave open the possibility that, in order to invoke their protections, substance abusers must meet a different, and more stringent, standard than individuals with other disabilities. Both the Rehabilitation Act and the ADA protect only qualified individuals with disabilities.³²³ Under both laws, courts generally determine whether a particular individual with a disability is qualified by assessing whether, once the employer makes a reasonable accommodation, the person can perform the essential requirements of the job.³²⁴

In determining whether the Rehabilitation Act protects a particular substance abuser, however, some courts have not applied the analysis used in cases involving individuals with other disabilities. The *Burka v. New York City Transit Authority* court, for example, held that, as amended in 1978, the Rehabilitation Act protects only substance abusers who have completed or are participating in rehabilitation.³²⁵ Notably, the court did not consider whether employers had any duty to accommodate employees with substance abuse problems by providing them the opportunity to obtain treatment for their disability. Instead, the court limited protection under the Rehabilitation Act to those substance abusers who had, prior to the challenged employment action, already obtained treatment.

The court in *Heron v. McGuire* similarly ignored the possibility of reasonable accommodation in determining whether the Rehabilitation Act protected the plaintiff, a police officer who had tested

³²¹ 29 U.S.C. §§ 706(8)(B), 791(b), 793(a), 794(a) (1988).

³²² Pub. L. No. 101-336, tit. I, §§ 102(a), 104, 104 Stat. 331, 334-35 (1990).

³²³ See *id.* § 102(a), 104 Stat. 331; 29 U.S.C. §§ 793(a), 794(a); 29 C.F.R. § 1613.703 (1990).

³²⁴ See *supra* notes 76-80 and accompanying text.

³²⁵ 680 F. Supp. 590, 600 (S.D.N.Y. 1988). See *supra* notes 168-76 and accompanying text for a discussion of the *Burka* decision.

positive for heroin. The *Heron* court concluded that, as amended in 1978, the Rehabilitation Act's definition of "individual with handicaps" did not include those substance abusers whose disability impaired their work performance.³²⁶ Because the court believed that the plaintiff's drug dependency, which forced him to break the law, prevented him from properly performing the duties of a police officer, the court held that the Rehabilitation Act did not protect the plaintiff. The *Heron* court did not consider whether a reasonable accommodation, such as a leave of absence that would have allowed the plaintiff to obtain treatment, might have cured the deficiencies in the officer's performance.

The Rehabilitation Act, as originally enacted, made no reference to substance abusers. After courts and administrative agencies interpreted the Act's definition of "individual with handicaps" to include substance abusers, however, Congress passed the 1978 amendment.³²⁷ That amendment excluded from the Act's definition of "individual with handicaps" substance abusers whose condition impaired their work performance or threatened property or public safety.

The legislative history of the Rehabilitation Act does not clearly reveal Congress's intent in enacting the 1978 amendment.³²⁸ On the one hand, statements made during the floor debate suggest that the amendment was simply a clarification that substance abusers, like individuals with other disabilities, had to demonstrate that they were qualified in order to invoke the protections of the Rehabilitation Act.³²⁹ Regulations in force in 1978 defined qualified individuals with disabilities as individuals who could perform essential job duties once employers made reasonable accommodations to their disabilities.³³⁰ The statements made during the floor debate thus imply that Congress intended the 1978 amendment to clarify that the Rehabilitation Act protected only those substance abusers who could perform the essential job duties once their employer made a reasonable accommodation to their disability. In other words, Con-

³²⁶ 803 F.2d 67, 68-69 (2d Cir. 1986). See *supra* notes 165-67 and accompanying text for a discussion of the *Heron* decision.

³²⁷ Pub. L. No. 95-602, § 122, 92 Stat. 2984-85 (1978) (codified in part at 29 U.S.C. § 706(8)(B) (1988)).

³²⁸ See *supra* notes 147-60 and accompanying text for a discussion of the legislative history of the 1978 amendment.

³²⁹ See *supra* note 160 and accompanying text.

³³⁰ 29 C.F.R. § 1613.702(f) (1990); 41 C.F.R. § 60-741.2 (1990); 45 C.F.R. § 84.3(k)(1) (1989).

gress intended that courts determine whether the Rehabilitation Act protected a particular substance abuser in the same way that they determined whether the Act protected an individual with any other disability.

On the other hand, the 1978 amendment does not expressly mention "reasonable accommodation"; it simply states the Rehabilitation Act's definition of "individual with handicaps" does not include any substance abuser "whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat in the property or safety of others."³³¹ The Conference Committee report also did not refer to "reasonable accommodation."³³² Furthermore, Congress did not amend the definition of "qualified individual with handicaps." It instead amended the definition of "individual with handicaps," which suggests that Congress intended courts to completely bypass any analysis of a particular substance abuser as a qualified individual with a disability. Finally, because the amendment was a response to the protection by courts of substance abusers under the Rehabilitation Act, Congress might reasonably have intended to limit the number of substance abusers protected by the Act.

Ultimately, the language and legislative history of the 1978 amendment provide no clear answer on how courts should determine whether the Rehabilitation Act protects a particular substance abuser. When it enacted the ADA, Congress had the opportunity to clearly indicate how courts should determine which substance abusers the ADA protects. The ADA, however, fails to provide clear guidance to the courts.

Like the Rehabilitation Act, the ADA protects only qualified individuals with disabilities.³³³ Also, as do the Rehabilitation Act regulations, the ADA defines qualified individuals with disabilities as persons who, with or without a reasonable accommodation to their disability, can perform the essential functions of the job.³³⁴ The ADA also includes, however, two provisions that specifically address the protection of substance abusers. Section 104 provides that the term "qualified individual with disability" does not include

³³¹ 29 U.S.C. § 706(8)(B) (1988).

³³² H.R. CONF. REP. NO. 1780, 95th Cong., 2d Sess. 102 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7375, 7413.

³³³ Pub. L. No. 101-336, tit. I, § 102(a), 104 Stat. 331 (1990).

³³⁴ *Id.* § 101(8), 104 Stat. 331.

individuals currently engaging in the illegal use of drugs.³³⁵ The same section further provides that employers may hold substance abusers to "the same qualification standards for employment or job performance and behavior that such [employer] holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee"³³⁶ Although the legislative history of the ADA indicates that employers have no duty of accommodation to current users of illegal drugs,³³⁷ the ADA does not indicate whether employers must make a reasonable accommodation to other substance abusers before holding them to the same standards as employees without disabilities. In regard to substance abusers who do not use illegal drugs, such as alcoholics, the ADA leaves open the same question as does the Rehabilitation Act—should courts hold substance abusers seeking protection under the acts to the same, or to a more stringent, standard than they hold individuals with other disabilities.

In light of public concern over substance abuse, Congress certainly might have intended to require that substance abusers meet a higher standard than individuals with other disabilities. If Congress truly intended to limit the Rehabilitation Act and the ADA's protection to only those substance abusers who can perform the essential duties of the job *without* a reasonable accommodation, however, it effectively rendered the Rehabilitation Act and the ADA meaningless for most substance abusers. Disabilities, including substance abuse, often impair job performance, especially in a world designed for people without disabilities. That reality is implicit in the word "disability" and is at the heart of the concept of reasonable accommodation.³³⁸ Therefore, if the Rehabilitation Act and the ADA protect only those substance abusers who can perform the essential duties of the job *without* a reasonable accommodation, the Rehabilitation Act and the ADA will provide no protection for many substance abusers.

Furthermore, the Rehabilitation Act and the ADA directly address concerns raised by the protection of substance abusers under the two acts. As discussed in the introduction to this note, substance abusers differ in some important ways from individuals with other disabilities.³³⁹ Users of illegal drugs, for example, break the law.

³³⁵ *Id.* § 104(a), 104 Stat. 334.

³³⁶ *Id.* § 104(c)(4), 104 Stat. 335.

³³⁷ 135 CONG. REC. S10,777 (daily ed. Sept. 8, 1989) (remarks of Sen. Harkin).

³³⁸ See *supra* notes 58–64 and accompanying text.

³³⁹ See *supra* notes 15–17 and accompanying text.

Also, the accommodations required to make substance abusers productive members of the work force are, from the employer's perspective, far more complicated than building wheelchair ramps or purchasing Braille manuals. The Rehabilitation Act and the ADA, however, both contain provisions that directly address arguments that many substance abusers break the law, that substance abusers are incompetent and dangerous employees, and that reasonable accommodations required by substance abusers are too burdensome. Because the Rehabilitation Act and the ADA already directly address these concerns, courts should not rely upon them as policy reasons that support imposing a more stringent standard upon substance abusers seeking protection under the acts than courts impose upon individuals with other disabilities.

As noted above, substance abuse, unlike other disabilities, sometimes involves criminal activities. The ADA provides, however, that neither the Rehabilitation Act nor the ADA protects individuals who are currently using illegal drugs.³⁴⁰ The only substance abusers now entitled to protection under the Rehabilitation Act and the ADA are alcoholics, individuals who abuse legal drugs, and former users of illegal drugs. By barring those substance abusers whose disability involves them in criminal activities from the class of substance abusers entitled to protection under the Rehabilitation Act and the ADA, the ADA eliminates any argument that, because *some* substance abusers break the law, courts should hold substance abusers to a higher standard.

Another possible rationale for holding substance abusers to a more stringent standard than individuals with other disabilities is that substance abusers will be incompetent, or even dangerous, employees. This argument presumes, though, that a requirement that substance abusers be qualified would not adequately protect the interest of employers in a productive work force. Both the Rehabilitation Act and the ADA define qualified individuals with disabilities as individuals who can perform the essential duties of a job, once the employer makes a reasonable accommodation to their

³⁴⁰ Pub. L. No. 101-336, tit. I, § 104(a), 104 Stat. 334 (1990). The "currently engaging in" standard will, as Senator Armstrong predicted during the floor debate on the ADA, give rise to considerable litigation. See 136 CONG. REC. S9694 (daily ed. July 13, 1990) (remarks of Sen. Armstrong). In providing that the ADA and the Rehabilitation Act protect only those users of illegal drugs who have completed or are participating in rehabilitation *and* who are no longer engaging in the use of drugs, Congress ignores that, for the majority of substance abusers, rehabilitation includes relapses.

disabilities.³⁴¹ If courts hold substance abusers to that standard, employers would be free to dismiss or to refuse to hire substance abusers who, even after the employer makes a reasonable accommodation to their disability, could not perform the essential duties of the job. Furthermore, the ADA provides that courts should take the employer's judgment into consideration when determining which job duties are essential.³⁴² Courts can, therefore, protect employers who fear that they will be saddled with unproductive employees simply by requiring that, in order to bring an action under the Rehabilitation Act or ADA, substance abusers, like individuals with other disabilities, demonstrate that they are qualified. Congress has already provided that the Rehabilitation Act and the ADA protect only qualified individuals with disabilities; courts need not attempt to indirectly protect employers by making it more difficult for substance abusers to bring an action under the Rehabilitation Act.

A final rationale that courts might use to justify imposing a more stringent standard upon substance abusers than they impose upon individuals with other disabilities is that the accommodations for substance abusers are exceptionally burdensome. Courts have articulated a model of reasonable accommodation for substance abusers that requires employers to provide employees who have substance abuse problems with a firm choice between treatment and discipline, to grant the employees time off to undergo rehabilitation and to tolerate at least one relapse after employees have undergone rehabilitation.³⁴³ Thus, employers may have endured months of unsatisfactory performance before the employer has met the requirement for reasonable accommodation. Courts might accordingly argue that they should limit the number of substance abusers protected by the Rehabilitation Act and the ADA.

Courts articulated this model of reasonable accommodation for substance abusers, however, in cases arising under section 501 of the Rehabilitation Act, which prohibits discrimination by *federal* employers.³⁴⁴ In their decisions, the courts noted that federal agencies must comply not only with the Rehabilitation Act, but also with

³⁴¹ See *id.* § 101(8), 104 Stat. 331; 29 C.F.R. § 1613.702(f) (1990); 41 C.F.R. § 60-741.2 (1990); 45 C.F.R. § 84.3(k)(1) (1989).

³⁴² Pub. L. No. 101-336, tit. I, § 101(8), 104 Stat. 331.

³⁴³ See *supra* notes 204-34 and accompanying text for a discussion of cases applying the concept to reasonable accommodation to substance abuse.

³⁴⁴ See 29 U.S.C. § 791(b) (1988).

the Alcohol Rehabilitation Act.³⁴⁵ In *Whitlock*, the first of these reasonable accommodation cases, the court also noted that section 501 requires federal employers to take affirmative action toward employees with substance abuse problems.³⁴⁶ Neither section 504 of the Rehabilitation Act, which prohibits discrimination on the basis of disability by federal grantees, nor the ADA, which prohibits discrimination on the basis of disability by most private employers, requires employers to take affirmative action toward individuals with disabilities. Furthermore, the Alcohol Rehabilitation Act does not apply to federal grantees or other private employers. The precedent established by *Whitlock* and the following cases, therefore, need not apply in Rehabilitation Act and ADA cases involving private employers.³⁴⁷ Instead, courts may require that employers provide a far less expansive, or even completely different, type of accommodation.

Additionally, both the Rehabilitation Act and the ADA provide that an employer has no duty to accommodate where the accommodation would impose undue hardship upon the employer.³⁴⁸ Even if courts use the model of reasonable accommodation developed in section 501 cases as a starting point, the undue hardship provisions will limit the extent of accommodations that courts may impose upon employers. Again, the ADA and the Rehabilitation Act already directly address a concern raised by the protection of substance abusers under the acts. No reason exists, therefore, for courts to limit the number of substance abusers protected under the Act by imposing a higher standard upon them than they impose upon individuals with other disabilities.

As they decide how to determine which substance abusers the Rehabilitation Act and the ADA protect, courts should also consider that their determination affects not only employers, but also substance abusers who are seeking employment. Recent studies suggest that, because jobs provide structure and an incentive to successfully complete rehabilitation, substance abusers with jobs are more likely than other substance abusers to avoid relapse.³⁴⁹ Congress intended

³⁴⁵ See *Walker v. Weinberger*, 600 F. Supp. 757, 761 (D.D.C. 1985); *Whitlock v. Donovan*, 598 F. Supp. 126, 131 (D.D.C. 1984), *aff'd mem. sub nom. Whitlock v. Brock*, 790 F.2d 964 (D.C. Cir. 1986).

³⁴⁶ *Whitlock*, 598 F. Supp. at 136.

³⁴⁷ See 42 U.S.C. § 290dd-1(b)(1) (1988).

³⁴⁸ See Pub. L. No. 101-336, tit. I, § 102(a), (b)(5)(a), 104 Stat. 331-32 (1990); 29 C.F.R. § 1613.704(a) (1990); 41 C.F.R. § 60-741.6(d) (1990); 45 C.F.R. § 84.12(a) (1989).

³⁴⁹ See *supra* notes 32-45 and accompanying text.

both the Rehabilitation Act and the ADA to increase the employment opportunities available to individuals with disabilities.³⁵⁰ In light of that goal, it would be particularly ironic if courts interpreted the Rehabilitation Act and the ADA to make it more difficult for one group of individuals with disabilities—substance abusers—who may derive some special benefit from employment to bring an employment discrimination claim.

One commentator has suggested that the ADA's "currently engaging in" standard appropriately balances the interests of employers and employees who are substance abusers.³⁵¹ The writer concludes that the ADA's limitation of its protection to rehabilitated or rehabilitating substance abusers not only protects the employer's interest in maintaining a productive work force, but also encourages substance abusers to obtain treatment.³⁵² The writer may be overly optimistic. Certainly, the application of the Rehabilitation Act and the ADA to substance abusers will not *discourage* substance abusers from seeking treatment. It seems unlikely, though, that prohibitions on discrimination will actively encourage many substance abusers to obtain treatment. If Congress truly wishes to push substance abusers toward treatment, it should amend the Rehabilitation Act and the ADA to provide that courts should consider the possibility of reasonable accommodation when determining whether the Rehabilitation Act or ADA protects a particular substance abuser. Such an amendment would ensure that, unless the accommodation would unduly burden the employer, employers provide employees with substance abuse problems some opportunity to obtain treatment.

In sum, the legislative history and cases under the Rehabilitation Act do not clearly indicate whether substance abusers bringing actions under the Rehabilitation Act must meet a more stringent standard than individuals with other disabilities. The ADA, as enacted, leaves the same question unanswered. Future courts faced with deciding which substance abusers the Rehabilitation Act and the ADA protect will, therefore, be free to take either route. These courts should consider, however, that the Rehabilitation Act and the ADA already address many of the concerns raised by the protection of substance abusers under those acts. Neither the Rehabil-

³⁵⁰ See *supra* notes 50–52 and 278–79 for a discussion of the purposes of, respectively, the Rehabilitation Act and the ADA.

³⁵¹ Henderson, *supra* note 156, at 735–36. See *supra* notes 310–14 and accompanying text for a discussion of Henderson's article.

³⁵² Henderson, *supra* note 156, at 735–36.

itation Act nor the ADA protects users of illegal drugs. Additionally, employers' interests in a productive work force are adequately protected by the Rehabilitation Act and the ADA, which require substance abusers invoking the protections of the acts to demonstrate that they are qualified. The Rehabilitation Act and ADA also provide that employers have no duty of accommodation where the accommodation would unduly burden the employer. Finally, courts should consider the important role that employment may play in the recovery of substance abusers.

VI. CONCLUSION

Both the courts and administrative agencies that interpreted the Rehabilitation Act of 1973 included substance abusers in the Act's definition of "individual with handicaps." Congress ratified that interpretation by expressing its intent to include substance abusers in the ADA's definition of "individuals with disabilities." Unfortunately, Congress also included in the Rehabilitation Act and the ADA provisions that can be, and, in the case of the Rehabilitation Act, have been, interpreted to make it more difficult for substance abusers than for individuals with other disabilities to obtain protection under the Rehabilitation Act and the ADA.

No reason exists, however, for courts to treat substance abusers differently from individuals with other disabilities. The Rehabilitation Act and the ADA already include provisions that directly address concerns raised by the protection of substance abusers under the acts. Ideally, Congress will amend both the Rehabilitation Act and the ADA to state clearly that courts should apply the same standards to substance abusers and individuals with other disabilities. Until Congress takes such action, courts should apply the same standards to *all* individuals bringing claims under the Rehabilitation Act and the ADA.

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