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THE LAW AND REASONABLE ACCOMMODATION OF THE HANDICAPPED IN FEDERAL GOVERNMENT: FOCUS ON DEAFNESS

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Almost everyone knows someone who is handicapped. However, the term "handicapped" encompasses a wide spectrum of disabilities. Each group of handicapped individuals is different and each individual is different from others within that same group. Because of the dissimilarities of handicapped individuals, even within the same group, there can be no blanket or standard accommodation for all persons within a specific group. Instead, each handicapped person's situation must be examined on a case-by-case basis.

Many obstacles impede the opportunities of handicapped individuals for employment. Negative employer attitudes continue to be a major obstacle in the hiring and promotion of handicapped individuals. In the study done by Phillips (1975), several similar attitudes among employers were identified that seemed to limit the employment opportunities of handicapped persons. These similarities were employers' perception of handicapped persons, employers' reluctance to place handicapped persons in supervisor jobs, and employers' lack of information about training handicapped persons.

Reasonable accommodation of handicapped persons in employment is broad. It should be an important consideration at every step of the selection process. The need for reasonable accommodation, depending on the disability and/or degree of severity, may be present when taking employment tests, interviews, training, daily communication needs, or job duties.

An important facet of the reasonable accommodation requirement is that it surpasses the "equal treatment" concept of non-discrimination. Handicapped individuals are now entitled to different or special treatment instead of the equal treatment of non-discrimination.

There are three main approaches on how to deal with the question of reasonable accommodation. Two of these are considered extreme. Of these two approaches, one is to do nothing at all and the other is to provide a sheltered or segregated approach to ensure an adequate qual-

ity of life. However, the courts have generally adopted a middle of the road approach to provide reasonable accommodations to give handicapped persons a fair and equal opportunity to participate and receive benefits of services as most people do.

The primary law relevant to this discussion of reasonable accommodation of handicapped persons is the Rehabilitation Act of 1973, hereafter referred to as the "Act". Specifically, sections 501, 503, and section 504 are important to handicapped persons.

There lies a clear and distinct difference between these three important sections of the act with regard to employment discrimination against the handicapped. These differences are as follows:

Section 501: applies to the federal government and requires affirmative action.

Section 503: applies to federal contractors and subcontractors. It also requires affirmative action in the hiring, placement, and promotion of qualified handicapped people by these contractors.

Section 504: applies to recipients of federal financial assistance. It requires non-discrimination, but not affirmative action.

It should be pointed out that section 504 of the Act requires only non-discrimination and not the higher standard of affirmative action as do sections 501 and 503.

This act was the first successful major attempt at establishing a national policy to integrate handicapped individuals into society regarding employment. It is designed to increase participation by handicapped individuals in the daily routines of society, including employment, and to prohibit discrimination against them.

Two regulations of the Equal Employment Opportunity Commission (EEOC) are important to the issue of reasonable accommodation of handicapped individuals. The first regulation, 5 C.F.R. 1913.702(f), defines the term "qualified handicapped individual" as it is meant by the Act. Briefly, this regulation states that a

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"qualified handicapped individual" with respect to employment, is a handicapped person who meets the experience and/or education requirements and who can perform the essential functions of the position in question. If a handicapped person satisfies these requirements, then, he/she will be considered legally "qualified" and protected against discriminatory actions in employment by the Act.

The second regulation, 5 C.F.R. 1613.704(b), defines reasonable accommodation by giving examples. Such examples include (1) making facilities readily accessible to and usable by handicapped persons; (2) job restructuring, part-time or modified work schedules; (3) acquisition or modification of equipment or devices; (4) appropriate adjustment or modification of examinations; (5) the provision of readers and interpreters, and other similar actions.

This regulation also provides a defense to employers for denying an accommodation to a qualified handicapped applicant or employee if the employer can demonstrate that accommodation would impose an "undue hardship" on the operation of its business or program. Cost of the particular accommodation may add an undue hardship to a business or program. Also, the accommodation itself may prevent a smooth and/or orderly operation of the business.

However, if an employer asserts this defense, then the "burden of proof" is on him. For example, a hearing-impaired employee has requested a certified sign language interpreter for periodic staff meetings. The employer asserts the defense of an "undue hardship" as the reason for failing to accommodate the hearing-impaired employee. The burden of proof of an undue hardship upon his business would, be on the employer. In looking at the validity of this defense the courts will weigh three things:

- (1) Budget and overall size with respect to number of employees;
- (2) The type of business or agency;
- (3) The nature and cost of the accommodation.

However, as pointed out in "Employment Discrimination Against the Handicapped and Section 504 of the Rehabilitation Act: An Essay on Legal Evasiveness," (97 Harvard L. Rev. 997-1015, Feb. 1984), how such factors are to be weighted and assessed and how much hardship is "undue" are unspecified.

A primary question to be answered with regard to reasonable accommodation is *who* should be reasonably accommodated. Generally, if you are

a qualified handicapped individual who can perform the essential functions of the job in question or you are capable of performing a particular job, with or without reasonable accommodation to your handicap, then you are protected against discriminatory actions in employment.

The case of *Southeastern Community College v. Davis* (1979) was the Supreme Court's first extensive opinion on this issue. In the *Davis* case, Davis, a hearing-impaired applicant, was denied admission to the nursing program of Southeastern Community College, a state institution that receives federal funds. The Court held that Davis was not a "qualified handicapped individual" within the meaning of the Act. The reasoning used by the Court to support this ruling was that she did not meet the "essential and fundamental" qualifications to gain entrance to the program of Southeastern Community College. In essence, the Court was saying that meeting the legitimate essential and fundamental requirements would qualify a person as a "qualified handicapped individual". The Court held that the requirements of Southeastern Community College's program (i.e. ability to hear, communicate, and finish necessary requirements of the program) were legitimate.

Even though the *Davis* case has a higher education and professional context, it is still relevant to reasonable accommodation. The relevancy is in the Court's holding and reasoning on the term "qualified handicapped individual". This term plays an intrinsic role in non-discrimination law.

The ruling in the *Davis* case has been expanded recently by *Consolidated Rail Corp. v. Darrone* (1984). In this case, Darrone's estate filed suit against Consolidated Rail Corp. for violation of rights conferred by section 504 of the Rehabilitation Act which requires non-discrimination in employment practices by recipients of federal financial assistance. Darrone had become handicapped because of an accident but could still perform the essential duties of the job in question, a fact not disputed in the case. However, Consolidated Rail then refused to continue to employ him. They argued that the federal financial assistance they were receiving was not for the purpose of employment.

In deciding this case, the Court rejected this "primary purpose" test of *Consolidated Rail* emphasizing that section 504 prohibits discrimination against the handicapped under "any" program or activity of recipients of federal financial assistance. In other words, the federal financial assistance does not have to be designated for

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employment purposes, but applies to *any* program or activity for which the recipient is responsible.

The act never really gives a clear definition of what is considered to be "federal financial assistance" as stated in section 504. This was clarified in the case *Gottfried v. Federal Communications Commission*, (1981). In this case, Gottfried had challenged the renewal of the license of a public TV station on the ground that the Commission had failed to inquire specifically into the station's efforts to meet the programming needs of the hearing-impaired. The station's obligation to do so, Gottfried proposed, was founded upon section 504 of the Act because the station was a recipient of federal financial assistance as evidenced by the broadcasting license issued by the federal government. However, the court ruled that a license issued by the federal government does not constitute federal financial assistance within the meaning of the act. The court went on to give examples of federal financial assistance such as grants, loans, and subsidies.

Close examination of the Act does not reveal an application of the law to either intentional discrimination or unintentional discrimination. The Court clarified this ambiguity in its holding in the case *Guardians Assn. v. Civil Service Commission of NY City*, (1983). An employment discrimination suit was filed against Guardians Assn. alleging (unintentional) employment practices. Guardians Assn. asserted that the act only applied to intentional discrimination. The Court ruled that it applied to unintentional discrimination as well.

Section 504, as many may assume, especially from the many cases filed under it, is not only relevant to employment practices but also to other kinds of discrimination as well. It should be noted that, in a recent case, the Supreme Court held that section 504 of the Rehabilitation Act of 1973 is by no means confined to employment discrimination claims. The Act does not say "employment discrimination" but it does say

(any) discrimination.

Situations have arisen in government agencies which have been used by the Court to explain how the Act is to be applied. For example, a federal employee requests a sign language interpreter for a training course where such course is a prerequisite for employment, retaining, or advancing in a job. To deny this accommodation would be in violation of section 501 of the Act.

Another example used by the Court was a situation where a deaf employee had requested a certified interpreter for his job performance evaluation. In this situation, a certified interpreter would be needed instead of a co-worker who knows sign language for two reasons. First, the importance of such a meeting would warrant accurate communication, and, secondly, the confidentiality and sensitivity of such a meeting would necessitate the exclusion of co-workers of the evaluatee.

To satisfy the obligations of the Act, the federal government has established several methods of providing interpreters for deaf employees of the federal government. These methods include:

1. Hiring full-time interpreters,
2. Using other employees who can interpret fluently, or
3. Contracting out with individual interpreters of interpreter referral agencies.

Funds have been set aside by the Office of Personnel Management and the Comptroller General of the United States for interpreters for deaf employees of the federal government who want to take advantage of training programs.

Since the passage of the Rehabilitation Act of 1973, there have been several laws, cases, and regulations that have had a significant impact on employment discrimination against the handicapped. As with improvements and advances in other kinds of discrimination law, these improvements have been fostered by increased public awareness of the problem. However, employment discrimination against handicapped individuals has by no means been eradicated.

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