THE REHABILITATION ACT OF 1973

29 USC 701 *et seq.*

(Selected Sections)

Sec.

THE REHABILITATION ACT OF 1973

29 USC 701 *et seq.*

(Selected Sections)

Sec. 791 Employment of individuals with handicaps

(a) Interagency Committee on Handicapped Employees; establishment; membership; co-chairmen; availability of other Committee resources; purpose and functions

There is established within the Federal Government an Interagency Committee on Handicapped Employees (hereinafter in this section referred to as the "Committee"), comprised of such members as the President may select, including the following (or their designees whose positions are Executive Level IV or higher): the Chairman of the Equal Employment Opportunity Commission (hereafter in this section referred to as the "Commission"), the Secretary of Veterans Affairs, and the Secretary of Labor, the Secretary of Education, and the Secretary of Health and Human Services. The Secretary of Education and the Chairman of the Commission shall serve as co-chairpersons of the Committee. The resources of the President's Committees on Employment of People With Disabilities and on Mental Retardation shall be made fully available to the Committee. It shall be the purpose and function of the Committee (1) to provide a focus for Federal and other employment of individuals with handicaps, and to review, on a periodic basis, in cooperation with the Commission, the adequacy of hiring, placement, and advancement practices with respect to individuals with handicaps, by each department, agency, and instrumentality in the executive branch of Government, and to insure that the special needs of such individuals are being met; and (2) to consult with the Commission to assist the Commission to carry out its responsibilities under subsections (b), (c), and (d) of this section. On the basis of such review and consultation, the Committee shall periodically make to the Commission such recommendations for legislative and administrative changes as it deems necessary or desirable. The Commission shall timely transmit to the appropriate committees of Congress any such recommendations.

(b) Federal agencies; affirmative action program plans

Each department, agency, and instrumentality (including the United States Postal Service and the Postal Rate Commission) in the executive branch shall, within one hundred and eighty days after September 26, 1973, submit to the Commission and to the Committee an affirmative action program plan for the hiring, placement, and advancement of individuals with handicaps in such department, agency, or instrumentality. Such plan shall include a description of the extent to which and methods whereby the special needs of employees with handicaps are being met. Such plan shall be updated annually, and shall be reviewed annually and approved by the Commission, if the Commission determines, after consultation with the Committee, that such plan provides sufficient assurances, procedures and commitments to provide adequate hiring, placement, and advancement opportunities for individuals with handicaps.

(c) State agencies; rehabilitated individuals, employment

The Commission, after consultation with the Committee, shall develop and recommend to the Secretary for referral to the appropriate State agencies, policies and procedures which will facilitate the hiring, placement, and advancement in employment of individuals who have received rehabilitation services under State vocational rehabilitation programs, veterans' programs, or any other program for individuals with handicaps, including the promotion of job opportunities for such individuals. The Secretary shall encourage such State agencies to adopt and implement such policies and procedures.

(d) Report to Congressional committees

The Commission, after consultation with the Committee, shall, on June 30, 1974, and at the end of each subsequent fiscal year, make a complete report to the appropriate committees of the Congress with respect to the practices of and achievements in hiring, placement, and advancement of individuals with handicaps by each department, agency, and instrumentality and the effectiveness of the affirmative action programs required by subsection (b) of this section, together with recommendations as to legislation which have been submitted to the Commission under subsection (a) of this section, or other appropriate action to insure the adequacy of such practices. Such report shall also include an evaluation by the Committee of the effectiveness of the activities of the Commission under subsections (b) and (c) of this section.

(e) Federal work experience without pay; non-Federal status

An individual who, as a part of an individualized written rehabilitation program under a State plan approved under this chapter, participates in a program of unpaid work experience in a Federal agency, shall not, by reason thereof, be considered to be a Federal employee or to be subject to the provisions of law relating to Federal employment, including those relating to hours of work, rates of compensation, leave, unemployment compensation, and Federal employee benefits.

(f) Federal agency cooperation; special consideration for positions on President's Committee on Employment of People With Disabilities

(1) The Secretary of Labor and the Secretary of Education are authorized and directed to cooperate with the President's Committee on Employment of People With Disabilities in carrying out its functions.

(2) In selecting personnel to fill all positions on the President's Committee on Employment of People With Disabilities, special consideration shall be given to qualified individuals with handicaps.

(Pub. L. 93112, Title V, Section 501, Sept. 26, 1973, 87 Stat. 390; Pub. L. 98221, Title I, Section 104(b)(3), Feb. 22, 1984, 98 Stat. 18; Pub. L. 99506, Title I, Section 103(d)(2)(C), Title X, Sections 1001(f)(1), 1002(e)(1), (2)(A), Oct. 21, 1986, 100 Stat. 1810, 1843, 1844; Pub. L. 100630, Title II, Section 206(a), Nov. 7, 1988, 102 Stat. 3310; Pub. L. 102-54, June 13, 1991, 105 Stat. 276.)

Sec. 794a Remedies and attorney fees

(a)(1) The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16), including the application of sections 706(f) through 706(k) (42 U.S.C. 2000e-5(f) through (k)), shall be available, with respect to any complaint under section 791 of this Title, to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint. In fashioning an equitable or affirmative action remedy under such section, a court may take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefor or other appropriate relief in order to achieve an equitable and appropriate remedy.

(2) The remedies, procedures, and rights set forth in Title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.] shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this Title.

(b) In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

(Pub. L. 93112, Title V, Section 505, as added Pub. L. 95602, Title I, Section 120(a), Nov. 6, 1978, 92 Stat. 2982.)

REHABILITATION ACT

29 U.S.C. §§ 791, 794, 794a
29 C.F.R. § 1613.701 et seq.

I. THE REHABILITATION ACT OF 1973: AN OVERVIEW.

A. STATUTORY AND REGULATORY STANDARDS - A SUMMARY.

1. Prohibits irrational discrimination against qualified handicapped employees and job applicants.

2. Requires "reasonable accommodation" in employment practices for qualified handicapped persons.

3. Requires physical access to be provided in work-sites.

4. Includes as handicapped those with alcohol and, to a somewhat lesser extent, drug problems.

5. The "remedies, procedures, and rights" of Title VII apply.

II. THE "QUALIFIED HANDICAPPED PERSON"

A federal employer's obligation not to discriminate under the Rehabilitation Act extends only to "qualified handicapped persons." The term "qualified handicapped person" is defined at 29 C.F.R. § 1613.702(f) to be

> "with respect to employment, a handicapped person who, with or without reasonable accommodation, can perform the essential functions of the position in question without endangering the health and safety of the individual or others. . . ."

A. WHO IS "HANDICAPPED"?

1. General Definition

29 U.S.C. § 706(8)(A)
29 C.F.R. § 1613.702(a)

2. Impairment which substantially limits a major life activity

Supreme Court:

School Board of Nassau Co., Florida v. Arline, 480 U.S. 273 (1987) (tuberculosis - handicap)

Circuit Courts:

Jasany v. U.S. Postal Service, 755 F.2d 1244 (6th Cir. 1985) (strabismus/cross-eyed - no handicap)
Osterling v. Walters, 760 F.2d 859 (8th Cir. 1985) (varicose veins - no handicap)
Forrisi v. Bowen, 794 F.2d 931 (4th Cir. 1986) (acrophobia/fear of heights - no handicap)(unfit for one job only)
De La Torres v. Bolger, 781 F.2d 1134 (5th Cir. 1986) (left-handedness - no handicap)
Harris v. Adams, 873 F.2d 929 (6th Cir. 1989) (asthma - no handicap)
Daley v. Koch, 892 F.2d 212 (2d Cir. 1989) (poor judgment; irresponsibility and poor impulse control - no handicap)
Thornhill v. Marsh, 866 F.2d 1182 (9th Cir. 1989) (congenital spinal deformity - handicap because perceived by employer as disqualifying employee from weight lifting requirements)

District Courts:

E.E. Black, Ltd. v. Marshall, 497 F. Supp. 1088 (D. Hawaii 1980) (back condition - handicap)

Tudyman v. United Airlines, 608 F. Supp. 739 (C.D. Cal. 1984) (failure to meet weight guidelines - no handicap)(unfit for one job only)

Elstner v. Southwestern Bell Telephone, 659 F. Supp. 1328 (S.D. Tex. 1987), aff'd, 863 F.2d 881 (5th Cir. 1988) (knee problem - no handicap)

Wright v. Tisch, 45 FEP 151 (E.D. Va. 1987) (allergies - no handicap)

Freyer v. Kinetic Concepts, Inc., et al., No. 87 Civ. 4098 (S.D.N.Y. 1988) (aerophobia - no handicap)

Harrison v. Marsh, 691 F. Supp. 1223 (W.D. Mo. 1988) (surgery requiring removal of a substantial amount of muscle - handicap)

Rezza v. U.S. Dept. of Justice, 46 FEP 1366 (E.D. Pa. 1988) (compulsive gambling - handicap)

Fugua v. Unisys Corp., 716 F. Supp 1201 (D. Minn. 1989) (back injury - no handicap since it does not prevent employee from an active life and alternate job)

Thomas v. GSA, 51 E.P.D. 39,221 (D.D.C. 1989) (sinusitis/hypertension - no handicap)

Miller v. AT&T Network Systems, 722 F. Supp. 633 (D. Ore. 1989) (asthma and heat sensitivity - no handicap) (unfit for one job only)

Desper v. Montgomery County, 727 F. Supp. 959 (E.D. Pa. 1990) (stress and depression requiring hospitalization - handicap)

Blanton v. AT&T, 52 FEP 19 (D. Mass. 1990) (sexual harasser - no handicap)

Santiago v. Temple University, 739 F. Supp. 974 (E.D. Pa. 1990) (loss of partial vision in one eye - no handicap)

Osekre v. Yeutter, 54 FEP 1341 (D.D.C. 1991) (cigarette smoke allergy - no handicap since plaintiff could still work)

3. Temporary Disability

Circuit Courts:

Grimard v. Carlston, 567 F.2d 1171 (1st Cir. 1978) (fractured leg and ankle - no handicap)
Evans v. City of Dallas, 861 F.2d 846 (5th Cir. 1988) (knee injury requiring surgery - no handicap)

District Courts:

Stevens v. Stubbs, 576 F. Supp. 1409 (N.D. Ga. 1983) (undisclosed transitory illness - no handicap)
Alderson v. Postmaster General of U.S., 598 F. Supp. 49 (W.D. Okla. 1984) (knee injury - no handicap)
Perez v. Philadelphia Housing, 677 F. Supp. 357 (E.D. Pa. 1987) aff'd without op., 841 F.2d 1120 (3d Cir. 1988) (even if transitory handicap, may be protected under the Act due to scope of limitations)
Adams v. GSA, 723 F. Supp. 1531 (D.D.C. 1989) (stress toward supervisor - no handicap)

4. Hidden Handicaps

Circuit Courts:

Cook v. Department of Labor, 688 F.2d 669 (9th Cir. 1983)
Nathanson v. The Medical College of Pennsylvania, 926 F.2d 1368 (3d Cir. 1991)

District Courts:

Butler v. Department of the Navy, 595 F. Supp. 1063 (D. Md. 1984)
Lutter v. Fowler, 41 FEP 1227 (D.D.C.) aff'd, 808 F.2d 137 (D.C. Cir. 1986)
Ferguson v. Department of Commerce, 680 F. Supp. 1514 (M.D. Fla. 1988) vacated and withdrawn, 694 F. Supp. 1541 (M.D. Fla. 1988)
Dowden v. Tisch, 685 F. Supp. 153, n.3 (E.D. Tex. 1988)
Williams v. Casey, 691 F. Supp. 760 (S.D.N.Y. 1988)
Fong v. Department of the Treasury, 705 F. Supp. 41 (D.D.C. 1989)

B. ESSENTIAL FUNCTIONS OF THE POSITION/OTHERWISE QUALIFIED

Circuit Courts:

Simon v. St. Louis County, Mo., 656 F.2d 316 (8th Cir. 1981), cert. denied, 455 U.S. 976 (1982)
Treadwell v. Alexander, 707 F.2d 473 (11th Cir. 1983)
Daubert v. U.S. Postal Service, 733 F.2d 1367 (10th Cir. 1984)
Hall v. U.S. Postal Service, 857 F.2d 1073 (6th Cir. 1988)
Copeland v. Philadelphia Police Dept., 840 F.2d 1139 (3d Cir. 1988), cert. denied, 109 S. Ct. 1636 (1989)
Leckelt v. Board of Commissioners, 909 F.2d 820 (2d Cir. 1990) (HIV positive employee not otherwise qualified because he failed to submit to testing to monitor infectious diseases in accordance with policy)
Chiari v. City of League City, 920 F.2d 311 (5th Cir. 1991) (construction inspector's degenerative disease makes him not otherwise qualified for his physical job).

District Courts:

Schmidt v. Bell, 33 FEP 839 (E.D. Pa. 1983)
Guerriero v. Shultz, 557 F. Supp. 511 (D.D.C. 1983)
Swann v. Walters, 620 F. Supp. 741 (D.D.C. 1984)
Ackerman v. Western Electric, 643 F. Supp. 836 (N.D. Cal. 1986), aff'd, 860 F.2d 1514 (9th Cir. 1988)
Wallace v. Veterans Administration, 683 F. Supp. 758 (D. Kan. 1988)
Davis v. Meese, 692 F. Supp. 505 (E.D. Pa. 1988), aff'd, 865 F.2d 592 (3d Cir. 1989)
Dowden v. Tisch, 729 F. Supp. 1137 (E.D. Tex. 1989), aff'd without op., 902 F.2d 957 (5th Cir. 1990)
Bailey v. Tisch, 683 F. Supp. 652 (S.D. Ohio 1988)
Franklin v. U.S. Postal Service, 687 F. Supp. 1214 (S.D. Ohio 1988) (paranoid schizophrenic who refuses to take medication to control behavior is not otherwise qualified)
Davis v. Frank, 711 F. Supp. 447 (N.D. Ill. 1989)
Nisperos v. Buck, 720 F. Supp. 1424 (N.D. Cal. 1989)
Adams v. GSA, 723 F. Supp. 1531 (D.D.C. 1989) (one unable to restrain from physical violence to supervisor not qualified for employment)
Desper v. Montgomery Co., 727 F. Supp. 959 (E.D. Pa. 1990) (drug addiction, stress and depression make undercover narcotics officer not otherwise qualified)
Black v. Frank, 730 F. Supp. 1087 (S.D. Ala. 1990) (carpal tunnel syndrome so incapacitated employee he is not qualified for any available job)
Hart v. Frank, 55 FEP 177 (D. Mass 1990), aff'd, 55 FEP 224 (1st Cir. 1991) (substance abuse addict who also suffers from wartime stress not otherwise qualified due to poor attendance)
Pandazides v. Virginia Board of Education, 752 F. Supp. 696 (E.D. Va. 1990) (applicant for state teaching certificate not qualified because learning disability prevents her from passing state exam)

C. SPECIAL PROBLEMS

1. Absenteeism

District Courts:

Stevens v. Stubbs, 576 F. Supp. 1409 (N.D. Ga. 1983)
Wimbley v. Bolger, 642 F. Supp. 481 (W.D. Tenn. 1986), aff'd, 831 F.2d 298 (6th Cir. 1987)
Matzo v. Postmaster General, 685 F. Supp. 260 (D.D.C. 1987), aff'd, 861 F.2d 1290 (D.C. Cir. 1988)
Lemere v. Burnley, 683 F. Supp. 275 (D.D.C. 1988)
King v. U.S. Postal Service, 47 EPD ¶ 38,179 (D.D.C. 1988)
Santiago v. Temple University, 739 F. Supp. 974 (E.D. Pa. 1990)
Holmes v. Frank, 54 EPD ¶ 40,136 (E.D. Mich. 1990)
Hart v. Frank, 55 FEP 177 (D. Mass. 1990), aff'd, 55 FEP 224 (1st Cir. 1991)

2. Mental and Emotional Handicaps

Circuit Courts:

Doe v. NYU, 666 F.2d 761 (2d Cir. 1981)
Doe v. Region 13, 704 F.2d 1402 (5th Cir. 1983)
Lucero v. Hart, 915 F.2d 1367 (9th Cir. 1990)

District Courts:

Guerriero v. Shultz, 557 F. Supp. 511 (D.D.C. 1983)
Schmidt v. Bell, 33 FEP 839 (E.D. Pa. 1983)
Swann v. Walters, 620 F. Supp. 741 (D.D.C. 1984)
Franklin v. U.S. Postal Service, 687 F. Supp. 1214 (S.D. Ohio 1988)
Adams v. GSA, 723 F. Supp. 1531 (D.D.C. 1989)

D. REASONABLE ACCOMMODATION

29 C.F.R. § 1613.704(a) requires that "[a]n agency shall make reasonable accommodation to the known physical or mental limitations of a qualified handicapped applicant or employee unless the agency can demonstrate that the accommodation would impose an undue hardship on the operation of its program." These regulations prohibiting discrimination against the handicapped are somewhat circular. That is, although an employer must only reasonably accommodate the limitations of a "qualified handicapped" applicant or employee, the regulations, as previously discussed, define a "qualified handicapped person" as an individual "who, with or without reasonable accommodation, can perform the essential functions of the position in question . . . ." 29 C.F.R. § 1613.702(f) (emphasis added).

Identifying a reasonable accommodation and showing it is possible is part of the employee's, or applicant's, prima facie case. Treadwell v. Alexander, 707 F.2d 473, 478 (11th Cir. 1983); Prewitt v. United States Postal Service, 662 F.2d 292, 310 (5th Cir. 1981); Bey v. Bolger, 540 F. Supp. 910 (E.D. Pa. 1982). The plaintiff must present plausible reasons to believe that his or her handicap could have been accommodated without modifying the essential nature of his or her job or imposing an undue burden on the employer. Johnson v. Weinberger, 48 FEP 1627 (E.D. Pa. 1988). However, once a prima facie case is established, the burden shifts to the employer to persuade the court that the accommodation is not reasonable and that it imposes an "undue hardship on its operations." Factors that can be considered are cost, burdensomeness, or a restructuring of the job to the extent the employee's essential functions are performed by others. See Hall v. U.S. Postal Service, 857 F.2d 1073 (6th Cir. 1988); Dexler v. Tisch, 660 F. Supp. 1418 (D. Conn. 1987); Ackerman v. Western Electric, 643 F. Supp. 836 (N.D. Cal. 1986), aff'd, 860 F.2d 1514 (9th Cir. 1988).

This determination is highly fact-specific and requires the court to engage in an individualized inquiry to ensure that the employer's justifications reflect a well-informed judgment grounded in a careful and open-minded weighing of the risks and alternatives. Hall at 1080.

Whether an employer must defer to the accommodation preferred by the employee when more than one accommodation is possible is not clear. However, at least two courts have endorsed a result similar to that found in the context of religious accommodation where the Supreme Court held that "an employer has met its obligation . . . when it demonstrates that it has offered a reasonable accommodation to the employee." Ansonia Board of Education v. Philbrook, 479 U.S. 60 (1986). See also American Postal Worker's Union v. Postmaster General, 781 F.2d 772 (9th Cir. 1986). Thus, in Carter v. Bennett, 840 F.2d 63 (D.C. Cir. 1988) the court held that the employer does not have to provide every accommodation a handicapped employee requests, only such reasonable accommodation as is necessary to help him perform his essential functions. In Langon v. HHS, 749 F. Supp. 1 (D.D.C. 1990), the court said that the agency had reasonably accommodated a computer analyst with multiple sclerosis even if it did not grant all her requests for accommodation, such as the one to work at home. See also Bento v. ITO Corporation, 599 F. Supp. 731 (D.R.I. 1984).

As to what constitutes "reasonable accommodation" in a given case, it seems clear that the question can only be answered with respect to the facts of that case. The EEOC's regulations do provide some guidance, however, and should be kept in mind. As stated at 29 C.F.R. § 1613.704(b), "reasonable accommodation" may include, but is not limited to, facility modification as well as "job structuring, part-time or modified work schedules, acquisition or modification of equipment or devices, appropriate adjustment or modification of examinations, the provision of readers and interpreters, and other similar actions."

1. **Position in Question**

Supreme Court:

School Board of Nassau Co., Florida v. Arline, 480 U.S. 273 (1987)

Circuit Courts:

Jasany v. U.S. Postal Service, 755 F.2d 1244 (6th Cir. 1985)
Carter v. Tisch, 822 F.2d 465 (4th Cir. 1987)
Shea v. Tisch, 870 F.2d 786 (1st Cir. 1989)

District Courts:

Alderson v. Postmaster General of U.S., 598 F. Supp. 49 (W.D. Okla. 1984)
Carty v. Carlin, 623 F. Supp. 1181 (D. Md. 1985)
Ignacio v. U.S. Postal Service, 86 F.M.S.R. 7026 (Sp. Panel 1986)
Hurst v. U.S. Postal Service, 653 F. Supp. 259 (N.D. Ga. 1986)
Wimbley v. Bolger, 642 F. Supp. 481 (W.D. Tenn. 1986)
Dexler v. Carlin, 40 FEP Cases 633 (D. Conn. 1986)
Rhone v. Department of the Army, 665 F. Supp. 734 (E.D. Mo. 1987)
Coley v. Secretary of the Army, 689 F. Supp. 519 (D. Md. 1987)
Wright v. Tisch, 45 FEP 151 (E.D. Va. 1987)
Davis v. U.S. Postal Service, 675 F. Supp. 225 (M.D. Pa. 1987)
AFGE, Local 51 v. Baker, 677 F. Supp. 636 (N.D. Cal. 1987)
Dancy v. Kline, 639 F. Supp. 1076 (N.D. Ill. 1986); 44 FEP 380 (N.D. Ill. 1987)
Fowler v. Frank, 702 F. Supp. 143 (E.D. Mich. 1988)
Black v. Frank, 730 F. Supp. 1087 (S.D. Ala. 1990) (no reassignment requirement, including reassignment to light duty)
Grist v. Frank, 1990 U.S. Dist. Lexis 17638 (D.D.C. 1990) (no reassignment to any other job required)
Henry v. Menorah Medical Center, 1991 U.S. Dist. Lexis 3686 (W.D. Mo. 1991) (reassignment in certain cases may be reasonable)

2. Job Restructuring

Circuit Courts:

Treadwell v. Alexander, 707 F.2d 473, 478 (11th Cir. 1983)
Daubert v. U.S. Postal Service, 733 F.2d 1367 (10th Cir. 1984)
Mantolete v. Bolger, 767 F.2d 1416 (9th Cir. 1985)
Jasany v. U.S. Postal Service, 755 F.2d 1244 (6th Cir. 1985)
Carter v. Bennett, 840 F.2d 63 (D.C. Cir. 1988)
Copeland v. Philadelphia Police Dept., 840 F.2d 1139 (3d Cir. 1988), cert. denied, 490 U.S. 1004 (1989)

District Courts:

Trimble v. Carlin, 633 F. Supp. 367 (E.D. Pa. 1986)
Koffler v. Hahneman University, Slip. Op. 85-5189 (E.D. Pa. July 10, 1986)
Dancy v. Kline, 44 FEP Cases 380 (N.D. Ill. 1987)
Rosiak v. Department of the Army, 679 F. Supp. 444 (M.D. Pa. 1987)
Fields v. Lyng, 705 F. Supp. 1134 (D. Md. 1988), aff'd without op., 888 F.2d 1385 (4th Cir. 1989)
Harrison v. Marsh, 691 F. Supp. 1223 (W.D. Mo. 1988)
Wallace v. Veterans Administration, 683 F. Supp. 758 (D. Kan. 1988)

3. Modification of Equipment

Circuit Courts:

Mantolete v. Bolger, 767 F.2d 1416 (9th Cir. 1985)
Carter v. Bennett, 840 F.2d 63 (D.C. Cir. 1988)

4. Modification of Examinations/Tests

Supreme Court:

Wynne v. Tufts Univ., 1990 U.S. App. LEXIS 6772 (1st Cir. 1990)

Circuit Courts:

Brookhart v. Illinois State Board of Education, 697 F.2d 179 (7th Cir. 1983)
Stutts v. Freeman, 694 F.2d 666 (11th Cir. 1983)
Doherty v. Southern College of Optometry, 862 F.2d 57 (6th Cir. 1988)

District Courts:

Pandazides v. Virginia Board of Education, 752 F. Supp. 696 (E.D. Va. 1990)

5. Readers and Interpreters; Training

Supreme Court:

Board of Education v. Rowley, 458 U.S. 176 (1982)

Circuit Courts:

Stutts v. Freeman, 694 F.2d 666 (11th Cir. 1983)
Carter v. Bennett, 840 F.2d 63 (D.C. Cir. 1988)

District Courts:

Nelson v. Thornbugh, 567 F. Supp. 369 (E.D. Pa. 1983), aff'd, 732 F.2d 126 (3d Cir. 1984), cert. denied, 469 U.S. 1188 (1985)
Davis v. Frank, 711 F. Supp. 447 (N.D. Ill. 1989)
Arneson v. Heckler, 53 FEP 963 (E.D. Mo. 1990)

6. **Performance Standards**

Circuit Courts:

Carter v. Bennett, 840 F.2d 63 (D.C. Cir. 1988)
Doherty v. Southern College of Optometry, 862 F.2d 57 (6th Cir. 1988)
Lucero v. Hart, 915 F.2d 1367 (9th Cir. 1990)

District Courts:

Boyd v. U.S. Postal Service, 32 FEP 1217 (W.D. Wa. 1983), aff'd, 752 F.2d 410 (9th Cir. 1985)
Bruegging v. Burke, 696 F. Supp. 674 (D.D.C. 1987)
AFGE, Local 51 v. Baker, 677 F. Supp. 636 (N.D. Cal. 1987)
Fields v. Lyng, 705 F. Supp. 1134 (D. Md. 1988), aff'd without op., 888 F.2d 1385 (4th Cir. 1989)
Desper v. Montgomery County, 727 F. Supp. 959 (E.D. Pa. 1990)

E. **Safety Considerations**

Supreme Court:

Southeastern Community College v. Davis, 442 U.S. 397 (1979)

Circuit Courts:

Prewitt v. United States Postal Service, 662 F.2d 292, 310 (5th Cir. 1981)
Doe v. New York University, 666 F.2d 761 (2d Cir. 1981)
Bentivegna v. U.S. Department of Labor, 694 F.2d 619 (9th Cir. 1982)
Cook v. United States Department of Labor, 688 F.2d 669 (9th Cir. 1982), cert. denied, 464 U.S. 832 (1983)
Strathie v. Department of Transportation, 716 F.2d 227 (3d Cir. 1983)

Doe v. Region 13 Mental Health-Mental Retardation Commission, 704 F.2d 1402, reh. denied, 709 F.2d 712 (5th Cir. 1983)
Mantolete v. Bolger, 767 F.2d 1416 (9th Cir. 1985)
Gardner v. Morris, 752 F.2d 1271 (8th Cir. 1985)
Kohl v. Woodhaven Learning Center, 865 F.2d 930 (8th Cir. 1989)
Chiari v. City of League City, 920 F.2d 311 (5th Cir. 1991)

District Courts:

E.E. Black, Ltd. v. Marshall, 497 F. Supp. 1088 (D. Hawaii 1980)
Bey v. Bolger, 540 F. Supp. 910 (E.D. Pa. 1982)
Ackerman v. Western Elec., 643 F. Supp. 836 (N.D. Cal. 1986), aff'd, 860 F.2d 1514 (9th Cir. 1988)
School Board v. Nassau Co., Florida v. Arline, 480 U.S. 273 (1987)
Wallace v. Veterans Administration, 683 F. Supp. 758 (D. Kan. 1988)
David v. Meese, 692 F. Supp. 505 (E.D. Pa. 1988), aff'd without opinion, 865 F.2d 592 (3d Cir. 1989)
Franklin v. U.S. Postal Service, 687 F. Supp. 1214 (S.D. Ohio 1988)
DiPompo v. West Point Military Academy, 708 F. Supp. 540 (S.D.N.Y. 1989)
Serrapica v. City of New York, 708 F. Supp. 64 (S.D.N.Y. 1989), aff'd without op., 888 F.2d 126 (2d Cir. 1989)

F. Undue Hardship

Supreme Court:

Southeastern Community College v. Davis, 447 U.S. 397 (1979) (college did not have to provide an individual instructor for a deaf nursing student)

Circuit Courts:

Hall v. U.S. Postal Service, 857 F.2d 1073 (6th Cir. 1988)
Chiari v. City of League City, 920 F.2d 311 (5th Cir. 1991)

District Courts:

Davis v. Frank, 711 F. Supp. 447 (N.D. Ill. 1989) (employer failed to prove accommodation would place economic burden on it; lowered employee morale does not rise to the level of undue hardship)
Arneson v. Heckler, 53 FEP 963 (E.D. Mo. 1990) (financial burden on agency unduly harsh)

III. THE REHABILITATION ACT AND COLLECTIVE BARGAINING AGREEMENTS

Supreme Court:

Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977)

Circuit Courts:

Daubert v. U.S. Postal Service, 733 F.2d 1367 (10th Cir. 1984)
Skillern v. Bolger, 725 F.2d 1121 (7th Cir.), cert. denied, 469 U.S. 835 (1984)
Jasany v. U.S. Postal Service, 755 F.2d 1244 (6th Cir. 1985)
Carter v. Tisch, 822 F.2d 465 (4th Cir. 1987)
Shea v. Tisch, 870 F.2d 786 (1st Cir. 1989)

District Courts:

Ignacio v. U.S. Postal Service, 86 F.M.S.R. 7026 (Sp. Panel 1986)
Hurst v. United States Postal Service, 653 F. Supp. 259 (N.D. Ga. 1986)
Davis v. U.S. Postal Service, 675 F. Supp. 225 (M.D. Pa. 1987)

IV. THE REHABILITATION ACT AND ALCOHOL AND DRUG ABUSERS

Circuit Courts:

Crewe v. OPM, 834 F.2d 140 (8th Cir. 1987)*
Anderson v. Univ. of Wisconsin, 841 F.2d 737 (7th Cir. 1988)
Rodgers v. Lehman, 869 F.2d 253 (4th Cir. 1989)
Fuller v. Frank, 916 F.2d 558 (9th Cir. 1990)
Butler v. Thornburgh, 900 F.2d 871 (5th Cir. 1990)

District Courts:

Guerriero v. Schultz, 557 F. Supp. 511 (D.D.C. 1983)
Whitlock v. Donovan, 598 F. Supp. 126 (D.D.C. 1984), aff'd, 790 F.2d 964 (D.C. Cir. 1986)
Richardson v. U.S. Postal Service, 613 F. Supp. 1213 (D.D.C. 1985)
Robinson v. Devine, 37 FEP Cases 728 (D.D.C. 1985)
Walker v. Weinberger, 600 F. Supp. 757 (D.D.C. 1985)
Schenck v. U.S. Postal Service, 43 EPD ¶ 37,216 (M.D. Fla. 1987), aff'd, 843 F.2d 503 (11th Cir. 1988)
LeMere v. Burnley, 683 F. Supp. 275 (D.D.C. 1988)*
Wallace v. Veterans Administration, 683 F. Supp. 758 (D. Kan. 1988)
Callicotte v. Carlucci, 698 F. Supp. 944 (D.D.C. 1988); 731 F. Supp. 1119 (D.D.C. 1990)
Nisperos v. Buck, 720 F. Supp. 1424 (N.D. Cal. 1989)
Pierce v. Engle, 726 F. Supp. 1231 (D. Kan. 1989)
McElrath v. Kemp, 714 F. Supp. 23 (D.D.C. 1989); later proceeding, 52 FEP 457 (D.D.C. 1990)
Desper v. Montgomery County, 727 F. Supp. 959 (E.D. Pa. 1990)
Holmes v. Frank, 54 EPD ¶ 40,136 (E.D. Mich. 1990)
Hart v. Frank, 55 FEP 177 (D. Mass. 1990), aff'd, 55 FEP 224 (1st Cir. 1991)*

*These cases support the proposition that an employee's refusal to help himself recover from his substance abuse problems can be grounds for termination

V. SPECIAL PROGRAMS

Circuit Courts:

Shirey v. Devine, 670 F.2d 1188 (D.C. Cir. 1982)
Allen v. Heckler, 780 F.2d 64 (D.C. Cir. 1985)

District Courts:

Davis v. U.S. Postal Service, 675 F. Supp. 225 (M.D. Pa. 1987)

UNITED STATES POSTAL SERVICE

Washington, DC 20260

DATE: November 1, 1982

RECEIVED
MANAGER, EEO BRANCH
MAR 1 ? 1983
CENTRAL REGION - ROOM 1151
CHICAGO, IL 60699

OUR REF: GC330:RAGerman:ljs

SUBJECT: Rehabilitation Act of 1973

TO:
- Joseph F. Morris
  Senior Assistant Postmaster General
  Employee Relations
- James C. Gildea
  Assistant Postmaster General
  Labor Relations

Nancy L. George
Assistant Postmaster General
Employee Relations

The Rehabilitation Act of 1973 requires federal employers, including the Postal Service, to establish affirmative action plans "for the hiring, placement and advancement of handicapped individuals." 29 U.S.C. §791(b). The exact nature of this obligation was not immediately clear at the time of the legislation's passage, however, and it was not until four years later that federal agencies learned, through the decision of the U.S. Court of Appeals for the District of Columbia in Ryan v. F.D.I.C., 565 F.2d 762 (D.C. Cir. 1977), that affirmative action plans must include an appeals procedure whereby a handicapped employee may prosecute a complaint of discrimination on the basis of handicap.

In the wake of the Ryan decision, the Civil Service Commission, which was then charged with the duty of reviewing agency affirmative action plans, 1/ promulgated regulations under the Rehabilitation Act on April 10, 1978, providing for a complaints procedure parallel to the procedure available for complaints of discrimination on the basis of race, sex, religion, or national origin prohibited by Title VII of the Civil Rights Act of 1964. These regulations, now codified at 29 C.F.R. §1613.701 et seq., also "clarified" the duties of federal employers under the Rehabilitation Act by prohibiting discrimination against "qualified handicapped persons."

On November 6, 1978, Congress amended the Rehabilitation Act to provide, among other things, that the same "rights, remedies, and procedures" available under Title VII would be available

1/ The Civil Service Commission's enforcement and other functions related to federal employment of handicapped individuals were transferred effective January 1, 1979, to the Equal Employment Opportunity Commission (EEOC) pursuant to Reorganization Plan No. 1 of 1978.

to employees alleging discrimination on the basis of handicap. Thus, by the end of 1978 handicapped federal employees could not only appeal administratively an alleged act of discrimination, but could also file lawsuits in federal court.

Since 1978 the Postal Service has been involved in litigation before the courts and administrative bodies respecting its obligations to handicapped employees and applicants under the Rehabilitation Act. 2/ It is becoming increasingly clear that those obligations may be staggering.

It is the purpose of this memorandum to explore the issues which have arisen under the Rehabilitation Act and their meaning for the Postal Service. Specifically, this memorandum will consider problems associated with the term "qualified handicapped persons," as well as the relationship between the Rehabilitation Act and collective bargaining agreements.

I. The "Qualified Handicapped Person"

As noted, a federal employer's obligation not to "discriminate" under the Rehabilitation Act extends only to "qualified handicapped persons." The term "qualified handicapped person" is defined at 29 C.F.R. §1613.702(f) to be "with respect to employment, a handicapped person who, with or without reasonable accommodation, can perform the essential functions of the position in question without endangering the health and safety of the individual or others . . . ." The elements of this definition, both in general and as they particularly pertain to postal employment, are discussed below.

a. Who Is "Handicapped"?

There is little doubt that the range of particular disabling conditions regarded by the Rehabilitation Act as "handicaps" is extremely broad. The definitions contained within the Act as well as the legislative history lead to the inescapable conclusion that the Act was clearly intended by Congress to afford protection to a large class of disabling conditions. Thus, anyone with a "physical or mental impairment which substantially limits one or more of such person's major life activities . . ." is, for purposes of the Act, a "handicapped person." 29 U.S.C. §706(7)(B); 29 C.F.R. §1613.702(a).

The "physical or mental impairments" regarded as handicaps include:

(1) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological;

2/ We are currently defending more than forty such cases in the Federal courts.

musculoskeletal; special sense organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine, or

(2) any mental or physiological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. [29 C.F.R §1613.702(b).]

And "major life activities" "means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing speaking, breathing, learning and working." 29 C.F.R. §1613.702(c).

Not only does the Act afford protection for individuals with actual presently manifested disabilities, but it also encompasses individuals who may have recovered in whole or in part but have a past history of impairments, as well as individuals who are discriminated against because they are regarded as a having handicaps whether or not they are in fact handicapped.

Consistent with the broad scope of the definition, and in reliance on the perceived Congressional intent that the scope of the Act be liberally construed, the few authorities which have addressed the question of whether a particular disability constitutes a handicap under the Act have broadly construed the term "handicap" to cover such "disabilities" as drug/alcohol abuse even though "reasonable arguments" could be advanced that such disabilities should not be protected by the Act. 3/

b. Identifying The Essential Functions of Positions of Employment Within the Postal Service

The requirement that a handicapped individual be "qualified" -- that is, capable of performing the "essential functions" of the

3/ See E.E. Black, Ltd. v. Marshall, 497 F. Supp. 1088 (D. Hawaii 1980); Davis v. Bucher, 451 F. Supp. 791 (E.D. Pa. 1978). As the Court noted in E.E. Black, drug abuse (and alcohol abuse) are "handicaps" for purposes of the Act despite the fact that such "handicaps" are voluntarily created by the handicapped person and, moreover, despite the fact that drug possession and use are generally illegal and it would appear that Congress could not have intended to compensate users for criminal activity. Section 706 was amended as part of the 1978 amendments to limit circumstances when alcoholics or drug users would be considered "handicapped" for employment purposes under sections 793, 794 of Title 29. These circumstances relate to safety. Thus, alcoholics and drug users who present safety problems are not "handicapped." Although there is no similar limitation in Section 791, it seems clear that when safety problems are present such persons could not be "qualified handicapped persons" within the meaning of 29 C.F.R. §1613.701 et seq. See also, discussion on safety considerations infra at pp. 16-19.

position in question with or without reasonable accommodation -- provides an employer with a substantial opportunity to limit its obligations toward the otherwise broadly defined class of handicapped persons. To the extent that an employer can successfully demonstrate that a particular individual, though qualified, is incapable of satisfactorily performing the "essential functions" of the position in question, the employer can insulate itself from liability to that individual under the Act. 4/

This emphasis on ability to perform the essential functions of the position is consistent with the legislative history. Speaking with respect to sections 503 and 504 of the Rehabilitation Act (codified as sections 793 and 794 of Title 29), Senator Williams, during debate on the 1978 Amendments to the Act, stated in pertinent part:

> Sections 503 and 504 both state explicitly that covered employers need hire and retain only "qualified" handicapped individuals. All the authorities interpreting current law have clearly understood that handicapped individuals can be held to the same performance standards that an employer demands of all employees.
>
> 124 Cong. Rec. S 15, 567 (daily ed. Sept. 20, 1978). (Emphasis supplied).

Thus, although the underlying statute in this case, 29 U.S.C. §791, does not specifically refer to "qualified" handicapped persons, the EEOC picked up the phrase in its implementing

4/ This principle clearly emerges from an examination of the authorities. In Weber v. USPS, MSPB Order No. CH07528110303 (July 10, 1981), the Merit Systems Protection Board found that an employee who failed to qualify on the distribution scheme required of his position was not a "qualified handicapped person" and thus was not discriminated against on the basis of handicap when he was removed. Accord, Donaldson v. USPS, Decision No, SF0752990061 (July 10, 1981). Similarly, in Ziemba v. Department of the Navy, MSPB Order No. PH07528010134 (June 23, 1981), the Board held that an individual who could not satisfy the weight lifting requirements of his position, and who could tolerate only less than the required amount of alternate standing and sitting for his position, was not a qualified handicapped person. Finally, in Treadwell v. Alexander, 27 FEP Cases 548 (S.D. Ga. 1981), the Court emphasized that an employee whose condition was such that he could not perform the "essential functions" associated with the position of park technician was not "otherwise qualified" and therefore was not entitled under §504 of the Act to any reasonable accommodation even assuming that reasonable accommodation was a requirement under that section of the Act.

regulations on the basis of the "clear understanding," as Senator Williams characterized it, that Congressional purpose was not to impose upon covered employers an obligation to compromise their job standards or take imprudent risks.

We therefore believe that the Postal Service would be well served by analyzing its complement of positions, both bargaining unit and non-bargaining unit, in an effort to identify, to as great a degree as possible, the "essential functions" of the various positions within the agency.

The identification of essential functions would accomplish the two fold objective of enabling our medical and field personnel to make better judgments when making hiring decisions, as well as strengthen our ability to present a defense in those instances where our decisions are challenged through litigation. The decisions on hiring would be aided by virtue of having a ready made standard for evaluating whether a handicapped employee is indeed "qualified" and, accordingly, whether the individual is entitled to, and can be, reasonably accommodated. In addition, the identification of essential functions would enable us to avoid the problem encountered all too often in the past of attempting to identify the essential functions in response to already commenced litigation by relying on the all too general phraseology contained in the various postal manuals and handbooks. The identification of core or essential function in advance of, and wholly apart from pending litigation, would enable the Postal Service to avoid even the suggestion of an "after-the-fact" justification for its personnel decisions involving handicapped individuals, and, more importantly, would very likely be regarded by the trier of fact as significant evidence on the question of whether the individual was or was not a "qualified handicapped person."

For these reasons we believe that the identification of "essential functions" should be given very high priority in the course of action which the Postal Service contemplates taking in an effort to come to grips with the requirements of the Act.

We believe that the proper starting point in identifying "essential functions" is a "job analysis" comparable to the analysis recently undertaken in preparation of a defense in the I.M.A.G.E. litigation. I.M.A.G.E. v. Bolger, C.A. No. 76-1979-RFP. I.M.A.G.E. involved a class based challenge to a broad range of employment practices within the Postal Service, including a challenge to the Postal Service's written examinations for entry level positions, i.e., mailhandlers, clerk, carrier, and machine distribution clerk. In an attempt to demonstrate the legitimacy of the tests, the Postal Service conducted a job analysis in accordance with the Uniform Guidelines on Employee Selection Procedures. 29 C.F.R. §1607 et seq.

The Postal Service identified the critical and/or important work behaviors associated with the positions of mailhandler, clerk, carrier, and machine distribution clerk through a series of field meetings held around the country with subject matter experts (SMEs) who directly supervise the work of employees in each of the four positions. Through these meetings, task statements for each position were developed and clustered into work behaviors, with the resulting work behaviors then rated by the SMEs as to their criticality and importance in relation to job performance. The Postal Service also identified the frequency with which each of the work behaviors identified through the field meetings with SMEs was performed. Further, abilities necessary to the performance of the positions of mailhandler, clerk, carrier, and machine distribution clerk, were identified and defined.

We believe that the identification of critical and/or important work behaviors accomplished in connection with the I.M.A.G.E. litigation has gone a long way toward identifying the "essential functions" for the positions of mailhandler, clerk, carrier and machine distribution clerk. While the actual requirements of the positions may vary somewhat throughout the country, a job analysis based on a national survey is consistent with the Uniform Guidelines and professional practice, and probably offers the most sensible and practical approach for attempting to identify the "essential functions" for all postal positions. We strongly urge that similar analyses be conducted for all postal positions not encompassed within the I.M.A.G.E. litigation.

The identification of critical and/or important work behaviors is the first step towards accomplishing the ultimate objective of identifying "essential functions" of postal positions. The second step requires articulating the physical efforts or requirements necessary for satisfactory performance of each of the identified work behaviors associated with respective positions. The latter could be accomplished, we believe, through an analysis by our medical personnel of the various behaviors associated with each of the respective positions. The ultimate objective would be an articulation, as precisely as possible, of the specific physical requirements associated with each critical and/or important work behavior. The end result of the two step analysis -- that is, the identification of critical and/or important work behaviors and the articulation of specific physical requirements associated with such work behaviors -- could provide our medical and field personnel with an invaluable tool for making the determination of whether a particular individual is or is not a "qualified handicapped person" and whether he/she can in fact be reasonably

accommodated. Having emphasized the desirability of the objective of identifying essential functions of the position in question, it is necessary to note a significant caveat and potential limitation on the use of the analysis which has just been suggested. The two step approach of identifying critical and/or important work behaviors and articulating physical requirements associated with those work behaviors accomplishes the objective of identifying essential functions of the position in question; that is, the end result of this analysis will be a list of "essential functions" for the various postal positions when adjudged from an agency-wide or national standpoint. Due to the wide variations in actual job duties of various postal positions within the many installations across the nation, it is apparent that the analysis will in many cases not accurately portray the essential functions of a particular job at a paticular facility. This distinction between essential functions of a position and essential functions of a particular job within, for example, a craft position, cannot be overlooked because it has been regarded by some authorities as the critical factor in the determination of whether an individual was indeed "qualified" and whether or not he/she could be acccmmodated. 5/

In Simon v. St. Louis County, Mo., 656 F.2d 315 (8th Cir. 1981), an individual who was discharged from his position as police officer after sustaining a gunshot wound which left him paraplegic, alleged that the police department's failure to rehire him violated his rights under the Act. The defendant presented evidence that the plaintiff, due to his physical limitations, was incapable of performing all of the essential functions generally required of police officers. The Court of Appeals held, however, that before determining whether a particular individual was "qualified" a determination had to be made whether the functions he could not perform were uniformly required of all officers. The ccurt's opinion suggests that an employer's showing that an individual may not be capable of performing the essential functions of the position in question may not necessarily insulate the employer from a finding of handicap discrimination if in fact those functions were not essential to the job in question.

The implication of the reasoning in Simon is that in making decisions on the hiring of handicapped persons it is insufficient to make these decisions in a vacuum based solely on an overall,

5/ As discussed infra, at pp. 9-12, we regard, in this analysis, the "position in question" to be, in the case of bargaining unit employees, the craft in which a person seeks employment at the facility at which the person seeks employment. Obviously, many employees in the same craft position have totally different job duties.

general compilation of essential functions for our various positions without regard to the reality as it pertains to jobs on the local level. It will be necessary, therefore, in arriving at the conclusion whether a particular individual is "qualified" and whether or not he/she can be reasonably accommodated, to apply the general, nationally identified list of critical and/or important work behaviors and physical requirements for those work behaviors to the local level to determine whether in fact those work behaviors and physical requirements are necessary for the job in question.

This "extra step" of focusing on the reality at the local level presents certain obvious difficulties due to the manner in which the Postal Service conducts its hiring. In the first place, we generally hire against anticipated needs rather than to fill specific job vacancies. It is therefore difficult to project at the time a particular hiring decision is made which work behaviors and which physical requirements will in fact have to be performed by the handicapped individual presently being considered for a position. A second difficulty arises from the fact that new hires are, for the most part, part-time flexibles, whose job duties are frequently subject to change. Again, this raises the problem of attempting to "predict" at the time of hiring which duties or physical capabilities will be essential to the job which the handicapped person will later be asked to perform. We believe that the only workable solution to these problems is to have our medical and field personnel make their best good faith judgment at the moment in time when the handicapped person is being considered for a position based on then existing conditions and past experience -- that is, in determining which duties will be essential for the "job" in question, and in deciding whether the individual can or cannot be reasonably accommodated, the decision should be made based on a judgment made at the local level which reflects current and past experience regarding the behaviors and physical capabilities required of individuals who fill the job vacancy in question. While the decisions we make will not in all instances prove to be correct, we believe that this approach is the best manner of avoiding potential liability under the Rehabilitation Act. The combined utilization of a broad based analysis of postal positions with an application of this analysis to the realities at the local level will enable, we believe, the Postal Service to properly defend its decisions not to hire, and at the same time satisfy its burden to reasonably accommodate qualified handicapped persons.

c. Reasonable Accommodation

29 C.F.R. §1613.704(a) requires that "[a]n agency shall make reasonable accommodation to the known physical or mental limitations

of a qualified handicapped applicant or employee unless the agency can demonstrate that the accommodation would impose an undue hardship on the operation of its program." It is thus seen that the EEOC's regulations prohibiting discrimination against the handicapped are somewhat circular. That is, although an agency must only reasonably accommodate the limitations of a "qualified handicapped" applicant or employee, the regulations, as previously discussed, define a "qualified handicapped person" to be an individual "who, with or without reasonable accommodation, can perform the essential functions of the position in question . . . ." 29 C.F.R. §1613.702(f). 6/

As to what constitutes "reasonable accommodation" in a given case, it seems clear that the question can only be answered with respect to the facts of that case. As to what kinds of agency action may be required to discharge its responsibility of reasonably accommodating "qualified handicapped" applicants or employees, however, the EEOC's regulations provide some guidance. As stated at 29 C.F.R. §1613.704(b), "reasonable accommodation" may include, but is not limited to, facility modification as well as "job structuring, part-time or modified work schedules, acquisition or modification of equipment or devices, appropriate adjustment or modification of examinations, the provision of readers and interpreters, and other similar actions."

The possible implications of specific types of "reasonable accommodation" are discussed below.

1. Position in Question

Perhaps the single most important issue relating to an agency's duty to make reasonable accommodation goes to a matter not covered in the EEOC's litany of types of accommodation; that is, the identification of the "position in question."

As discussed above, an agency owes a duty of reasonable accommodation only to a "qualified handicapped person." A "qualified handicapped person," in turn is someone who can perform the essential functions of the "position in question." In the Postal Service, employees are generally, if not exclusively, hired from registers pertaining to a particular craft at a particular facility. Although an applicant may be on more than one craft register at a given facility, or on the register(s)

6/ Additionally, it should be noted that an agency need only attempt to reasonably accommodate the known handicaps of an employee or applicant. See Carl E. Pajewski, EEO Appeal No. 01800941, discussed, infra, at p. 22.

at more than one facility, when the applicant is reached on a specific craft register at a specific facility, he is considered for employment only for a vacancy in that craft at that facility. As a matter of postal personnel practice, as well as common sense, it would therefore seem that the "position in question" relates to the craft position for which the applicant was actually considered. 7/

The EEOC, at least at the attorney/examiner level, recognizes no such limitation and appears to view the "position in question" as being virtually any position anywhere in the agency the duties of which the applicant could conceivably perform. Thus, in the case of Adolfo Garcia, EEO Complaint No. 9280-X0106, where the complainant applied for reinstatement as a letter carrier, the EEOC, in recommending a final agency decision of discrimination against the complainant, found that the complainant could "safely perform all of the duties of certain positions" (such as window clerk or personnel clerk). The EEOC went on to hold, as a remedial matter, that:

> [P]ositions should be considered in other facilities in "light duty" assignments and other non-traditional work assignments; the guiding criteria should be the complainant's ability to safely perform the essential functions of the position in question.

In this case the attorney/examiner has clearly considered the "position in question" to encompass positions other than the one for which the complainant applied.

Similarly, in the case of H. Eric Jones, EEOC Complaint No. 081-081-X0011, the complainant, a mail handler at the Denver BMC, was removed for inability to fulfill his job requirements. The EEOC attorney/examiner found, in the recommended final agency decision, that although the complainant was unable to continue functioning as a mail handler, the agency was obligated to accommodate the complainant in another "position." Specifically, the EEOC stated that:

> [T]he complainant should be [assigned] to a position either in the bulk mail center or to an appropriate position in a postal facility in the Denver metropolitan area after determining his physical limitations, his job interests, qualifications and abilities and after matching those factors with those

7/ This approach is also consistent with judicial decisions in other areas of employment discrimination law. Courts have traditionally looked to the position from which a person is removed or to the position applied for in determining whether the plaintiff has made out a prima facie case of discrimination. E.g., McDonnell-Douglas Corp. v. Green, 411 US. 792 (1973).

actually required by the facility or jobs in the Postal Service.

One limitation on the EEOC's view of "position in question," as reflected in Garcia and Jones, not considered in those cases, is stated by 29 C.F.R. §1613.702(f), which provides that the term "qualified handicapped person" may include passing a written test. An individual who has taken the mail handler examination (O/N 450) but not the clerk/carrier examination (O/N 440), for example, has not demonstrated that he is qualified for a clerk position. If, therefore, that person is turned down for a mail handler position the Postal Service should have no obligation to hire him as a clerk as he is not qualified for a clerk position. 8/

Even if this limitation is accepted, the EEOC's view of the "position in question" would remain extraordinarily broad, as many applicants take all the major entrance examinations. It would require, for example, that the Postal Service hire, as a clerk, assuming the ability to perform the essential functions of that position, someone considered and rejected for a mail handler vacancy despite the fact that the person had not been reached on the clerk register. The end result would be to undermine the register system. The effects would be compounded, obviously, if the applicant had to be hired at a facility other than the one to which he had originally applied, as in that case the register of applicants at the second office would be completely bypassed.

Not only would the EEOC's approach be administratively troublesome, it could also result in a violation of veterans' preference. In many cases, individuals low on a register, or not on a register at all, would be hired at the expense of a compensable veteran. 9/

8/ However, under the Postal Service's Rehabilitation Program for employees injured on duty, the examination requirement may be waived. See Part 546.212 of the Employee and Labor Relations Manual (ELM).

9/ In our judgment, the requirements of the Rehabilitation Act do not override veterans' preference. Title VII of the Civil Rights Act of 1964, as amended, specifically stated at 42 U.S.C. §2000e-11 that nothing in Title VII "shall be construed to repeal rights or preference for veterans." As federal employees or applicants for employment bringing actions alleging discrimination under the Rehabilitation Act are limited to the "rights and remedies" available under Title VII (29 U.S.C. §794a(a)(1)), it follows that the Rehabilitation Act in no way "repeals" veterans' preference.

We do not believe the views of the EEOC's attorney/examiners on the "position in question" are sound. 10/

2. Job Restructuring

As a qualified handicapped person is one who can, with or without accommodation, perform the essential functions of the position in question, it would seem that job restructuring, as an aspect of reasonable accommodation, would mean the elimination of the non-essential functions associated with the position which the applicant or employee cannot perform. Administrative determinations of the EEOC and MSPB have carried job restructuring considerably farther, however.

In the case of Jenise K. Banks, EEO Complaint No. 092-81-X0047, the complainant was removed from her position as a machine distribution clerk. The EEOC found that the complainant could not perform all of the essential functions of her position without endangering her health and safety, but nevertheless found in its recommended agency decision that she should be reinstated and "be given the least amount of physical duties to minimize her risk of possible injury and balance this concern with the equally justified concern of the efficiency of the Postal Service."

A similar approach was taken by a MSPB Presiding Official in the case of Phillip C. Alvarado, MSPB No. SC07529900ZREM. Alvarado had been removed from position as a Mail Handler at the St. Louis Bulk Mail Center for failure to meet his required work schedule. Although finding that the appellant was unable to meet the lifting requirements of the mail handler position, the Presiding Official found that there were certain mail handler duties which Alvarado could perform, which he termed "essential functions," and accordingly found that the appellant's removal from employment constituted discrimination. The Postal Service has petitioned for review of this decision by the full Board.

The position on job restructuring reflected in the cases discussed above seems extreme, and amounts to a requirement that an

10/ The MSPB's decision in Donaldson (see footnote 4, supra, at p. 4) is supportive of our position. In that case, the MSPB's Presiding Official, in sustaining the removal of a machine distribution clerk claiming discrimination on the basis of handicap, rejected the appellant's claim that the Postal Service should have accommodated his handicap by reassigning him to a mail handler position, stating that "[t]his is an entirely different type of position, and such a reassignment would be beyond the scope of the examples of reasonable accommodation given in 29 C.F.R. 1613.704(b)."

agency tailor a set of job duties to match the specific limitations and abilities of a handicapped applicant or employee. Moreover, when applied to employees rather than applicants, this expansive view could run afoul of the seniority provisions of a collective bargaining agreement. 11/ The relationship between the Rehabilitation Act and collective bargaining agreements is discussed below.

3. Part-time Employment

It may be anticipated that the Postal Service will receive -- and probably has alredy received -- applications from persons wishing to work part-time. Although the Postal Service initially hires bargaining unit employees as part-time flexibles, it is doubtful that the Service's desire for part-time employees can be reconciled with many applicants' desire to work part-time.

Part-time flexible employees are, of course, flexible in both days and hours worked. Their employment allows the Postal Service to match, at least in part, its labor needs to the volume of mail. The desire to work part-time, on the other hand, is usually the desire to work a fixed schedule of less than eight hours each day.

As an aspect of reasonable accommodation, part-time employment represents a "slippery slope." While in most offices a fixed part-time schedule could be created with minimal impact on opertional needs or costs, large scale employment of what in effect would be part-time regulars would have a profound impact on operations and labor costs.

The EEOC does recognize that an accommodation that imposes an undue hardship on the operation of the agency's program is not a "reasonable" one. 29 C.F.R. §1613.704(a). However, it would probably prove difficult to show that creation of a specific part-time job would in and of itself constitute an undue hardship. 12/

11/ Indeed, it appears to be in conflict with the position of the EEOC's Office of Review and Appeals. See discussion of Carl E. Pajewski, EEO Appeal No. 01800941, infra, at p. 22.

12/ One source of possible difficulty is the fact that the Postal Service does offer part-time employment to many individuals on the roles of the Office of Workers Compensation Programs. In this case, of course, it is to the distinct financial advantage of the Postal Service to return to work for any period of time persons who receive compensation whether they work or not.

A variation on this theme is presented in the Cosgrove v. U.S. Postal Service, C.A. 80-1658-N (S.D. Cal.), where the San Diego Post Office declined to hire an applicant with a history of epilepsy upon being informed that the applicant could not work overtime (fatigue may lower the threshold to a seizure). The position taken by the post office is that it is necessary financially and operationally for employees to be available to work overtime.

It should be noted that the Office of Personnel Management's "Handbook on Reasonable Accommodation" specifically discusses creation of fixed schedules for certain employees, such as those with epilepsy or diabetes, as a means of reasonably accommodating their handicaps.

4. Modification of Equipment

In Mantolete v. Bolger, C.A. 78-291 PHX WPC (D. Ariz), the plaintiff, an epileptic, has retained a rehabilitation engineer to testify as to how the MPLSM could be modified to allow plaintiff to work as a distribution clerk machine without undue risk to her personal safety. Apart from the threshold, and important, issue as to whether reasonable accommodation requires an agency to retain experts such as rehabilitation engineers before making its most basic personnel decisions, Mantolete will necessarily provide guidance as to what lengths an employer must go in the way of modifying equipment so as to enable a handicapped person to perform the "essential functions of the position in question."

It is our understanding that minor adjustments to equipment are now routinely made to facilitate an employee's performance of his duties.

5. Modification of Examinations

Although recognizing that in order to be a "qualified handicapped person" an applicant or employee may have to pass a written examination (29 C.F.R. §1613.702(f)), the EEOC's regulations, as noted above, include modification of examinations as an example of reasonable accommodation.

Since the essence of any test is its content, reasonable accommodation should certainly not mean varying the contents of a test to match the ability of the individual taking it. Rather, reasonable accommodation in this context would appear to require eliminating the effects of any handicap not directly related to the knowledges, skills and abilities the test is designed to measure.

This was the approach taken by the court in Brookhart v. Illinois State Bd. of Ed., 534 F. Supp. 725 (C.D. Ill. 1982), involving

the denial of high school diplomas to certain handicapped students because of their failure to pass a minimal competency test. Rejecting plaintiff's claim made under the All Handicapped Children Act of 1975 (20 U.S.C. §1401 et seq.) that the competency test should be modified, the court stated:

> Plaintiffs also proceed upon a basic fallacy in arguing that such a test must be modified to take account of lack of mental ability or capacity. It is certainly true that giving a blind person a test from a printed test sheet discloses only his handicap and nothing of his knowledge. To discover a blind person's knowledge, a test must be given orally or in braille, if appropriate. This, however, certainly does not mean that one can discover the knowledge or degree of learning of a mentally impaired student by modifying the test to avoid contact with the mental deficiency. To do so would simply be to pretend that the deficiency did not exist, and to fail completely to measure the learning. A diploma issued as a result of passing such a modified test would be a perversion of the program to lend meaning to the diploma as a record of educational achievement. The extent of the modification necessary to avoid the degree of learning deficiency would simply measure the pretense and the degree of the perversion of the program. This program does not involve any lack of compassion or feeling for people living with serious handicaps; it simply involves the avoidance of pretense, the integrity of a knowledge-testing program, and reserves some meaning for a high school diploma in relation to the attainable knowledge and skills for which the schools exist.

534 F. Supp. at 728-29 (footnote omitted).

Part 421.84 of the P-11 Personnel Handbook provides that special arrangements may be made for applicants who have handicaps which may prevent their competing in regular examinations.

6. Readers and Interpreters

It would certainly appear that the concept of reasonable accommodation does not extend so far as to require an agency to provide a blind or deaf applicant/employee with a full time reader or interpreter. Cf. Board of Education v. Rowley, 50 U.S.L.W. 4925 (June 29, 1982) (School Board not required under All Handicapped Children Act to provide full-time interpreter). But see Camenisch v. University of Texas, 616 F.2d 127 (5th

Cir. 1980) (HEW regulations issued under section 504 of the Rehabilitation Act applied to require university to provide sign language interpreter for deaf students).

Indeed, it would seem that in most situations involving deaf individuals, of which the Postal Service has employed many in recent years, adequate communication may be achieved without benefit of professional interpreting services. Nevertheless, there would appear to be certain situations, such as investigatory interviews, where obtaining an interpreter would be the prudent course of action. It is our understanding that Employee Relations is presently formulating general guidelines, based on postal experience and needs, on the provision of readers and interpreters to handicapped employees.

7. Accessibility

EEOC regulations provide that "a facility shall be deemed accessible if it is in complaince with the Architectural Barriers Act of 1968." 29 C.F.R. §1613.707(b). The Postal Service shall, in consultation with the Secretary of Health and Human Services, "prescribe such standards for the design, construction and alteration of its buildings to insure whenever possible that physically handicapped persons will have ready access to, and use of, such buildings." 42 U.S.C §4154a. The Act only imposes this burden, however, with respect to buildings constructed, altered or leased after August 12, 1968. 42 U.S.C. §4151.

In a recent draft "Comprehensive Affirmative Action Programs for Hiring, Placement and Advancement of Handicapped Individuals," however, the EEOC would require that all facilities be made "accessible" without regard to when a facility was built or leased and without regard to whether there are any handicapped applicants or employees at a given facility.

Postal Service Handbook RE-4, "Standards for Facility Accessibility By the Physically Handicapped," presently provides that:

> Where handicapped persons are employed in existing postal facilities, or where their employment is imminent, applicable employee work areas must be altered in compliance with [accessibility] standards . . . .

The Postal Service has informed the EEOC that the expansive view taken by the Commission in the aforementioned draft exceeds its authority under the Rehabilitation Act and would serve no legitimate purpose.

It should be noted that the issue of facility accessibility is presently in litigation in Rose v. U.S. Postal Service, C.A. No. 82-1974-WPG (C.D. Cal.).

d. Safety Considerations

Closely related to the question of who is a "qualified handicapped" person for purposes of employment are safety and health considerations. According to the EEOC's definition, a qualified handicapped person is one who "with or without reasonable accommodation can perform the essential functions of the position in question without endangering the health and safety of the individual or others . . . . ." 29 C.F.R. 1613.702(f) (emphasis supplied).

It is apparent, therefore, that considerations of health and safety provide the employer with potential additional legitimate bases for not accommodating all handicapped individuals.

In interpreting the obligations under both Title VII and the Act, the courts have demonstrated a willingness to accept employers' refusals to hire based upon proof that the non-hiring was the result of legitimate safety and/or health considerations.

Under Title VII, for example, it has been held that an employer's requirement that a manual laborer have a good back was so manifestly related to performance as a manual laborer that it was obviously related to business necessity and thus immune from a Title VII challenge under Griggs v. Duke Power Co., 401 U.S. 424 (1971). 13/ Smith v. Olin Chemical Corp., 555 F.2d 1283 (5th Cir. 1977). Similarly, pre-employment qualifications for airline pilots, (Spurlock v. United Airlines, 475 F.2d 216 (10th Cir. 1972)), an employer's requirement that intercity bus drivers not be over 40 years of age (Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224 (5th Cir. 1976)), and a mandatory pregnancy leave policy for airline stewardesses (Harris v. Pan American World Airways, 437 F. Supp. 413 (N.D. Cal. 1977)) have all withstood attacks under Title VII on the basis of proof that they were based on legitimate safety and/or health considerations.

The courts have displayed a similar willingness to take account of safety considerations in construing an employer's obligations toward handicapped individuals under the Rehabilitation Act. Thus, in Prewitt v. United States Postal Service, 662 F.2d 292 (5th Cir. 1981), the court noted that if Prewitt, a disabled war veteran, would suffer substantial pain in the performance of his duties as a clerk/letter carrier, he might be unable to satisfy the requirement of 29 C.F.R. 1613.702(f), and hence be unable to make the requisite showing for a prima facie case that he was qualified. Similarly, in Bey v. Bolger, 540 F. Supp. 910 (E.D.

13/ Griggs held that Title VII requires elimination of artificial, arbitrary, and unnecessary barriers to employment that operate to invidiously discriminate on the basis of race unless the employer can show that the discriminatory practice is related to job performance.

Pa. 1982), the court found that the Postal Service did not violate the Act when it refused to reinstate an employee who suffered from hypertension. The court noted: "[D]efendant has met its burden of proof . . . that, even if . . . a position was offered, plaintiff could not have performed the essential functions . . . without endangering his own health and safety because of his uncontrolled hypertension and cardiovascular disease."

The foregoing clearly demonstrates that employers can in certain instances avoid hiring handicapped employees when a sufficient demonstration of safety considerations can be presented. The standard for determining when safety considerations rise to the level of permitting the non-selection of a handicapped individual has yet to be fully defined by the courts; however, a few cases have addressed the question. In evaluating a bus company's policy of refusing to consider applications for bus driver from persons over the age of 35, the court in Hodgson v. Greyhound, Inc., 499 F.2d 859 (7th Cir.), cert. denied, 419 U.S. 1122 (1974), held that due to the compelling concerns for safety [i.e. the lives and well-being of passengers]:

> [I]t is not necessary that Greyhound show that all or substantially all bus driver applicants over forty could not perform safely. Rather to the extent that the elimination of Greyhound's hiring policy may impede the attainment of its goal of safety, it must be said that such action undermines the essence of Greyhound operations. Stated differently, Greyhound must demonstrate that it has a rational basis in fact to believe that elimination of its maximum hiring age will increase the likelihood of risk of harm to its passengers. Greyhound need only demonstrate however a minimal increase in risk of harm for it is enough to show that elimination of the hiring policy might jeopardize the life of one more person than might otherwise occur under the present hiring practice.

In Usery, supra, at 531 F. 2d 238, the Court further refined the extent of the employer's obligation to substantiate safety considerations:

> We emphasize safety in busing just as we would in an variety of other industrial areas where safety to fellow employees is of such a humane importance that the employer must be afforded substantial discretion in selecting specific standards which, if they err at all, should err on the side of preservation of life and limb. The employer must of course show a reasonable basis for its assessment of risk of injury/death. But it cannot be expected to establish this to a certainty, for certainty would require running the

> risk until a tragic accident would prove that the judgment was sound. Priceless as is a single life in our concept of the value of human life and our undoubted unwillingness ever to approve a practice which might kill one but not, say, twenty, we think the safety factor should be evaluated in terms of the possibility or likelihood of injury/death.

Clearly then, the Postal Service will on occasion want to invoke safety and health considerations as a basis for concluding that handicapped individuals are not "qualified". The cases, and indeed the regulations demonstrate that safety considerations can be legitimate grounds for non-selecting a handicapped employee provided that a reasonable basis for an assessment of risk of injury can be demonstrated. We believe that safety and health considerations should be factored into suitability determinations made for handicapped applicants. However, it is important that our medical and local appointing authorities be made aware of the fact that they should be prepared to offer proof to support judgments that the hiring of a particular handicapped individual would pose a health and/or safety risk.

II. The Rehabilitation Act and the Collective Bargaining Agreement

As a starting point in any dicussion of the relationship between the requirements of the Rehabilitation Act and the provisions of a collective bargaining agreement, it is helpful to consider the Supreme Court's decision in Trans World Airlines v. Hardison, 432 U.S. 63 (1977), dealing with an employer's obligation under Title VII of the Civil Rights Act to reasonably accommodate an employee's religious beliefs.

In Hardison the plaintiff, a member of the World Wide Church of God bound by the tenets of his faith to observe the Sabbath by refraining from work from sunset Friday through sunset Saturday, was employed as a supply shop clerk at a TWA maintenance facility. Like many postal operations, that facility was "a twenty-four-hour-a-day, seven-day-a-week operation". By virtue of the application of the seniority provision of the contract between TWA and the Machinist's Union, the best bid position Hardison could get included daytime Saturday work. The factual situation governing the possibility of providing him an accommodation was stated by the Court as follows (at pp. 68-69):

> . . . TWA agreed to permit the union to seek a change of work assignments for Hardison, but the union was not willing to violate the seniority provisions set out in the collective-bargaining contract, and Hardison had insufficient seniority to bid for a shift having Saturdays off.

> A proposal that Hardison work only four days a week was rejected by the company. Hardison's job was essential, and on weekends he was the only available person on his shift to perform it. To leave the position empty would have impaired supply shop functions, which were cirtical to airline operations; to fill Hardison's position with a supervisor or an employee from another area would simply have undermanned another operation; and to employ someone not regularly assigned to work Saturdays would have required TWA to pay premium wages.

One question presented by the case therefore, was whether the company was required to violate the contractual seniority provisions.

The Court answered in the negative the assertion that TWA was required to violate the seniority provisions of the collective bargaining agreement in order to meet its legitimate needs:

> We are also convinced, contrary to the Court of Appeals, that TWA cannot be faulted itelf for having failed to work out a shift or job swap for Hardison. Both the union and TWA had agreed to the seniority system; the union was unwilling to entertain a variance over the objections of men senior to Hardison; and for TWA to have arranged unilaterally for a swap would have amounted to a breach of the collective-bargaining agreement. [432 U.S. at 78-79.]

The Court reasoned that this result followed from the very purpose of Title VII.

> Had TWA nevertheless circumvented the seniority system by relieving Hardison of Saturday work and ordering a senior employee to replace him, it would have denied the latter his shift preference so that Hardison could be given his. The senior employee would also have been deprived of his contractual rights under the collective-bargaining agreement.
>
> It was essential to TWA's business to require Saturday and Sunday work

> from at least a few employees even though most employees preferred those days off. Allocating the burdens of weekend work was a matter for collective bargaining . . . . There were no volunteers to relieve Hardison on Saturdays, and to give Hardison Saturdays off, TWA would have had to deprive another employee of his shift preference at least in part because he did not adhere to a religion that observed the Saturday Sabbath.
>
> Title VII does not contemplate such unequal treatment. The repeated, unequivocal emphasis of both the language and the legislative history of Title VII is on eliminating discrimination in employment, and such discrimination is proscribed when it is directed against majorities as well as minorities . . . . It would be anomalous to conclude that by "reasonable accommodation" Congress meant that an employer must deny the shift and job preference of some employees, as well as deprive them of their contractual rights, in order to accommodate or prefer the religious needs of others, and we conclude that Title VII does not require an employer to go that far. [432 at 80-81.]

At least one court has followed Hardison in a case brought under the Rehabilitation Act. In Daubert v. U.S. Postal Service, C.A. No. 79-C-1183 (D. Colo. May 13, 1982), appeal pending, Docket No. 82-1917 (10th Cir. 1982) plaintiff, a machine distribution clerk with less than five years of service, was terminated for failing to meet the requirements of her position due to a back problem. Plaintiff argued that she was entitled to be reasonably accommodated by assignment to permanent light duty. The Postal Service countered that under the terms of the National Agreement only employees with five or more years of service could be assigned to permanent light duty. Ruling for the Postal Service, the court, noting that "a permanent light assignment could only be held by persons with five-years' seniority [sic] or more," stated that:

> The Postal Service was legally incapable, under the union contract, of either modifying those requirements or creating an exception for Daubert's back problem. See, Trans World Airlines v. Hardison, 432 U.S. 63 (1977).

The EEOC has also apparently recognized that the Postal Service's obligations under the Rehabilitation Act do not override the provisions of a collective bargaining agreement in the case of Carl E. Pajewski, EEOC Appeal No. 01800941. Pajewski was hired as a part-time flexible carrier. As such he was required to substitute for regular carriers on leave. Pajewski was terminated during his probationary period.

Pajewski claimed in his EEO appeal that he was a "slow learner" who experienced anxiety in new learning situations and was thus mentally handicapped. Pajewski claimed that the agency should have accommodated him by giving him a permanent route assignment. The Postal Service argued that it could not give Pajewski a regular route as such action would not be consistent with the seniority provision of the National Agreement.

In rejecting this claim, the Commission found, among other things, that Pajewski was not a "qualified handicapped person" stating:

> The nature of the job was such that appellant would have no regular route -- he would substitute for regular carriers and could conceivably have a different route every day. According to the VA doctor, appellant's anxiety attacks came in new learning situations. Thus, it appears that applicant could not perform the duties of his job with or without reasonable accommodation, as the retraining program appellant received did not increase his performance to an acceptable level. Furthermore, as the agency did not have the power to transfer appellant to a regular route, the steps it took to retrain appellant were reasonable accommodation. [Emphasis supplied.]

Pajewski is presently pursuing his claim in federal district court.

Nevertheless, it is unclear whether Hardison will be applied in a blanket fashion in future cases. One undoubted, but unstated, reason for the Supreme Court's ruling in Hardison was the Court's desire to avoid ruling on the constitutionality of Title VII's requirement that religious beliefs be accommodated. This aspect of Title VII has been attacked as violative of the First Amendment's ban on laws promoting the establishment of religion. No such constitutional problem is presented by the Rehabilitation Act.

Even if Hardison should not be found to be fully applicable in cases arising under the Rehabilitation Act, it should be

clear from the above discussion that a collective bargaining agreement may play at least two important roles relative to the Postal Service's obligations under the Act. First of all, the seniority provisions of a contract are critical to "qualified handicapped person" status; that is, if an employee bidding on a position is not the senior bidder, no other question of qualification arises. This is recognized in the EEOC's regulations which provide that the term "qualified handicapped person" means, in some cases, a person who meets experience requirements. 29 C.F.R. §1613.702(f).

Secondly, the Postal Service's obligation under the National Agreement to create permanent light duty assignments may go far toward meeting an obligation to reasonably accommodate an employee. Indeed in Bey v. Bolger, supra, the district court held that the Postal Service was not required to place an employee with less than five years service in a permanent light duty position, as the five-year limitation was necessary "to maintain a high level of efficiency and to keep the attendant costs down." 540 F. Supp. at 927. See also, Daubert, supra. 14/

Summary

1. The definition of "handicapped person" under the Rehabilitation Act of 1973, as amended (29 U.S.C. §701 et seq.), and the EEOC's implementing regulations (29 C.F.R. §1613.701 et seq.) is extremely broad. However, the law imposes obligations on the Postal Service only with respect to "qualified handicapped persons."

2. A "qualified handicapped person" means with respect to employment "a handicapped person, who, with or without reasonble accommodation, can perform the essential functions of the position in question without endangering the health and safety of the individual or others . . . ." 29 C.F.R. §1613.702(f).

3. A handicapped employee or applicant must be able to perform the "essential functions" of the "position in question" at the same level of proficiency the employer expects of all employees in order to be a "qualified handicapped person."

14/ It might also be argued that employees seeking light duty assignments are not "qualified handicapped persons," and therefore outside the scope of the Rehabilitation Act, as permanent light duty assignments are only available to employees who can no longer perform the duties of their positions. See discussion of "position in question," supra, at pp. 9-12. Thus, providing permanent light duty assignments to certain employees under the National Agreement goes far beyond any obligation owed to them under the Rehabilitation Act.

4. The identification of the "essential functions" of postal positions will require thorough job analyses of those positions including complete review of existing medical standards.

5. The concept of "reasonable accommodation" is elastic and has been expansively interpreted by EEOC attorney/examiners in ways which, if these interpretations prevail, will profoundly impact upon postal employment practices. In our view, many of the accommodations suggested by the EEOC's attorney/examiners can in no sense be considered "reasonable."

6. When an employment decision turns on the ability of the employee or applicant to safely perform the duties of the position, the safety problem must be thoroughly documented. This will necessarily involve some redefinition of the roles of Postal Service Medical Officers and employment specialists.

7. In our judgment, the requirements of the Rehabilitation Act do not override the provisions of a collective bargaining agreement, although this issue, like many others, is still unclear. Moreover, the provisions of existing collective bargaining agreements impact upon both the "qualifications" of employees or applicants and the Postal Service's obligation to reasonably accommodate the handicapped.

Conclusion

Although we have endeavored to make this memorandum as comprehensive and clear as possible, there is obvious need for additional discussion. We, therefore, suggest that representatives of the Employee and Labor Relations Group meet with representatives of the Office of Labor Law for that purpose.

Stephen E. Alpern
Associate General Counsel
Office of Labor Law

cc: Mr. Gillespie
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July 13, 1990

To Eleanor
(PDL) 7/18/90

MEMORANDUM FOR FIELD DIRECTORS HUMAN RESOURCES

SUBJECT: Reasonable Accommodation

Handbook EL-307, "Guidelines On Reasonable Accommodation" (copy enclosed) has recently been updated and distributed to all divisions.

The enclosed decision trees have been developed as additional guidance when making reasonable accommodation decisions related to employment issues of people with disabilities. Used properly, they will help in addressing the complex issues involved in making reasonable accommodation determinations. Also enclosed as information are summaries of EEOC case decisions pertaining to handicap issues. Additional case summaries on disability employment issues may be found in the quarterly MSPB report from the Office of EEO and in the Federal Equal Opportunity Reporter.

Please insure that field personnel involved in making these decisions receive these aids, as well as a copy of the newly updated EL-307. This would include appropriate managers and specialists in personnel, injury compensation, safety, medical officer and operations officials involved in making decisions related to such issues as hiring, transfers, and reassignments.

If you have any questions regarding the enclosures, contact John Kumke on PEN 286-3970.

Joel S. Trosch

Enclosures

CASE SUMMARY

HANDICAP DISCRIMINATION, ALCOHOL ABUSE OR DEPENDENCY

BACKGROUND:

A former PS-6 Distribution Clerk, Machine (MPLSM), filed a formal complaint alleging that the agency had discriminated against her when it terminated her employment. The agency investigation found no discrimination. After a hearing on the employee's complaint, an EEOC Administrative Judge recommended a finding that the agency had discriminated against her on the basis of handicap but not on the basis of sex. The agency, however, issued a final decision of no discrimination and the employee then appealed to the EEO Commission.

During her first three years of employment the employee received three letters of warning and one three-day suspension for failure to meet the requirements of her position in the area of attendance and was placed on restricted sick leave.
The employee's supervisor referred her to the agency's Program for Alcoholic Recovery ("PAR"). The employee entered PAR and was admitted to an inpatient alcohol treatment program at a hospital and she remained hospitalized for approximately 3 weeks. The agency provided the employee with leave without pay while she was hospitalized.

While she was in the hospital the employee was issued a written notice of removal. The notice listed three reasons for the action: (1) possession of intoxicating beverages while on agency property; (2) consumption of intoxicating beverages while on agency property and (3) an accident in which she caught her arm in a letter sorting machine and the supervisors who worked to free her noticed an odor of alcohol on her breath. The employee filed a grievance and the resolution provided that the effective date of removal was to be held in abeyance for a specified period and that an effective date may be set at any time during the interim period if the employee failed to demonstrate satisfactory improvement in all areas of job performance.

The employee returned to work and had a good attendance record for about 6 months when she again began to be absent or late. Her supervisor then placed her on restricted sick leave and issued her a notice of fourteen-day suspension for excessive unscheduled absences.

The employee incurred other instances of absence or lateness in the following months, failed to provide substantiation for her tardiness and her supervisor charged her with AWOL.

The employee was then issued a notice of removal. The notice

CASE SUMMARY

HANDICAP DISCRIMINATION, PREFERRED ACCOMMODATION

BACKGROUND:

A letter carrier alleged discrimination when he was ordered to report for duty at a station other than the one to which he was normally assigned on the basis of his race (black), sex (male) and physical handicap (chronic lumbrosacral spine sprain). As a remedy for the alleged discrimination, the employee requested to be allowed to work at his regular station, to be reimbursed for travel to and from the new station (40 miles daily) and to be paid 2.5 hours overtime until he returned to his regular station.

Medical evidence in the record showed that the employee suffered chronic lumbrosacral spine sprain as a result of an on-the-job injury sustained in an automobile accident. At the time of the alleged discrimination, he was restricted by a physician to working four hours a day and carrying not more than 10 pounds. The medical reports indicated that he was treated with medicine, a back brace and a walking program and stated that his prognosis was "good for eventual recovery" and that no permanent effects of his condition were anticipated.

The Station Manager who transferred the employee testified that he did so because he could not work eight hours a day and carry mail, i.e., he required limited duty and he was therefore transferred to a limited duty station. The Station Manager also stated that the employee had subsequently been brought back to his regular station because his prognosis had changed.

The employee argued that he was not handicapped but was regarded as handicapped by the agency and that his condition could be accommodated through work within his limitations at his regular station.

The agency stated that it did not regard appellant as handicapped but rather as having a temporary disability, that appellant was not a qualified handicapped person since he could not perform his regular duties, and that he was reasonably accommodated through assignment to limited duty.

ANALYSIS AND FINDINGS:

The EEOC found that the medical evidence suggested that the employee's condition may not be permanent. Generally, a temporary or transitory condition is not sufficient to qualify one as a handicapped person within the meaning of the Rehabilitation Act. The record showed that, as a result of his automobile accident, the employee was severely limited in

CASE SUMMARY

HANDICAP DISCRIMINATION, DISPARATE TREATMENT, PRETEXT FOR DISCRIMINATION, REASSIGNMENT

BACKGROUND:

A letter carrier, reinjured his back while driving a mail truck. The doctor who initially examined him following this injury recommended bedrest and advised him not to drive a truck when he returned to work. He returned to part-time duty as a letter carrier and was advised by his doctor that he could resume full duty. However, he again claimed to be experiencing pain while driving and indicated that having to wear a seat belt aggravated his back condition. The employee was relieved of his delivery route, assigned solely to casing mail and as a result his workday was reduced to three or four hours. The employee was then submitted to a fitness-for-duty (FFD) examination conducted by an orthopedic surgeon who diagnosed him as having "chronic low-back syndrome" which was aggravated by bending, twisting, and lifting and recommended that he should not "return to his former status of delivering mail in a small truck...as this certainly would just precipitate further trouble and compound the problem"; he therefore suggested that the agency provide the employee with a "more sedentary quiescent job" that did not require prolonged standing. The employee was temporarily reassigned from the carrier craft to the clerk craft, changing his hours from 7:30 a.m. to 4:00 p.m. with Sundays and rotating days off to 3:00 a.m. to 11:30 a.m. with night differential pay and Wednesdays and Thursdays off.

The employee claimed that the reassignment was in violation of his seniority bid rights and the collective bargaining agreement because he was forced to work outside his craft and on a different schedule.

The employee was temporarily reassigned to the clerk craft based on the results of his FFD examination which indicated that continued employment as a letter carrier exacerbated his symptoms of degenerative disc disease. When his leave nearly was exhausted, he was transferred to another craft so that he could be afforded full-time work within his medical limitations. Before the employee was reassigned, an effort was made to find him enough work to do for eight hours in his craft.

ANALYSIS AND FINDINGS:

The EEOC noted that the the employee had a history of degenerative disc disease which inhibits his ability to drive, lift, and stand and therefore appears to substantially limit his ability to work as a letter carrier. Accordingly, they found that the employee was a handicapped person.

BIDS, PROMOTIONS, REASSIGNMENTS

An individual who has a physical or mental condition which may, after analysis, rise to the level of a "handicapping" condition has the same right to bid on preferred assignments, apply for promotion, or request reassignment as any other employee. No individual should be prohibited from bidding, applying for a promotion, or requesting reassignment. This does not mean that an individual who has a physical or mental condition and who cannot perform the essential functions of the position for which he or she bid or applied must be awarded the bid or the promotion. It merely means that the decision to award or deny should be made after the analysis described in this decision tree and not before the process even begins based on purely visual observations, superficial information, or stereotypical considerations.

The reasonable accommodation decision process is triggered each time an employee with a disability is being considered for a different position (either through bid, application, or other procedures).

Decision Tree on Reverse

UNITED STATES POSTAL SERVICE

REINSTATEMENT/TRANSFER

An individual with a physical or mental condition which, after analysis, may rise to the level of a "handicapping" condition, has the same right as any other employee or former employee to seek a transfer or to request reinstatement. This does not mean that management must exercise its discretion and grant the request just because the individual happens to have an allegedly "handicapping" condition. The analysis described in this decision tree should be followed to determine whether an otherwise eligible employee, requesting reasonable accomodation, should be considered for a transfer or reinstatement. Please note that many of the reinstatement cases involve past removals for cause, or resignations in lieu of facing charges, allegedly the result of a handicapping condition, and a request that the past misconduct be overlooked. Transfer cases may also involve individuals who are on permanent limited or light duty assignments at their current work location.

Decision Tree on Reverse

LIGHT OR LIMITED DUTY

Grants and denials of light or limited duty assignments are governed by Article 13 of the National Agreement, Employee and Labor Relations Manual, 540 Injury Compensation, and by various decisions of federal courts and the Merit System Protection Board. This is a complex area and assistance should be sought from labor relations and injury compensation professionals to ensure compliance with contractual or other rights. It should be noted that rights under the Rehabilitation Act and under Article 13 and the Federal Employees' Compensation Act (FECA) are not identical and that compliance with one is no guarantee that one has complied with the other. An individual who is entitled to no protection under the Rehabilitation Act may in fact have an Article 13 or FECA entitlement.

Decision Tree on Reverse

UNITED STATES
POSTAL SERVICE

COMPETITIVE/NONCOMPETITIVE HIRING PROCESS

The identification of a physical or mental condition, which rises to the level of a "handicapping" condition, can occur at any time during the hiring process. Obviously, the sources of information on a physical or mental condition are many, the most common being the applicant him/herself, the preemployment physical, or another agency such as the Department of Vocational Rehabilitation or the Veterans Administration. It should be noted that appointing authorities should not rely on visual observation or superficial information to determine whether an individual is entitled to consideration for reasonable accommodation. Also, appointing authorities should not rely solely on the medical officer's risk assessment to determine employability since whether an individual is a "qualified handicapped person" is a legal, not a medical question. This document is intended as a handy reference item and is not a substitute for completing the checklists contained in Handbook EL-307, Guidelines on Reasonable Accommodation.

Decision Tree on Reverse

UNITED STATES POSTAL SERVICE

REASONABLE ACCOMMODATION DECISION TREES

Attached are four decision trees designed to aid the thought process when making reasonable accommodation determinations.

It is important that Human Resources and Operations Officials understand the concept of reasonable accommodation as it pertains to making decisions involving hiring, promotions, transfers, reassignments and other job actions of people with disabilities. Each situation must be considered on a case by case basis taking into consideration the applicant's or employee's specific disability and functional limitations, the essential functions of the position in question, the work environment, and whether the accommodation would cause an undue burden on postal operations.

Handbook EL-307, "Guidelines on Reasonable Accommodation" provides the basis for making sound rational and informed reasonable accommodation decisions. The decision trees are provided to guide the utilization of the EL-307 whenever a disability is identified.

Use of these tools will provide a documented process that meets the requirements of the law and will insure that people with disabilities are afforded the reasonable accommodation consideration to which they may be entitled.