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Folder Title:

Americans with Disabilities Act (ADA): ADA - Volunteers

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	Stacey Roth to Marvin Krislov; RE: Personal (2 pages)	04/27/1995	b(6)
002. letter	From Sarah Brau; RE: Personal (2 pages)	04/25/1995	b(6)
003. form	Personal and Personally Identifiable Information (2 pages)	09/19/1994	b(6)
004. paper	RE: Personal (2 pages)	00/00/0000	b(6)

COLLECTION:

Clinton Presidential Records
Counsel Office
Marvin Krislov
OA/Box Number: 18946

FOLDER TITLE:

Americans with Disabilities Act (ADA): ADA - Volunteers

Debbie Bush
2007-0143-F
db4482

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

94?

TO: Marvin Krislov
FROM: Liz Provencio LP
DATE: June 5, 1995
RE: Volunteers with Disabilities

I. Issues:

- A. Does the Americans with Disabilities Act (ADA) apply to volunteers in the White House?
- B. What is a reasonable accommodation for a hearing impaired person?

II. Brief Answer:

- A. The ADA does not specifically address whether volunteers at the White House are covered by the ADA. However, 3 C.F.R. § 102 (1994) prohibits discrimination on the basis of handicaps in all programs or activities administered by the Executive Office. This regulation may include volunteer programs at the White House.

Case law suggests that, although volunteers are covered under the Rehabilitation Act of 1973, volunteers cannot bring a private action against the government. Wisher v. Coverdell, 782 F. Supp. 703 (D.Mass. 1992). In Wisher v. Coverdell the court decided that the volunteer's complaint should be reviewed under the Administrative Procedures Act (APA) in order to preclude the judiciary from "determining who is qualified to volunteer." The court also stated that allowing private actions would be "contrary to the APA's purpose of having federal agencies make such decisions in the first instance instead of the courts." Wisher, 782 F. Supp. at 710.

- B. Section 102 of 3 C.F.R. outlines steps to accommodate individuals with impaired hearing. Under the regulation, the covered entity must furnish auxiliary aids "where necessary to afford an individual with handicaps an equal opportunity to participate in, and enjoy the benefits of, a program or activity conducted by the agency." 3 C.F.R. § 102.160(a)(1).

Relevant case law defines a reasonable accommodation as an obligation to eliminate existing obstacles against the handicapped. Realbuto v. Howe, 872 F. Supp. 1103, 1108 (N.D.N.Y. 1993) citing Alexander v. Choate, 469 U.S. 287, 300-01 n. 20 (1985). In providing a reasonable accommodation for a hearing impaired individual, "the agency should suggest reasonable accommodations, such as hearing aids or other telephone amplification devices, and test plaintiff's performance with them. If plaintiff cannot perform adequately without a compensatory device and refuses to use one then the

agency will have fulfilled its responsibility to plaintiff." Crane v. Lewis, 551 F. Supp. 27, 32 (D.C.D.C. 1982), rev'd sub nom. Crane v. Dole, 617 F. Supp 156, 163 (D.C.Tex. 1985). In Crane, the court states that the Office of Personnel Management (OPM) provides numerous advisory publications for federal management officials including a Handbook of Reasonable Accommodation, a Handbook of Job Analysis for Reasonable Accommodation and a specific publication concerning Reasonable Accommodation for Deaf Employees in White-Collar Jobs.

III. Relevant Statutes:

A. Programs prohibited from engaging in discriminatory activities

The relevant regulation governing the programs conducted by the Executive Office of the President appear in 3 C.F.R. § 102. The regulation applies to all programs or activities conducted by:

the White House Office, the Office of the Vice President, the Office of Management and Budget, the Office of Policy Development, the National Security Council, the Office of Science and Technology Policy, the Office of the United States Trade Representative, the Council on Environmental Quality, the Council of Economic Advisers, the Office of Administration, the Office of Federal Procurement Policy, and any committee, board, commission, or similar group established in the Executive Office of the President.

B. Covered Individuals

3 C.F.R. § 102.130 General prohibitions against discrimination.

(a) No qualified individual with handicaps shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity conducted by the agency.

(b)(1) The agency in providing any aid, benefit or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of

handicap - (i) Deny a qualified individual with handicaps the opportunity to participate in or benefit from the aid, benefit, or service;

* * *

(2) The agency may not deny a qualified individual with handicaps the opportunity to participate in programs or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities.

C. Accommodations

3 C.F.R. § 102.160 Communications

(a) The agency shall take appropriate steps to ensure effective communication with applicants, participants, personnel of other Federal entities, and members of the public.

(1) The agency shall furnish appropriate auxiliary aids where necessary to afford an individual with handicaps an equal opportunity to participate in, and enjoy the benefits of, a program or activity conducted by the agency.

(i) In determining what type of auxiliary aid is necessary, the agency shall give primary consideration to the requests of the individual with handicaps.

(ii) The agency need not provide individually prescribed devices, readers for personal use or study, or other devices of a personal nature.

(2) Where the agency communicates with applicants and beneficiaries by telephone, telecommunication devices for deaf persons (TDD's) or equally effective telecommunication systems shall be used to communicate with persons with impaired hearing.

(b) The agency shall ensure that interested persons, including persons with impaired vision or hearing, can obtain information as to the

existence and location of accessible services, activities, and facilities.

(c) The agency shall provide signage at a primary entrance to each of its inaccessible facilities, directing users to a location at which they can obtain information about accessible facilities. The international symbol for accessibility shall be used at each primary entrance of an accessible facility.

(d) This section does not require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. . .

(1994)

3 3102

PART 102—ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES CONDUCTED BY THE EXECUTIVE OFFICE OF THE PRESIDENT

Sec.

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- 102.161–102.169 [Reserved]
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- 102.171–102.999 [Reserved]

Authority: 29 U.S.C. 794. *Vulgar*

Source: The provisions of this part 102 appear at 53 FR 25879, July 8, 1988, and 55 FR 46037, November 1, 1990, unless otherwise noted.

§ 102.101 Purpose.

The purpose of this regulation is to effectuate section 119 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, which amended section 504 of the Rehabilitation Act of 1973 to prohibit discrimination on the basis of handicap in programs or activities conducted by Executive agencies or the United States Postal Service.

§ 102.102 Application.

This regulation (§§ 102.101–102.170) applies to all programs or activities conducted by the agency, except for programs or activities conducted outside the United States that do not involve individuals with handicaps in the United States.

§ 102.103 Definitions.

For purposes of this regulation, the term—

“Agency” means, for purposes of this regulation only, the following entities in the Executive Office of the President: the White House Office, the Office of the Vice President, the Office of Management and Budget, the Office of Policy Development, the National Security Council, the Office of Science and Technology Policy, the Office of the United States Trade Representative, the Council on Environmental Quality, the Council of Economic Advisers, the Office of Administration, the Office of Federal Procurement Policy, and any committee, board, commission, or similar group established in the Executive Office of the President.

“Agency head” or “head of the agency”; as used in §§ 102.150(a)(3), 102.160(d) and 102.170 (i) and (j), shall be a three-member board which will include the Director, Office of Administration, the head of the Executive Office of the President, agency in which the issue needing resolution or decision arises and one other agency head selected by the two other

board members. In the event that an issue needing resolution or decision arises within the Office of Administration, one of the board members shall be the Director of the Office of Management and Budget.

“Assistant Attorney General” means the Assistant Attorney General, Civil Rights Division, United States Department of Justice.

“Auxiliary aids” means services or devices that enable persons with impaired sensory, manual, or speaking skills to have an equal opportunity to participate in, and enjoy the benefits of, programs or activities conducted by the agency. For example, auxiliary aids useful for persons with impaired vision include readers, Brailled materials, audio recordings, and other similar services and devices. Auxiliary aids useful for persons with impaired hearing include telephone handset amplifiers, telephones compatible with hearing aids, telecommunication devices for deaf persons (TDD’s), interpreters, notetakers, written materials, and other similar services and devices.

“Complete complaint” means a written statement that contains the complainant’s name and address and describes the agency’s alleged discriminatory action in sufficient detail to inform the agency of the nature and date of the alleged violation of section 504. It shall be signed by the complainant or by someone authorized to do so on his or her behalf. Complaints filed on behalf of classes or third parties shall describe or identify (by name, if possible) the alleged victims of discrimination.

“Facility” means all or any portion of buildings, structures, equipment, roads, walks, parking lots, rolling stock or other conveyances, or other real or personal property.

“Historic preservation programs” means programs conducted by the agency that have preservation of historic properties as a primary purpose.

“Historic properties” means those properties that are listed or eligible for listing in the National Register of Historic Places or properties designated as historic under a statute of the appropriate State or local government body.

“Individual with handicaps” means any person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.

As used in this definition, the phrase:

(1) “Physical or mental impairment” includes—

(i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine; or

(ii) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term “physical or mental impairment” includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and drug addiction and alcoholism.

(2) “Major life activities” includes functions such as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(3) “Has a record of such an impairment” means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(4) "Is regarded as having an impairment" means—

(i) Has a physical or mental impairment that does not substantially limit major life activities but is treated by the agency as constituting such a limitation;

(ii) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(iii) Has none of the impairments defined in paragraph (1) of this definition but is treated by the agency as having such an impairment.

"Qualified individual with handicaps" means—

(1) With respect to preschool, elementary, or secondary education services provided by the agency, an individual with handicaps who is a member of a class of persons otherwise entitled by statute, regulation, or agency policy to receive education services from the agency;

(2) With respect to any other agency program or activity under which a person is required to perform services or to achieve a level of accomplishment, an individual with handicaps who meets the essential eligibility requirements and who can achieve the purpose of the program or activity without modifications in the program or activity that the agency can demonstrate would result in a fundamental alteration in its nature;

(3) With respect to any other program or activity, an individual with handicaps who meets the essential eligibility requirements for participation in, or receipt of benefits from, that program or activity; and

(4) "Qualified handicapped person" as that term is defined for purposes of employment in 29 CFR 1613.702(f), which is made applicable to this regulation by § 102.140.

"Section 504" means section 504 of the Rehabilitation Act of 1973 (Pub. L. 93-112, 87 Stat. 394 (29 U.S.C. 794)), as amended by the Rehabilitation Act Amendments of 1974 (Pub. L. 93-516, 88 Stat. 1617); the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978 (Pub. L. 95-602, 92 Stat. 2955); and the Rehabilitation Act Amendments of 1986 (Pub. L. 99-506, 100 Stat. 1810). As used in this regulation, section 504 applies only to programs or activities conducted by Executive agencies and not to federally assisted programs.

"Substantial impairment" means a significant loss of the integrity of finished materials, design quality, or special character resulting from a permanent alteration.

§§ 102.104—102.109 [Reserved]

§ 102.110 Self-evaluation.

(a) The agency shall, by September 6, 1989, evaluate its current policies and practices, and the effects thereof, that do not or may not meet the requirements of this regulation and, to the extent modification of any such policies and practices is required, the agency shall proceed to make the necessary modifications.

(b) The agency shall provide an opportunity to interested persons, including individuals with handicaps or organizations representing individuals with handicaps, to participate in the self-evaluation process by submitting comments (both oral and written).

(c) The agency shall, for at least three years following completion of the self-evaluation, maintain on file and make available for public inspection:

- (1) A description of areas examined and any problems identified; and
- (2) A description of any modifications made.

§ 102.111 Notice.

The agency shall make available to employees, applicants, participants, beneficiaries, and other interested persons such information regarding the provisions of this regulation and its applicability to the programs or activities conducted by the agency, and make such information available to them in such manner as the head of the agency finds necessary to apprise such persons of the protections against discrimination assured them by section 504 and this regulation.

§§ 102.112—102.129 [Reserved]

§ 102.130 General prohibitions against discrimination.

(a) No qualified individual with handicaps shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity conducted by the agency.

(b)(1) The agency, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap—

(i) Deny a qualified individual with handicaps the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified individual with handicaps an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified individual with handicaps with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

(iv) Provide different or separate aid, benefits, or services to individuals with handicaps or to any class of individuals with handicaps than is provided to others unless such action is necessary to provide qualified individuals with handicaps with aid, benefits, or services that are as effective as those provided to others;

(v) Deny a qualified individual with handicaps the opportunity to participate as a member of planning or advisory boards;

(vi) Otherwise limit a qualified individual with handicaps in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.

(2) The agency may not deny a qualified individual with handicaps the opportunity to participate in programs or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities.

(3) The agency may not, directly or through contractual or other arrangements, utilize criteria or methods of administration the purpose or effect of which would—

(i) Subject qualified individuals with handicaps to discrimination on the basis of handicap; or

(ii) Defeat or substantially impair accomplishment of the objectives of a program or activity with respect to individuals with handicaps.

(4) The agency may not, in determining the site or location of a facility, make selections the purpose or effect of which would—

(i) Exclude individuals with handicaps from, deny them the benefits of, or otherwise subject them to discrimination under any program or activity conducted by the agency; or

(ii) Defeat or substantially impair the accomplishment of the objectives of a program or activity with respect to individuals with handicaps.

(5) The agency, in the selection of procurement contractors, may not use criteria that subject qualified individuals with handicaps to discrimination on the basis of handicap.

(6) The agency may not administer a licensing or certification program in a manner that subjects qualified individuals with handicaps to discrimination on the basis of handicap, nor may the agency establish requirements for the programs or activities of licensees or certified entities that subject qualified individuals with handicaps to discrimination on the basis of handicap. However, the programs or activities of entities that are licensed or certified by the agency are not, themselves, covered by this regulation.

(c) The exclusion of nonhandicapped persons from the benefits of a program limited by Federal statute or Executive order to individuals with handicaps or the exclusion of a specific class of individuals with handicaps from a program limited by Federal statute or Executive order to a different class of individuals with handicaps is not prohibited by this regulation.

(d) The agency shall administer programs and activities in the most integrated setting appropriate to the needs of qualified individuals with handicaps.

§§ 102.131—102.139 [Reserved]

§ 102.140 Employment.

No qualified individual with handicaps shall, on the basis of handicap, be subject to discrimination in employment under any program or activity conducted by the agency. The definitions, requirements, and procedures of section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791), as established by the Equal Employment Opportunity Commission in 29 CFR Part 1613, shall apply to employment in federally conducted programs or activities.

§ 102.141—102.148 [Reserved]

§ 102.149 Program accessibility: Discrimination prohibited.

Except as otherwise provided in § 102.150, no qualified individual with handicaps shall, because the agency's facilities are inaccessible to or unusable by individuals with handicaps, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity conducted by the agency.

§ 102.150 Program accessibility: Existing facilities.

(a) *General.* The agency shall operate each program or activity so that the program or activity, when viewed in its entirety, is readily accessible to and usable by individuals with handicaps. This paragraph does not—

(1) Necessarily require the agency to make each of its existing facilities accessible to and usable by individuals with handicaps;

(2) In the case of historic preservation programs, require the agency to take any action that would result in a substantial impairment of significant historic features of an historic property; or

(3) Require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the agency has the burden of proving that compli-

ance with § 102.150(a) would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the agency head or his or her designee after considering all agency resources available for use in the funding and operation of the conducted program or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action would result in such an alteration or such burdens, the agency shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with handicaps receive the benefits and services of the program or activity.

(b) *Methods*—(1) *General.* The agency may comply with the requirements of this section through such means as redesign of equipment, reassignment of services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of services at alternate accessible sites, alteration of existing facilities and construction of new facilities, use of accessible rolling stock, or any other methods that result in making its programs or activities readily accessible to and usable by individuals with handicaps. The agency is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section. The agency, in making alterations to existing buildings, shall meet accessibility requirements to the extent compelled by the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151–4157), and any regulations implementing it. In choosing among available methods for meeting the requirements of this section, the agency shall give priority to those methods that offer programs and activities to qualified individuals with handicaps in the most integrated setting appropriate.

(2) *Historic preservation programs.* In meeting the requirements of § 102.150(a) in historic preservation programs, the agency shall give priority to methods that provide physical access to individuals with handicaps. In cases where a physical alteration to an historic property is not required because of § 102.150(a) (2) or (3), alternative methods of achieving program accessibility include—

(i) Using audio-visual materials and devices to depict those portions of an historic property that cannot otherwise be made accessible;

(ii) Assigning persons to guide individuals with handicaps into or through portions of historic properties that cannot otherwise be made accessible; or

(iii) Adopting other innovative methods.

(c) *Time period for compliance.* The agency shall comply with the obligations established under this section by November 7, 1988, except that where structural changes in facilities are undertaken, such changes shall be made by September 6, 1991, but in any event as expeditiously as possible.

(d) *Transition plan.* In the event that structural changes to facilities will be undertaken to achieve program accessibility, the agency shall develop, by March 6, 1989, a transition plan setting forth the steps necessary to complete such changes. The agency shall provide an opportunity to interested persons, including individuals with handicaps or organizations representing individuals with handicaps, to participate in the development of the transition plan by submitting comments (both oral and written). A copy of the transition plan shall be made available for public inspection. The plan shall, at a minimum—

(1) Identify physical obstacles in the agency's facilities that limit the accessibility of its programs or activities to individuals with handicaps;

(2) Describe in detail the methods that will be used to make the facilities accessible;

(3) Specify the schedule for taking the steps necessary to achieve compliance with this section and, if the time period of the transition plan is longer than one year, identify steps that will be taken during each year of the transition period; and

(4) Indicate the official responsible for implementation of the plan.

§ 102.151 Program accessibility: New construction and alterations.

Each building or part of a building that is constructed or altered by, on behalf of, or for the use of the agency shall be designed, constructed, or altered so as to be readily accessible to and usable by individuals with handicaps. The definitions, requirements, and standards of the Architectural Barriers Act (42 U.S.C. 4151–4157), as established in 41 CFR 101–19.600 to 101–19.607, apply to buildings covered by this section.

§§ 102.152–102.159 [Reserved]

§ 102.160 Communications.

(a) The agency shall take appropriate steps to ensure effective communication with applicants, participants, personnel of other Federal entities, and members of the public.

(1) The agency shall furnish appropriate auxiliary aids where necessary to afford an individual with handicaps an equal opportunity to participate in, and enjoy the benefits of, a program or activity conducted by the agency.

(i) In determining what type of auxiliary aid is necessary, the agency shall give primary consideration to the requests of the individual with handicaps.

(ii) The agency need not provide individually prescribed devices, readers for personal use or study, or other devices of a personal nature.

(2) Where the agency communicates with applicants and beneficiaries by telephone, telecommunication devices for deaf persons (TDD's) or equally effective telecommunication systems shall be used to communicate with persons with impaired hearing.

(b) The agency shall ensure that interested persons, including persons with impaired vision or hearing, can obtain information as to the existence and location of accessible services, activities, and facilities.

(c) The agency shall provide signage at a primary entrance to each of its inaccessible facilities, directing users to a location at which they can obtain information about accessible facilities. The international symbol for accessibility shall be used at each primary entrance of an accessible facility.

(d) This section does not require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the agency has the burden of proving that compliance with § 102.160 would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the agency head or his or her designee after considering all agency resources available for use in the funding and operation of the conducted program or activity and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action required to comply with this section would result in such an alteration or

such burdens, the agency shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, individuals with handicaps receive the benefits and services of the program or activity.

§§ 102.161–102.169 [Reserved]

§ 102.170 Compliance procedures.

(a) Except as provided in paragraph (b) of this section, this section applies to all allegations of discrimination on the basis of handicap in programs and activities conducted by the agency.

(b) The agency shall process complaints alleging violations of section 504 with respect to employment according to the procedures established by the Equal Employment Opportunity Commission in 29 CFR Part 1613 pursuant to section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791).

(c) The Director, Facilities Management, Office of Administration, Executive Office of the President, shall be responsible for coordinating implementation of this section. Complaints may be sent to the Director at the following address: Room 486, Old Executive Office Building, 17th and Pennsylvania Ave. NW., Washington, DC 20500.

(d) The agency shall accept and investigate all complete complaints for which it has jurisdiction. All complete complaints must be filed within 180 days of the alleged act of discrimination. The agency may extend this time period for good cause.

(e) If the agency receives a complaint over which it does not have jurisdiction, it shall promptly notify the complainant and shall make reasonable efforts to refer the complaint to the appropriate Government entity.

(f) The agency shall notify the Architectural and Transportation Barriers Compliance Board upon receipt of any complaint alleging that a building or facility that is subject to the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151–4157), is not readily accessible to and usable by individuals with handicaps.

(g) Within 180 days of the receipt of a complete complaint for which it has jurisdiction, the agency shall notify the complainant of the results of the investigation in a letter containing—

- (1) Findings of fact and conclusions of law;
- (2) A description of a remedy for each violation found; and
- (3) A notice of the right to appeal.

(h) Appeals of the findings of fact and conclusions of law or remedies must be filed by the complainant within 90 days of receipt from the agency of the letter required by § 102.170(g). The agency may extend this time for good cause.

(i) Timely appeals shall be accepted and processed by the head of the agency.

(j) The head of the agency shall notify the complainant of the results of the appeal within 60 days of the receipt of the request. If the head of the agency determines that additional information is needed from the complainant, he or she shall have 60 days from the date of receipt of the additional information to make his or her determination on the appeal.

(k) The time limits cited in paragraphs (g) and (j) of this section may be extended with the permission of the Assistant Attorney General.

(l) The agency may delegate its authority for conducting complaint investigations to other Federal agencies, except that the authority for making the final determination may not be delegated to another agency.

§ 102.171–102.999 [Reserved]

leave to amend where "plaintiff ha[d] already filed an original complaint and two amended complaints ... [and] even in the latest proposed amendments he fail[ed] to remedy the most basic deficiencies in his earlier complaints.", *reh'g denied*, 981 F.2d 1254 (5th Cir.1992), *cert. denied*, — U.S. —, 113 S.Ct. 2342, 124 L.Ed.2d 252 (1993); *Fidelity Fin. Corp. v. Federal Home Loan Bank*, 792 F.2d 1432, 1437-38 (9th Cir.1986) ("A district court's discretion to deny leave to amend is particularly broad where the court has already given the plaintiff an opportunity to amend the complaint.", *cert. denied*, 479 U.S. 1064, 107 S.Ct. 949, 93 L.Ed.2d 998 (1987); *Mir v. Fosburg*, 646 F.2d 342, 347 (9th Cir.1980) ("[A] district court has broad discretion to grant or deny leave to amend, particularly where the court has already given a plaintiff one or more opportunities to amend his complaint to allege federal claims."); *Denny v. Barber*, 576 F.2d 465, 471 (2d Cir.1978) (affirming district court's denial of leave to amend where plaintiffs' counsel aware of deficiencies in complaint when he first amended it; declining to "require the busy district judge to engage in still a third go-around."); *McGovern v. American Airlines, Inc.*, 511 F.2d 653, 654 (5th Cir.) (affirming district court's denial of leave to amend where plaintiff "has shown in a second plea to the trial court no inclination to cure the jurisdictional defect even though on notice of the defect..."), *reh'g denied*, 514 F.2d 1072 (5th Cir.1975); *Mooney v. Vitolo*, 435 F.2d 838, 839 (2d Cir.1970) (per curiam) (affirming district court's denial of leave to amend where plaintiffs had access to relevant information and "were twice given an opportunity to replead."); *Sanders v. Thrall Car Mfg. Co.*, 582 F.Supp. 945, 952-53 (S.D.N.Y.1983) (denying leave to amend where "plaintiff has had two opportunities subsequent to the initial filing to remedy any perceived deficiencies in the complaint.", *aff'd*, 730 F.2d 910 (2d Cir.1984) (per curiam). *Accord* 6 Wright & Miller, § 1487, at 643-645 ("If a court determines that the plaintiff has had sufficient opportunity to state a claim,

but has failed to do so, leave to amend may be denied."). See also *Chitamacha Tribe v. Harry L. Laws Co.*, 690 F.2d 1157, 1164 (5th Cir.) (noting that plaintiffs failed to correct pleading deficiencies when given the opportunity to do so, but declining to rely on that ground in affirming district court denial of leave to amend where district court did not rely on that ground), *reh'g denied*, 697 F.2d 1092 (5th Cir.1983), *cert. denied*, 464 U.S. 814, 104 S.Ct. 69, 78 L.Ed.2d 83 (1983); *John Birch Soc'y v. NBC*, 377 F.2d 194 (2d Cir. 1967) ("Where ... the district court has pointed out the defects in the complaint and has afforded a plaintiff a reasonable time to amend and the plaintiff, with the intention to delay, has not done so, the appellate court will not allow the plaintiff-appellant leave to amend.")

Second, the plaintiffs' failure to cure the deficiencies of their complaint—approximately sixteen months, three amended complaints, and three motions to dismiss later—evidences a dilatory motive; that is, conduct designed to avoid decision on United Technologies's motion to dismiss. The court notes that plaintiffs have been aware of the pleading defects in their complaints, particularly the question of the relief available under section 502(a)(3), since at least October 1993.¹⁰ The plaintiffs have offered no explanation for their failure to cure these defects.

Third, United Technologies will be prejudiced if the court grants the plaintiffs leave to amend the Second Amended Complaint. See *Wade v. Hopper*, 993 F.2d 1246, 1249 (7th Cir.1993) (concluding that defendants would suffer prejudice if plaintiffs permitted to amend complaint for third time and affirming district court's denial of leave "where plaintiffs had been granted leave to amend twice before, despite the fact that the defendants had fully briefed their motion to dismiss.", *cert. denied*, — U.S. —, 114 S.Ct. 193, 126 L.Ed.2d 151 (1993). It has fully briefed its motion to dismiss three times; each time the plaintiffs have avoided a deci-

damages are available under that section. See *Mertens*, — U.S. — at —, 113 S.Ct. # 2068-72; *Burkhart*, 991 F.2d at 1011.

sion on the motion to dismiss by amending their complaint.

In sum, the plaintiffs repeatedly have failed to cure the substantive defects contained in their complaint. The court finds that their failure evidences a dilatory motive and prejudices United Technologies. Accordingly, the plaintiffs request for leave to amend the Second Amended Complaint is DENIED.

CONCLUSION

Based on the foregoing, the defendant's motion to dismiss [doc. # 25] is GRANTED. The plaintiffs' request to amend the Second Amended Complaint [doc. # 28] is DENIED. Accordingly, the Second Amended Complaint [doc. # 24] is DISMISSED WITH PREJUDICE. The Clerk shall enter judgment accordingly.

SO ORDERED.



Lori Boyar REALBUTO, Plaintiff,

v.

Elin M. HOWE, Individually and as Commissioner of the New York State Office of Mental Retardation and Developmental Disability, and Edward Regan, Individually and as Director of the New York State Department of Audit Control, and Josephine Gambino, Individually and as Commissioner of the New York State Department of Civil Service, and the State of New York, Defendants.

No. 92-CV-1003.

United States District Court,
N.D. New York.

Nov. 8, 1993.

Former state employee brought action against state and state officials alleging that state discriminated against her on the basis

of her hearing impairment and chronic fatigue immunity deficiency syndrome in violation of the Rehabilitation Act, and due process and equal protection clauses. Cross-motions were filed for summary judgment. The District Court, Cholakakis, J., held that: (1) state's failure to provide mechanism for converting from noncompetitive to competitive classification, which would have permitted employee to bump a junior employee during a reduction in force, did not constitute a discriminatory failure to provide "reasonable accommodation" under the Rehabilitation Act, and (2) state's civil service classifications were not irrational.

Defendant's motion granted.

1. Civil Rights ⇐173.1

To prevail on Rehabilitation Act claim, employee must prove that she is a handicapped person or an individual with disabilities under the Act, that she was "otherwise qualified" for position sought, that she is being excluded from position solely by reason of her handicap, and that position exists as part of a program or activity receiving federal financial assistance. Rehabilitation Act of 1973, §§ 2 et seq., 504, 29 U.S.C.A. §§ 701 et seq., 794.

2. Civil Rights ⇐240(2)

Once employee makes out a prima facie case under Rehabilitation Act, burden shifts to employer to rebut presumption of discrimination by coming forward with evidence that employee was injured for legitimate reason. whereupon employee must prove that reason was not true but a pretext for impermissible discrimination: in other words, after employee makes a prima facie case, employer must rebut inference of illegality. Rehabilitation Act of 1973, §§ 2 et seq., 504, 29 U.S.C.A. §§ 701 et seq., 794.

3. Civil Rights ⇐173.1

State employer's failure to provide a mechanism for employee who suffered from hearing impairment and chronic fatigue immunity deficiency syndrome for converting from noncompetitive to a competitive classification without a competitive examination, which would have entitled employee to bump

10. Although uncertainty exists regarding whether individual equitable relief is available under § 502(a)(3), see *supra* note 7, no uncertainty exists about whether compensatory and monetary

a junior employee under the New York civil service system during reduction in force, did not constitute a discriminatory failure to provide a "reasonable accommodation" within meaning of Rehabilitation Act; employee was in essence asking court to rewrite state's civil service laws to provide her with greater benefits because she was handicapped rather than to provide her equal benefits in spite of her handicap. Rehabilitation Act of 1973, §§ 2 et seq., 504, 29 U.S.C.A. §§ 701 et seq., 794; N.Y. McKinney's Civil Service Law § 55-b, subd. 1.

4. Federal Civil Procedure ¶2543

In deciding a motion for summary judgment, district court is not required to draw argumentative inferences in favor of nonmovant, only reasonable inferences. Fed. Rules Civ. Proc. Rule 56, 28 U.S.C.A.

5. Constitutional Law ¶211(2)

Equal protection clause does not forbid states from drawing distinctions between classes of people. U.S.C.A. Const. Amend. 14.

6. Constitutional Law ¶238.5

Officers and Public Employees ¶11.2

State's civil service classifications did not violate equal protection clause, although handicapped employee's status as being in noncompetitive service precluded her under New York law from bumping a junior employee during reduction in force, where handicapped citizens do not fall within a suspect class and classification did not trample upon a fundamental right, and civil service classification that encouraged prospective civil servants to compete through competitive examination was not irrational. U.S.C.A. Const. Amend. 14.

7. Constitutional Law ¶277(2)

Officers and Public Employees ¶11.1

New York's civil service law did not provide noncompetitive handicapped employee with a protected interest in the benefits that her colleagues in competitive class enjoyed. U.S.C.A. Const. Amends. 5, 14; N.Y. McKinney's Civil Service Law § 55-b, subd. 1.

Disability Advocates, Inc., Albany, NY (S. Leon Goldman, of counsel), for plaintiff.

Robert Abrams, Atty. Gen., State of NY, Albany, NY (David B. Roberts, Asst. Atty. Gen., of counsel), for defendants.

MEMORANDUM DECISION AND ORDER

CHOLAKIS, District Judge.

Plaintiff Lori Boyar Realbuto, a former employee at the New York State Office of Mental Retardation and Developmental Disability (OMRDD), filed this civil rights action against New York State and several of its officials including Elin M. Howe (Commissioner of the OMRDD), Edward Regan (former Comptroller and Director of the State's Department of Audit and Control), and Josephine Gambino (Commissioner of Civil Service). Ms. Realbuto, who suffers from a hearing impairment and chronic fatigue immunity deficiency syndrome, alleges that the defendants discriminated against her on the basis of her handicaps in violation of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, the due process and equal protection clauses, and the Americans With Disabilities Act, 42 U.S.C. §§ 12101-12213. Now before the Court are cross-motions for summary judgment.

DISCUSSION

Rule 56 of the Federal Rules of Civil Procedure permits a court to render a summary judgment only if,

the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56(c). The materiality of a factual dispute depends upon the governing law. A brief recitation of the facts and applicable law is therefore in order.

Ms. Realbuto began her State service in 1974 as a Mental Hygiene Therapy Aid, a

position within the competitive class¹ of the State's civil service system. In 1979, she was appointed to serve as a Budget Analyst Trainee in the Division for Youth (DFY). This position in the DFY fell within the noncompetitive class of civil service appointments. She served in the DFY until sometime in 1981, when she returned to the OMRDD to serve as a "Senior Administrative Analyst 55-b," also a position in the noncompetitive class.

The term "55-b" appended to Ms. Realbuto's job title indicates that she obtained her position under Section 55-b of the State's Civil Service Law. That section permits the State to appoint certain handicapped persons to the civil service even though they have not taken the competitive civil service examination. Specifically, the section provides:

The state civil service commission may determine up to twelve hundred positions with duties such as can be performed by persons with physical or mental disability who are found otherwise qualified to perform satisfactorily the duties of any such position. Upon such determination the said positions shall be classified in the noncompetitive class, and may be filled only by persons who shall have been certified by the employee health service ... as being a person with either a physical or mental disability, but capable of performing the duties of such positions.

N.Y. Civ. Serv. § 55-b[1]. There is no dispute that Ms. Realbuto knew that the Senior Budget Analyst position which she sought in 1981 would be classified as noncompetitive under Section 55-b. See Letter from Lori A. Boyar to Michael Pelham dated May 19, 1981 (attachment No. 15 to Defendants' Answers to Interrogatories).

1. The term "competitive class" refers to a category of civil service jobs for which "it is practical to ascertain the merit and fitness of applicants by competitive examination...." See N.Y. Civ. Serv. § 44. The term "noncompetitive class" refers to jobs for which "it is not practical to ascertain the merit and fitness of applicants by competitive examination." *Id.* § 42[1]. Thus, both disabled and non-disabled employees serve in both classes; disabled applicants who pass the examination may serve in the competitive class; non-disabled applicants who apply for positions that

Ms. Realbuto served the OMRDD until June, 1991 when defendant Elin M. Howe notified her that her position was being abolished due to a "reduction-in-force" or "RIF" that apparently resulted from the State's fiscal woes. As a result of the RIF, the State laid off 373 employees at the OMRDD. Of those employees, 347 were in the competitive class and 5 were employees classified under Section 55-b as noncompetitive employees.² See Defendants' 10[J] Statement at ¶20; Plaintiff's Responsive 10[J] Statement at ¶20.

The State helped Ms. Realbuto find employment with the Research Foundation for Mental Hygiene, a non-state employer. After accepting the position, however, Ms. Realbuto found it to be unsatisfactory. See Defendants 10[J] Statement at ¶26; Plaintiff's Responsive 10[J] Statement at ¶26. She complains that the position was temporary, required too much travel, and provided inferior employee benefits. She would have preferred to retain her employment by bumping a more junior colleague, even one in the competitive class.

Generally, when the State reduces its work force it first displaces the employees with the shortest duration of State service within each class of employees, either the competitive or non-competitive class. See N.Y. Civ. Serv. §§ 80 (competitive class) & 80-a (noncompetitive class). This principle gives rise to a practice called "bumping" through which an employee whose position is eliminated has the option of displacing a more junior employee in the same class. Under the civil service statute, a noncompetitive employee may not bump a competitive employee and vice versa. Ms. Realbuto, as an employee who held a noncompetitive position, was unable to bump a junior employee and for this reason she lost her job.

do not lend themselves to competitive examination may serve in the non-competitive class.

2. As for the remaining 20 employees not accounted for, the balance may be Section 55-c employees, i.e. handicapped veterans, or employees who worked in jobs for which "it is not practical to ascertain the merit and fitness of applicants by competitive examination." See, e.g., N.Y. Civ. Serv. §§ 55-c & 42[1].

Relying on two statutory and two constitutional provisions, she filed this action. Acknowledging, however, that her claims under the Americans with Disabilities Act and the Rehabilitation Act of 1973 are identical, the plaintiff has apparently abandoned her claims under the latter. See Plaintiff's Memorandum of Law in Opposition at 22 n. 10.

1. *Rehabilitation Act of 1973, 29 U.S.C. § 701 et seq.*

[1-3] Congress has forbidden recipients of Federal financial assistance from discriminating against individuals on the basis of disability. Specifically, the Rehabilitation Act provides:

No otherwise qualified individual with a disability in the United States, as defined in section 7(8) [29 U.S.C. § 706(8)], shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance....

29 U.S.C. § 794. The Second Circuit has set forth the requirements for a *prima facie* case under the Act. To prevail, a plaintiff must prove that:

- (1) she is a "handicapped person" [or an individual with disabilities] under the Act,
- (2) that she is "otherwise qualified" for the position sought, (3) that she is being excluded from the position solely by reason of her handicap, and (4) that the position exists as part of a program or activity receiving Federal financial assistance.

Doe v. New York University, 666 F.2d 761, 774-74 (2d Cir.1981).³ Assuming that Ms. Realbuto has made out a *prima facie* case, the burden would then shift to the government to rebut the presumption of discrimination by coming forward with evidence that the plaintiff was injured for a legitimate reason, "whereupon the plaintiff must prove that the reason was not true but a pretext for impermissible discrimination." *Id.* at 776.

3. The Court notes that the statute now uses the term "qualified individual with a disability" rather than "qualified individual with handicaps." Congress accomplished the amendment through its Act of Oct. 29, 1992, P.L. 102-569, Title I,

In other words, after plaintiff makes a *prima facie* case the defendants must "rebut the inference of illegality." *Rothschild v. Orentlicher*, 907 F.2d 286, 190 (2d Cir.1990).

The material facts in this case are not disputed. For example, there is no dispute that Ms. Realbuto's job responsibilities as "Senior Administrative Analyst 55-b" were identical to those of a Senior Administrative Analyst in the competitive class. There is also no dispute that plaintiff satisfactorily performed her job with OMRDD. See Plaintiff's 10[J] Statement at ¶20; Defendants' Responsive 10[J] Statement at ¶20. Similarly, there is no dispute that the State's OMRDD receives or distributes federal funds, a prerequisite to liability under the Rehabilitation Act. See Plaintiff's 10[J] Statement at ¶4; Defendants' Responsive 10[J] Statement at ¶4.

With respect to the second requirement of a *prima facie* case, the State responds that Ms. Realbuto is not "otherwise qualified" for the retention or bumping rights that she seeks because unlike her colleagues in the competitive class, she did not earn her position through competitive examination. The defendants summarize this portion of their argument:

[I]t is undisputed that plaintiff was not legally entitled to the retention benefits of competitive class employees, as she has not met all of the requirements for competitive class appointment—that is, by passing a competitive examination and being reachable on the eligible list established from the results of the examination.

See Memorandum of Law In Support of Defendants' Motion for Dismissal at 8. This argument seems to ignore the regulation defining the term "qualified handicapped person." With respect to employment, the regulation provides that the term means a "handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question." See 45 C.F.R. § 84.3(k)(1) (1992); *School Bd. of Nassau*

Subtitle A, § 102(p)(32), Title V, § 506, 106 Stat. 4360, 4428. The cases and the regulations still use the term "handicap" but the change is not material for present purposes.

Arline, 480 U.S. 273, 287 n. 17, 107 S.Ct. 123, 1130 n. 17, 94 L.Ed.2d 307 (1987). Thus, the term focuses on the functions of the job, rather than the technical requirements for obtaining it. Because there is no dispute that Ms. Realbuto can perform the job in question, the Court finds that she is "otherwise qualified" within the meaning of the statute and the implementing regulations.

Thus, Ms. Realbuto has come three quarters of the way to establishing a *prima facie* case. The only question that remains is whether the defendants discriminated against Ms. Realbuto "solely by reason of her handicap." The gist of Ms. Realbuto's complaint is that her classification as "noncompetitive" deprives her of the more favorable bumping rights that employees in the competitive class enjoy, even though she did the same work as her colleagues who acquired their jobs after taking a competitive examination. She says that the Civil Service law should provide a mechanism for converting from a noncompetitive status to competitive status, and that the failure to provide for such conversion discriminates against her on the basis of her handicap.

The defendants, in contrast, contend that the Rehabilitation Act entitles Ms. Realbuto only to evenhanded treatment, not to substantial modifications of the State's civil service regimen. See *Alexander v. Choate*, 469 U.S. 287, 300-01 n. 20, 105 S.Ct. 712, 719-20 n. 20, 83 L.Ed.2d 661 (1985). They argue that nothing prevented her from taking the competitive examination and thereby winning a competitive appointment with concomitant benefits. Instead, according to defendants, she elected to pursue a position without taking the examination and now "she seeks the same benefits as those employees, both disabled and non-disabled, who obtained their positions through the competitive civil service process." *Id.* at 11.

Ms. Realbuto responds that her decision to pursue a noncompetitive appointment was neither informed nor voluntary, because the defendants did not address the lack of the

plaintiff's retention rights" under the Civil Service laws when she applied for the Senior Budget Analyst position in 1981. See Plaintiff's Memorandum of Law at 13 n. 6. Plaintiff, however, was well aware that she could take the competitive civil service examination—indeed she did just that when she first joined the State's work force. There is no dispute that Ms. Realbuto knew that the position she sought at OMRDD in 1981 would be reclassified as a "55-b" position, in the noncompetitive class. She simply elected to pursue the noncompetitive position and avoid the competitive examination.

In support of her claim that the denial of competitive bumping rights constituted illegal discrimination, Ms. Realbuto relies primarily on two decisions of the Court of Appeals for the District of Columbia Circuit resolving an analogous Rehabilitation Act challenge to the federal civil service "competitive" and "excepted" classes. See *Allen v. Heckler*, 780 F.2d 64 (D.C.Cir.1985); *Shirey v. Devine*, 670 F.2d 1188 (D.C.Cir.1982). Though these cases favor Ms. Realbuto's position, the Court does not find them persuasive.

In *Shirey*, a deaf NASA employee (Mr. Shirey) lost his job at NASA after that agency announced a reduction-in-force. Mr. Shirey originally secured the job without taking a competitive civil service examination because the federal Civil Service Commission "excepted" the position from the normal competitive appointment process under a provision analogous to Section 55-b of New York's Civil Service Law. Like Ms. Realbuto, Mr. Shirey ably served his employer despite his handicapping condition, and like Ms. Realbuto, Mr. Shirey was not permitted to "bump" or displace other employees in the competitive class.⁴

Mr. Shirey complained that the failure to provide him the same "meaningful job tenure protections and promotion opportunities afforded other employees" violated the Rehabilitation Act of 1973, specifically Section 501, as well as the Fifth Amendment's due process and equal protection clauses. *Shirey*,

no bumping rights, whereas Ms. Realbuto has the right to bump other noncompetitive employees. See *Shirey*, 670 F.2d at 1190 n. 5.

4. There are, of course, differences between Mr. Shirey's bumping rights and Ms. Realbuto's bumping rights. For example, Mr. Shirey had

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670 F.2d at 1190-92. The D.C. Circuit framed the issue there as follows:

whether Section 501 permitted NASA to permanently deny Mr. Shirey the job benefits afforded his co-workers solely because he had been hired under excepted service authority, four and half years earlier, on account of the severity of his physical disability.

Id. at 1200. The State points out that the obligations of a federal employer like NASA differ from the obligations of a non-federal employer, like OMRDD, because the former has the statutory obligation to take "affirmative action" while the latter has only the obligation to make "reasonable accommodations."

The Supreme Court explained that "affirmative action" refers to "substantial" changes in programs or "fundamental alteration[s] in the nature of a program." "Reasonable accommodation," a more limited obligation, refers to the "elimination of existing obstacles against the handicapped." *Alexander*, 469 U.S. at 300-01 n. 20, 105 S.Ct. at 719-20 n. 20 (explaining *Southeastern Community College v. Davis*, 442 U.S. 397, 410-11, 99 S.Ct. 2361, 2369-70, 60 L.Ed.2d 980 (1979)). The State is correct in noting the difference between the duties of a federal employer under Section 501 [29 U.S.C. § 791], and a recipient of federal funds under Section 504 [29 U.S.C. § 794]. But accepting this distinction does not end the matter, it merely frames the issue.

The issue in the case is this: whether the State's failure to provide a mechanism for converting from non-competitive to competitive classification (without competitive examination) constitutes a discriminatory failure to provide a "reasonable accommodation" within the meaning of Section 504. It is a legal question upon which both motions for summary judgment depend.

The State argues that permitting Ms. Realbuto to take advantage of the bumping rights available to employees in the competitive class would constitute a "substantial" or "fundamental alteration" in the civil service program. In essence, Ms. Realbuto is asking the Court to rewrite the State's civil service laws to provide her with greater benefits

because she is handicapped rather than to provide her equal benefits in spite of her handicap. See *Flowers v. Webb*, 576 F.Supp. 1450, 1456 (E.D.N.Y.1983).

Ms. Realbuto claims discrimination because she is deprived of the same bumping rights that other employees enjoy even though she performs the same work with the same success. Though *Shirey* involved a federal employer, the D.C. Circuit nevertheless considered the reasonableness of the accommodation that Mr. Shirey sought when it described his injury:

The unlawful discrimination in this case occurred when Mr. Shirey was kept in the excepted service long after the reason for keeping him in a separate employment category had expired. He was working alongside and performing the same tasks as competitive service employees, and no expensive modification of his employment conditions was required. His need for the benefits of competitive service status was certainly no less than that of his co-workers.

Shirey, 670 F.2d at 1203 (emphasis added). The D.C. Circuit reiterated this view in *Allen*, a case involving former mental patients serving in the excepted class of employees at St. Elizabeth's Hospital in the District of Columbia.

Although the majority opinions in *Shirey* and *Allen* favor Ms. Realbuto, the Court finds the dissenting opinions more persuasive. Judge Friedman, dissenting in *Allen*, noted that "[a]lthough the appellees might have obtained a classified position after their appointment by taking and passing the same competitive examination that other nondisabled persons routinely take, they have not attempted to do so." *Allen*, 780 F.2d at 72 (dissenting opinion). Similarly, Judge Tamm, dissenting in *Shirey*, observed that the cause of Mr. Shirey's unequal benefits "was not the fact of his handicapped status but rather was his status as an excepted service employee." *Shirey*, 670 F.2d at 1208 (dissenting opinion).

These dissents express the difficulty that the Court has with Ms. Realbuto's argument. The State claims that it discriminated against

her based upon her failure to take the competitive examination, rather than on her handicap. She has not propounded evidence demonstrating that the Civil Service Law is a mere pretext.

The distinction that the Civil Service Law draws between employees who took the examination and those who didn't may seem unsound as a matter of policy, but the Rehabilitation Act does not give the Court the license to rewrite ill-considered State statutes, only to remedy discrimination based on an individual's disability.

Contrary to the majority's statements in *Allen* and *Shirey*, the Court finds that the change Ms. Realbuto seeks is not the sort of "reasonable accommodation" that the statute mandates. Reasonable accommodations are those that permit the employee to function as an employee. Under the regulation, a reasonable accommodation is an accommodation to the known physical or mental limitations of an otherwise qualified handicapped individual that will not "impose an undue hardship on the operation of [the recipient's] program." See 45 C.F.R. § 84.12(a). As examples of such accommodations, the regulations list changes directed at the person's disability, for example modifying facilities, equipment, scheduling, and providing readers and interpreters. *Id.* at § 84.12(b). The change that Ms. Realbuto seeks is of a different nature: it has nothing to do with her physical or mental limitations but rather with her classification as a noncompetitive employee.

The more pointed question is whether the competitive examination itself presents barriers to handicapped State job applicants. The Court would have to examine the nexus between Ms. Realbuto's handicap and the examination, an issue that she does not raise. Hypothetically, if Section 55-b provided the only means for handicapped persons to secure State employment, Ms. Realbuto might have a better argument.⁵ The fact remains, however, that individuals with disabilities are free to take the competitive examination and,

under the Rehabilitation Act, the State has the duty to reasonably accommodate them by removing barriers in the examination process. Here, Ms. Realbuto does not claim that the State failed reasonably to accommodate her handicap by refusing to facilitate access to the examination process, nor does she claim that she sought to take the examination in 1981. Moreover, the defendants note that Section 55 of the Civil Service law accommodates handicapped persons who wish to take the examination (1) by furnishing examinees with an "amanuensis" or scribe who can assist them and (2) by allowing handicapped individuals additional time in which to take the examination. See N.Y.Civ.Serv. § 55.

[4] Given the structure of the State's civil service system and the fact that Section 55-b provides an alternative avenue to State service, Ms. Realbuto has not demonstrated that she suffered discrimination "solely" on the basis of her handicap. From the differential benefits that she received based on her status as a § 55-b appointee, she asks the court to infer that she suffered discrimination based solely on her handicap. This inference asks too much of the Court. In deciding a motion for summary judgment, a court is not required to draw argumentative inferences in favor of the non-movant, only reasonable inferences.

Even if Ms. Realbuto had made out a *prima facie* case for discrimination, the State has satisfactorily demonstrated that it discriminated against her not on the basis of her disability, but on the ground that she did not take the competitive examination. Because Ms. Realbuto does not rebut this defense, but only disparages its validity in light of *Shirey* and *Allen*, the defendants are entitled to summary judgment dismissing the Rehabilitation Act claims.

2. Equal Protection Claim

In addition to the Rehabilitation Act, Ms. Realbuto invokes the equal protection clause.

bumping rights) to handicapped individuals would unfairly discriminate against handicapped persons in violation of the statute. This case, however, does not present that set of facts.

5. If Section 55-b represented the State's only attempt at reasonably accommodating handicapped persons who cannot take the exam because of their disabilities, then the failure to provide full competitive benefits (including

The gist of this portion of her claim is that the State's classifications are irrational. The claim should not delay the Court for long.

[5, 6] The equal protection clause does not forbid the States from drawing distinctions between classes of people. Indeed, Courts routinely uphold classifications not involving immutable or suspect characteristics (e.g. race or gender) and classifications that do not burden fundamental rights, so long as the State offers a reason for the distinction. Here, handicapped citizens do not fall within one of the suspect classes and the classification does not trample upon a fundamental right. Moreover, a civil service classification that encourages prospective civil servants to compete through competitive examination is not irrational. Though the Court is inclined to agree that Ms. Realbuto should be treated the same as her colleagues in the competitive class, it is not willing to say that the Constitution requires this. In other words, the State has offered a legitimate reason for the discrimination, which is all that it must do.

3. Due Process Clause

[7] Similarly, plaintiff's due process argument must fail. The Supreme Court has held that a person's protected interest does not spring from desire or want alone, but must find its origin in a positive source such as State law. Here, the State's civil service law clearly does not provide Ms. Realbuto with a protected interest in the benefits that her colleagues in the competitive class enjoy. The statute could not be more plain in this regard. Finding no protected interest in the retention rights that she claims, the Court must dismiss this portion of her complaint.

CONCLUSION

As noted above, plaintiff cannot prevail on her claim under the Rehabilitation Act of 1973, the equal protection clause, or the due process clause. In addition, plaintiff has abandoned her claim under the Americans With Disabilities Act. Accordingly, the Court hereby grants the defendants' motion for summary judgment, denies plaintiff's cross-motion for summary judgment, and di-

rects the Clerk to enter judgment dismissing all claims in this action.

IT IS SO ORDERED.



Joseph M. MENDOZA, Plaintiff,

v.

The CITY OF ROME, NEW YORK,
James Boyer, Donald Early, and Terry
Gowett, as Police Officers of the City of
Rome Police Department; and Other
Unknown Police Officers of the City of
Rome, Defendants.

No. 92-CV-436.

United States District Court,
N.D. New York.

Dec. 21, 1994.

Arrestee brought action for damages against police officer for false arrest and use of excessive force, and against city for pattern, policy, or practice of failing to supervise and train its officers. After judgment was entered for arrestee, defendants moved for order setting aside verdicts and directing judgment in their favor, or, alternatively, for new trial. The District Court, Hurd, United States Magistrate Judge, held that: (1) evidence that only description officer had of alleged perpetrators was that they were white teenagers supported jury finding that officer lacked probable cause to arrest plaintiff; (2) plaintiff failed to prove that city, either by pattern, policy, or practice, failed to train or supervise, which was causally related to acts committed by police officer against plaintiff; (3) compensatory damages award of \$200,000 was excessive for limited personal injuries and mental anguish that plaintiff suffered; (4) officer waived any objection to not being named as individual defendant in caption of complaint after being placed on notice that plaintiff was seeking punitive damages.

since he failed to raise objection until after he received jury verdict against him; and (5) maximum amount for compensatory damages that would have been upheld as not excessive was \$62,500.

Motion granted in part and denied in part.

1. Arrest $\Rightarrow$ 68(2)

Under New York law, police officer is empowered to use only such force as is reasonably necessary to make arrest. N.Y. McKinney's Penal Law $\S$ 35.30, subd. 1.

2. Municipal Corporations $\Rightarrow$ 747(3)

Under New York law, arresting officer who uses excessive force will be liable for assault and battery. N.Y. McKinney's Penal Law $\S$ 35.30, subd. 1.

3. False Imprisonment $\Rightarrow$ 31

Evidence that police officer's only description of alleged perpetrators of larceny and assault was that they were white males in their teens provided sufficient basis for reasonable jury to conclude that officer did not have probable cause to arrest plaintiff, supporting jury finding for plaintiff on false arrest claim.

4. Arrest $\Rightarrow$ 63.4(11)

Arresting officer was not entitled to rely upon directions of superior officer for probable cause to arrest plaintiff; evidence supported finding that officer made arrest without any directions from superior, who was not even present at time of arrest, and, even if superior ordered officer to make arrest, it would be based upon same general descriptions of perpetrators that were insufficient to give officer probable cause to arrest plaintiff.

5. Arrest $\Rightarrow$ 63.4(11)

Under fellow officer rule, arresting officers may rely upon information or direction from another officer because directing officer is presumed to possess probable cause.

6. Arrest $\Rightarrow$ 63.4(18)

If warrantless arrest is challenged, presumption of probable cause for arrest under fellow officer rule disappears and government has burden to establish that officer or

agency imparting information in fact possessed probable cause to act.

7. Arrest $\Rightarrow$ 63.4(11)

Where directing officer does not have probable cause, arrest under fellow officer rule is unlawful regardless of good faith of arresting officer.

8. Civil Rights $\Rightarrow$ 242(5)

Study conducted by New York State Division of Criminal Justice Services which reviewed command structure of city police department and recommended elimination of deputy chief and captain did not support finding of municipal liability based on federal claims that city's pattern of failing to supervise and train its police officers properly resulted in violation of plaintiff's rights, where plaintiff submitted no expert testimony that failure to implement recommendations in any manner caused false arrest or use of excessive force upon plaintiff. 42 U.S.C.A. $\S$ 1983.

9. Civil Rights $\Rightarrow$ 206(4)

Evidence of written policy in city police department is not required to support finding of municipal liability upon federal claims that city's pattern, policies, or practices of failing to properly supervise and train its police officers resulted in violation of plaintiff's constitutional rights. 42 U.S.C.A. $\S$ 1983.

10. Civil Rights $\Rightarrow$ 242(5)

Evidence of notice of claims filed with city for alleged acts of its police department did not establish pattern, policy, or practice which was causally related to false arrest and use of excessive force upon plaintiff by police officer to support liability of city and its police department, where plaintiff offered no evidence concerning treatment of any of these claims or evidence on investigations conducted by police department.

11. Federal Civil Procedure $\Rightarrow$ 2336

Court's failure to instruct jury on fellow officer rule in false arrest claim did not require new trial, where defendants never specifically requested charge, and court's response to jury question adequately covered rule and properly submitted issue to jury.

As the Court of Appeals has noted in this case, at the sentencing on October 29, 1980, the Court, prior to sentencing,

"went to great lengths to ensure that the information in the report was correct. The judge recessed the proceedings to enable Appellant to read the presentence report. He then listened to each of Appellant's proffered corrections and stated for the record that the incorrect information would be totally disregarded."

The Defendant and his attorney were given every opportunity to read this presentence report before the sentencing hearing and again during the recess in the middle of it. They were given every opportunity to challenge, correct, or add to it. At no point did either the Defendant or his attorney express the slightest disagreement with the psychological evaluations reported therein. At the sentencing hearing, the Defendant's attorney demonstrated considerable knowledge of the Defendant's problems but mentioned to the Court no health problems except an audiological one. Further, when asked whether he was addicted or presently under the influence of narcotics or dangerous drugs, the Defendant responded in the negative.

At no time did the Defendant's attorney suggest to the Court that the Defendant was not fully assisting in his defense. All indications are to the contrary. The gunsmith defense, the plea of nolo contendere rather than guilty, the Defendant's change of plea at trial, his response to questioning, his allocution, his decision at the sentencing to read the presentence report and then to correct it extensively, and his generally responsive and intelligent behavior before the Court, as the Court remembers it, all point toward his competence to enter the plea.

Further, his Motion herein is self-contradictory. Therein, he states:

evaluation, and the warden did so. However, the Defendant refused to cooperate unless his Court-appointed attorney approved. The attorney refused to respond, and the psychiatric evaluation was limited but positive. It was that "Mr. Barnes' behavior shows no bizarre patterns and that he is in good contact with

On the 15th of September, 1980, Defendant entered his plea of guilty, [sic] withdrawing the plea of not guilty previously entered. His reason for doing so was to provide protection for his wife, who was to be prosecuted on the second and third counts of the Indictment. Charges against Defendant's wife were then dismissed.

This frank statement suggests rationality rather than incompetence and contradicts the allegation that he was unable to assist his counsel in defending him. It suggests an acute awareness of himself and his environment and refutes his allegation of depersonalization.

Moreover, as to the allegation of "black-outs," if the Defendant means that term, as its common meaning denotes, that he was unconscious at the time he entered his plea or when he appeared for sentencing, the Court's own observations alone conclusively refute this allegation. Such behavior would necessarily have been observable by the Court.

Further, the exhibit to the Motion, a physician's worksheet or report, dated August 13, 1980, refutes rather than supports the allegation. It notes that the Defendant complained of "depersonalization" $\times$ 2 days lasting up to 30 min. at a time & occurring 4-5 times/day." Under the heading of "diagnosis/disposition," the physician does not mention depersonalization. The obvious meaning of this is that the Defendant complained of periodic depersonalization for two days following the motorcycle accident that occurred three weeks earlier.

Finally, there is the alleged incident of the Defendant's removing his clothes at the office of his wife's attorney, which, he alleges, the attorney reported in a letter to the Oklahoma Bar Association. The Court finds it incredible that, if such an event occurred, the attorney would report such an

appropriate affect and attitude." The Defendant agrees but asserts that this is not relevant to his competency at the time of his plea. The Court considers it relevant to the question of whether there is a "bona fide doubt" of such competency.

incident to the Oklahoma Bar Association. In any event, no "bona fide doubt" is raised in the Court's mind by the proffered evidence one year and two months after sentencing.

Six days after sentencing, the Defendant through his attorney filed his notice of appeal and, ever since, has worked unremittingly to have his sentence reduced, the judgment set aside, or bond set. He has appealed on several grounds and has filed numerous motions in this Court. All have been denied.

The apparent motive for pursuing all such efforts is his dissatisfaction with the length of his sentence. There is no manifest injustice in denying a Motion to withdraw a plea for such a reason. *Miles v. United States*, 385 F.2d 541 (10th Cir.1967).

[4] The Court concludes that there was evidence at the sentencing that Defendant was mentally competent, that the Defendant and his counsel had opportunities prior to and during the sentencing hearing to review such evidence, that the Defendant was on notice that the hearing was his opportunity to contest any of the statements in the presentence report, and that no question was raised by the Defendant or any other person at or before the sentencing as to the mental competency of the Defendant. In such circumstances, there is no requirement for any hearing. *United States v. Dunn*, supra, at 1372 (1979); *Kienlen v. United States*, supra, at 29. The Defendant has the burden to show manifest injustice before the Court should grant a Rule 32(d) Motion, and this should be more than speculation. *Callaway v. United States*, 367 F.2d 140 (10th Cir.1966). The Court concludes that the Defendant is not entitled to have the judgment set aside, to withdraw his plea of nolo contendere and to enter a plea of not guilty by reason of temporary insanity.

Since filing the instant Motion, the Defendant has filed a "Motion to Appoint Counsel for the Defendant" and a "Request for Extension of Time to Traverse Government's Response." In the latter, he requests an extension of time until the ap-

pointment of counsel. As the Court finds that further discovery is unnecessary and that an evidentiary hearing is not required, the Court can discern no justification for such appointment, under § 2255, Rules 6(a) and 8(c), or 18 U.S.C. § 3006A(g). *Martinez v. United States*, 344 F.2d 325 (10th Cir. 1965). Finally, Defendant's statement in his Motion to Appoint Counsel that he can produce additional medical reports is taken to be frivolous and conclusory.

The Motion is denied.



Robert CRANE, Plaintiff,

v.

Andrew L. LEWIS, Secretary of Transportation, et al., Defendants.

No. CA 81-1081.

United States District Court,
District of Columbia.

June 29, 1982.

Former air traffic control specialist brought action for back pay, promotion adjustments and placement as air information specialist following denial by Federal Aviation Administration of his application for reinstatement as air information specialist. On cross motions for summary judgment, the District Court, John Garrett Penn, J., held that: (1) the Rehabilitation Act, and regulations issued pursuant to the Act, required Federal Aviation Administration to suggest reasonable accommodation for former air traffic control specialist who received disability retirement upon being unable to meet hearing requirement and who sought reemployment in air information specialist's position requiring substantial use of telephone and required the Administration to test former employee's perform-

ance with hearing aids or telephone amplification devices before refusing reemployment in position sought, and (2) decision by the Administration refusing to rehire as air information specialist former air traffic control specialist lacked evidentiary basis, and thus the decision was arbitrary and capricious.

Motion by the Secretary of Transportation denied; plaintiff's motion denied in part and granted to extent of remanding case to agency for further proceedings.

1. Civil Rights — 9.16

The Rehabilitation Act, and regulations issued pursuant to the Act, require Federal Aviation Administration to suggest reasonable accommodation for former air traffic control specialist who received disability retirement upon being unable to meet hearing requirement and who sought reemployment in air information specialist's position requiring substantial use of telephone and required the Administration to test former employee's performance with hearing aids or telephone amplification devices before refusing reemployment in position sought. Rehabilitation Act of 1973, § 2 et seq. as amended 29 U.S.C.A. § 701 et seq.

2. Civil Rights — 13.13(3)

Decision by Federal Aviation Administration refusing to rehire as air information specialist former air traffic control specialist lacked evidentiary basis, and thus the decision was arbitrary and capricious, where evidence failed to establish whether former air traffic control specialist, who had been unable to meet hearing requirements for such position, had capacity, as would be required in air information specialist position, to use telephone with or without hearing aid or other accommodation device. Rehabilitation Act of 1973, § 2 et seq. as amended 29 U.S.C.A. § 701 et seq.

John D. Bates, Asst. U.S. Atty., Washington, D.C., for defendants.

Leonard Rubenstein, Washington, D.C., for plaintiff.

MEMORANDUM ORDER

JOHN GARRETT PENN, District Judge.

Plaintiff, a retired Air Traffic Control Specialist (Control Specialist) with the Federal Aviation Administration (FAA), filed this action for back pay, promotion adjustments and placement as an Air Information Specialist (Information Specialist). He contends that the FAA's denial of his application for reinstatement as an Information Specialist was discrimination on the basis of physical handicap in violation of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794a(a), and was arbitrary and capricious in violation of the Administrative Procedure Act (APA), 5 U.S.C. § 551 et seq.

The case is currently before the Court on cross-motions for summary judgment. There are no outstanding issues of material fact in the case.

I

In 1976 plaintiff received a disability retirement from his employment with the FAA as a Control Specialist because he was unable to meet the hearing requirements for that position.

Prior to his retirement plaintiff had applied for an Information Specialist position, which consists of the collection and verification of aeronautical data. Unlike Control Specialists, who must communicate with pilots in-flight and handle airborne emergencies, Information Specialists are not required to pass any special hearing tests. They must merely meet those standards generally imposed on federal employees, including the "ability to hear the conversational voice, with or without a hearing aid."

Plaintiff's name was inadvertently omitted from the list of promotion candidates so he was not considered for the next available Information Specialist position. Ordinarily, an employee not given proper consideration for promotion would be given priority as to the next available position. Since plaintiff already had been retired at the time the error was discovered, no corrective action was taken.

By letter dated June 21, 1977 plaintiff demanded priority consideration for the next available Information Specialist position. E.F. Whitfield, Director of Personnel and Training, granted plaintiff's request, informed him that his employment would be subject to the Civil Service Commission's regulations on reemployment of annuitants, and directed him to submit a current SF-171. On August 19, 1977 Mr. Whitfield informed plaintiff that he anticipated the next vacancy would occur in six to eight weeks.

On February 13, 1978 Beauford A. Bancroft, Chief of the National Flight Data Center, refused to select plaintiff for an available Information Specialist position. He found plaintiff unqualified for the following reasons:

1. We have been advised by the Northwest Regional Office that Mr. Crane was given a medical disability retirement due to a loss of hearing, which affected his performance as a Flight Service Station Specialist.
2. The working environment in the NOTAM Office is almost identical to that of the Flight Service Station, in that there are four teletype positions of operation. Each position has either one or two high-speed printers, in addition to the CRT transmitting device. The office also has two additional high-speed printers that contribute to the noise level.
3. Specialists in the NOTAM Office are required to use telephones extensively.
4. The work is done on rotating shifts, where Mr. Crane could be on duty alone with no assistance in monitoring incoming phone calls.

Exhibit H, Defendants' Motion for Summary Judgment.

1. The delay of more than one year was the result of unsuccessful attempts by plaintiff to bring this issue before the Court in ongoing litigation between plaintiff and the FAA. See Exhibit J, Defendants' Motion for Summary Judgment.

Plaintiff filed a formal grievance on April 3, 1979,¹ alleging that Mr. Bancroft imposed medical requirements not sanctioned by the Civil Service Commission, failed to inquire into plaintiff's actual medical qualifications, and denied plaintiff's application for medical reasons not imposed [sic] on other employees. After reviewing plaintiff's grievance Mr. Whitfield concluded that Mr. Bancroft's findings were not adequately documented and ruled that the priority consideration should be rerun. Since disability retirees seeking reemployment must show that they can perform satisfactorily Mr. Whitfield also directed plaintiff to submit to a medical examination. Finally, Mr. Whitfield denied plaintiff's request for back pay since there was no evidence that plaintiff should have been selected earlier.

Plaintiff acquiesced in Mr. Whitfield's decision to the extent it agreed to rerun the priority consideration but he took exception to, and attempted to appeal, the other conclusions. By letter dated December 18, 1979 Donald B. Rock, Director of Personnel and Training, informed plaintiff that Mr. Whitfield's decision was final agency action and no other relief was available. With respect to plaintiff's priority consideration, a decision would not be reached until the agency received and evaluated the medical information.

At the FAA's request plaintiff was examined by Dr. Archie C. Powell and the Seattle Hearing and Speech Clinic. Dr. Powell submitted a report to Dr. Edwin E. Westura, Chief of the Clinical Specialties Division of the FAA.² He concluded as follows:

Our audiogram shows a sensorineural deafness in both ears as seen with exposure to excessive noise. Although percentage-wise, using ISO Standards, he has only 16% loss in the left ear and 13% in the right, his speech perception is down. With amplification he hears 96% of pho-

2. Dr. Powell was under the impression that the position for which plaintiff was applying did not require good hearing. See Exhibit P, Defendants' Motion for Summary Judgment. The parties dispute whether this impression was false or not.

netically balanced words in the left, but only 72% on [sic] the right ear. This means that with an aid he possibly will hear adequately except for tones over 2000 frequency in the left ear, but with the right his speech discrimination would be poor. As we both know this type of curve can become progressively worse. If Mr. Crane would furnish a waiver on his hearing I should think the FAA would be safe in hiring this man.

Exhibit P, Defendants' Motion for Summary Judgment.

After reviewing Dr. Powell's findings Dr. Westura found that plaintiff failed to meet the general medical requirements for the Information Specialist position, which require an individual to be able to operate safely, efficiently and without presenting a danger to himself or others. His conclusions were based on the fact that an Information Specialist must verify garbled information transmitted to him by computer or telephone and that plaintiff's hearing loss was not adequately compensated for by artificial aids. The Acting Chief of the Operations Division, John R. Ryan, reviewed plaintiff's file and determined that he was not qualified for employment as an Information Specialist.

Plaintiff then filed a petition for reconsideration. In support of his petition plaintiff submitted reports by Dr. R. Emil Hecht and Denise Kossover-Wechter, M.A., Audiologist, which allegedly showed that his speech reception threshold with the advantage of a hearing aid was "quite normally functioning hearing." Attachment, Exhibit S, Defendants' Motion for Summary Judgment.

Notwithstanding the agency's assertion that the FAA's grievance procedure does not provide for requests for reconsideration, Lionel Driscoll, Chief of the Labor Relations and Career Development Branch of the FAA, reviewed plaintiff's submissions, and made the following findings, in pertinent part:

4. The material provided by you with your November 25 request for reconsideration is irrelevant to the necessary medical determination.

- a. The material submitted from Dr. Hecht and Ms. Kossover-Wechter is speculative and hypothetical in nature. Their conclusions depend upon a premise being met which Mr. Crane has never attempted to satisfy.

- b. Except for the tests conducted by Ms. Kossover-Wechter, Mr. Crane has never worn or attempted to wear artificial [sic] aids to improve his hearing. Any improvement in his hearing that would even approach acceptable standards would require Mr. Crane to procure and wear bilateral [sic] aids, a step which he has never indicated he was willing to consider. It is speculative to assume that he could comfortably accept wearing artificial [sic] aids for a sufficient period of time that he could safely and efficiently perform the duties of a [sic] Aeronautical Information Specialist without hazard to himself or others.

5. The material you submitted was reviewed by Dr. Westura but was not judged to be different from the data submitted by Dr. Powell, because the interpretation of that data depends on Mr. Crane possessing and wearing hearing aids.

6. As the additional data submitted can only be considered on a hypothetical basis, no reason has been presented to grant a request for reconsideration, even if such a request was provided for under the regulations or under our agreement.

Exhibit T, Defendants' Motion for Summary Judgment. The agency never asked plaintiff whether he was willing to wear a hearing aid. The petition was rejected and this action followed.

II

According to regulations promulgated by the Office of Personnel Management, to implement the Rehabilitation Act, "[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." 29 C.F.R. § 1613.704(a). An otherwise disqualifying physical condition or impairment may be overcome by the satisfactory use of mechanical devices such as a hearing aid. Federal Personnel Manual Letter 339-15.

Information Specialists are primarily responsible for the receipt, processing and dissemination of time-critical flight data concerning flying conditions throughout the total National Airspace System. Defendants contend that the use of a telephone is an essential function for the Information Specialist position as it is necessary to use a telephone to collect and confirm the accuracy of flight data. Defendants' Statement of Material Facts at ¶22; Declaration of Beauford Bancroft, Exhibit A, Defendants' Reply to Plaintiff's Opposition to Defendants' Motion for Summary Judgment. Defendants further contend that, based on the evidence before the agency, the agency reasonably concluded that plaintiff's hearing was not at a level sufficient to ensure that he could understand telephone conversations to the extent necessary to satisfactorily perform as an Information Specialist. Defendants' Reply Memorandum at 1. Because plaintiff never obtained, or indicated a willingness to obtain, a hearing aid, which would correct his hearing, the agency had no obligation to consider the strictly potential effect of such a device.³ Defendants' Memorandum In Support of Motion for Summary Judgment at 15-16.

Plaintiff asserts three alternative methods of relief from the agency's failure to provide him the same opportunities it affords non-handicapped individuals. First, pursuant to the Rehabilitation Act he claims a right to *de novo* judicial consideration of his discrimination allegations. To find discrimination the Court must be able to conclude that plaintiff was denied employment due to his handicap and that he is

3. Defendants do not contest the jurisdiction of this Court to decide the issues before it. They join plaintiff in requesting this Court to decide

qualified for the position notwithstanding his handicap.

Even if the Court does not find plaintiff presently qualified, plaintiff suggests he is entitled to summary judgment because the agency failed to meet its duty of reasonable accommodation under the Rehabilitation Act.

Plaintiff's third avenue of attack is that the agency's decision was arbitrary and capricious, in violation of the APA, because there was no evidence to support the agency's conclusion that plaintiff's hearing loss rendered him incompetent to perform as an Information Specialist.

III

Both sides have extensively analyzed the medical reports in an attempt to glean support for their respective contentions. The Court concludes, however, that the medical reports are not helpful as they do not address the underlying question in this case: whether or not plaintiff has the capacity to use a telephone with or without a hearing aid or other accommodation devices. Thus, there is insufficient evidence before the Court for the Court to make a *de novo* finding as to plaintiff's ability to meet the job qualifications.

[1] The Court does find that the agency has not met its burden of proposing reasonable methods of facilitating plaintiff's handicap. For some reason the agency contends that because plaintiff has not come forward and indicated a willingness to obtain and use certain compensatory devices it has no duty to consider and recommend those methods of accommodation. In this Court's view the agency is putting the cart before the horse. Pursuant to the Rehabilitation Act and 29 C.F.R. § 1613.704(a), the agency should suggest reasonable accommodations, such as hearing aids or other telephone amplification devices, and test plaintiff's performance with them. If plaintiff cannot perform adequately without a compensatory device and refuses to use one

whether the agency erred in deciding plaintiff could not satisfactorily hear on a telephone. Defendants' Reply Memorandum at 4 n. 2.

then the agency will have fulfilled its responsibility to plaintiff.

[2] Finally, for the same reason the Court cannot reach a decision on plaintiff's ability to perform as an Information Specialist on the evidence before it, the Court finds the agency's decision to be lacking an evidentiary basis and therefore arbitrary and capricious. Dr. Westura's conclusion was predicated on the fact that plaintiff's hearing was not compensated for by artificial devices and on Dr. Powell's conclusion that even with amplification plaintiff would have partial hearing loss. But, Dr. Powell did not test plaintiff with a hearing aid specifically designed to meet plaintiff's needs, nor did he test plaintiff's hearing capacity on a telephone. Moreover, unless Mr. Driscoll has a medical background he should not be deciding that plaintiff's medical submissions are irrelevant, and therefore, his decision must be regarded as arbitrary and capricious.

IV

In view of the above, it is hereby

ORDERED that defendants' motion for summary judgment is denied, and it is further

ORDERED that so much of plaintiff's motion for summary judgment requesting placement as an Information Specialist, back pay, and costs, is denied, and it is further

ORDERED that plaintiff's motion for summary judgment is granted to the extent that this case is remanded to the FAA for further proceedings in accordance with this opinion, and it is further

ORDERED that this case may be reopened after the administrative proceedings have been completed.



Stanley D. STEARNS, Plaintiff,

v.

G.H. SMITH, Charles R. Haile
Associates, Inc., Defendants.

Civ. A. No. H-78-1262.

United States District Court,
S.D. Texas,
Houston Division.

Sept. 3, 1982.

Property owner brought suit against engineering firm and against director of county flood control district, alleging that the modification of creek by construction of a cement liner caused permanent damage to plaintiff's property and ousted him from the exclusive use, enjoyment and possession of it. The District Court, McDonald, J., held that: (1) engineering firm was not liable for a taking under the Fifth and Fourteenth Amendments based on the decisions not to acquire a right-of-way over plaintiff's land and to truncate the liner, since it did not participate in either decision, and (2) as constructed, cement liner for creek did not result in taking of plaintiff's property in violation of the United States Constitution and, therefore, director of county flood control district was not liable for a taking of plaintiff's property; moreover, since that defendant was sued in his individual and not his official capacity, he was immune from personal liability for damages, in that his actions were taken in the good-faith performance of his official duties and plaintiff failed to show that defendant reasonably should have known that his actions would violate plaintiff's constitutional rights.

Judgment for defendants.

1. Federal Courts ⇐47

Doctrine of abstention had no applicability to the instant case, in which property owner claimed that defendants' modification of creek by construction of a cement liner caused permanent damage to his prop-

erty and ousted him from the exclusive use, enjoyment and possession of it, even though there was a similar action pending against flood control district in state court, since state court construction of the state law would not obviate the need for a decision on the federal constitutional issues. 42 U.S.C.A. § 1983; U.S.C.A. Const.Amends. 5, 14.

2. Civil Rights ⇐13.9

Although courts in other circuits have held that there is no cause of action under section 1983 where plaintiff alleges a "taking" of his property by the state without due process and does not first attempt to avail himself of adequate state procedures for compensation following the de facto appropriation, the Court of Appeals for the Fifth Circuit has not required first resort to state courts; the remedy in federal court is deemed "supplementary to any remedy any state might provide." 42 U.S.C.A. § 1983.

3. Eminent Domain ⇐2

A taking under the Fifth and Fourteenth Amendments may be established without an actual physical appropriation. U.S.C.A. Const.Amends. 5, 14.

4. Navigable Waters ⇐36(1)

"Beds and bottoms" of public creeks and streams in Texas are the property of the state. V.T.C.A., Parks & Wildlife Code § 1.011(c).

5. Waters and Water Courses ⇐90

Bed of a stream is generally measured as extending to a point or line on the bank which is habitually washed during the year by the variation up and down in flow caused by normal rains or ordinarily washed free of vegetation.

6. Eminent Domain ⇐285

In suit brought by property owner who claimed that modification of creek by construction of a cement liner caused permanent damage to his property and ousted him from the exclusive use, enjoyment and possession of it, engineering firm was not lia-

ble for a taking under the Fifth and Fourteenth Amendments based on the decisions not to acquire a right-of-way over plaintiff's land and to truncate the liner, since it did not participate in either decision. U.S.C.A. Const.Amends. 5, 14.

7. Counties ⇐88

Eminent Domain ⇐2(10)

As constructed, cement liner for creek did not result in taking of plaintiff's property in violation of the United States Constitution and, therefore, director of county flood control district was not liable for a taking of plaintiff's property; moreover, since that defendant was sued in his individual and not his official capacity, he was immune from personal liability for damages, in that his actions were taken in the good-faith performance of his official duties and plaintiff failed to show that defendant reasonably should have known that his actions would violate plaintiff's constitutional rights. U.S.C.A. Const.Amends. 5, 14.

Donald Gunn, Gunn & Lee, Houston, Tex., for plaintiff.

Billy E. Lee, Asst. County Atty., Houston, Tex., for G.H. Smith.

John M. Zukowski, Byrnes, Myers, Adair, Campbell & Sinex, Houston, Tex., for Charles R. Haile Associates.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

McDONALD, District Judge.

This action was tried before the Court without a jury on September 8, 9, and 10, 1981. Plaintiff seeks damages for violation of his constitutional rights under the Fifth and Fourteenth Amendments, pursuant to 42 U.S.C. § 1983, and under the theories of negligence, strict liability, trespass and nuisance. He claims that defendants' modification of Spring Branch Creek by construction of a cement liner caused permanent

MEMORANDUM OPINION

Robert J. CRANE, Plaintiff,

v.

Elizabeth DOLE, et al., Defendants.

Civ. A. No. 81-1081.

United States District Court,
District of Columbia.

Feb. 26, 1985.

Former air traffic controller brought action against Federal Aviation Administration following FAA's denial of his application for reinstatement as aeronautical information specialist. The United States District Court for the District of Columbia, John Garrett Penn, J., 551 F.Supp. 27, remanded to FAA for further proceedings. On remand, the FAA again decided not to hire former controller, and he again appealed. The District Court, John Garrett Penn, J., held that Federal Aviation Administration violated Rehabilitation Act by refusing to hire former air traffic controller for position of aeronautical information specialist on basis of his hearing loss.

Ordered accordingly.

Civil Rights — 9.16

Federal Aviation Administration violated Rehabilitation Act [29 U.S.C.A. § 794a] by refusing to hire former air traffic controller for position of aeronautical information specialist on basis of his hearing loss, where test given to determine former controller's ability to perform was not job related and did not have adequate control, and FAA failed to consider controller's ability to perform job with reasonable accommodation. Rehabilitation Act of 1973, § 505, as amended, 29 U.S.C.A. § 794a.

Marc P. Charnatz, Washington, D.C., for plaintiff.

Charles F. Flynn, Asst. U.S. Atty., Washington, D.C., James W. Whitlow, Off. Chief Counsel, F.A.A., Washington, D.C., for defendants.

JOHN GARRETT PENN, District Judge.

The plaintiff filed this action pursuant to the Rehabilitation Act of 1973 (Act), 29 U.S.C. §§ 791 and 794a and the Administrative Procedure Act (APA), 5 U.S.C. § 501 *et seq.* He alleges that the defendants violated the Act by discriminating against him based solely on his physical handicap, a hearing loss, and that they violated the APA by treating him in a wholly arbitrary and capricious manner. He contends that he is entitled to placement in a position as an Aeronautical Information Specialist (AIS) in the National Flight Data Center of the Federal Aviation Administration (FAA) with back pay, "including appropriate account taken for step and grade promotions, and attorneys' fees and costs incurred in this action". The case came before the Court for a trial *de novo*. This memorandum opinion constitutes the Court's findings of fact and conclusions of law. See Fed.R.Civ.P. 52.

I

1. Plaintiff Robert Crane is a hearing-impaired individual. He uses a hearing aid, and at times, hearing aids.

2. From 1966 to 1976, plaintiff was an employee of the FAA. For eight of those ten years he worked as an air traffic control specialist (station), GS-2152, a position in which he provided advice and guidance to general aviation pilots and which required, on certain occasions, in-flight communications with pilots and handling of airborne emergencies. During one two-year period, plaintiff held the position of evaluations, proficiency and development specialist, where his principal task was training others.

3. The medical requirements for the position of air traffic control specialist include the requirement that the incumbent or applicant have no hearing loss of more than 25 decibels in the 500, 1000 or 2000 HZ ranges and must demonstrate no hearing loss in these ranges of more than 20 decibels in the better ear, using ISO (1964) or ANSI (1969) standards.

4. In 1975, a hearing examination routinely conducted by the FAA revealed that plaintiff suffered from a hearing loss which ultimately resulted, in 1976, in a disability retirement from the FAA because he could no longer meet the stringent hearing requirements for the position of air traffic control specialist.

5. Later in 1976, plaintiff applied for another FAA position, as an Aeronautical Information Specialist, GS-1361-12 in the National Flight Data Center in Washington, D.C., FAA headquarters, which is responsible for the collection, verification and distribution of aeronautical data concerning the nation's airports, navigation system, air space and related subjects. The AIS position involves no in-flight communications with pilots or any other flight-control function.

6. The National Flight Data Center is divided into six separate functional areas, some of which are sections and some of which are combined into one section. All are staffed by Specialists in the GS-1361 series. The job descriptions of all sections other than the Notice to Airmen section are identical.

7. One section, the Flight Data Services Section, is responsible exclusively for publishing seven different compilations of data which appear at designated intervals of time and which are designed to keep the aviation community up to date on the status of flight paths, airports, air space, terminology and other relevant flight information. The seven publications are published on a specific schedule, most every 112 days. The shortest publication interval is 28 days, while the longest is quarterly. Specialists in the Flight Data Services Section prepare these publications.

8. Two other functional areas, Navigations Aids and Communications and Airports, are combined in one section and have similar functions. The navigation and communication specialists maintain information on the status of navigational aids and communications mechanisms used in the na-

tion's air traffic control system. They do this by receiving information on changes in the system, by verifying those changes, obtaining a written record and entering the changes into the data base used by the FAA for such information. Ninety-nine percent of the time this information is received in writing the ordinary course of business; emergency changes would be entered through a different mechanism, through the Notice of Airmen Section described below.

9. The Airports specialists maintain records on all public use of privately owned airports, including such matters as changes in operating hours of runways, services and other aspects of airport operation. They use the same methods to obtain, verify and transfer the information received as the navigations/communications specialists. It takes 15 days to get information from receipt to the data base. As with respect to the navigations and communications specialists, emergencies are handled through the Notice of Airmen Section.

10. Two of the sections, Air Space and Flight Procedures, are responsible for updating information on the routes on which the procedures by which planes fly. The information for these sections almost always becomes a rulemaking component of the FAA inasmuch as the information received concerning these matters consists of rules or regulations of the agency. These sections receive the rules or regulations in writing and transmit that information in various ways on a specific cycle, such as 56 days for the Airspace Section.

11. The Notice to Airmen Section (NOTAM) differs from the other sections of the National Flight Data Center, despite the fact that the AIS are in the same job category and Civil Service designation, GS-1361. This section, as the job description states, is responsible for "ensur[ing] expeditious receipt, effective processing and dissemination of time-critical" information concerning changes in any aspect of the nation's flight data. The NOTAM section is divided into two parts, the domestic and international. The domestic section re-

ceives information from 371 flight service stations by teletypes in the National Flight Data Center; the international section receives information worldwide. The specialists who work in the NOTAM section receive teletyped pieces of information (NOTAMs) and, when necessary, verify it by contacting its sources. While, at present, specialists in the domestic part of the NOTAM section use the telephone to perform this task, this is not the only way in which verification can take place. For example, the international component verifies information by teletype; telephone verification is not used at all in the international section. Other means of verification are possible.

12. At the time plaintiff applied for the position of AIS in the National Flight Data Center, there existed no hearing requirements for the AIS job similar to those which existed for the position of air traffic control specialist. At the time he applied in 1976, the requirement for hearing was that imposed generally on federal employees, that is, the "ability to hear the conversational voice, with or without a hearing aid." The FAA does not test or otherwise make any effort to ascertain the hearing levels of its AIS in any section.

13. In 1978, Congress amended the Act, 29 U.S.C. § 794a. As a result of that legislation, the Office of Personnel Management revised the hearing requirements for AIS positions so as to provide, as of September 24, 1979, that "in most cases, a specific physical condition or impairment will not automatically disqualify an applicant for appointment." Rather, the new rule provides that the "loss or impairment of a specific function may be compensated for by the satisfactory use of a prosthesis or mechanical aid. Reasonable accommodation may also be considered in determining an applicant's ability to perform the duties of a position. Reasonable accommodation may include but is not limited to: the use of assistive devices, job modification or restructuring, provisions of readers and interpreters, or adjusted work schedules."



14. When plaintiff applied for the position of AIS, GS-13611-112, in 1976, he was found among the "best qualified" by personnel rules, but his name was inadvertently left off the list of best qualified applicants, the list of names from which a selecting official must make his selection. Thereafter, the agency reconsidered plaintiff for the position. The first time, the agency acknowledged erroneous procedures were used, and agreed to consider plaintiff again. The second time, the Court found the decision to be unlawful and remanded. The third consideration is at issue here.

15. After administrative appeal, the FAA agreed, on August 5, 1977, to give Mr. Crane "priority consideration" for the next AIS position at the National Flight Data Center.

16. Under FAA personnel rules, an applicant granted "priority consideration" must be considered for the next "appropriate" vacancy before other candidates are considered for the position. An "appropriate" vacancy is one which (a) would normally be filled competitively; (b) is at the same grade level as originally applied for; and (c) would be acceptable to the employee.

17. On February 13, 1978, Beauford Bancroft, director of the National Flight Data Center, considered plaintiff solely for a position in the NOTAM section and declined to select plaintiff.

18. The basis for Bancroft's decision was that plaintiff had been medically retired as a result of his hearing loss from his position as air traffic control specialist.

19. At the time of his decision, Bancroft had no authority to impose medical requirements on the position of AIS, had no knowledge of the extent of plaintiff's hearing loss and made no inquiries to determine what the extent of plaintiff's hearing loss was. Nor did Bancroft have any knowledge whether plaintiff had any difficulty using the telephone. He was unaware of any duty toward plaintiff with respect to his hearing impairment. Finally, at the time of the decision in 1978, Bancroft had

no knowledge whether plaintiff's hearing loss would affect his ability to perform the essential function of the job of AIS in the NOTAM section of any other National Flight Data Center section. The actions of Bancroft or the agency did not amount to an "intentional" discrimination against the plaintiff. In other words, the action of the agency was not done with bad faith or with the design to discriminate against plaintiff personally, or as the result of his handicap.

20. Plaintiff sought to challenge Bancroft's decision in ongoing litigation between the plaintiff and the Federal Aviation Administration, but at the suggestion of the Court, *see* Civil Action No. 77-0895, it was agreed to handle the matter through an administrative grievance. Plaintiff filed a grievance at the FAA. On October 17, 1979, the FAA decided the grievance. It found that Bancroft's decision "was not completely documented." The agency decided that it would "re-run" the priority consideration after a determination of applicable medical standards.

21. Pursuant to this decision, plaintiff reapplied and on November 7, 1980, was again turned down by John R. Ryan, the acting chief of the Operations Division, the official who was Bancroft's direct superior. In his decision, Ryan stated that plaintiff was not medically qualified for employment as an AIS. While the decision made reference to the position of AIS without regard to section, Ryan only considered plaintiff for a position in the domestic portion of the Notice to Airmen Section. He did not consider any other sections.

22. Ryan made no attempt to determine whether plaintiff could actually perform the job as an AIS. Nor did he consider whether reasonable accommodation of plaintiff's handicap would permit him to be hired as an AIS in the National Flight Data Center.

23. Plaintiff sought reconsideration of Ryan's decision. He submitted medical evidence, including the results of an examination by R. Emil Hecht, M.D., a board-certified otolaryngologist, a graduate with wings from the Aerospace Medical Insti-

tute Flight Surgery Training Program and a former aviation medical examiner.

24. On reconsideration, the agency reaffirmed its original decision. Its chief of the Labor Relations and Career Development Branch, Lionel R. Driscoll, stated, *inter alia*, that material provided by plaintiff was not relevant and affirmed the original decision.

25. Plaintiff then filed this lawsuit, alleging violations of the Act and the APA. On June 29, 1982, on cross-motions for summary judgment, the Court found that the decisions by Ryan and Driscoll violated the Act because they failed to determine whether plaintiff could perform the job and failed to consider any reasonable accommodations. *Crane v. Lewis*, 551 F.Supp. 27 (D.D.C.1982). The court also found that the decision of the agency was arbitrary and capricious under the APA in considering medical evidence plaintiff submitted irrelevant and drawing conclusions about plaintiff's ability to do the job without ascertaining relevant facts.

26. The Court remanded the case to the agency for further administrative consideration, particularly with respect to plaintiff's ability to perform the essentials of the job of AIS with a hearing aid and with respect to any other accommodations the agency might consider.

27. On remand, Mr. Ryan and the agency's attorney developed a "test" which purported to ascertain whether Mr. Crane could perform the job of an AIS in the NOTAM Section. In developing the test, however, FAA officials considered only plaintiff's ability to perform in the domestic side of the Notice to Airmen section.

28. Neither of the individuals who participated in the development of the test had any experience in the development of tests. They had no knowledge of how one develops a valid job-related test. They did not secure available professional advice on how to develop a test from within the agency or from the Office of Personnel Management.

29. The test consisted of reading plaintiff a list of individual pieces of information

which come in by teletype to the NOTAM section, called notice to airmen or "NOTAMs". Each consisted of a sentence describing a particular aeronautical condition at a particular place and time, e.g., operating hours of the Fort Riley, Kansas tower. Curtis Alms read a series of 15 of these notices to plaintiff without interruption and at a speed of approximately 100 words per minute. Plaintiff was expected to copy the notices to airmen sequentially without error in transcription. Prior to the test, no attempt was made to verify or test it through the use of a control individual or group.

30. The test had a number of very serious deficiencies, including the following: (a) It tested in addition to hearing, the skill of shorthand. Unless one knew some form of shorthand, it was difficult to copy language read at 100 words per minute, the speed at which Mr. Alms read the notices to plaintiff. The federal government requires entry-level stenographers to take shorthand at only 80 words per minute, the same speed as the leading secretarial school in Washington (100 words per minute is considered for an advanced course at that school). Plaintiff noted in his notes his inability to write the NOTAMs down as quickly as they were read. He also objected to the test.

(b) The test was not job-related. The NOTAMs were read sequentially and without interruption, in a form completely unlike the circumstances under which the job would actually be performed. On the job, if an AIS had a question about a NOTAM which arrived by teletype, he would call the originating flight service section on the phone and discuss any clarification he felt was needed. This would be a normal back-and-forth conversation in which any problems could be discussed, cleared up and verified. No such conversations about a particular notice or series of notices was used in the test given to plaintiff; rather, a list was read to be transcribed. Moreover, whereas in an entire eight-hour shift, a specialist will have received 15 NOTAMs which require clarification, here 15 NO-

TAMs were read without interruption in a matter of minutes.

(c) The conditions of the test were uncontrolled, without an attempt to ascertain whether the telephone was operating properly.

(d) The text was not validated to determine whether an AIS who was not hearing-impaired could pass.

31. On remand, the agency was also required by the Court to give consideration to reasonable accommodation, but none of the officials involved in the decision was even aware that reasonable accommodation was necessary to plaintiff and apparently all were unsure what it meant. The deciding official, again Mr. Ryan, was unaware that he had to consider reasonable accommodation for plaintiff and did not know how he would go about considering such reasonable accommodations.

32. Neither Mr. Ryan nor Mr. Bancroft were able to say whether any accommodations to plaintiff's handicap were possible in the National Flight Data Center.

33. The Director of Personnel for the Washington headquarters of the FAA, Mr. Driscoll, similarly never considered whether reasonable accommodations were possible for plaintiff, notwithstanding the requirements of the Court's order.

34. Numerous publications of the Office of Personnel Management provide guidance to federal management officials responsible for complying with the duty of reasonable accommodation. These include a Handbook of Reasonable Accommodation, a Handbook of Job Analysis for a Reasonable Accommodation and specific publication concerning Reasonable Accommodation for Deaf Employees in White-Collar Jobs. These publications were not consulted by any FAA officials responsible for the decision not to hire the plaintiff.

35. The evidence demonstrates that, even without any accommodation by the agency, but with the use of a hearing aid which plaintiff has obtained and is willing to use, he may be able to perform the essential functions of the AIS job in the

domestic Notice to Airmen section. Since the other jobs require less use of the telephone, he would be able to do those jobs. The tests performed by the audiologist at the Gallaudet College demonstrate that, in a variety of circumstances, including the introduction of significant background noises, plaintiff can hear and receive messages over the telephone.

36. Alternatively, plaintiff can perform the job of an AIS with reasonable accommodation.

37. It may be that accommodations are possible which would enable plaintiff to perform the job of an AIS in the domestic NOTAM section competently and efficiently, without hazard to anyone.

38. Unfortunately, the "test" conducted by the agency did not have adequate controls. First, as noted, *see* Finding No. 30, the test was given in such a way, that it not only tested hearing, but the skill of the plaintiff in recording the information read over the telephone as well. Nothing in the record indicates that speed writing or shorthand are requirements of the job. Second, the agency did not conduct a controlled test, that is, the agency did not give the test to one or more other persons so as to have the results of those tests as a gauge for the performance of the plaintiff. Third, the agency did not take action to preserve the test, for example, the agency could have recorded the test so that the actual statements of the reader could be played back at a later date. The agency should have recorded the message received over the telephone so that it would have been clear to the finder of fact what the plaintiff should have heard. Such action would also have conclusively established the speed at which the test was given, any problem in the method the NOTAMs were read, any problems with the telephone, and any comments made by the reader and the plaintiff. Such action also may have assisted the agency to determine whether a reasonable accommodation could be made if the plaintiff is assigned to work in the domestic NOTAM section.

39. In the event the plaintiff is unable to "pass" the test, the agency could have considered the accommodation which would be to assign the plaintiff to the international NOTAM section, where little telephone communication is used.

II

1. At all times relevant to this action, that is, from 1978 to the present, plaintiff has been a qualified handicapped individual within the meaning of Act, 29 U.S.C. § 791, and 29 C.F.R. 1613.702(f).

2. Under FAA regulations, plaintiff's entitlement to "priority consideration" pursuant to the 1977 decision of the agency, entitled him to be considered for the "next appropriate vacancy" defined by regulation as one which (a) would normally be filled by competitive promotion procedures, or by other placement action, including outside recruitment; (b) which is the same grade or level as that to which the employee was not promoted or given proper consideration because of the violation; and (c) which would be acceptable to the employee if selected.

3. To the extent that the FAA, throughout the proceedings in this case, considered plaintiff *only* for a position in the domestic Notice to Airmen section when it believed plaintiff was not medically qualified for employment in that section as a result of his hearing loss, the agency has never considered plaintiff for the next "appropriate" vacancy, in violation of the FAA's own regulations, when construed in conjunction with the requirements of the Act.

4. The decision in 1978 not to hire plaintiff violated the Act by discriminating against plaintiff solely on the basis of his hearing loss and his disability retirement, where the selecting official made no attempt to find out the extent of plaintiff's hearing loss or whether that hearing loss interfered with his ability to perform the job.

5. The decision of Bancroft in 1978 not to hire plaintiff was arbitrary and capricious in violation of the APA, because the selecting official made no attempt to find out the extent of plaintiff's hearing loss or

whether that hearing loss interfered with his ability to perform the job.

6. The decision of the FAA in 1980, reaffirmed on reconsideration in 1981, not to hire plaintiff for a position as an AIS violated the Act insofar as it did not consider plaintiff's ability to perform the job with or without reasonable accommodation. This conclusion is the law of the case pursuant to the Court's order of June 29, 1982. See *Crane v. Lewis*, *supra*.

7. The decision of the FAA in 1980, reaffirmed on consideration in 1981, not to hire plaintiff for a position as an AIS was arbitrary and capricious in violation of the APA insofar as it did not consider plaintiff's ability to perform the essential functions of the job with or without reasonable accommodation, rendered medical conclusions without medical knowledge and deemed plaintiff's evidence irrelevant. This conclusion is the law of the case pursuant to the Court's order of June 29, 1982.

8. The agency's decision on remand from this Court violated the Act in using a test for job performance which was not valid, which was not administered fairly or under controlled conditions and which was not job-related. 29 C.F.R. 1613.705(a).

9. The agency's decision on remand from this Court was arbitrary and capricious under the APA in using a test for job performance which was not valid, which was not administered fairly or under controlled conditions and which was not job-related.

10. The agency's decision on remand from this Court violated the Act by failing to consider reasonable accommodations to plaintiff which would enable him to perform the essential functions of the job of AIS in the domestic NOTAM section, despite a specific order from this Court to consider such accommodations.

11. The agency's decision on remand from this Court was arbitrary and capricious in violation of the APA by failing to consider reasonable accommodations to plaintiff which would enable him to per-

form the essential functions of a job of AIS in the domestic NOTAM section.

12. Reasonable accommodations the agency could have considered, and which it is required to consider as a matter of law, include making facilities usable by handicapped persons, 29 C.F.R. 1613.704(b)(1); and modification of equipment or devices, 29 C.F.R. 1613.704(b)(2). The agency never considered any of these possible accommodations.

13. Some of the accommodations proposed by plaintiff could be accomplished without undue hardship on the operation of the agency, considering the size of the National Flight Data Center, the number of employees, the resources of the FAA; the nature of the agency's operation, including the composition and structure of the work force and the nature and cost of the accommodations suggested.

14. As a result of the violation of law described, plaintiff is entitled to back pay to February 1978 at the level of GS-12, with all statutory pay increases, grade increases and promotions.

15. Insofar as plaintiff's hearing loss complaint is concerned, and as a result of the violations of law described, plaintiff is entitled to placement in the position of AIS in the National Flight Data Center, GS-1361-13 in the next vacancy which arises in the Center. Until such vacancy occurs, plaintiff is entitled to "front pay" from the date of the Court's decision to the date of placement in a position.

16. Plaintiff is entitled to reasonable attorney's fees and costs. 29 U.S.C. § 794a(a).

III

In this part, the Court briefly amplifies what it has stated in Parts I and II. It is clear that the defendants have not complied with the direction given by this Court in *Crane v. Lewis*, *supra*. The Court noted the difficulty it had in deciding this case on the cross-motions because the agency's decision to reject the plaintiff lacked an evidentiary basis. 551 F.Supp. at 32. It was

CLARK v. PROCUNIER

Cite as 617 F.Supp. 163 (D.C.Tex. 1985)

Clifton Earl CLARK, Petitioner,
v.

Raymond PROCUNIER, et al.,
Respondents.

Civ. A. No. H-83-6540.

United States District Court,
S.D. Texas,
Houston Division.

March 5, 1985.

Petitioner filed an application for writ of habeas corpus. The District Court, McDonald, J., held that: (1) petitioner's failure to present insufficiency of evidence argument to Texas courts on appeal constituted procedural default and waived that ground for purposes of federal habeas review, and (2) jury charge which made it clear that defendant knew of codefendant's intent to rob and acted with intent to promote or assist in robbery did not improperly authorize conviction on theory not alleged in indictment charging aggravated robbery.

Motion to dismiss granted.

1. Habeas Corpus ⇐25.1(9)

Failure to appeal directly claim that evidence in criminal proceeding was insufficient to support conviction waives claim for purpose of review by habeas corpus petition in Texas.

2. Habeas Corpus ⇐45.3(1.40)

Habeas corpus petitioner's failure to present insufficiency of evidence argument to Texas courts on appeal constituted procedural default on that point and since nothing in record suggested a cause for default, that claim was waived in federal habeas corpus proceeding.

3. Criminal Law ⇐814(1)

Jury charge which made it clear that defendant knew of codefendant's intent to

for this reason that the case was remanded to the agency with direction that the hearing capability of the plaintiff be tested. In Findings Numbered 30 and 38, Part I, *supra*, the Court has noted the deficiencies apparent in the test given the plaintiff. The Court now concludes that the defendants could have reached a reasonable accommodation by placing the plaintiff in the next appropriate vacancy in the International NOTAM Section. See *Southeastern Community College v. Davis*, 442 U.S. 397, 99 S.Ct. 2361, 60 L.Ed.2d 980 (1979); *Treadwell v. Alexander*, 707 F.2d 473 (11th Cir.1983). For this reason, the Court's decision is a final one and a final order has been entered. Notwithstanding this fact, the defendants may give further consideration to placing the plaintiff in the domestic NOTAM section either with or without making an accommodation. In short, the agency may retest the plaintiff one more time having in mind the defects found in the earlier test. If such a test is given, the agency shall "preserve" the test as suggested by the Court. If the plaintiff passes the test, then the agency shall take action to place the plaintiff in the next appropriate vacancy in the domestic NOTAM section. If the plaintiff fails the test, the agency may consider whether there are reasonable accommodations which can be made to permit the plaintiff to work in the domestic NOTAM section. Such accommodations may include, but are not limited to, a phone designed to amplify voices, however, the agency is not required to hire additional personnel or to make scheduling changes which would decrease, in any way, the operations of the important services the agency renders.

The plaintiff brought this action pursuant to the Rehabilitation Act of 1973 and the Administrative Procedures Act. While the Court finds that the agency has acted arbitrarily and capriciously in considering plaintiff's application for employment, the relief it grants is solely based upon that afforded under the Rehabilitation Act of 1973.

An appropriate order has been issued.

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1. Barth v. Gelb, 2 F.3d 1180, 62 USLW 2199, 63 Empl. Prac. Dec. P 42,659, 303 U.S.App.D.C. 211, 2 A.D. Cases 1180, 2 A.D.D. 1181, 4 NDLR P 136 (D.C.Cir., Aug 27, 1993) (NO. 91-5199)
2. Nelson v. Ryan, 860 F.Supp. 76, 3 A.D. Cases 857, 7 A.D.D. 594, 5 NDLR P 266 (W.D.N.Y., Jul 29, 1994) (NO. 91-CV-619S)
3. Realbuto v. Howe, 872 F.Supp. 1103, 3 A.D. Cases 1524, 6 NDLR P 135 (N.D.N.Y., Nov 08, 1993) (NO. 92-CV-1003)
4. Crane v. Dole, 617 F.Supp. 156, 37 Fair Empl.Prac.Cas. (BNA) 255, 36 Empl. Prac. Dec. P 35,083, 1 A.D. Cases 699 (D.D.C., Feb 26, 1985) (NO. CIV. A. 81-1081)
5. Crane v. Lewis, 551 F.Supp. 27, 36 Fair Empl.Prac.Cas. (BNA) 31, 31 Empl. Prac. Dec. P 33,359, 1 A.D. Cases 353 (D.D.C., Jun 29, 1982) (NO. CA 81-1081)

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(Cite as: 827 F.2d 1353)

GREATER LOS ANGELES COUNCIL ON DEAFNESS, INC., et al., Plaintiffs-Appellants,
v.

Malcolm BALDRIGE, Secretary of the Department of Commerce, Defendant-Appellee.
No. 86-6256.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted April 10, 1987.

Decided Sept. 15, 1987.

Nonprofit corporation devoted to furthering interests of deaf and **hearing-impaired** individuals, attorney for corporation, and two deaf individuals, acting on their own behalf and as representatives of class consisting of deaf and **hearing-impaired** persons, brought action against Secretary of Commerce, seeking to compel Department to rule on administrative complaint alleging that public television station was discriminating against **hearing-impaired** people in violation of Rehabilitation Act, and seeking to compel Department to require television stations receiving federal funding to caption their television programs for deaf and **hearing-impaired** viewers for full range of stations' broadcasting activities. The United States District Court for the Central District of California, Richard A. Gadbois, Jr., J., dismissed the case, and plaintiffs appealed. The Court of Appeals, Ferguson, Circuit Judge,

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716 F.Supp. 796	Rank(R)	Page(P)	Database	Mode
55 Ed. Law Rep. 146	R 1 OF 1	P 1 OF 25	ALLFEDS	Term
(Cite as: 716 F.Supp. 796)				

Kenneth and Karen ROTHSCILD, Plaintiffs,
v.

Charles GROTTENTHALER, Superintendent of the Ramapo Central School District,
and Ramapo Central School District, Defendants.

No. 89 Civ. 2992 (GLG).

United States District Court,

S.D. New York.

July 12, 1989.

Hearing-impaired parents brought action against school district and superintendent alleging handicap discrimination in violation of Rehabilitation Act and s 1983. Defendants moved to dismiss. The District Court, Goettel, J., held that: (1) **hearing-impaired** parents were "otherwise qualified" handicapped persons who had to be provided meaningful access to school-initiated parent-teacher conferences, and (2) superintendent was entitled to qualified immunity from liability.

Motion granted in part and denied in part.

Liz -

Pls. research

the following:

- 1) what statutory law, case law, or legis history there is to explain "reasonable accommodation" as it applies to a hearing-impaired person?
- 2) whether volunteers are covered under the ADA?

Let's try to have by

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— MK

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You are cordially invited to attend a farewell reception for

Jose Cerda

Senior Policy Analyst for the Domestic Policy Council

Tuesday, May 30, 1995

Old Executive Office Building

Indian Treaty Room 474 - 5:30 - 7:30 P.M.

Please RSVP to Ian Van Praagh

At (202) 456-5390

found Dr. Grassian's testimony credible and reliable, despite relevant if unpersuasive challenges on cross-examination to his professionalism and objectivity.

The psychiatric experts agreed that Plaintiff's PTSD requires her to take calming medication, such as Valium and Halcion. The principal points of their agreement as to the symptoms she suffered are as follows:

(1) Massive free-floating anxiety which has lessened over time but will persist to some extent for the balance of her life.

(2) Clinical depression which originally manifested itself in suicidal ideation. This includes both social withdrawal and loss of self-esteem which the Plaintiff still suffers from. The suicidal ideation ended within approximately nine months after the searches took place, and the symptoms of social withdrawal have also lessened.

(3) Intrusive recollections. These are not simply memories of the events of May 12, 1986. They are recollections which overwhelmingly invade the consciousness of the Plaintiff and cause her to relive mentally the experience of the searches.

(4) Insomnia which has lessened over time, but still persists to some extent.

(5) Fear of encounters that remind her of the searches, such as gynecological exams and undressing in front of others. This is especially distressing to the Plaintiff since much of her family still lives in Nigeria, and she cannot visit them without going through customs inspections. In addition, her name is now listed in the TEC system, so that when she returns to the United States, at whatever point of entry, she is likely to be searched again.

(6) Nightmares that are more frequent and different in content than those she experienced before May 12, 1986 and that increase in frequency when the Plaintiff encounters experiences reminding her of the events of that night.

records and previous testimony, was based completely on two 90 minute meetings he had with Plaintiff almost five years after May 12, 1986. In contrast, Dr. Grassian observed Plaintiff over

(7) At least a temporary diminution of her efficiency in her job, as attested to by her supervisor, Mrs. Russo, who testified that Plaintiff made many more mistakes and seemed very depressed and "different" after May 12, 1986.

(8) Lastly, Plaintiff experienced a diminished ability to enjoy life, or so-called "anhedonia." This includes the difficulties she has had in sexual relations since the searches took place.

In coming to a fair determination of damages, the Court must do its best to compare Plaintiff's quality of life before and after May 12, 1986 and the proximate cause of those differences. She certainly was not accustomed to what many would consider an enjoyable lifestyle before the searches. She changed jobs frequently, and there was often an insecurity about her situation. In addition, there were significant reasons that she might otherwise experience some depression. She was far away from many of her immediate family members and had lost her first-born son years ago to an accident. From the standpoint of enjoyment of sexual activities, she lived in a different country than her husband and only saw him infrequently. The Court has considered all of these factors in making a determination of damages.

Plaintiff must also prove the likely cost and clear requirement of future psychiatric services. To the extent that awards are made for recovery on account of future expenditures or conditions, a discounting process has been followed by the Court. See *Jones & Laughlin Steel Corp. v. Pfeiffer*, 462 U.S. 523, 103 S.Ct. 2541, 76 L.Ed.2d 768 (1983).

IX. Conclusion

Considering all of the elements above, the Court finds that the Plaintiff has established her case under the MCRA as brought to this Court through the auspices of the Federal Torts Claims Act. Plaintiff has proven that the United States, through

the course of many interviews and changes in her circumstances beginning shortly after May 12, 1986. Thus, the basis for his opinion was much less theoretical than that of Dr. Bursztajn.

its employees, has interfered with her rights as secured by both the Constitution of the United States and the Massachusetts constitution by threats, intimidation and coercion, and that she is, therefore, entitled to recover compensatory damages. The Plaintiff is awarded \$200,000 for past and future pain and suffering and false imprisonment and \$15,000 for past and future psychiatric care necessitated by the events of May 12, 1986, a total of \$215,000. Judgment for the Plaintiff against the United States shall enter in that amount.²⁹

SO ORDERED.



Doris WISHER, Plaintiff,

v.

Paul COVERDELL, in his official capacity as Director of the United States Peace Corps, Defendant.

Civ. A. No. 89-2570-K.

United States District Court,
D. Massachusetts.

Jan. 27, 1992.

After she was medically disqualified from participating in jointly administered United Nations volunteer program, Peace Corps volunteer brought action against Corps under §§ 501 and 504 of the Rehabilitation Act. On Corps' motion to dismiss, the District Court, Keeton, J., held that: (1) volunteer was not "employee" of Corps such that she could pursue claim under § 501; (2) volunteer could not pursue claim for damages under § 504 inasmuch as Corps' decision was regulatory decision that could be reviewed under Administrative Procedures Act; but (3) agency record did not support disqualification decision

29. After a hearing and by separate memorandum of decision, dated December 27, 1991, the

and remand for further proceedings was required.

Dismissed in part; vacated and remanded in part.

1. Civil Rights §173

Peace Corps volunteer was not "employee" of Peace Corps such that she could state claim under § 501 of the Rehabilitation Act after she was medically disqualified from participating in jointly administered United Nations volunteer program, notwithstanding volunteer's contention that her claim was accepted and addressed by Peace Corps as claim under § 501 and that Peace Corps exercised substantial control over or access to volunteer's relationship with United Nations program; Peace Corps Act specifically stated that volunteers were not employees of federal government except for purposes of specifically enumerated statutes, and Rehabilitation Act was not one of those statutes. Peace Corps Act, § 5(a, h), 22 U.S.C.A. § 2504(a, h); Rehabilitation Act of 1973, § 501, 29 U.S.C.A. § 791.

See publication Words and Phrases for other judicial constructions and definitions.

2. Civil Rights §194

Decision by Peace Corps to medically disqualify volunteer from participating in jointly administered United Nations volunteer program was "regulatory" decision such that volunteer could not pursue claim for damages under § 504 of the Rehabilitation Act if review was available and appropriate under Administrative Procedures Act. Rehabilitation Act of 1973, § 504, 29 U.S.C.A. § 794; 5 U.S.C.A. § 551 et seq.

See publication Words and Phrases for other judicial constructions and definitions.

3. Civil Rights §194

Judicially created rule that person aggrieved by agency action cannot pursue claim under § 504 of the Rehabilitation Act where action was "regulatory" in nature applies whenever review of action is available and appropriate under Administrative Procedures Act. Rehabilitation Act of

Court has ruled that Plaintiff is not entitled to attorney's fees.

1973, § 504, 29 U.S.C.A. § 794; 5 U.S.C.A. § 551 et seq.

4. Civil Rights ⇐194

Review under Administrative Procedures Act (APA) of decision by Peace Corps to medically disqualify volunteer from participating in jointly administered United Nations volunteer program was both available and appropriate, and volunteer could not pursue claim for damages under § 504 of the Rehabilitation Act, notwithstanding volunteer's contention that decision involved regulations regarding her qualifications for employment, that review under APA would be much more deferential and inconsistent with strict principles of employment discrimination, that Peace Corps did not have resources to make proper decisional record, and that APA did not obtain damages remedy. Rehabilitation Act of 1973, § 504, 29 U.S.C.A. § 794; 5 U.S.C.A. § 551 et seq.

5. Administrative Law and Procedure ⇐676

Court typically reviews agency decision under Administrative Procedures Act on basis of record compiled by agency in making decision; judicial review is made on administrative record already in existence and not on new evidence presented for first time before district court. 5 U.S.C.A. § 551 et seq.

6. United States ⇐125(5)

Waiver of government's sovereign immunity must be unequivocally expressed and not implied.

7. Administrative Law and Procedure ⇐663

Civil Rights ⇐182

District court had jurisdiction under Administrative Procedures Act to review Peace Corps' decision to medically disqualify volunteer from participating in jointly administered United Nations volunteer program even though volunteer's complaint was in part phrased in terms of private action under § 504 of the Rehabilitation Act, over which district court lacked juris-

diction; although volunteer sought monetary relief, she also requested other and further relief as court saw just and proper. Rehabilitation Act of 1973, § 504, 29 U.S.C.A. § 794; 5 U.S.C.A. § 551 et seq.

8. Civil Rights ⇐182

Evidence in agency record did not support Peace Corps' decision to medically disqualify volunteer from participating in jointly administered United Nations volunteer program. Rehabilitation Act of 1973, § 504, 29 U.S.C.A. § 794; 5 U.S.C.A. § 551 et seq.

9. Administrative Law and Procedure ⇐819

Civil Rights ⇐182

Inadequacy of agency record to support Peace Corps' decision to medically disqualify volunteer from participating in jointly administered United Nations volunteer program required remand for further consideration rather than permitting volunteer to pursue private action for damages under § 504 of the Rehabilitation Act. Rehabilitation Act of 1973, § 504, 29 U.S.C.A. § 794; 5 U.S.C.A. § 551 et seq.

Harold L. Lichten, Angoff, Goldman, Manning, Pyle, Wanger & Hiatt, Boston, Mass., for plaintiff.

Susan M. Poswistilo, U.S. Attorney's Office, Boston, Mass., for defendant.

OPINION

KEETON, District Judge.

This is a handicap discrimination action under Sections 501 and 504 of the Rehabilitation Act. On October 7, 1991, ten days before trial was scheduled to commence, defendant filed a motion to dismiss on the ground that plaintiff may not state a claim under either § 501 or § 504 of the Rehabilitation Act. A bench trial was held on October 17, 1991. At the start of trial the court stated that it would proceed to conduct the one-day trial, hear closing arguments, and then rule on defendant's motion to dismiss as appropriate. At the close of the evidence the court gave the parties a

briefing schedule with the understanding that the court would decide the action based on the briefs and evidence before the court.

I. Background

The parties have stipulated to the following facts. The plaintiff, Doris Wisher, is a 39 year-old woman. From June 28, 1982 until September 25, 1984, she served in the United States Peace Corps ("Peace Corps") as a volunteer in Makokou, Gabon, West Africa. Upon completion of her Peace Corps service, plaintiff submitted to the Peace Corps her application to become a United Nations Volunteer ("UNV"). The UNV program utilizes volunteers from countries around the world by placing them in assignments in developing countries. The program was established by the United Nations General Assembly in December 1970, maintains its headquarters in Geneva, and is administered by the United Nations Development Program ("UNDP").

The UNV program requires each volunteer to be sponsored by an agency in the country from which the volunteer is applying. The Peace Corps is the sponsoring agency for American participants in the UNV program, and is responsible for recruiting, selecting, and screening all Americans applying to the program. An applicant for a UNV position must submit both a Peace Corps application and a UNV application to the Peace Corps.

Because an American UNV volunteer receives benefits from both the UNV program and the Peace Corps, the volunteer must meet qualifying standards for both Peace Corps and UNV service, and a volunteer who is selected is sworn in both as a Peace Corps volunteer and a UNV. A UNV receives a monthly living allowance, settling-in grant, housing, basic furniture and utilities and other similar in-country expenditures. The Peace Corps is responsible for paying the UNV's travel and readjustment allowances, at the same rate paid to Peace Corps volunteers. The United Nations funds all other expenses and allowances arising under the program, including living expenses and in-service medical costs. The Peace Corps will pay for emer-

gency medical evacuations of its sponsored individuals.

After a candidate has submitted the appropriate references and application materials, the Peace Corps determines whether the candidate meets the requirements, exclusive of medical clearance, for UNV service. If the Peace Corps determines that a candidate is suitable for UNV service, it recommends the applicant to the UNV program. If the UNV program accepts the application, the candidate's name is placed by the program on a Roster for Qualified Candidates. Because of the length of the application process, the Peace Corps does not require a medical clearance examination until after the candidate has been accepted by the UNV program. The acceptance is contingent upon medical clearance.

Medical and dental information submitted by a UNV applicant to the Peace Corps is reviewed by an Occupational Health Nurse. In making the determination for medical clearance, the Occupational Health Nurse utilizes the Peace Corps medical review guidelines ("guidelines") as a guide. If the Occupational Health Nurse is unable to clear the applicant medically, the case is presented to the Medical Review Board for a case-by-case review and decision. The Peace Corps guidelines indicate that an individual who is diagnosed with chronic hepatitis, type B, is medically unqualified.

Upon receipt of plaintiff's UNV application, the Peace Corps immediately forwarded it to UNV headquarters in Geneva. On July 4, 1984, plaintiff was notified by UNV headquarters that she was accepted to the Roster of Qualified Candidates for UNV service, contingent upon medical clearance. Between October 1984 and April 1985, plaintiff was nominated for several UNV positions. In particular, in February 1985 the UNDP asked the Peace Corps to sponsor plaintiff for the Mauritania position, subject to medical clearance.

Later that month plaintiff consulted a physician, Richard E. Bryant, to obtain the physical examination for UNV service. On May 3, 1985, as a result of further testing, plaintiff tested positive for hepatitis B sur-

face antigen and negative for hepatitis E antibodies. Plaintiff was then diagnosed by Dr. Emmet Keeffe to have mild chronic hepatitis B, without evidence of any progression towards scarring or cirrhosis, and with no serious impairment to the liver. She was advised by Dr. Keeffe not to donate blood and to be sure any long term sexual partner was vaccinated.

On May 8, 1985, plaintiff and Paul Knepp, the former Coordinator of the UNV program at the Peace Corps, were advised by the Peace Corps that plaintiff would not be medically cleared based upon the results of Dr. Bryant's examination and indicated that her name must be withdrawn from UNV consideration. Mr. Knepp thereafter advised the UNDP that plaintiff could not be medically cleared for the Mauritania position.

Because the Occupational Health Nurse was unable to clear plaintiff's application, plaintiff's application was referred to the Medical Review Board ("Board"). At the time the Board reviewed plaintiff's application, the Board was comprised of a medical advisor, the director of nurses and Dr. Philip Pierce, an outside expert medical consultant. After review, the Board determined that plaintiff was not medically qualified and, by letter dated September 17, 1985, the Peace Corps notified plaintiff that her chronic hepatitis B medically disqualified her from service.

On October 9, 1985, upon the appeal of plaintiff, the Board reconsidered its decision to medically disqualify plaintiff. The Board once again denied plaintiff's appeal because they determined that she was potentially infectious to others and that the Peace Corps should not send such chronically infected individuals to a host country. The Board also stated that they believed her medical situation might progress to cirrhosis and the rate of progression might be unpredictable, and that the countries of potential assignments lack the medical facilities to treat plaintiff. Plaintiff was notified of this final decision on October 10, 1985. On June 21, 1988 plaintiff filed a formal complaint alleging that the Peace Corps violated § 501 and § 504 of the Re-

habilitation Act by medically disqualifying her on account of her handicap.

II. Plaintiff's § 501 Claim

[1] Defendant argues that because plaintiff is a volunteer, rather than an employee of the Peace Corps, she cannot state a claim under § 501 of the Rehabilitation Act. Under § 501 a federal agency has an affirmative "duty to structure its procedures and programs so as to ensure that handicapped persons are afforded equal opportunity in both job placement and promotion." *Salmon Pineiro v. Lehman*, 663 F.Supp. 483, 489 (D.Puerto Rico 1987) (quoting *Ryan v. Federal Deposit Insurance Corp.*, 565 F.2d 762, 763 (D.C.Cir. 1977)). Aggrieved federal employees have a private right of action under § 501. *Prewitt v. United States Postal Service*, 662 F.2d 292, 302-303 (5th Cir.1981).

Plaintiff responds that for purposes of § 501 she is an employee of the Peace Corps. She makes two arguments in support of her contention. First, plaintiff asserts that when she brought her discrimination complaint to the EEOC, defendant accepted plaintiff's charge under § 501, investigated that charge under the procedures for § 501, and provided plaintiff with a notice specifying her rights to appeal under § 501, including authorization either to file for a full hearing with an administrative law judge, or to file a civil action directly in federal court. Rights that plaintiff alleges flow only from a complaint filed under § 501. Second, plaintiff argues that because the Peace Corps exercised "substantial control" over or access to plaintiff's employment relationship with UNV, the Peace Corps is considered plaintiff's employer for § 501 purposes, even if it is not technically her employer.

Plaintiff's arguments fail to address a dispositive issue. Congress has specifically stated that a Peace Corps volunteer shall not be considered a federal employee. The Peace Corps Act states:

except as provided in this chapter, volunteers shall not be deemed officers or employees or otherwise in the service of employment of, or holding office under, the United States for any purpose.

22 U.S.C. § 2504(a). That statute provides further that a Peace Corps volunteer may be deemed a federal employee for "the purposes of the Federal Tort Claims Act and any other Federal tort liability statute, the Federal Voting Assistance Act of 1955 ... section 3342(a), (b), and (c)(1) of Title 31, section 5584 of Title 5 ... and section 214 of this title." 22 U.S.C. § 2504(h). The statute does not make an exception for discrimination laws, including the Rehabilitation Act, although Congress clearly knew how to make an exception when it so intended.

The fact that the Peace Corps issued regulations for volunteers that track the procedures and remedies available generally to federal employees under § 501, does not make Peace Corps volunteers Peace Corps employees. Congress passed a statute that provides unambiguously that Peace Corps volunteers shall not be considered employees except for the purposes of certain laws. The Rehabilitation Act is not one of those laws. Thus the Peace Corps regulations that appear to have treated plaintiff as an employee for the purposes of her Rehabilitation Act claim, not only lack support in the language of the Peace Corps statute, *see EEOC v. AR-AMCO*, — U.S. —, 111 S.Ct. 1227, 1235, 113 L.Ed.2d 274 (1991), they directly contradict that statute's language. Thus, this court should not—and indeed cannot—accord the Peace Corps' regulations any weight in determining if plaintiff is an "employee" with the right to bring a private action under § 501.

Although it may seem inequitable to allow the Peace Corps to argue at this point in the litigation that plaintiff may not bring her § 501 claim to federal court, this court does not have the authority to disregard the explicit mandate of Congress and hold that plaintiff is an employee who has a private right of action under § 501. Accordingly, plaintiff's § 501 claim must be dismissed.

III. Section 504 Claim

[2-4] Plaintiff also makes a claim under § 504 of the Rehabilitation Act. That section provides in relevant part:

No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination ... under any program or activity conducted by any Executive Agency.

29 U.S.C. § 794. Plaintiff's handicap discrimination claim fits squarely within the language of this statute. Plaintiff alleges that she was denied the benefits of the UNV program—a program conducted in part by the Peace Corps, an Executive Agency—solely because of her handicap.

Although the Peace Corps must abide by the Rehabilitation Act, defendant argues that the First Circuit's decision in *Cousins v. Secretary of the U.S. Department of Transportation*, 880 F.2d 603 (1st Cir. 1989), requires that this court dismiss plaintiff's claim for lack of subject matter jurisdiction because § 504 does not provide plaintiff with a private right of action against government agencies.

In *Cousins*, a deaf truck driver brought suit under § 504 against the Department of Transportation ("DOT") after the DOT refused to waive a requirement that excluded deaf persons from working as truck drivers. The First Circuit observed that the Rehabilitation Act does provide for private enforcement actions against any recipient of federal aid and actions against federal agencies as employers. The court noted, however, that the Act is silent about whether a person injured by an agency acting as a regulator may enforce the Act against the agency. The court concluded that the silence reflects the fact that a person aggrieved by agency action has a right to judicial review as provided under the Administrative Procedures Act ("APA"). Thus, there was no need for Congress to create a private right of action because a means of review already existed. *Id.* at 608.

Plaintiff responds that *Cousins* does not control this action because the Peace Corps was acting as an employer when it medically disqualified plaintiff, and a private right of action against a federal agency may

exist to challenge the conduct of a federal agency in its capacity as employer. See *Clark v. Skinner*, 937 F.2d 123, 125 (4th Cir.1991). In the alternative, plaintiff argues that even if the Peace Corps was not acting as an employer, it was clearly not acting as a regulator and therefore *Cousins* does not apply. Instead, plaintiff urges the court to follow the Ninth Circuit's recent decision in *John Doe v. Attorney General of the United States*, 941 F.2d 780 (9th Cir.1991).

Doe involved a physician who worked for a private clinic and performed routine pre-employment physical examinations for FBI employees and applicants. When the FBI had cause to believe that Doe was infected with the HIV virus, they stopped sending individuals to him for examination. Doe then sued the government under § 504. The *Doe* court held that Congress manifested an intent that the federal government be subject to the same standards as were private recipients of federal money and local and state governments who received federal funds, thus the FBI was subject to a private right of action for damages under § 504. In so holding, the court specifically distinguished its holding from *Cousins* by concluding that *Cousins* is limited to claims "against a federal agency as a regulator." *Id.* at 780.

Plaintiff's attempt to distinguish *Cousins* is not persuasive. I do not read that case so narrowly as to apply only when a federal agency acts as a regulator in exactly the same manner as the DOT. Rather, I interpret *Cousins* as holding that an agency decision is "regulatory" whenever APA review of that decision is available and appropriate. As the court stated

One would ordinarily expect ... that when Congress means to permit a private party to ask a court to review the legality of federal actions in a manner that differs from APA review, Congress will say so explicitly in the statute.... Otherwise, it is reasonable to assume that Congress meant the APA to govern. *Cousins*, 880 F.2d at 607 (quoting *NAACP v. Secretary of Housing and Urban Development*, 817 F.2d 149, 153 (1st Cir.1987).

Thus the issue before the court is not whether the Peace Corps' denial of plaintiff's medical clearance was regulatory activity in the same sense as the DOT's action in *Cousins*, but rather whether it was the type of decision for which APA review is available and appropriate.

Plaintiff argues that APA review is inappropriate because this case involves a federal agency's regulations about qualifications for employment. As support for her contention plaintiff cites *Davidson v. United States Department of Energy*, 838 F.2d 850 (6th Cir.) cert. denied, 487 U.S. 1207, 108 S.Ct. 2849, 101 L.Ed.2d 886 (1988), and *Cleghorn v. Harrington*, 813 F.2d 992 (3d Cir.1987). Those cases involved discrimination challenges to federal regulations about qualifications for employment by the agency's private contractors. The courts in both cases held that because APA review would allow those plaintiffs to avoid exhaustion of administrative remedies, an APA challenge was improper. The *Cousins* court distinguished its holding from these two cases by observing that they involved a federal agency's regulations about qualifications for employment. *Cousins*, 880 F.2d at 609.

This case, however, does not involve a federal agency's qualifications for employment. As explained in Part II, *supra*, Congress expressly stated by statute that Peace Corps volunteers are not employees. Thus qualifications for volunteers cannot be considered qualifications for employment. Second, even putting aside Congress' explicit mandate, if one looks beyond the labels "regulator" and "employer," and instead examines the function of the Peace Corps as a UNV sponsoring agency, it is clear that the Peace Corps' decision to medically disqualify plaintiff was more similar to the DOT's action in *Cousins* than to the FBI's decision in *Doe*, or the Department of Energy's regulation in *Davidson*.

The Peace Corps Act states that the purpose of the Peace Corps is to promote world peace and friendship through a Peace Corps, which shall make available to interested countries and areas men and women of the United States

qualified for service abroad and willing to serve....

22 U.S.C. § 2501. The very purpose of the Peace Corps is to make service abroad available to "qualified" individuals. In addition, the Peace Corps Act gives the Peace Corps Director the responsibility to promulgate rules and regulations to carry out the Peace Corps' functions, much like the Secretary of Transportation has the authority to promulgate rules to carry out its function of assuring transportation safety. See 22 U.S.C. § 2503(b).

The Peace Corps' regulation of who may serve as a volunteer is no more an "employment" regulation than the DOT's regulation of who may drive a truck. When the Peace Corps decides who may serve as a UNV participant, the agency is in essence "regulating" who is qualified for UNV service. It is a decision that is closely related to the crux of the Peace Corps' legislative purpose. In contrast, when the Department of Energy passed regulations on who was qualified to be employed by the Department's private contractors, the Department was not acting upon its central and specific legislative mandate to regulate energy. Rather, it was acting upon its implicit authority as an employer of persons to carry out its regulatory mandate. Thus, *Davidson* may be distinguished from *Cousins* and from the present case on the ground that the Department of Energy was acting as an employer rather than as regulator even when acting as to those persons employed by the Department's private contractors.

Similarly, the FBI's decision in *Doe* may be distinguished from *Cousins* and this case because the employment that was affected was only incidentally related to the agency's primary purpose—that is, law enforcement. Accordingly, I conclude that this case does not involve employment qualifications in a sense analogous to that illustrated in *Davidson* and *Doe*. Instead, the regulation by the Peace Corps in this case is more closely analogous to the regulation of employment of a truck driver in *Cousins*.

Plaintiff also contends that APA review is inappropriate because a court usually reviews an agency's decision under a much more deferential standard than is consistent with the strict principles of employment discrimination. Such a process, plaintiff argues, will allow agencies like the Peace Corps to be held to a lower standard under § 504 than private employers.

The plaintiff in *Cousins* made a similar argument. The First Circuit's response in that case is equally applicable here.

DOT must comply with whatever legal requirements § 504 places upon it. The special weight that courts might give the DOT's position normally arises out of a determination of congressional intent, in respect to DOT's interpretation of the highway safety statutes it administers, but it is far less likely that Congress intended that courts give any special weight to DOT's view of the Rehabilitation Act, a statute it is not charged with administering and in respect to which it has no special expertise.... Regardless, the various factors relevant to a court's decision about whether and to what extent to defer to an agency's view of a statute, ... like the factors that help determine whether the statute applies at all, are identical whether one calls the action an implied private right of action, or APA review. And, being identical, these factors should lead to the same conclusion irrespective of the label one applies to the action.

Id. at 609-10. Similarly, the Peace Corps must comply with the Rehabilitation Act whether its actions are being reviewed pursuant to a private right of action under § 504 or under the APA.

[5] Plaintiff next contends that APA review is inappropriate because the Peace Corps does not have the resources to make the type of decisional record that is necessary for APA review. A court typically reviews an agency decision under the APA on the basis of the record compiled by the agency in making the challenged decision. See *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420, 91 S.Ct. 814, 825, 28 L.Ed.2d 136 (1970). Judicial review is

made on the administrative record already in existence and not on new evidence presented for the first time before the district court. See *Camp v. Pitts*, 411 U.S. 138, 142, 93 S.Ct. 1241, 1244, 36 L.Ed.2d 106 (1973).

Plaintiff could submit all the evidence and legal arguments she wants this court to consider to the Peace Corps in the first instance. The Peace Corps would then have all that information before it when reviewing its decision to disqualify plaintiff from volunteer service. That same information would be part of the record the district court considers pursuant to APA review. In other words, there is no reason a plaintiff will be disadvantaged by having to first present her evidence to the Peace Corps.

Moreover, if aggrieved volunteers are permitted to pursue their handicap discrimination claims directly under § 504, the judiciary, on a case-by-case basis, will have first crack at determining who is qualified to volunteer. This result would be contrary to the APA's purpose of having federal agencies make such decisions in the first instance instead of the courts. This is especially important in this case because plaintiff is requesting that the court order the Peace Corps not to bar any applicants from service because they carry the chronic hepatitis B virus. Such broad relief affects the central function of the Peace Corps—to select qualified individuals for volunteer service abroad. As a result, it is a decision that the Peace Corps should be given the first opportunity to make based on all the relevant evidence plaintiff offers.

Plaintiff's final argument against APA review is that it will prove inadequate because the APA does not contain a damages remedy. The plaintiff points out that in *Cousins* the First Circuit specifically noted that APA review was appropriate in part because the plaintiff in that case was requesting only equitable relief. *Id.* at 606. Thus, plaintiff appears to argue that this court should hold that plaintiff has a private right of action under § 504 so that she may state a claim for damages.

[6] Plaintiff's contention lacks merit. The court cannot hold that there is a private right of action for damages against the federal government on the ground that a plaintiff cannot recover damages under an APA action. A waiver of the government's sovereign immunity must be unequivocally expressed and not implied. See *Library of Congress v. Shaw*, 478 U.S. 310, 106 S.Ct. 2957, 92 L.Ed.2d 250 (1986). The *Cousins* court found that there was no such waiver when governmental regulatory action is involved and APA review is available. Congress thus did not provide persons aggrieved by agency action with a damages action against the government, and this court may not now simply hold that one exists by implication.

In summary, I conclude that the Peace Corps' decision to medically disqualify plaintiff from UNV service is an agency decision that may appropriately be reviewed under the APA. Accordingly, plaintiff's claim pursuant to § 504 of the Rehabilitation Act must be dismissed.

IV. APA Review

[7] As explained in Part III, *supra*, this court does not have jurisdiction to hear plaintiff's claim directly under § 504. Plaintiff's complaint, however, can be read as requesting APA review, at least in the alternative. See *Cousins*, 880 F.2d at 605 (stating that it is preferable to call a § 504 action against a federal agency a request for APA review). Count II of plaintiff's Complaint alleges that the Peace Corps violated § 504 of the Rehabilitation Act, and plaintiff's prayer for relief requests "other and further relief as this court sees just and proper." Thus, this court has jurisdiction under the APA to review the Peace Corps' decision to medically disqualify plaintiff to determine if accordance with law." 5 U.S.C. § 706(2). In other words, this court has APA jurisdiction to determine whether the decision violated the Rehabilitation Act. In making such a determination the court must rely on the record before the Peace Corps when it made its decision, and should not consider *ex post facto* evidence that was not before the agency at the time the Peace Corps made

its decision. See *Camp*, 411 U.S. at 142, 93 S.Ct. at 1244.

[8] At trial the Peace Corps argued that there were two reasons for its decision to disqualify plaintiff. First, the Peace Corps argued that plaintiff's chronic hepatitis B condition is contagious and that the Peace Corps, as the sponsoring agency for American UNV participants, cannot accept the risk of exporting contagious diseases to Third World countries. Second, the Peace Corps contended that because of her chronic hepatitis B condition, plaintiff may encounter further diseases such as cirrhosis of the liver, cancer and hepatitis D. Because UNV participants are generally sent to remote areas of countries where there is little medical care immediately available, the Peace Corps would not be able to guarantee that plaintiff would have adequate medical care available wherever she is assigned.

Plaintiff offered the testimony of her own expert that she was not a risk to others because hepatitis B can be transmitted only through sexual activity or blood transfusions—two activities that are easy to avoid. In addition, her expert testified that the remoteness of potential assignments is not a danger to plaintiff's health because the type of illnesses plaintiff may be at risk of developing are diseases that progress slowly and would not require immediate medical attention.

None of the expert testimony presented to the court at trial appears to have been before the Peace Corps Medical Review Board ("Board") at the time they made their decision to disqualify her. The Board apparently did have before it the medical report of plaintiff's physician, Dr. Keefe, and several letters Dr. Keefe wrote the Board stating that he believed plaintiff to be medically qualified. In addition, the defendant did provide testimony that the Board relied primarily on Peace Corps guidelines to disqualify plaintiff. The government placed those guidelines into evidence at trial only after the court specifically requested them. The government did not offer any evidence, however, as to how those guidelines were developed. Who de-

veloped them? Upon what medical expertise are the guidelines based? Thus the only record of what was before the Board at the time of its decision appears to be Dr. Keefe's report and recommendations and the unsubstantiated screening guidelines. This record alone does not support the Peace Corps' contention that plaintiff is not "otherwise qualified."

[9] Plaintiff argues that the failure of the Peace Corps to create a record of its decision to disqualify plaintiff is an example of why APA review is not appropriate in this case. I cannot sustain that contention. It is true that the Peace Corps has failed to make a record of its decision as is required by law. It is equally true that the court cannot accept the Peace Corps' decision that plaintiff is not medically qualified without being able to examine the evidence and reasoning upon which the Board relied. Judicial review in such a case would be meaningless. See *We Who Care, Inc. v. Sullivan*, 756 F.Supp. 42 (D.Me.1991). The solution, however, is not for this court to hold that plaintiff has a private right of action under § 504.

In *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 105 S.Ct. 1598, 84 L.Ed.2d 643 (1985), the Supreme Court stated:

If the record before the agency does not support the agency action, if the agency has not considered all relevant facts, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.

Id. at 744, 105 S.Ct. at 1607. Here, all three of these circumstances are present. The skeleton record that appears to have been before the Board does not support the agency's decision to medically disqualify plaintiff for UNV service. In addition, it appears the agency has not considered all relevant factors, including what reasonable accommodation could be made for plaintiff. Third, this court simply cannot evaluate the Peace Corps' decision on the basis of the bare record of the agency's decision.

Accordingly, I conclude that defendant's motion to dismiss must be denied, and that this case should be remanded to the Peace Corps for reconsideration of its decision to medically disqualify plaintiff. This procedure seems particularly appropriate in this case because neither party entered this lawsuit with the belief that the APA was the appropriate law under which plaintiff's claim should be brought. In addition, ordering the Peace Corps to create a record of its reasons for disqualifying an applicant with chronic hepatitis B will allow a court to determine if the medical guideline should be struck down—relief specifically requested by plaintiff. This court simply cannot make such a determination on the bare record that now exists.

Final judgment, remanding this action to the Peace Corps for reconsideration shall be issued forthwith. In addition, reasonable costs will be awarded to the plaintiff. This decision is based on the fact that although the plaintiff did not prevail on her § 504 claim for damages, she did convince the court that the Peace Corps must reconsider its decision. Moreover, many of the costs associated with this action could have been avoided if the government had made its motion to dismiss earlier in this litigation, leading to an earlier focus upon the issues that I have now concluded are dispositive. Finally, remand, rather than a decision on the merits, is necessitated by the fact that the Peace Corps did not create an adequate record of its decision.

FINAL JUDGMENT

For the reasons stated in the Opinion of this date, it is hereby ORDERED:

(1) Count I of the Complaint is dismissed.

(2) Plaintiff's claim in Count II for relief under an implied private right of action is dismissed.

(3) Plaintiff's alternative claim in Count II for review under the Administrative Procedures Act is allowed. The determination against plaintiff is vacated, and the matter

is remanded to the United States Peace Corps for further proceedings.

(4) Costs are awarded to plaintiff.



Astrid Castro FRANCESCHI,
et al., Plaintiffs,

v.

HYATT CORPORATION,
et al., Defendants.

Civ. No. 88-0285(PG).

United States District Court,
D. Puerto Rico.

Jan. 16, 1992.

Hotel guest and visitors filed suit against Puerto Rico hotel after visitors were allegedly denied access to hotel based on race. Hotel's motion for summary judgment was granted in part by the District Court, 747 F.Supp. 138. Hotel moved to dismiss. The District Court, Perez-Gimenez, J., held that: (1) equal benefits clause of § 1981 applied to discrimination based on race or ethnic background; (2) § 1981 has no state action requirement; (3) Puerto Ricans constituted race or ethnic group for purposes of § 1981; and (4) alleged discriminatory statements by hotel security guard were admissible as admission against party interest or by party opponent.

Denied.

1. Civil Rights — 118, 120

Intraracial discrimination was actionable under § 1981; thus, claim that Puerto Rican hotel's policy of excluding visitors who were believed to be Puerto Rican was actionable under equal benefit clause of § 1981. 42 U.S.C.A. § 1981.

2. Civil Rights — 197

State action was not required element of private § 1981 private discrimination claim. 42 U.S.C.A. § 1981.

3. Civil Rights — 104

Private discrimination against Puerto Rican could be subject of discrimination on basis of nationality and race or ethnicity sufficient to state claim under equal benefits provision of § 1981 of Civil Rights Act, even though birthplace alone is insufficient to state cause of action. 42 U.S.C.A. § 1981.

4. Civil Rights — 120

Puerto Rican visitor who was excluded from private hotel could assert § 1981 discrimination claim based on race, even if visitor appeared to be caucasian; Puerto Rican heritage was race or ethnicity for purposes of action under § 1981. 42 U.S.C.A. § 1981.

5. Civil Rights — 120

Alleged statements by Puerto Rican hotel guard, to effect that Puerto Rican hotel management discriminated "against people of our race," was statement of undisclosed management policy which, if proven true, was evidence of discriminatory intent. 42 U.S.C.A. § 1981.

6. Evidence — 242(5)

Evidence of statement by Puerto Rican guard to excluded hotel visitor, that Puerto Rican management discriminates "against people of our race," was admission against party interest or admission by party's agent or servant which could be used in § 1981 discrimination claim. 42 U.S.C.A. § 1981; Fed.Rules Evid.Rules 801(d)(2)(D), 804(b)(3), 28 U.S.C.A.

Harry Anduze, Hato Rey, P.R., for plaintiffs.

Keith A. Graffam, Old San Juan, P.R., for defendants.

OPINION OF THE COURT

PEREZ-GIMENEZ, District Judge.

I. Nature of the Case

In this case, the Court considers an issue of considerable import to civil rights, name-

ly, whether 42 U.S.C. § 1981 prohibits the exclusion, on the basis of race, ancestry, or ethnic background of non-registered guests to a privately owned hotel with a facially neutral "no visitors policy," see Defendant's Motion For Partial Reconsideration p. 4, but which allegedly excludes guests on impermissible grounds. The Court also considers the novel question whether intraracial discrimination is actionable under § 1981. This Court answers both question in the affirmative. We hold, in light of *Patterson v. McLean Credit Union*, 491 U.S. 164, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1990), *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 107 S.Ct. 2022, 95 L.Ed.2d 582 (1987) and *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615, 107 S.Ct. 2019, 95 L.Ed.2d 594 (1987), that § 1981 affords plaintiffs a remedy for the alleged wrong; therefore, Defendant's Motions for Dismissal And/Or Summary Judgment and For Partial Reconsideration must be denied.

II. Summary of Facts

A summary of the facts is a necessary prerequisite for a pellucid understanding of the interesting and novel issues raised by this case. Even though the parties, through a plethora of documents filed with this Court over a two year period, have bitterly contested virtually every statement of fact, we accept as true the facts alleged by the plaintiff for defendant moves for dismissal for failure to state a cause of action and or summary judgment. F.R.C.P. 12(b)(6); *Chongris v. Board of Appeals*, 811 F.2d 36, 37 (1st Cir.1987). cert. denied, 483 U.S. 1021, 107 S.Ct. 3266, 97 L.Ed.2d 765 (1987) (When considering a motion for summary judgment the court will interpret the facts "in the light most flattering to the plaintiff's cause . . . exempt[ing], of course, those 'facts' which have since been conclusively contradicted by plaintiff's concessions or otherwise, and likewise eschew[ing] any reliance on bald assertions, insupportable conclusions, and 'opprobrious epithets.'").

the reasons stated in Part II.C, *supra*, this argument was likely incorrect.)

In late November 1986, the district court denied all three plaintiffs' motions to amend. The district court accepted Diaz's (legally invalid) broker-liability argument, but it added that, in any event, the proposed actions against Diaz were time-barred under Puerto Rico's statute of limitations, 31 L.P.R.A. § 5298 (1968), which allows parties only one year after the date of injury to bring a tort complaint. Since all three plaintiffs had filed a complaint within one year of injury, the district court must have thought that in respect to Diaz, the relevant "filing" date was the date of the "Motion to Amend." That is to say, the court must have thought the amendments would not "relate back" to the date of the complaint. *But see* Fed.R.Civ.P. 15(c).

On December 8, 1986, all three plaintiffs, pointing to Fed.R.Civ.P. 15(c), asked the court to reconsider its ruling. In an Opinion and Order dated January 21, 1987, the district court reconsidered in respect to Andino, and granted Andino's request to amend her complaint to sue Diaz. The court wrote:

Federal Rule of Civil Procedure 15(c) permits an amendment adding a party to relate back to the date of the original pleading if three conditions are met: (1) the claims against the new party arise out of the same occurrence as the claims in the original pleading, (2) the new party received "notice of the institution of the action" before the limitations period expired, and (3) the new party "knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him." *Hernandez Jimenez v. Calero Toledo*, 604 F.2d 99, 102 (1st Cir.1979), *citing* C. Wright & A. Miller, *Federal Practice and Procedure* sec. 1498 at 507 (1971).

The institution of the action serves as constructive notice to the parties added after the limitations period expired, when the original and added parties are so closely related in business or other activi-

ties that it is fair to presume the added parties learned of the institution of the action shortly after it was commenced. *Id.*, at 102-03. We find that Diaz, as president of Group Brazil, had such constructive notice and, therefore GRANT plaintiffs' motion to amend the complaint to add him as a defendant.

Opinion and Order, *Ramonita Garcia Andino v. Alcan Aluminio do Brasil S.A.*, 652 F.Supp. 415, 419 (D.P.R.1987). *See also* *Serrano v. Torres*, 764 F.2d 47, 49-50 (1st Cir.1985). On March 18 and 19, 1987, however, the district court denied the apparently identical motions of plaintiffs Cruz Diaz and Benitez Allende.

Like Cruz Diaz and Benitez Allende, we can find no reason why the district court would grant Andino's motion and deny theirs. Although Rule 15(a) generally commits the decision of motions to amend to the discretion of the trial court, *Best Canvas Products and Supplies, Inc. v. Ploof Truck Lines, Inc.*, 713 F.2d 618 (11th Cir. 1983), it also says that permission to amend should be "freely given when justice so requires." *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222 (1962). The "policy of Rule 15(a) in liberally permitting amendments to facilitate determination of claims on the merits circumscribes the exercise of the trial court's discretion; thus '[u]nless there is a substantial reason to deny leave to amend, the discretion of the district court is not broad enough to permit denial.'" *Espy v. Wainwright*, 734 F.2d 748, 750 (11th Cir.1984) (citation omitted); *Foman v. Davis*, 371 U.S. at 182, 83 S.Ct. at 230. The district court explained why the "statute of limitations" issue was irrelevant; it found no other "substantial reason" for denying the motions to amend. Hence, we conclude that it should have granted the Cruz Diaz and Benitez Allende motions, as it did Andino's.

The district court will remain free, on remand, to determine whether in the changed circumstances of the case, amendment is no longer appropriate.

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The judgments of the district court against Alcan/Brasil and Diaz are Affirmed.

The judgments insofar as they disallow the claims of Cruz Diaz and Benitez Allende against Manuel Diaz are vacated and the cases are remanded for proceedings consistent with this opinion.



Michael COUSINS, Plaintiff, Appellant,

v.

SECRETARY OF THE UNITED STATES
DEPARTMENT OF TRANSPORTATION, Defendant, Appellee.

No. 88-1106.

United States Court of Appeals,
First Circuit.

Heard June 7, 1988.

Decided Sept. 20, 1988.

Deaf man who was unable to obtain employment as tractor trailer driver because regulation promulgated by United States Department of Transportation effectively prohibits deaf persons from driving motor carriers in interstate commerce brought action challenging the regulation against Secretary of the DOT under Rehabilitation Act section proscribing discrimination against handicapped. The United States District Court for the District of Maine, Gene Carter, J., found plaintiff had no private right of action against DOT under the Act, and dismissed the complaint. Plaintiff appealed. The Court of Appeals, Bownes, Circuit Judge, held that Rehabilitation Act provision carried with it private right of action against federal government acting in its regulatory capacity and did not confine action against federal government in its regulatory capacity to remedies avail-

able under the Administrative Procedure Act.

Remanded.

1. Administrative Law and Procedure ⇐668

Civil Rights ⇐13.1

Pursuant to Rehabilitation Act provision making available remedies set forth in Civil Rights Act Title VI, recipient of federal funds may obtain review of agency decision denying or terminating grant funding. Rehabilitation Act of 1973, § 505(a)(2), as amended, 29 U.S.C.A. § 794a(a)(2); Civil Rights Act of 1964, § 603, 42 U.S.C.A. § 2000d-2.

2. Administrative Law and Procedure ⇐668

Civil Rights ⇐13.1

Rehabilitation Act provision making available remedies set forth in Civil Rights Act Title VI does not confine person aggrieved by agency action when the agency acts in its regulatory capacity to remedy under the Administrative Procedure Act. 5 U.S.C.A. § 551 et seq.; Rehabilitation Act of 1973, § 505(a)(2), as amended, 29 U.S.C.A. § 794a(a)(2); Civil Rights Act of 1964, § 603, 42 U.S.C.A. § 2000d-2.

3. Administrative Law and Procedure ⇐660

Civil Rights ⇐13.1

Rehabilitation Act provision proscribing discrimination against the handicapped under program or activity receiving federal financial assistance or under program or activity conducted by executive agency carries with it private right of action against federal government acting in its regulatory capacity and does not confine action against the federal government in its regulatory capacity to remedies available under the Administrative Procedure Act. 5 U.S.C.A. § 551 et seq.; Rehabilitation Act of 1973, § 504, as amended, 29 U.S.C.A. § 794.

Harold L. Lichten with whom Angoff, Goldman, Manning, Pyle, Wanger & Hiatt, P.C., Boston, Mass., Marc P. Charnatz and

Sarah S. Geer, Nat. Ass'n of the Deaf Legal Defense Fund, and Sy DuBow and E. Elaine Gardner, Nat. Center for Law and the Deaf, Washington, D.C., were on brief, for plaintiff, appellant.

Robert K. Rasmussen, Appellate Staff, Civ. Div., Dept. of Justice, with whom John R. Bolton, Asst. Atty. Gen., Washington, D.C., Robert S. Mueller, III, Deputy U.S. Atty., Boston, Mass., and Michael Jay Singer, Appellate Staff, Civ. Div., Dept. of Justice, Washington, D.C., were on brief, for defendant, appellee.

Before BOWNES, TORRUELLA and SELYA, Circuit Judges.

BOWNES, Circuit Judge.

This appeal raises the question of whether there is a private right of action under section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, against the federal government acting in its regulatory capacity.¹ Plaintiff-appellant, Michael Cousins, is a deaf man who was unable to obtain employment in Maine as a tractor-trailer driver because a regulation promulgated by the United States Department of Transportation (DOT) effectively prohibits deaf persons from driving motor carriers in inter-

state commerce, regardless of their ability to perform such duties. See 49 C.F.R. § 391.41(b)(11) (1987).² Plaintiff challenged this regulation in the United States District Court for the District of Maine by bringing suit under section 504 against Elizabeth Dole in her official capacity as the Secretary of DOT. He alleged that, by promulgating and threatening to enforce the regulation against him, defendant caused him to be denied employment as a commercial truck driver.³ The district court found that the plaintiff had no private right of action against DOT under section 504, and accordingly, dismissed the complaint without prejudice to the filing of an amended complaint stating a claim for relief under the Administrative Procedure Act. See *Cousins v. Dole*, 674 F.Supp. 360 (D.Me. 1987). Plaintiff appealed.⁴

I.

Our analysis is controlled and therefore simplified by *Traynor v. Turnage*, — U.S. —, 108 S.Ct. 1372, 99 L.Ed.2d 618 (1988), in which the Supreme Court rested its holding on the assumption that there is a private right of action under section 504 of the Rehabilitation Act against the federal

by use of an audiometric device, does not have an average hearing loss in the better ear greater than 40 decibels at 500 Hz, 1000 Hz, and 2000 Hz with or without a hearing aid when the audiometric device is calibrated to American National Standard....
49 C.F.R. § 391.41(b)(11) (1987).

1. Section 504 provides in relevant part that [n]o otherwise qualified handicapped individual in the United States, ... shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.
29 U.S.C. § 794 (1982). By issuing regulations, the federal government is "conducting a program or activity." Because this case raises a challenge to a federal regulation, we describe the action against the federal government as a challenge to the government "acting in its regulatory capacity." We do not mean to imply that such a challenge is different from one directed at the "conduct" of a federal program. We simply prefer to use a phrase describing precisely the nature of the federal action claimed by the plaintiff to be discriminatory.
2. The regulation provides in relevant part that "[a] person is physically qualified to drive a motor vehicle if that person
[f]irst perceives a forced whispered voice in the better ear at not less than 5 feet with or without the use of a hearing aid or, if tested

3. On or about June 17, 1986, a representative of DOT advised the plaintiff's attorney that the regulation would be enforced against the plaintiff even if he were "engaged in the intrastate portion of interstate movements of property." Therefore, the plaintiff could not obtain employment by confining his driving to within the state of Maine.
4. The plaintiff also alleged that defendant violated the due process clause of the fifth amendment by depriving him of valuable property rights without an opportunity for a hearing. The district court found "that the existence of an effective and substantial statutory remedy in the Administrative Procedure Act obviate[d] the need to imply a constitutional remedy" under the fifth amendment. *Cousins v. Dole*, 674 F.Supp. 360, 363 (D.Me.1987). Plaintiff does not appeal this holding.

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government acting in its regulatory capacity. A procedural exegesis of *Traynor* is necessary.

Traynor was a consolidation of cases from different circuits challenging the same regulation issued by the Veterans' Administration (VA). Veterans *Traynor* and *McKelvey* were recovered alcoholics who sought veterans' educational assistance benefits under the G.I. Bill. See 38 U.S.C. § 1661. Although these benefits generally must be used within ten years following discharge or release from active duty, veterans may obtain an extension beyond this ten-year period, if they were prevented from using their benefits earlier by "a physical or mental disability which was not the result of [their] own willful misconduct...." 38 U.S.C. § 1662(a)(1). *Traynor* and *McKelvey* claimed an extension under this provision on the ground that they had been disabled by alcoholism during much of the ten-year period. The VA rejected their position, relying on that part of the challenged regulation which characterizes a disability resulting from "the drinking of a beverage to enjoy its intoxicating effects" as "willful misconduct." See 38 C.F.R. § 3.301(c)(2).

Traynor sought review of the VA decision in the United States District Court for the Southern District of New York, and *McKelvey*, in the United States District Court for the District of Columbia. Both claimed that the VA's refusal to extend them benefits, a decision made pursuant to the challenged regulation, violated their right under section 504 not to be discriminated against solely on the basis of a handicap, in their case, alcoholism. The district courts agreed. See *Traynor v. Walters*, 606 F.Supp. 391 (S.D.N.Y.1985); *McKelvey v. Walters*, 596 F.Supp. 1317 (D.D.C.1984).

On appeal, the Second Circuit reversed the decision in favor of *Traynor* on the ground that a separate provision of the Veterans' Benefits statute, 38 U.S.C.

§ 211(a),⁵ barred review of the section 504 claim. See *Traynor v. Walters*, 791 F.2d 226 (2d Cir.1986). The District of Columbia Circuit disagreed, but reversed the decision in favor of *McKelvey* on the merits. See *McKelvey v. Turnage*, 792 F.2d 194 (D.C. Cir.1986). The Supreme Court granted certiorari "to decide whether the Veterans' Administration's decision is subject to judicial review and, if so, whether that decision violates § 504 of the Rehabilitation Act of 1973, 87 Stat. 394, 29 U.S.C. § 794, which requires that federal programs not discriminate against handicapped individuals solely because of their handicap." *Traynor*, 108 S.Ct. at 1376.

The Court concluded that the question of "whether a [VA] regulation violate[d] the Rehabilitation Act is not foreclosed from judicial review by § 211(a).⁶" *id.* at 1380. but that the regulation in question did not violate the Act. *Id.* at 1380-84. In spite of the Court's explicit reference to the Rehabilitation Act, defendant-appellee argues that it is unclear from *Traynor* whether the petitioners' claims arose directly under the Rehabilitation Act, or under the Administrative Procedure Act (APA). Specifically, defendant suggests that the Supreme Court might have been assessing the validity of the veterans' benefit regulation under the APA provision which provides that agency action must be set aside if it is "arbitrary, capricious, ... or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). We think that defendant's argument defies the plain meaning of the Supreme Court's decision.

At no point in *Traynor* did the Court mention the APA. Its only reference to the type of claim that *might* be brought pursuant to the APA appears implicitly in its discussion of whether section 211(a) barred judicial review of the section 504 claim. The Court stated:

clusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise.
38 U.S.C. § 211(a).

5. Section 211(a) provides in relevant part: [T]he decisions of the [VA] Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans and their dependents or survivors shall be final and con-

[T]he cases now before us involve the issue whether the law sought to be administered is valid in light of a subsequent statute whose enforcement is not the exclusive domain of the Veterans' Administration. *There is no claim that the regulation at issue is inconsistent with the statute under which it was issued.*

Traynor, 108 S.Ct. at 1379 (footnote omitted) (emphasis added).

In fact, a claim that the regulation was "inconsistent with the statute under which it was issued" had been advanced and rejected in one of the courts below. In *McKelvey v. Walters*, 596 F.Supp. 1317, the district court described the issue "presented for determination" as

whether the regulation [was] arbitrary, irrational and exceed[ed] the agency's statutory authority by denying lawful benefits to veterans who suffer from alcoholism. The plaintiff's challenge arises under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), and the due process and equal protection prongs of the Fifth Amendment. The plaintiff's challenge also calls for consideration of his claim that in denying his request for relief, his rights under the Rehabilitation Act of 1973, 29 U.S.C. § 794, which prohibits discrimination against alcoholics, were violated.

596 F.Supp. at 1319. The district court rejected the APA claim because it found that the challenged regulation did not "contravene any implicit or explicit congressional intent" reflected in the statutory provision allowing an extension of the ten-year delimiting period for those veterans prevented from using their benefits by a disability not the result of their own "willful misconduct." *Id.* at 1321. In contrast, the court found that the regulation did violate section 504. Only the claim arising under section 504 was appealed. *See McKelvey v. Turnage*, 792 F.2d 194.

6. The district court used the term "regulations" because it assessed not only the regulation eventually challenged before the Supreme Court, *see*

In *Traynor v. Walters*, the district court considered whether the regulation violated "the nondiscrimination provisions of the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 701-794, and the fifth amendment." 606 F.Supp. at 393. Although the court found that the "regulations challenged herein with[stood] constitutional scrutiny, [it also found that] they violate[d] § 504 of the Rehabilitation Act, 29 U.S.C. § 794." *Id.* at 401.⁶ It based its conclusion on a finding that the VA policy "contravene[d] the Rehabilitation Act by discriminating against those rehabilitated alcoholics (a remarkable accomplishment) most deserving of aid." *Id.* Only the claim arising under section 504 was appealed. *See Traynor v. Walters*, 791 F.2d 226.

The issue before the Supreme Court therefore was whether the regulation characterizing alcoholism as "willful misconduct" violated section 504 of the Rehabilitation Act of 1973. The question of whether the regulation also violated the APA mandate that agency action not be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), was not before the Court. Had it been, the Court would have said so. Moreover, it would have referred to the standard of review applicable under 5 U.S.C. § 706(2)(A). In defining this standard, known as the "arbitrary and capricious" standard, the Supreme Court has directed that a reviewing court must "consider whether the [agency] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 2866-67, 77 L.Ed.2d 443 (1983) (quoting *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285, 95 S.Ct. 438, 441-42, 42 L.Ed.2d 447 (1974)). *See also Citizens To Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415-17, 91 S.Ct. 814, 823-24, 28 L.Ed.2d 136 (1971). This standard of review is a "narrow" one, requiring that a court not "substitute its judgment for that

38 C.F.R. § 3.301(c)(2), but also the regulation setting forth definitions of "willful misconduct." *See* 38 C.F.R. § 3.1(n).

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of the agency," *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43, 103 S.Ct. at 2866. If, therefore, the Court in *Traynor* had been reviewing the petitioners' claim under the APA, it would have conducted a limited inquiry to assess whether the VA had advanced a "'rational connection between the facts found [about alcoholism] and the choice made [to characterize alcoholism as 'willful misconduct']'." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43, 103 S.Ct. at 2866-67 (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168, 83 S.Ct. 239, 245-46, 9 L.Ed.2d 207 (1962)).⁷

The Court did not approach the issue before it as one implicating the APA. Rather, it reasoned that the same Congress which in 1977 "created an exception to th[e] 10-year delimiting period for veterans who delayed their education because of 'a physical or mental disability which was not the result of [their] own willful misconduct,'" *Traynor*, 108 S.Ct. at 1380 (quoting 38 U.S.C. § 1662(a)(1)), also, one year later, "extended § 504's prohibition against discrimination on the basis of handicap to 'any program or activity conducted by any Executive agency.'" *Id.* 108 S.Ct. at 1331 (quoting 29 U.S.C. § 794). Accordingly, the Court held that the "petitioners can prevail under their Rehabilitation Act claim only if the 1978 legislation can be deemed to have implicitly repealed the 'willful misconduct' provision of the 1977 legislation or forbade the Veterans' Administration to classify primary alcoholism as willful misconduct." *Id.*⁸ The Court concluded that there was no implicit repeal: the "1978 legislation [would not be] rendered meaningless, even with respect to those who

7. Defendant asserts that the standard of review under section 504 of the Rehabilitation Act of 1973 and 5 U.S.C. § 706(2)(A) is the same. It claims that the phrase in 5 U.S.C. § 706(2)(A) precluding agency action not "otherwise in accordance with law," incorporates by reference all laws (including the Rehabilitation Act) and not just the law of the enabling statute itself. We express no opinion on this interpretation of 5 U.S.C. § 706(2)(A). It suffices to say that the interpretation is a novel one that has been rejected by at least two circuits. *See Davidson v. U.S. Dep't of Energy*, 838 F.2d 850 (6th Cir.), cert. denied, — U.S. —, 108 S.Ct. 2849, 101 L.Ed.2d 886 (1988); *Cleghorn v. Herrington*, 813 F.2d 992 (9th Cir.1987). Therefore, it seems

claim to have been handicapped as a result of alcoholism, if the 'willful misconduct' provision of § 1662(a)(1) [were] allowed to retain the import originally intended by Congress." *Id.* at 1381-1382. Construing this "original import" to mean that the alcoholism from which the petitioners had recovered was "willful misconduct," *id.* at 1380-81, the Court upheld the challenged regulation.

II.

We have detailed the decision in *Traynor* in order to make clear that the Supreme Court rested its holding in that case on the assumption that a private action could be maintained under section 504 of the Rehabilitation Act of 1973 against the federal government acting in its regulatory capacity. To explicate the basis for this assumption, we turn to an assessment of the Rehabilitation Act in light of the Supreme Court's teachings on implied causes of action.

In its most recent case, the Supreme Court held that

[i]n determining whether to infer a private cause of action from a federal statute, our focal point is Congress' intent in enacting the statute.... Congress' "intent may appear implicitly in the language or structure of the statute, or in the circumstances of its enactment."

Thompson v. Thompson, — U.S. —, 108 S.Ct. 513, 516, 98 L.Ed.2d 512 (1988) (quoting *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 18, 100 S.Ct. 242, 246, 62 L.Ed.2d 146 (1979)). *See Transamerica*, 444 U.S. at 15-16, 100 S.Ct.

very unlikely that the Supreme Court in *Traynor* used this interpretation without even mentioning it, as the basis for a holding on the meaning of the Rehabilitation Act.

8. The Court used the term "primary alcoholism," as did the VA, to distinguish it from alcoholism that is "secondary to and a manifestation of an acquired psychiatric disorder." *Traynor*, 108 S.Ct. at 1376 n. 2 (quoting Administrator's Decision, Veterans' Administration No. 988, Interpretation of the Term "Willful Misconduct" as Related to the Residuals of Chronic Alcoholism, Aug. 13, 1964).

at 244-45 ("what must ultimately be determined is whether Congress intended to create the private remedy asserted"). But the Court also warned that the "implied cause of action doctrine would be a virtual dead letter were it limited to correcting drafting errors when Congress simply forgot to codify its evident intention to provide a cause of action." *Thompson*, 108 S.Ct. at 516. Therefore, the Court directed, there must be an initial examination of "the context of the [statute] with an eye toward determining Congress' perception of the law that it was shaping or reshaping." *Id.* (citations omitted).

There can be no doubt that in 1974, when Congress first amended the Rehabilitation Act of 1973, it intended that there be a private remedy under section 504. At that time, section 504 read as follows:

No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

29 U.S.C. § 794. The Senate Report discussing the 1974 amendments (none of which are relevant here) noted that section 504

was patterned after, and is almost identical to, the anti-discrimination language of section 601 of the Civil Rights Act of 1964 ... and section 901 of the Education Amendments of 1972.... [It] envisions the implementation of a compliance program which is similar to those Acts, including promulgation of regulations providing for investigation and review of recipients of Federal financial assistance, attempts to bring non-complying recipients into voluntary compliance through informal efforts such as negotiation, and the imposition of sanctions against recipients who continue to discriminate.... Such sanctions would include, where appropriate, the termination of Federal financial assistance to the recipient or other means authorized by law.... This approach ... would ...

permit a judicial remedy through a private action.

S.Rep. No. 1297, 93rd Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. & Admin. News 6373, 6390-91 (emphasis added). In reliance on this language, a number of federal courts found an implied cause of action under section 504. See, e.g., *Kampmeier v. Nyquist*, 553 F.2d 296 (2d Cir. 1977); *Lloyd v. Regional Transp. Auth.*, 548 F.2d 1277 (7th Cir. 1977); see also *Pushkin v. Regents of Univ. of Colo.*, 658 F.2d 1372, 1377-78 (10th Cir. 1981) (listing cases).

[1, 2] In 1978, Congress amended the Act in two ways relevant to our inquiry. At the end of section 504, it added the phrase: "or under any program or activity conducted by any Executive Agency or by the United States Postal Service." It also added a completely new section, section 505, which provided in relevant part:

(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.

(2) The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 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.

29 U.S.C. § 794a.

Two questions are raised by the 1978 amendment. First, do the remedies specified in section 505(a)(1) and (2) allow for

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claims against an executive agency when it conducts a "program or activity"? In other words, do the remedies allow for private actions against the federal government when it acts, as it did in the case at bar, in its regulatory capacity? Second, if not, are these remedies exclusive, i.e., is an action against the federal government in its regulatory capacity confined to the remedies available under the APA?

The district court found that the plaintiff's challenge to the DOT could be brought pursuant to section 505(a)(2) and that the remedy under that section was limited to the APA. As mandated by section 505(a)(2), the court looked to the remedies "set forth" in Title VI of the Civil Rights Act of 1964, specifically to those in section 603 of the Act. That section, which is the only one to "set forth" any remedies at all, provides that

[a]ny department or agency action taken pursuant to section 2000d-1 of this title shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds. In the case of action, not otherwise subject to judicial review, terminating or refusing to grant or to continue financial assistance upon a finding of failure to comply with any requirement imposed pursuant to section 2000d-1 of this title, any person aggrieved (including any State or political subdivision thereof and any agency of either) may obtain judicial review of such action in accordance with chapter 7 of Title 5, and such action shall not be deemed committed to unreviewable agency discretion within the meaning of that chapter.

42 U.S.C. § 2000d-2.

The district court correctly concluded from the second sentence in the quoted

9. This section, which is section 602 under Title VI of the Civil Rights Act of 1964, provides in relevant part:

Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, ... is authorized and directed to effectuate the provisions of ... this title ... by issuing rules, regulations, or orders.... Compliance with any requirement adopted pursuant to this sec-

provision that a "recipient of federal funds may obtain review of an agency decision denying or terminating grant funding...." *Cousins*, 674 F.Supp. at 364. But the court misread the first sentence by inferring from it that a person aggrieved by agency action when that agency acts in its regulatory capacity must confine his or her challenge to a remedy under the APA. *Id.* The first sentence makes no such pronouncement. Rather, it requires that agency action "taken pursuant to section 2000d-1" be subject to judicial review "as may otherwise be provided by law." Section 2000d-1, in turn, provides that federal agencies granting financial assistance to recipients may effect compliance with the antidiscrimination mandate of Title VI by issuing rules and regulations and by terminating or refusing to grant or continue assistance to any recipient failing to comply with that mandate. See 42 U.S.C. § 2000d-1. It is an agency's action or inaction in effecting compliance with Title VI through its control over a recipient's funding that makes it subject to such judicial review "as may otherwise be provided by law." On its face, then, Title VI provides an avenue for challenging agency action only when that agency acts as a provider of federal funds. And section 505(a)(2), which refers to the "remedies, procedures, and rights set forth in title VI," 29 U.S.C. § 794a(a)(2) (emphasis added), reinforces this conclusion by stating that such remedies, procedures and rights are "available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance...." *Id.* (emphasis added).

[3] The question remains whether the remedies set forth in section 505 are exclusive. The defendant argues that they are.

tion may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement ..., or (2) by any other means authorized by law....

42 U.S.C. § 2000d-1.

claiming that Congress' mere act of adding them in 1978 showed congressional intent to make them the exclusive remedies under the Act, at least for plaintiffs pursuing actions against the federal government. The legislative history, the defendant concludes, "is devoid of any implication that Congress wished to provide a cause of action against a federal agency when it issues general safety regulations."

We do not agree. The short and conclusive answer rejecting the defendant's argument comes from the Senate Committee Report on the 1978 legislation. In that report, the Committee stated that

the rights extended to handicapped individuals under title V ... are, and will remain, in need of constant vigilance, by handicapped individuals to assure compliance, and the availability of attorney's fees should assist in vindicating private rights of action in the case of section 502 and 503 cases, as well as those arising under section 501 and 504.

S.Rep. No. 890, 95th Cong., 2d Sess. 19 (1978), U.S.Code Cong. & Admin.News pp. 7312, 7330. This language, we think, conclusively shows Congress' continued intent—even after amending the statute to include section 505—to allow private rights of action under the Act.

Moreover, the "fact that other provisions of a complex statutory scheme create express remedies has not been accepted as a sufficient reason for refusing to imply an otherwise appropriate remedy under a separate section." *Cannon v. Univ. of Chicago*, 441 U.S. 677, 711, 99 S.Ct. 1946, 1965, 60 L.Ed.2d 560 (1979) (citations omitted).

10. As the Supreme Court recently held, the legislative history of section 505(a)(2) reveals that Congress enacted the section to make clear that handicapped individuals could use the procedures of Title VI for filing complaints. See *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 635, 104 S.Ct. 1248, 1255, 79 L.Ed.2d 568 (1984) (section 505(a)(2) "was intended to codify the regulations of the Department of Health, Education, and Welfare governing enforcement of § 504"). These procedures had already been expressly incorporated by reference in regulations governing enforcement of section 504. See 45 C.F.R. § 84.61 (1987). It is undisputed that a plaintiff may also pursue an action against the recipient directly under section 504.

Section 505 provides two express remedies. The first, in section 505(a)(1), states that the "remedies, procedures, and rights" set forth in Title VII of the Civil Rights Act of 1964 are available "with respect to any complaint brought under section 791 of this title." 29 U.S.C. § 794a(a)(1). Section 791, in turn, applies to action by the federal government in its capacity as an employer. The second remedy, in section 505(a)(2), states that the "remedies, procedures, and rights" set forth in Title VI of the Civil Rights Act of 1964 are available to "any person aggrieved" under section 794. 29 U.S.C. § 794a(a)(2). As discussed above, see *supra* at 43-44, section 505(a)(2) applies to action by the federal government in its capacity as a provider of federal funds.

Both sections, by referring to Titles VII and VI, make available to handicapped plaintiffs the administrative procedures available under those laws. For example, under section 505(a)(1), a plaintiff seeking to file an action against a federal employer must, before attempting judicial review, first file his or her complaint with the Equal Employment Opportunity Commission (Title VII procedure). Similarly, under section 505(a)(2), a plaintiff seeking to file an action against a recipient of federal funds may attempt to resolve his or her complaint by filing it with the federal provider.¹⁰ If the provider does not take action against the recipient, then the aggrieved person can pursue his or her complaint through judicial review (Title VI procedure).¹¹ Neither of these remedies is so

See *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 104 S.Ct. 1248, 79 L.Ed.2d 568 (1984).

11. It is unclear from section 505(a)(2) whether a plaintiff who claims that a federal provider is not taking sufficient enforcement action against a discriminatory recipient *must* pursue his or her action through the APA, or may, additionally, claim against the provider directly under section 504. We refrain from issuing a definitive ruling on this matter, and simply note the different approaches among the circuits. Compare *Baker v. Bell*, 630 F.2d 1046, 1055-57 (5th Cir.1980) (finding private cause of action against provider directly under section 504) with *Marlow v. U.S. Dept. of Educ.*, 820 F.2d 581

comprehensive as to indicate a congressional intent to foreclose alternate avenues of relief. Cf. *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 20, 101 S.Ct. 2615, 2626, 69 L.Ed.2d 435 ("When the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983."). Placing them within "the structure of the statute," *Thompson*, 108 S.Ct. at 516 (quoting *Transamerica*, 444 U.S. at 18, 100 S.Ct. at 246), they are quite similar to the administrative enforcement procedures that were available under Title IX when the Supreme Court found an additional remedy of a private cause of action under that statute. See *Cannon*, 441 U.S. 677, 99 S.Ct. at 1946.¹²

Furthermore, like the private action found implicit in Title IX, a private action under section 504 against the federal government acting in its regulatory capacity would promote the underlying legislative scheme. The purpose of section 504, like that of the two statutes from which its language is drawn (Title VI and Title IX) is to "avoid the use of federal resources to support discriminatory practices ... [and] provide individual citizens effective protection against those practices." *Id.* at 704, 99 S.Ct. at 1961. As stated repeatedly by the Court, the primary goal of the Rehabilitation Act is to enhance the employment rights of those who are, or are perceived to be, handicapped. See *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 633 n. 13, 104 S.Ct. 1248, 1253-54 n. 13, 79 L.Ed.2d 568 (1984); *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 107 S.Ct. 1123, 94 L.Ed.2d 307 (1987); see also *Alexander v.*

(2d Cir.1987), *cert. denied*, — U.S. —, 108 S.Ct. 780, 98 L.Ed.2d 866 (1988) (refusing to find private cause of action against provider directly under section 504); *Salvador v. Bennett*, 800 F.2d 97 (7th Cir.1986) (same).

12. Section 902 of the Title IX provides in relevant part:

Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, ... is authorized and directed to effectuate the provisions ... of this title ... by issuing

Choate, 469 U.S. 287, 307 n. 28, 105 S.Ct. 712, 723 n. 28, 83 L.Ed.2d 661 (1985) (citing *Consolidated*). Allowing individuals the opportunity to sue directly under section 504, not just when a recipient allegedly discriminates, but also when the federal government itself allegedly discriminates by issuing safety regulations which preclude the employment of the handicapped. "is not only sensible but is also fully consistent with ... orderly enforcement of the [Rehabilitation Act]." *Cannon*, 441 U.S. at 705-06, 99 S.Ct. at 1062 (footnote omitted).

In another attempt to prevail on its claim that the plaintiff is limited to review under the APA, the defendant relies on *N.A.A.C.P. v. Secretary of Housing & Urban Dev.*, 817 F.2d 149 (1st Cir.1987). It focuses on language in that decision in which we noted that "[o]ne would ordinarily expect ... that when Congress means to permit a private party to ask a court to review the legality of federal actions in a manner that differs from APA review, Congress will say so explicitly in the statute." 817 F.2d at 153 (citation omitted). Because there is no language in the Rehabilitation Act providing for actions against federal agencies acting in their regulatory capacity, defendant argues that we must as a matter of First Circuit law find that Congress meant to limit actions against such agencies to those provided by the APA.

Defendant reads too much into this holding. First, our decision in *N.A.A.C.P.* was controlled by our prior decision in *Latinos Unidos de Chelsea en Accion v. Secretary of Housing and Urban Dev.*, 799 F.2d 774, 791-93 (1st Cir.1986), in which we found that there was no private cause of action

rules, regulations, or orders.... Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement ..., or (2) by any other means authorized by law....

20 U.S.C. § 1682. See *supra* note 9 for a comparison of the language above with that of section 602 of Title VI.

under Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601-3631. The plaintiff in *N.A.A.C.P.* also sought a private remedy under Title VIII, and in reliance upon *Latinos*, we simply rejected the claim.

Second, we noted in *N.A.A.C.P.* that there might be "a few instances in which a court might, notwithstanding the APA, wonder whether Congress meant to create a private right of action against the federal government." 817 F.2d at 153. Because the APA does not award attorney's fees, one of these instances is when a statute provides for such fees. Then, we said, a court "might . . . have to decide . . . whether the action arises under the particular act or whether it is simply a general APA-based request for judicial review." *Id.* (emphasis in original) (citing *Cannon*, 441 U.S. at 699-700, 99 S.Ct. at 1958-59, for proposition that explicit authorization of attorney's fee award against the federal government in certain actions to enforce Title VI is support for conclusion that Title VI confers private right of action) (other citation omitted).

The Rehabilitation Act falls squarely within the exception put forward in *N.A.A.C.P.* For, in addition to setting forth the express remedies discussed above, section 505 also allows attorney's fees to the prevailing party "[i]n any action or proceeding to enforce or charge a violation of a provision of this subchapter. . . ." 29 U.S.C. § 794a(b). The defendant argues, and the court below held, that this provision applies only to the two express remedies contained in the same section. *See Cousins*, 674 F.Supp. at 364 n. 9. But the language of the provision itself belies such an interpretation: it provides attorney's fees for any action to enforce a violation of "this subchapter." "Subchapter" refers to subchapter V, which extends from 29 U.S.C. § 790 through 29 U.S.C. § 794a. Had Congress sought to limit the attorney's fees provision to the remedies contained only in section 505, 29 U.S.C. § 794a, it would have said so. *See also supra* at 43 (setting forth the Senate Report discussing the attorney's fee provision in the 1978 amendment).

Traynor v. Turnage, — U.S. —, 108 S.Ct. 1372, other Supreme Court teachings, and the legislative history of the statute mandate a holding that section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1982) carries with it a private right of action against the federal government acting in its regulatory capacity.

Case remanded for a trial on the merits.

Costs on appeal awarded to appellant.



UNITED STATES of America,
Plaintiff, Appellee,

v.

The PROCEEDS OF SALE OF 3,888
POUNDS ATLANTIC SEA SCALLOPS,
etc., Defendant, Appellee.

Appeal of Arne JENSEN and A & E
Fisheries, Inc., Claimants,
Appellants.

No. 88-1309.

United States Court of Appeals,
First Circuit.

Submitted July 20, 1988.

Decided Sept. 21, 1988.

Government brought forfeiture action. The United States District Court for the District of Rhode Island, Raymond J. Pettine, Senior District Judge, dismissed forfeiture action and refused to set aside default judgment subsequently entered against claimants. Claimants appealed. The Court of Appeals, Coffin, Circuit Judge, held that claimants failed to establish excusable neglect for violating local rule by failing to respond within ten days to Government's motion to strike claimant's answer.

Affirmed.

1. Federal Civil Procedure ¶2662

To prevail on motion to set aside order or judgment upon finding of mistake, inadvertence, surprise, or excusable neglect, party seeking to have judgment vacated bears heavy burden of showing both good reason for default and existence of meritorious defense. Fed.Rules Civ.Proc.Rule 60(b), 28 U.S.C.A.

2. Federal Civil Procedure ¶2646

Federal Courts ¶829

In reviewing motion to set aside order or judgment upon finding of mistake, inadvertence, surprise, or excusable neglect, district court has broad discretion, and the Court of Appeals reviews district court order only for abuse of that discretion. Fed. Rules Civ.Proc.Rule 60(b), 28 U.S.C.A.

3. Federal Civil Procedure ¶2656

Claimants failed to establish excusable neglect for violating local rule by failing to respond within ten days to Government's motion to strike claimants' answer in forfeiture action; claimants' excuse for missing filing deadline was that they relied on erroneous advice from local counsel, who had advised lead counsel that there was no specific date by which opposition papers had to be filed, and that advice should have been viewed with at least some skepticism by an experienced attorney. Fed.Rules Civ.Proc.Rule 60(b)(1), 28 U.S.C.A.; U.S. Dist.Ct.Rules D.R.I., Rule 12(a)(2).

4. Federal Civil Procedure ¶2448

While fact that sanction of default may be too harsh considering relative lack of prejudice to party seeking default and fact that there may be an absence of client blameworthiness may be legitimate factors for district court to consider in ruling on motion to set aside judgment or order upon finding of mistake, inadvertence, surprise, or excusable neglect, those factors do not require a finding of excusable neglect. Fed.Rules Civ.Proc.Rule 60(b), 28 U.S.C.A.

5. Federal Civil Procedure ¶2444

Default judgment may stand even when there has been no showing of substantial prejudice to party benefiting from default.

6. Federal Civil Procedure ¶1713

District court acted within its discretion in not dismissing Government's forfeiture complaint filed in district of Rhode Island, although Government had mistakenly dismissed with prejudice an earlier complaint in district of New Jersey, before Government had opportunity to correct its mistake.

Joseph J. Altieri, Providence, R.I., Edward V. Cattell, Jr., Philadelphia, Pa., and Nancy E. Sim, Pleasantville, N.J., on brief, for appellants.

Roger J. Marzulla, Asst. Atty. Gen., Peter R. Steenland, Jr., Atty., Dept. of Justice, and Lee M. Kolker, Atty., Dept. of Justice, Washington, D.C., on brief, for appellees.

Before COFFIN, BOWNES and
SELYA, Circuit Judges.

COFFIN, Circuit Judge.

This is an appeal from the district court's refusal (1) to dismiss a forfeiture action brought by the government and (2) to set aside a default judgment subsequently entered against appellants in that action. Because we find no abuse of discretion, we affirm.

I.

On August 18, 1986, the government seized 3,888 pounds of scallops belonging to appellants-claimants. Arne Jensen and A & E Fisheries, Inc. [hereinafter appellant or claimant], pursuant to the Magnuson Fishery Conservation and Management Act, 16 U.S.C. § 1857(1)(A), (G). In December of that year, the government filed a forfeiture action in district court in New Jersey to obtain title to the value of those scallops. The government subsequently dismissed its complaint with prejudice in late March, but a few days later, on March 27, filed another forfeiture complaint in district court in Rhode Island. According to the government, both the summons in the Rhode Island action and Rule C(6) of the Supplemental Rules for Certain Admi-

postmarked, or, in the absence of a postmark, within 60 calendar days after the date it was received by an official with whom claims may be filed. If the agency and claimant do not agree that the claimant is a member of the class or upon the relief to which the claimant is entitled, the agency shall refer the claim, with recommendations concerning it, to the Administrative Judge.

(e) The Administrative Judge shall notify the claimant of the right to a hearing on the claim and shall allow the parties to the claim an opportunity to submit evidence and representations concerning the claim. If a hearing is requested, it shall be conducted in accordance with § 1613.218. If no hearing is requested, the Administrative Judge, in his/her discretion, may hold a hearing to obtain necessary evidence concerning the claim.

(f) The Administrative Judge shall issue a report of findings and recommendations on the claim which shall be treated the same as a report of findings and recommendations under §§ 1613.611 and 1613.612.

(g) If the Administrative Judge determines that the claimant is not a member of the class or that the claim was not timely filed he/she shall recommend rejection of the claim and give notice of his/her action to the agency, the claimant, and his/her representative. Such notice shall include advice as to the complainant's right to appeal to the Office of Federal Operations or to file a civil action in accordance with the provisions of this part.

[37 FR 22717, Oct. 21, 1972. Redesignated at 43 FR 60901, Dec. 29, 1978, and amended at 45 FR 24133, Apr. 9, 1980; 52 FR 10086, Mar. 30, 1987; 52 FR 41932, Oct. 30, 1987; 56 FR 6983, Feb. 21, 1991]

APPEAL TO THE COMMISSION

§ 1613.631 Appeal to the Office of Federal Operations.

(a) An agent may appeal to the Office of Federal Operations the decision of the head of the agency or designee:

(1) To reject or cancel a complaint, or a portion thereof, for reasons covered by § 1613.604;

(2) Under the circumstances set forth in § 1613.609 (d) or (e);

(3) On the merits of the complaint;

(4) On the issue of attorney's fees and costs and corrective action; or

(5) The failure of an agency to implement its final agency decision.

(b) A claimant may appeal to the Office of Federal Operations from a decision of the head of the agency or designee:

(1) To cancel or reject a claim for individual relief in accordance with § 1613.614 (f) and (g); and

(2) On the merits of the claim for individual relief including attorney's fees or costs.

(c) An appeal may be filed at any time after receipt of the agency's final decision, but not later than 20 calendar days after receipt of that decision except when the appellant shows that neither the appellant nor the appellant's representative was notified of the prescribed time limit and was not otherwise aware of it, or that the appellant or the appellant's representative was prevented by circumstances beyond the appellant's or representative's control from appealing within the prescribed time limit.

(d) An appeal shall be deemed timely if it is delivered in person or postmarked before the expiration of the filing period, or if, in the absence of a legible postmark, it is received by the Commission by mail within five days of the expiration of the filing period. The Office of Federal Operations' review will be made upon the existing record to determine if the agency decision is in accord with applicable law, Executive order, or Civil Service regulations, rules, and instructions and is supported by substantial evidence.

[52 FR 41932, Oct. 30, 1987, as amended at 56 FR 6983, Feb. 21, 1991]

§ 1613.632 Reopening and reconsideration by the Commissioners.

The Commissioners may reopen and reconsider any previous decision of a Commission office on their own motion or at the request of either party in accordance with provisions of § 1613.235.

[52 FR 41932, Oct. 30, 1987]

CIVIL ACTIONS

§ 1613.641 Statutory right.

(a) An agent who has filed a complaint or a claimant who has filed a claim for relief based on race, color, religion, sex, and/or national origin discrimination is authorized to file a civil action in an appropriate U.S. district court:

(1) Within 30 calendar days of his/her receipt of notice of final action taken by his/her agency on a complaint or claim;

(2) After 180 calendar days from the date he/she filed a complaint or claim with his/her agency if there has been a decision on the complaint or claim;

(3) Within 30 calendar days of his/her receipt of the decision of the Office of Federal Operations on his/her appeal;

(4) After 180 calendar days from the date he/she filed an appeal with the Office of Federal Operations, if there has been no Office of Federal Operations decision.

For purposes of this part, the decision of an agency shall be final only when the agency makes a determination on all of the issues in the complaint, including whether or not to award attorney's fees and costs. If a determination to award attorneys fees is made the decision will not be final until the procedure is followed for determining the amount of the award as set forth in § 1613.271(c).

(b) An agent who filed a complaint or a claimant who has filed for relief based on age discrimination, is authorized to file a civil action in an appropriate U.S. district court.

[37 FR 22717, Oct. 21, 1972. Redesignated at 43 FR 60901, Dec. 29, 1978, and amended at 45 FR 24133, Apr. 9, 1980; 56 FR 6983, Feb. 21, 1991]

§ 1613.642 Notice of right.

When the agent alleges that the agency discriminated against a class on the basis of race, color, religion, sex, national origin, and/or age, or a claimant files for relief, the agency or the Commission shall notify him/her of his/her right to file a civil action in any final action on a complaint, or claim, under §§ 1613.604, 1613.612, 1613.614, or 1613.631.

§ 1613.643 Effect on administrative processing.

The filing of a civil action by an agent involving a complaint filed under this subpart terminates processing of that complaint. The filing of a civil action by a claimant involving a claim filed under this subpart, terminates processing of that claim.

[52 FR 41933, Oct. 30, 1987]

Subpart G—Prohibition Against Discrimination Because of a Physical or Mental Handicap

AUTHORITY: 5 U.S.C. 7153; § 5.1 of the Civil Service Rules; 29 U.S.C. 791.

SOURCE: 43 FR 12295, Mar. 24, 1978, unless otherwise noted. Redesignated at 43 FR 60901, Dec. 29, 1978.

GENERAL PROVISIONS

§ 1613.701 Purpose and applicability.

(a) *Purpose.* This subpart sets forth the policy under which an agency shall establish a continuing program to assure nondiscrimination on account of physical or mental handicap and the regulations under which an agency will process complaints of discrimination based on a physical or mental handicap.

(b) *Applicability.* (1) This subpart applies to executive agencies as defined in section 105 of title 5 of the United States Code and to those positions in the legislative and judicial branches of the Federal Government and the government of the District of Columbia which are in the competitive service.

(2) This subpart applies to the U.S. Postal Service and Postal Rate Commission.

(3) This subpart applies only to applicants and employees who have a handicap as defined in § 1613.702(a).

§ 1613.702 Definitions.

(a) *Handicapped person* is defined for this subpart as one who: (1) Has a physical or mental impairment which substantially limits one or more of such person's major life activities, (2) has a record of such an impairment, or (3) is regarded as having such an impairment.

(b) *Physical or mental impairment* means (1) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or (2) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(c) *Major life activities* means functions, such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(d) *Has a record of such an impairment* means has a history of, or has been classified (or misclassified) as having a mental or physical impairment that substantially limits one or more major life activities.

(e) *Is regarded as having such an impairment* means (1) has a physical or mental impairment that does not substantially limit major life activities but is treated by an employer as constituting such a limitation; (2) has a physical or mental impairment that substantially limits major life activities only as a result of the attitude of an employer toward such impairment; (3) or has none of the impairments defined in paragraph (b) of this section but is treated by an employer as having such an impairment.

(f) *Qualified handicapped person* means 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 and who, depending upon the type of appointing authority being used:

(1) Meets the experience and/or education requirements (which may include passing a written test) of the position in question, or

(2) Meets the criteria for appointment under one of the special appointing authorities for handicapped persons.

§ 1613.703 General policy.

Agencies shall give full consideration to the hiring, placement, and advancement of qualified mentally and physically handicapped persons. The Federal Government shall become a model employer of handicapped individuals. An agency shall not discriminate against a qualified physically or mentally handicapped person.

§ 1613.704 Reasonable accommodation.

(a) An 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.

(b) Reasonable accommodation may include, but shall not be limited to: (1) Making facilities readily accessible to and usable by handicapped persons, and (2) job restructuring, 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.

(c) In determining pursuant to paragraph (a) of this section whether an accommodation would impose an undue hardship on the operation of the agency in question, factors to be considered include: (1) The overall size of the agency's program with respect to the number of employees, number and type of facilities and size of budget; (2) the type of agency operation, including the composition and structure of the agency's work force; and (3) the nature and the cost of the accommodation.

§ 1613.705 Employment criteria.

(a) An agency may not make use of any employment test or other selection criterion that screens out or tends to screen out qualified handicapped persons or any class of handicapped persons unless: (1) The test score or other selection criterion, as used by the agency, is shown to be job-related for the position in question, and (2) alternative job-related tests or criteria that do not screen out or tend to screen out as many handicapped persons are not shown by the Civil Service Commis-

son's Director of Personnel Research and Development Center to be available.

(b) An agency shall select and administer tests concerning employment so as to insure that, when administered to an applicant or employee who has a handicap that impairs sensory, manual, or speaking skills, the test results accurately reflect the applicant's or employee's ability to perform the position or type of positions in question rather than reflecting the applicant's or employee's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure).

§ 1613.706 Preemployment inquiries.

(a) Except as provided in paragraphs (b) and (c) of this section, an agency may not conduct a preemployment medical examination and may not make preemployment inquiry of an applicant as to whether the applicant is a handicapped person or as to the nature or severity of a handicap. An agency may, however, make preemployment inquiry into an applicant's ability to meet the medical qualification requirements, with or without reasonable accommodation, of the position in question, i.e., the minimum abilities necessary for safe and efficient performance of the duties of the position in question. The Civil Service Commission may also make an inquiry as to the nature and extent of a handicap for the purpose of special testing.

(b) Nothing in this section shall prohibit an agency from conditioning an offer of employment on the results of a medical examination conducted prior to the employee's entrance on duty. *Provided, That:* (1) All entering employees are subjected to such an examination regardless of handicap or when the preemployment medical questionnaire used for positions which do not routinely require medical examination indicates a condition for which further examination is required because of the job-related nature of the condition, and (2) the results of such an examination are used only in accordance with the requirements of this part. Nothing in this section shall be construed to prohibit the gathering of preemployment medical information for the purposes

of special appointing authorities for handicapped persons.

(c) To enable and evaluate affirmative action to hire, place, or advance handicapped individuals, the agency may invite applicants for employment to indicate whether and to what extent they are handicapped, if: (1) The agency states clearly on any written questionnaire used for this purpose or makes clear orally, if no written questionnaire is used, that the information requested is intended for use solely in conjunction with affirmative action and (2) the agency states clearly that the information is being requested on a voluntary basis, that refusal to provide it will not subject the applicant or employee to any adverse treatment, and that it will be used only in accordance with this part.

(d) Information obtained in accordance with this section as to the medical condition or history of the applicant shall be kept confidential except that: (1) Managers, selecting officials, and others involved in the selection process or responsible for affirmative action may be informed that the applicant is a handicapped individual eligible for affirmative action; (2) supervisors and managers may be informed regarding necessary accommodations; (3) first aid and safety personnel may be informed, where appropriate, if the condition might require emergency treatment; (4) government officials investigating compliance with laws, regulations, and instructions relevant to equal employment opportunity and affirmative action for handicapped individuals shall be provided information upon request; and (5) statistics generated from information obtained may be used to manage, evaluate, and report on equal employment opportunity and affirmative action programs.

[43 FR 12295, Mar. 24, 1978. Redesignated at 43 FR 60901, Dec. 29, 1978, and amended at 46 FR 11285, Feb. 6, 1981]

§ 1613.707 Physical access to buildings.

(a) An agency shall not discriminate against qualified handicapped applicants or employees due to the inaccessibility of its facility.

(b) For the purpose of this subpart, a facility shall be deemed accessible if it

nation. *T & S Service Associates, Inc. v. Crenson*, C.A.1 (R.I.) 1981, 666 F.2d 722.

1078. Arrest

Dismissal of black arrestee's § 1981 civil rights claim was not required on grounds there was no separate damages remedy under that provision, where arrestee sought injunctive relief under that provision and damages under § 1983. *Marcus v. Carrasquillo*, M.D.Fla.1992, 782 F.Supp. 593.

1079. Employment—Generally

Employment discrimination complainants could recover damages for any wrongful acts committed by employer and union defendants within the applicable limitations period. *Bernard v. Gulf Oil Co.*, C.A.5 (Tex.) 1979, 596 F.2d 1249, on rehearing 619 F.2d 459, affirmed 101 S.Ct. 2193, 452 U.S. 89, 68 L.Ed.2d 693.

1080. — Emotional or mental harm

Black employee who was subject of retaliatory harassment for filing complaints with Equal Employment Opportunity Commission and Office of Federal Contract Compliance Programs was entitled to \$10,000 in damages, notwithstanding the harassment was not a daily occurrence, where it was not infrequent and given employee's personality and viewpoint, emotional distress caused by harassment was substantial. *Goldsmith v. E.I. du Pont de Nemours & Co., Inc.*, D.C.Del.1983, 571 F.Supp. 235.

1081. Prisons and prisoners

Where plaintiff in civil rights action sought both injunctive relief with respect to prison conditions and monetary damages, trial court which denied injunctive relief was required to make some disposition of claim for damages. *Dunn v. Henderson*, C.A.5 (La.) 1976, 529 F.2d 446.

1082. Recreational facilities

Black homeowner, who was discouraged from applying for membership in "community swimming pool" because of his race, two members, whose black guest was refused admission after guest policy was changed to limit guests to relatives of members, and guest, all of whom brought suit under this section, § 1982 of this title, and § 2000a et seq. of this title, were entitled to recover damages because of the racial discrimination. *Tillman v. Wheaton-Haven Recreation*

Ass'n, Inc., D.C.Md.1973, 367 F.Supp. 860, reversed on other grounds 517 F.2d 1141.

1083. Utilities

Fact of damage was inherent in allegation that black customers of electric company were required to pay greater security deposits than white customers solely on account of their race. *Cody v. Union Elec.*, C.A.8 (Mo.) 1975, 518 F.2d 978, on remand 410 F.Supp. 307.

1084. Prejudgment interest—Generally

Prejudgment interest would not be appropriate since the amount and nature of defendant's liability did not become clear until the conclusion of the trial. *Taylor v. Jones*, D.C.Ark.1980, 495 F.Supp. 1285, affirmed in part, reversed in part on other grounds 653 F.2d 1193.

1085. — Back pay

Although § 1981 plaintiff's proposed verdict form lumped past and future wages together and plaintiffs did not request prejudgment interest until after verdict had been returned, computation of back pay, for purpose of awarding prejudgment interest on such back pay, may have been reasonably ascertainable so as to support award of prejudgment interest, but method of determining amount of back pay and whether back pay was reasonably ascertainable was within discretion of district court on remand. *Williamson v. Handy Button Mach. Co.*, C.A.7 (Ill.) 1987, 817 F.2d 1290.

1086. Jury trial

An action for damages under this section is by nature legal and must be tried by jury on demand. *Lincoln v. Board of Regents of University System of Georgia*, C.A.11 (Ga.) 1983, 697 F.2d 928, rehearing denied 705 F.2d 471, certiorari denied 104 S.Ct. 97, 464 U.S. 826, 78 L.Ed.2d 102.

Where plaintiff's claim for legal relief and equitable relief were both based on alleged racial discrimination and where plaintiff was entitled to a jury trial with respect to his legal claims, he was entitled to have jury determine liability, i.e., whether he had been a victim of racial discrimination, and if jury so determined that there was liability, it would be for the court to determine whether plaintiff was entitled to back pay. *Moore v. Sun Oil Co. of Pennsylvania*, C.A.6 (Ohio) 1980, 636 F.2d 154.

A plaintiff seeking compensatory and punitive damages pursuant to this section is entitled to a trial by jury unless those demands are so baseless as to be treated as a sham. *Davidson v. Yeshiva University*, D.C.N.Y.1982, 555 F.Supp. 75.

Compensatory and punitive damages are permissible under this section and, when such damages are claimed and a jury trial has been demanded, court must try issues to jury. *Irby v. Shelby County Government*, D.C.Tenn.1981, 508 F.Supp. 1080.

A plaintiff under this section may demand compensatory and punitive damages and also may demand a jury trial unless claims for punitive or compensatory damages are so baseless as to be treated as a sham. *Seymore v. Reader's Digest Ass'n, Inc.*, D.C.N.Y.1980, 493 F.Supp. 257.

1087. Remand

Remand was required for reconsideration of findings and conclusions and specific statements of basis for relief against former black parole officer's former supervisors and of amount of damages, if any, suffered by reason of acts of each where, rather than defining degree of

each supervisor's liability, trial judge made general finding that the former black parole officer should and does prevail in his action under this section, such conclusion was based on numerous findings involving acts committed by persons other than former supervisors, and it was impossible to determine what injury and damage trial judge found was caused by each supervisor's acts and why they were jointly and severally liable. *Foulks v. Ohio Dept. of Rehabilitation and Correction Adult Parole Authority*, C.A.6 (Ohio) 1983, 713 F.2d 1229.

In employment discrimination action brought under section 2000e et seq. of this title and under this section, court was unable to determine whether any of plaintiff's evidence supported his claims for damages other than for lost compensation and, under the circumstances, court could not say whether denial of jury trial was harmless error; thus, remand was required for determination of whether plaintiff produced evidence sufficient to go to a jury in support of his claim for actual and punitive damages. *Bibbs v. Jim Lynch Cadillac, Inc.*, C.A.8 (Mo.) 1981, 653 F.2d 316.

§ 1981a. Damages in cases of intentional discrimination in employment

(a) Right of recovery

(1) Civil rights

In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5) [42 U.S.C.A. §§ 2000e-5 or 2000e-16] against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act (42 U.S.C. 2000e-2 or 2000e-3) [42 U.S.C.A. §§ 2000e-2, 2000e-3, or 2000e-16], and provided that the complaining party cannot recover under section 1981 of this title, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000e-5(g)], from the respondent.

(2) Disability

In an action brought by a complaining party under the powers, remedies, and procedures set forth in section 706 or 717 of the

Civil Rights Act of 1964 [42 U.S.C.A. §§ 2000e-5 or 2000e-16] (as provided in section 107(a) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12117(a)), and section 794a(a)(1) of Title 29, respectively) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) under section 791 of Title 29 and the regulations implementing section 791 of Title 29, or who violated the requirements of section 791 of Title 29 or the regulations implementing section 791 of Title 29 concerning the provision of a reasonable accommodation, or section 102 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112), or committed a violation of section 102(b)(5) of the Act [42 U.S.C.A. § 12112(b)(5)], against an individual, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000e-5(g)], from the respondent.

(3) Reasonable accommodation and good faith effort

In cases where a discriminatory practice involves the provision of a reasonable accommodation pursuant to section 102(b)(5) of the Americans with Disabilities Act of 1990 [42 U.S.C.A. § 12112(b)(5)] or regulations implementing section 791 of Title 29, damages may not be awarded under this section where the covered entity demonstrates good faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business.

(b) Compensatory and punitive damages

(1) Determination of punitive damages

A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

(2) Exclusions from compensatory damages

Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief

authorized under section 706(g) of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000e-5(g)].

(3) Limitations

The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party—

(A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, \$50,000;

(B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, \$100,000; and

(C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, \$200,000; and

(D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, \$300,000.

(4) Construction

Nothing in this section shall be construed to limit the scope of, or the relief available under, section 1981 of this title.

(c) Jury trial

If a complaining party seeks compensatory or punitive damages under this section—

(1) any party may demand a trial by jury; and

(2) the court shall not inform the jury of the limitations described in subsection (b)(3) of this section.

(d) Definitions

As used in this section:

(1) Complaining party

The term "complaining party" means—

(A) in the case of a person seeking to bring an action under subsection (a)(1) of this section, the Equal Employment Opportunity Commission, the Attorney General, or a person who may bring an action on behalf of a person who

TO: Marvin Krislov
FROM: Liz Provencio
DATE: June 5, 1995
RE: Volunteers with Disabilities

A. Issues:

1. Does the Americans with Disabilities Act (ADA) apply to volunteers in the White House?
2. What is a reasonable accommodation for a person that is hearing impaired?

B. Brief Answer:

1. The ADA does not specifically address the volunteers at the White House. However, under 3 C.F.R. § 102 all programs or activities administered by the Executive Office must not discriminate on the basis of a handicap. Case law suggests that volunteers are not covered under the Rehabilitation Act of 1973.
- 2.

C. Relevant Statutes:

1. Covered Programs

The relevant regulation governing the programs conducted by the Executive Office of the President appear in 3 C.F.R. § 102. The regulation applies to all programs or activities conducted by:

the White House Office, the Office of the Vice President, the Office of Management and Budget, the Office of Policy Development, the National Security Council, the Office of Science and Technology Policy, the Office of the United States Trade Representative, the Council on Environmental Quality, the Council of Economic Advisers, the Office of Administration, the Office of Federal Procurement Policy, and any committee, board, commission, or similar group established in the Executive Office of the President.
3 C.F.R. § 102.103 (19**)

2. Covered Individuals

3 C.F.R. § 102.130 General prohibitions against discrimination.

(a) No qualified individual with handicaps shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity conducted by the agency.

(b)(1) The agency in providing any aid, benefit or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap - (i) Deny a qualified individual with handicaps the opportunity to participate in or benefit from the aid, benefit, or service;

(2) The agency may not deny a qualified individual with handicaps the opportunity to participate in programs or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities.

3 C.F.R. § 102.160 Communications

(a) The agency shall take appropriate steps to ensure effective communication with applicants, participants, personnel of other Federal entities, and members of the public.

(1) The agency shall furnish appropriate auxiliary aids where necessary to afford an individual with handicaps an equal opportunity to participate in, and enjoy the benefits of, a program or activity conducted by the agency.

(2) Where the agency communicates with applicants and beneficiaries by telephone, telecommunication devices for deaf persons (TDD's) or equally effective telecommunication systems shall be used to communicate with persons with impaired hearing.

(b) The agency shall ensure that interested persons, including persons with impaired vision or hearing, can obtain information as to the existence and location of accessible services, activities, and facilities.

(d) This section does not require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens.

(A) information on administrative costs associated with such volunteers; (B) a comparison of the quality of services provided by such volunteers and the quality of services provided by volunteers who receive a stipend under such parts, including the rate of absenteeism and turnover; and

(C) a review of the effect that participation by volunteers who do not receive such stipend have on the administration of such programs; and

(3) submit to the Committee on Education and Labor of the House of Representatives and the Committee on Labor and Human Resources of the Senate a report summarizing in detail the results of the evaluations made under paragraphs (1) and (2).

(g) Funds limitation; reduction of allotments

The Director is authorized to use such sums as are required, but not to exceed 1 percent of the funds appropriated under this chapter, to conduct program and project evaluations (directly, or by grants or contracts) as required by this chapter. In the case of allotments from such an appropriation, the amount available for such allotments (and the amount deemed appropriate therefor) shall be reduced accordingly.

(As amended Pub.L. 98-288, § 23, May 21, 1984, 98 Stat. 195; Pub.L. 99-551, § 8, Oct. 27, 1986, 100 Stat. 3076; Pub.L. 101-204, Title IV, § 402, Dec. 7, 1989, 103 Stat. 1815; Pub.L. 103-82, Title IV, § 406(a)(9), Sept. 21, 1993, 107 Stat. 920.)

HISTORICAL AND STATUTORY NOTES

1993 Amendments

Subsec. (f)(1). Pub.L. 103-82, § 406(a)(9), substituted "Corporation" for "ACTION Agency".

1989 Amendment

Subsec. (a). Pub.L. 101-204 inserted "(including the VISTA Literacy Corps which shall be evaluated as a separate program at least once every 3 years)" following "this chapter".

1986 Amendment

Subsec. (a). Pub.L. 99-551, § 8(a), added provisions relating to program evaluation once every three years, substituted "goals, in general" for "goals in general", "program or project evaluated" for "program or any project of such program being evaluated", and struck out "biennially" following "The Director shall".

Subsec. (f). Pub.L. 99-551, § 8(b)(2), added subsec. (f). Former subsec. (f) was redesignated (g).

Subsec. (g). Pub.L. 99-551, § 8(b)(1), redesignated subsec. (f) as (g).

1984 Amendment

Subsec. (a). Pub.L. 98-288, § 23(1), substituted "biennially" for "periodically".

§ 5057. Nondiscrimination provisions

(a) In general

(1) Basis

An individual with responsibility for the operation of a program that receives assistance under this chapter shall not discriminate against a participant in, or member of the staff of, such program on the basis of race, color, national origin, sex, age, or political affiliation of such participant or member, or on the basis of disability, if the participant or member is a qualified individual with a disability.

(c) D. Section

(b) Federal financial assistance

Any assistance provided under this chapter shall constitute Federal financial assistance for purposes of title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), and the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.).

(c) Religious discrimination

(1) In general

Except as provided in paragraph (2), an individual with responsibility for the operation of a program that receives assistance under this chapter shall not discriminate on the basis of religion against a participant in such program or a member of the staff of such program who is paid with funds received under this chapter.

(2) Exception

Paragraph (1) shall not apply to the employment, with assistance provided under this chapter, of any member of the staff, of a program that receives assistance under this chapter, who was employed with the organization operating the program on the date the grant under this chapter was awarded.

(d) Rules and regulations

The Director shall promulgate rules and regulations to provide for the enforcement of this section that shall include provisions for summary suspension of assistance for not more than 30 days, on an emergency basis, until notice and an opportunity to be heard can be provided.

(As amended Pub.L. 98-288, § 30(a), May 21, 1984, 98 Stat. 197; Pub.L. 103-82, Title III, § 367, Sept. 21, 1993, 107 Stat. 908.)

HISTORICAL AND STATUTORY NOTES

References in Text

The Civil Rights Act of 1964, referred to in subsec. (b), is Pub.L. 88-352, July 2, 1964, 78 Stat. 241, as amended. Title VI of the Civil Rights Act of 1964 is classified generally to subchapter V (section 2000d et seq.) of chapter 21 of this title. For complete classification of this Act to the Code, see Short Title note set out under section 2000a of this title and Tables.

The Education Amendments of 1972, referred to in subsec. (b), is Pub.L. 92-318, June 23, 1972, 86 Stat. 235, as amended. Title IX of the Education Amendments of 1972 is classified principally to chapter 38 (section 1681 et seq.) of Title 20, Education. For complete classification of this Act to the Code, see Short Title of 1972 Amendment note set out under section 1001 of Title 20 and Tables.

The Rehabilitation Act of 1973, referred to in subsec. (b), is Pub.L. 93-112, Sept. 26, 1973, 87 Stat. 355, as amended. Section 504 of the Rehabilitation Act of 1973 is classified to section 794 of Title 29, Labor. For complete classification of this Act to the Code, see Short Title note set out under section 701 of Title 29 and Tables.

The Age Discrimination Act of 1975, referred to in subsec. (b), is Pub.L. 94-135, Title III, Nov. 28, 1975, 89 Stat. 728, as amended, which is classified generally to chapter 76 (section 6101

1993 Amendments

Pub.L. 103-82, § 367, amended section generally, substituting provisions setting forth and defining general rule, provisions deeming assistance Federal financial assistance for certain statutory purposes, special provisions regarding religious discrimination, and provisions requiring promulgation of regulations, for provisions setting forth general rule and deeming assistance Federal financial assistance for certain statutory purposes, special provisions regarding sex discrimination, and provisions regarding applicability of certain statutory provisions to applicants for enrollment for service as volunteers and requiring prescription of regulations.

1984 Amendment

Subsec. (c)(1). Pub.L. 98-288 struck out "and the Peace Corps Act (22 U.S.C. 2501 et seq.)" at the end of the first sentence.

Effective Date of 1993 Amendments

Amendment by section 367 of Pub.L. 103-82 effective Oct. 1, 1993, see section 392 of Pub.L. 103-82, set out as a note under section 4951 of this title.

Legislative History

For legislative history and purpose of Pub.L. 93-113, see 1973 U.S. Code Cong. and Adm. News, p. 2155. See, also, Pub.L. 96-143, 1979 U.S. Code Cong. and Adm. News, p. 2183;

(1) and such recommendations for legislative and administrative reform as the Secretary may determine to be appropriate.

(Pub.L. 101-610, Title I, § 172, Nov. 16, 1990, 104 Stat. 3159; Pub.L. 103-82, Title I, § 114, Title IV, § 402(b)(1), Sept. 21, 1993, 107 Stat. 861, 919.)

HISTORICAL AND STATUTORY NOTES

References in Text

This subchapter, referred to in subsecs. (a)(1), (2), (3)(A) and (c)(1), was in the original "this title", meaning Title I of Pub.L. 101-610, which enacted this subchapter and amended sections 1070a-6 and 1087vv of Title 20, Education.

This chapter, referred to in subsec. (a)(3)(A), was in the original "this Act", meaning Pub.L. 101-610, Nov. 16, 1990, 104 Stat. 3127, known as the National and Community Service Act of 1990, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 12501 of this title and Tables.

1993 Amendments

Subsec. (a)(1). Pub.L. 103-82, § 402(b)(1), substituted "Corporation" for "Commission".

Subsec. (a)(3)(A). Pub.L. 103-82, § 114(1), substituted "section 12637 of this title" for "sections 12637 and 12523(9) of this title".

Subsec. (b)(1). Pub.L. 103-82, § 402(b)(1), substituted "Corporation" for "Commission".

§ 12633. Supplementation

(a) In general

Assistance provided under this subchapter shall be used to supplement the level of State and local public funds expended for services of the type assisted under this subchapter in the previous fiscal year.

(b) Aggregate expenditure

Subsection (a) of this section shall be satisfied, with respect to a particular program, if the aggregate expenditure for such program for the fiscal year in which services are to be provided will not be less than the aggregate expenditure for such program in the previous fiscal year, excluding the amount of Federal assistance provided and any other amounts used to pay the remainder of the costs of programs assisted under this subchapter.

(Pub.L. 101-610, Title I, § 173, Nov. 16, 1990, 104 Stat. 3160.)

HISTORICAL AND STATUTORY NOTES

References in Text

This subchapter, referred to in text, was in the original "this title", meaning Title I of Pub.L. 101-610, which enacted this subchapter and amended sections 1070a-6 and 1087vv of Title 20, Education.

§ 12634. Prohibition on use of funds

(a) Prohibited uses

No assistance made available under a grant under this subchapter shall be used to provide religious instruction, conduct worship services, or engage in any form of proselytization.

(b) Political activities

Pub.L. 103-82, § 114(2)(B), substituted "the national service laws" for "this subchapter".

Subsec. (b)(2). Pub.L. 103-82, § 402(b)(1), substituted "Corporation" for "Commission".

Subsec. (b). Pub.L. 103-82, § 114(2)(A), substituted "Report to Congress by Corporation" for "Report to Congress" in the catchline.

Subsec. (c). Pub.L. 103-82, § 114(3), added subsec. (c).

Effective Date of 1993 Amendments

Amendment to this section by Title I of Pub.L. 103-82 effective Oct. 1, 1993, see section 123 of Pub.L. 103-82, set out as a note under section 1701 of Title 16, Conservation.

Amendment by section 402(b)(1) of Pub.L. 103-82 effective Oct. 1, 1993, see section 406(a) of Pub.L. 103-82, set out as a note under section 5061 of this title.

Legislative History

For legislative history and purpose of Pub.L. 101-610, see 1990 U.S. Code Cong. and Adm. News, p. 4446. See, also, Pub.L. 103-82, 1993 U.S. Code Cong. and Adm. News, p. 1710.

(1) assist, promote, or deter union organizing; or

(2) finance, directly or indirectly, any activity designed to influence the outcome of an election to Federal office or the outcome of an election to a State or local public office.

(c) Contracts or collective bargaining agreements

A program that receives assistance under this subchapter shall not impair existing contracts for services or collective bargaining agreements.

(Pub.L. 101-610, Title I, § 174, Nov. 16, 1990, 104 Stat. 3160.)

HISTORICAL AND STATUTORY NOTES

References in Text

This subchapter, referred to in text, was in the original "this title", meaning Title I of Pub.L. 101-610, which enacted this subchapter and amended sections 1070a-6 and 1087vv of Title 20, Education.

Legislative History

For legislative history and purpose of Pub.L. 101-610, see 1990 U.S. Code Cong. and Adm. News, p. 4446.

§ 12635. Nondiscrimination

(a) In general

(1) Basis

An individual with responsibility for the operation of a project that receives assistance under this subchapter shall not discriminate against a participant in, or member of the staff of, such project on the basis of race, color, national origin, sex, age, or political affiliation of such participant or member, or on the basis of disability, if the participant or member is a qualified individual with a disability.

(2) Definition

As used in paragraph (1), the term "qualified individual with a disability" has the meaning given the term in section 12111(8) of this title.

(b) Federal financial assistance

Any assistance provided under this subchapter shall constitute Federal financial assistance for purposes of title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), and the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.), and shall constitute Federal financial assistance to an education program or activity for purposes of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.).

(c) Religious discrimination

(1) In general

Except as provided in paragraph (2), an individual with responsibility for the operation of a project that receives assistance under this subchapter shall not discriminate on the basis of religion against a participant in such project or a member of the staff of such project who is paid with funds received under this subchapter.

(2) Exception

Paragraph (1) shall not apply to the employment, with assistance provided under this subchapter, of any member of the staff, of a project that receives assistance under this subchapter, who was employed with the organization operating the project on the date the grant under this subchapter was awarded.

(d) Rules and regulations

Medical exams and inquiries under the Disabilities Act. Leo T. Crowley, 211 N.Y.L.J. 3 (June 30, 1994).

Mental disabilities in the workplace. Louis Pechman, 211 N.Y.L.J. 1 (March 2, 1994).

Nonconsensual HIV testing in the health care setting: The case for extending the occupational

protections of California proposition 96 to health care workers. 26 Loy.L.A.L.Rev. 1251 (1993).

Reasonable accommodation under the Americans with Disabilities Act: The limitations of Rehabilitation Act precedent. Barbara A. Lee, 14 Berkeley J. of Empl. & Lab.L. 201 (1993).

NOTES OF DECISIONS

Anencephaly 2
Facilitated communications 1
Individual with disability 3
Medication side effects 5
Physical or mental impairment 4

1. Facilitated communications

Even if Americans with Disabilities Act requires that auxiliary aids and sources for disabled person such as computer-assisted transcripts be made available to litigants, Act did not require admission of alleged statement regarding sexual abuse, made by 16-year-old autistic child through facilitated communication, with aid of facilitator and device such as letter board or typewriter, in neglect proceeding, absent showing that facilitated communication satisfied reliability and validity requirements of *Frye* test. Department of Social Services on Behalf of Jenny S v. Mark S, N.Y.Fam.Ct.1992, 593 N.Y.S.2d 142.

2. Anencephaly

Baby's anencephaly was a "disability" within meaning of Americans with Disabilities Act (ADA), which prohibits discrimination against disabled individuals by public accommodations, because baby's condition, which resulted in lack of cerebral function, affected baby's neurological functioning, ability to walk and ability to see or talk. Matter of Baby K, E.D.Va.1993, 832 F.Supp. 1022.

3. Individual with disability

Patient who was diagnosed with mental illness and was limited in major life activity in that her ability to work was limited by side effects of her medication was "disabled" within meaning of Americans with Disabilities Act (ADA). Dees v. Austin Travis County Mental Health and Mental Retardation, W.D.Tex.1994, 860 F.Supp. 1186.

Individual suffering from idiopathic thrombocytopenic purpura (ITP), a serious autoimmune

disorder affecting the blood system, was individual with disability under both Americans with Disabilities Act (ADA) and Rehabilitation Act; individual's physical impairment required hospitalization on three occasions over period of two and one-half months, covering period of three to four weeks, as well as causing on-going need to receive medication and weekly medical treatment. Thomas By and Through Thomas v. Davidson Academy, M.D.Tenn.1994, 846 F.Supp. 611.

4. Physical or mental impairment

Mental or nervous disorders are not "impairments," for purposes of Americans with Disabilities Act (ADA), unless they substantially limit one's ability to care for oneself, learn, work, go to school, see, hear, or walk. Clark v. Virginia Bd. of Bar Examiners, E.D.Va.1994, 861 F.Supp. 512.

Genuine issue of material fact existed as to whether employee who had suffered from cancer and had had radiation treatment suffered a disability under ADA, precluding summary judgment in action alleging that termination of employee violated ADA. Braverman v. Penobscot Shoe Co., D.Me.1994, 859 F.Supp. 596.

Employee's esophageal reflux, which was condition which prevented her from becoming pregnant naturally, was "physical or mental impairment," for purposes of determining whether condition was covered under ADA. Pacourek v. Inland Steel Co., Inc., N.D.Ill.1994, 858 F.Supp. 1393.

5. Medication side effects

For purposes of determining whether worker suffers from disability for purposes of ADA, it makes no difference whether major life function is affected directly by disability or indirectly by side effect of medication taken for medical or physical condition. Fehr v. McLean Packaging Corp., E.D.Pa.1994, 860 F.Supp. 198.

(3) Direct threat

The term "direct threat" means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.

(4) Employee

The term "employee" means an individual employed by an employer. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

(5) Employer

(A) In general

The term "employer" means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this subchapter, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.

(B) Exceptions

The term "employer" does not include—

- (i) the United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or
- (ii) a bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of Title 26.

(6) Illegal use of drugs

(A) In general

The term "illegal use of drugs" means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act (21 U.S.C. 812). Such term does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act [21 U.S.C.A. § 801 et seq.] or other provisions of Federal law.

(B) Drugs

The term "drug" means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act [21 U.S.C.A. § 812].

(7) Person, etc.

The terms "person", "labor organization", "employment agency", "commerce", and "industry affecting commerce", shall have the same meaning given such terms in section 2000e of this title.

(8) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

(9) Reasonable accommodation

SUBCHAPTER I—EMPLOYMENT

LAW REVIEW COMMENTARIES

Reasonable accommodation of the disabled worker—A job for the man or a man for the

job? Gerald T. Holtzman, Kyle L. Jennings & David J. Schenck, 44 Baylor L.Rev. 279 (1992).

§ 12111. Definitions

As used in this subchapter:

(1) Commission

The term "Commission" means the Equal Employment Opportunity Commission established by section 2000e-4 of this title.

ADA of PPO

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

(10) Undue hardship

(A) In general

The term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).

(B) Factors to be considered

In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include—

- (i) the nature and cost of the accommodation needed under this chapter;
- (ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;
- (iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and
- (iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

(Pub.L. 101-336, Title I, § 101, July 26, 1990, 104 Stat. 330; Pub.L. 102-166, Title I, § 109(a), Nov. 21, 1991, 105 Stat. 1077.)

HISTORICAL AND STATUTORY NOTES

References in Text

For the effective date of this subchapter, referred to in par. (5)(A), see section 108 of Pub.L. 101-336, set out as a note under this section.

The Controlled Substances Act, referred to in par. (6), is title II of Pub.L. 91-513, Oct. 27, 1970, 84 Stat. 1242, as amended, which is classified principally to subchapter I (§ 801 et seq.) of chapter 13 of Title 21, Food and Drugs. For complete classification of this Act to the Code, see Short Title note set out under section 801 of Title 21 and Tables.

This "chapter", referred to in par. (10)(B)(i), was in the original this "Act", meaning Pub.L. 101-336, which enacted this chapter and section 225 of Title 47, Telegraphs, Telephones, and Radiotelegraphs, and amended section 706 of Title 29, Labor, and sections 152, 221, and 611 of Title 47.

1991 Amendment

Par. (4). Pub.L. 102-166 added provisions relating to employment in a foreign country.

Effective Date of 1991 Amendment

Amendment by Pub.L. 102-166 not to apply to conduct occurring before Nov. 21, 1991, see section 109(c) of Pub.L. 102-166, set out as a note under section 2000e of this title.

For applicability of Pub.L. 102-166 to any

Effective Date

Section 108 of Pub.L. 101-336 provided that: "This title [subchapter] shall become effective 24 months after the date of enactment [July 26, 1990]."

Severability of Provisions

Invalidation of provision, amendment or application of Pub.L. 102-166 not to affect remaining provisions, amendments and applications, see section 401 of Pub.L. 102-166, set out as a note under section 1981 of this title.

Effect of 1991 Amendment Upon Court-Ordered Remedies, Affirmative Action, and Conciliation Agreements

The amendments made by Title I of Pub.L. 102-166 were not to be construed to affect court-ordered remedies, affirmative action, or conciliation agreements that were in accordance with the law, see section 116 of Pub.L. 102-166, set out as a note under section 1981 of this title.

Alternative Means of Dispute Resolution Encouraged

The use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under the Acts or provisions of

Legislative History

For legislative history and purpose of Pub.L. 101-336, see 1990 U.S. Code Cong. and Adm.

News, p. 267. See, also, Pub.L. 102-166, 1991 U.S. Code Cong. and Adm. News, p. 649.

CROSS REFERENCES

Definitions, as in this section, have same meaning for purposes of, national and community service, see 42 USCA §§ 12581 and 12594.

Qualified individual with a disability—

Nondiscrimination in the receipt of assistance under the National Community Service Act, see 42 USCA § 12635.

Nondiscrimination respecting participants of volunteer service programs, see 42 USCA § 5057.

LAW REVIEW COMMENTARIES

AIDS in the food industry. Rebecca Winterscheidt, 28 Ariz. Atty. 13 (Mar. 1992).

AIDS-phobia claims and the Disabilities Act. Leo T. Crowley, 212 N.Y.L.J. 8 (Oct. 20, 1994).

Americans with Disabilities Act: An overview of the employment provisions. Thomas S. Christopher and Charles M. Rice, 33 S. Tex. L. Rev. 759 (1992).

Americans with Disabilities Act as it relates to AIDS in the workplace. Vimal K. Shah, 6 CBA Rec. 83 (Nov. 1992).

An employer's guide to the Americans with Disabilities Act: From job qualifications to reasonable accommodations. Lawrence P. Postol and David D. Kadue, 24 J. Marshall L. Rev. 693 (1991).

Balancing interests under the ADA. Richard Cerenthal, 210 N.Y.L.J. 1 (July 2, 1993).

Breaking down the telephone barrier—Relay services on the line. Karen Peltz Strauss and Robert E. Richardson, 64 Temp. L. Rev. 583 (1991).

Civil Rights Act of 1991 and EEOC enforcement. Donald R. Livingston, 23 Stetson L. Rev. 53 (1993).

Employment provisions of the Americans with Disabilities Act. John J. Murphy, Jr., 81 Ill. B.J. 236 (1993).

ERISA preemption and its efforts on capping the health benefits of individuals with AIDS: a demonstration of why the United States health and insurance systems require substantial reform. Comment, 30 Hous. L. Rev. 1347 (1993).

Labor relations: Liability of supervisors. John P. Furfaro and Maury B. Josephson, 210 N.Y.L.J. 3 (Sept. 3, 1993).

Nonconsensual HIV testing in the health care setting: The case for extending the occupational protections of California proposition 96 to health care workers. Note, 26 Loy. L.A. L. Rev. 1251 (1993).

Privatizing justice: A jurisprudential perspective on labor and employment arbitration from the *Steelworkers Trilogy* to *Gilmer*. Martin H. Malin and Robert F. Ladenson, 44 Hastings L.J. 1187 (1993).

Reasonable accommodation under the Americans with Disabilities Act: The limitations of Rehabilitation Act precedent. Barbara A. Lee, 14 Berkeley J. of Empl. & Lab. L. 201 (1993).

NOTES OF DECISIONS

Ability to perform tasks 4

Agency officials 7

Direct threat 2

Employee 3b

Employers 3

Essential functions 8

Person 6

Private membership clubs 3a

Qualified individuals 1

Reasonable accommodation 5

Retroactive effect 4

1. Retroactive effect

ADA does not apply retroactively to private employers. *Gonzales v. Garner Food Services, Inc.*, N.D. Ga. 1994, 855 F. Supp. 371.

Americans With Disabilities Act did not apply retroactively. *Verdon v. Consolidated Rail Corp.*, S.D. N.Y. 1993, 828 F. Supp. 1129.

1. Qualified individuals

Business college instructor, who suffered from lupus erythematosus, an autoimmune system disorder, was not "qualified" for her position.

assigned courses during scheduled class times and spend time with her students, instructor missed more than 40 days of work in seven months, missed crucial beginning of instructional cycle twice, and informed college that she would miss beginning of cycle third time, and college's extensive accommodations of instructor's condition did not improve her attendance level. *Tyndall v. National Educ. Centers, Inc. of California*, C.A.4 (Va.) 1994, 31 F.3d 209.

Police officer whose restricted use of his right arm and hand prevented him from using two-handed "Weaver stance" and from completing state-mandated handgun training program was not "qualified individual with a disability" and, thus, termination of his provisional employment did not violate ADA. *Ethridge v. State of Ala.*, M.D. Ala. 1994, 860 F. Supp. 808.

Fact question as to whether position taken by former employee suffering from Acquired Immune Deficiency Syndrome (AIDS) before Social Security Administration (SSA) was inconsistent with position taken by employee in Americans with Disabilities Act (ADA).

VOLUNTEER AGREEMENT

I, _____, recognize the importance and sensitivity of my role as a White House volunteer. In consideration of the opportunity to provide voluntary services to the White House, I hereby acknowledge and agree to the following:

- (i) I may have access as a volunteer to nonpublic, privileged and/or confidential information. I agree not to share such information with anyone outside the White House complex, unless such disclosure is required by law.
- (ii) I agree that all materials, documents, and/or information conveyed to the President are government or private property, and I agree that I will not duplicate, remove from the White House complex, or otherwise appropriate any such materials or information without duly authorized written permission to do so. I acknowledge that doing so may subject me to criminal liability.
- (iii) I understand that I have no authority to make policy or to speak on behalf of the White House. I further acknowledge that I am not authorized to discuss official matters with any persons outside the White House.
- (iv) I agree that I may not use my position as a volunteer to obtain benefits for myself or for others that are not available to the general public.
- (v) I agree to complete all necessary forms and documents required by the Volunteer Office, the Office of White House Personnel Security, or the United States Secret Service.
- (vi) I agree that I will not work on White House matters that could directly affect my financial interests, or those of my family or any organization or entity with which I am affiliated.
- (vii) I agree to comply with all applicable laws and regulations while performing my services as a volunteer.
- (viii) I agree that I am volunteering my service of my own free will without compensation from the Federal government or the expectation of such.
- (ix) I understand that my services as a volunteer may be discontinued at any time and for any reason.

- (x) I agree to commit to one full year of volunteer service.
- (xi) I agree to work a minimum of sixteen hours per month.
- (xii) I agree to restrict myself to certain locations within the White House Complex, i.e. the Volunteer Office, volunteer assigned work area, the restroom and cafeteria.
- (xiii) I agree that I must receive authorization from the Counsel's Office (202-456-6229) before I provide assistance on matters of policy or accept discretion to exercise independent authority in the White House complex. I understand that if my duties change to include such responsibilities, I may be required to attend ethics training, file financial disclosure reports, and/or comply with other conflicts of interest requirements.

I understand that others are depending on me to be in attendance during the times that I have committed to do so. I will do my best to meet these obligations. If I am unable to be present when expected, I will call the White House Volunteer Office at 202-456-7756 and/or my supervisor as early as possible so that a replacement may be obtained.

SIGNATURE: _____

DATE: _____

D.O.B. _____

PLACE OF BIRTH: _____

SUPERVISOR'S AGREEMENT:

The above volunteer will provide only clerical, administrative, or other assistance of nondiscretionary nature. I understand that volunteers providing assistance on matters of policy or given discretion to exercise independent authority in the White House complex must be cleared through the Counsel's Office.

SUPERVISOR'S NAME: _____

OFFICE: _____

SUPERVISOR'S SIGNATURE: _____

DATE: _____

Withdrawal/Redaction Marker

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	Stacey Roth to Marvin Krislov; RE: Personal (2 pages)	04/27/1995	b(6)

COLLECTION:

Clinton Presidential Records
Counsel Office
Marvin Krislov
OA/Box Number: 18946

FOLDER TITLE:

Americans with Disabilities Act (ADA): ADA - Volunteers

2007-0143-F
db4482

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1** National Security Classified Information [(a)(1) of the PRA]
- P2** Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3** Release would violate a Federal statute [(a)(3) of the PRA]
- P4** Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5** Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6** Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1)** National security classified information [(b)(1) of the FOIA]
- b(2)** Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3)** Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4)** Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6)** Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7)** Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8)** Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9)** Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

Withdrawal/Redaction Marker

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
002. letter	From Sarah Brau; RE: Personal (2 pages)	04/25/1995	b(6)

COLLECTION:

Clinton Presidential Records
Counsel Office
Marvin Krislov
OA/Box Number: 18946

FOLDER TITLE:

Americans with Disabilities Act (ADA): ADA - Volunteers

2007-0143-F
db4482

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

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003. form	Personal and Personally Identifiable Information (2 pages)	09/19/1994	b(6)

COLLECTION:

Clinton Presidential Records
Counsel Office
Marvin Krislov
OA/Box Number: 18946

FOLDER TITLE:

Americans with Disabilities Act (ADA): ADA - Volunteers

2007-0143-F
db4482

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

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004. paper	RE: Personal (2 pages)	00/00/0000	b(6)

COLLECTION:

Clinton Presidential Records
Counsel Office
Marvin Krislov
OA/Box Number: 18946

FOLDER TITLE:

Americans with Disabilities Act (ADA): ADA - Volunteers

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E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

04-May-1995 02:24pm

TO: ROTH_S
FROM: Mary M Overbey

SUBJECT: Delia Todd

Message Creation Date was at 4-MAY-1995 14:24:00

You should be aware that Delia Todd was at the federal employees' event last night. I saw her coming through Security but am unclear as to how she was able to get in without an i.d. Today I found out that the person who gave her the ticket was Ellen Ochs of our office. I had given Ellen the tickets to distribute to staff because she was more involved with the event than was I. According to Ellen, Delia asked her for the ticket and so she gave it to her.

Marvin,
FYI,
Stacey

THE WHITE HOUSE
WASHINGTON

— —

Marvin,

For your info -
This article was
approved by
Neel Lattimore
well before we
had knowledge of
Delia's activities

outside of our
office.

Thanks,

Stacey

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MARCH-APRIL 1995

