
Elizabeth Clark Morin
The United States' 43 million people with disabilities comprise the nation's largest minority. Their secondary class status arose from the custodial attitudes of Tudor England, which treated the disabled as wards of the state. Colonial America adopted this practice and made people with disabilities a separate and inferior class. During the Great Depression of the 1930's, the federal government established the social security system, which embraced people with disabilities and reaffirmed their status as a class apart from the rest of society. This system perpetuated the perception that individuals with disabilities are a permanently helpless and separate class, unable to work or otherwise contribute to society.

In 1973, the United States Congress made a conscious effort to include individuals with disabilities as productive members of society by enacting section 504 of the Rehabilitation Act of 1973 (section 504), which prohibited the federal government and entities that receive federal assistance from discriminating against people with disabilities in employment. Section 504 represented the first major break from the widely held assumption that people with disabilities were unemployable. Although section 504 took a step
toward integrating people with disabilities into society, it lifted only employment barriers that stood between individuals with disabilities and entities receiving federal assistance. It allowed, however, the vast majority of private employers to discriminate against people with disabilities.

Title I of the Americans With Disabilities Act (ADA) picks up where section 504 leaves off by extending to private employers the prohibition of employment discrimination against people with disabilities. Title I is con-

The statute expands its reach beyond employment by covering participation in any “program or activity.” For instance, in Majors v. Housing Authority of DeKalb, 652 F.2d 454 (5th Cir. 1981), the plaintiff, a low income housing resident, sued the housing authority under section 504 alleging that the lease provisions discriminated against her on the basis of her disability. Id. at 455. This Note, however, limits discussion to employment discrimination.

The Rehabilitation Act also mandates affirmative action programs for people with disabilities. Id. §§ 791(b), 793(a). Section 503 of the Rehabilitation Act requires Federal government contractors to take “affirmative action” to employ and advance workers with disabilities. Id. § 793. To be sure, section 503 does cover private employers who are federal contractors. Id. There is, however, a fundamental distinction between affirmative action and nondiscrimination. Affirmative action generally refers to remedial action taken because of past discrimination and entails, at a minimum, actively recruiting from a victimized minority group. See United States Commission on Civil Rights, Accommodating the Spectrum of Individual Abilities 155-56 (1983). Such remedial action may include giving preference to members of that group through the use of hiring goals or even altering admission criteria. Id. Thus, employers with affirmative action duties must do more than merely avoid discrimination or provide equal opportunity or treatment. See Mantolete v. Bolger, 767 F.2d 1416, 1422 (9th Cir. 1985). Section 501 of the Rehabilitation Act also places a similar “affirmative action” requirement upon Federal government employers. 29 U.S.C. § 791(b).

Tucker, Section 504 of the Rehabilitation Act After Ten Years of Enforcement: The Past and the Future, 1989 U. ILL. L. REV. 845, 850 (1989). Section 504 covers any institution or organization only if it receives financial assistance from the federal government, including grants, loans, contracts for assistance, services of federal personnel, or real or personal property. See, e.g., 45 C.F.R. § 84.3(h)(v) (1989). Procurement contracts or contracts of insurance or guaranty are not considered financial assistance for the purposes of section 504. Id. About 8.2 million people with disabilities want to work but cannot find jobs. H.R. REP. 485, supra note 1, at 32, reprinted in 1990 U.S. CODE CONG. & ADMIN. NEWS at 314; see also Americans with Disabilities Act of 1990 § 101(5), which defines employer as:

[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 title, 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.


sistent with the statutory language of section 504 and the regulatory lan-
guage implementing the section. 12 By borrowing language from Title VII of
the Civil Rights Act of 1964, it also provides enforceable standards to pre-
vant discrimination. 13 Under Title I, employers must comply with employee
selection criteria and provide reasonable accommodations to qualified indi-
viduals with disabilities. 14 Although the consistency of language between
section 504 and Title I offers employers the comfort of familiar words and
phrases, 15 it may also increase litigation 16 because the language fails to delin-

12. Id. Title I specifies that "[n]o covered entity shall discriminate against a qualified
individual with a disability because of the disability of such individual in regard to job applica-
tion procedures, the hiring, advancement, or discharge of employees, employee compensation,
job training, and other terms, conditions, and privileges of employment." Id. The language is
consistent with section 504. 29 U.S.C. § 794(a) (1988). Section 504 requires that each federal
agency implement regulations pursuant to the Act. Id. For the sake of brevity, this Note
refers only to regulations issued by the Department of Health and Human Services pursuant to
suit against the Department of Health and Human Services prior to the department's reorgani-
zation. The courts have accorded great deference to the regulations because the Department
of Health and Human Services formulated them through an extended rule making process.
See 42 Fed. Reg. 22,676 (1977); see also Consolidated Rail Corp. v. Darrone, 465 U.S. 624
(1984) (Congress intended 1978 amendments to the Act to codify the regulations enforcing
section 504). The regulation's general prohibition against discrimination says that "[n]o quali-
fied handicapped person shall, on the basis of handicap, be subjected to discrimination in em-
ployment under any program or activity to which this part applies." 45 C.F.R. § 84.11(a)(1)
(1990). Congress' deliberate use of previously existing language means one of two things.
First, Congress is committed to ending discrimination against people with disabilities and will
tolerate the increase in litigation and other costs the law will generate. Second, Congress re-
acted to political forces and pushed the bill through in a hurry, content that language that
worked before can work again. Indeed, the Senate debate on the measure was minimal. See
infra note 76.

That provision states:

The powers, remedies, and procedures set forth in ... the Civil Rights Act of 1964
shall be the powers, remedies, and procedures this title provides to the Commission,
to the Attorney General, or to any person alleging discrimination on the basis of
disability in violation of any provision of this Act, or regulations promulgated under
section 106, concerning employment.

Id. (citations omitted). Title VII of the Civil Rights Act of 1964, as amended, makes available
an administrative conciliation process through the Equal Employment Opportunity Commiss-
ion in which discrimination charges can be settled. If conciliation fails, the complaining party
or the Equal Employment Opportunity Commission may file a lawsuit and obtain equitable
relief such as reinstatement, injunctive relief, and back pay. 42 U.S.C. §§ 2000e-4 to -6, -8, -9
(1988).

14. Americans with Disabilities Act of 1990 § 102(b) (to be codified at 42 U.S.C. § 12112); see infra notes 80-89 and accompanying text.

15. Compare Americans with Disabilities Act of 1990 § 102 (prohibiting any covered en-
tity from discriminating against a qualified individual with a disability) with 45 C.F.R. § 84.11
(1990) (same). The language of Title I is familiar. First, any business receiving federal assist-
ance has been complying with the provisions for 15 years. See, e.g., H.R. REP. 485, supra note
1, at 33, reprinted in 1990 U.S. CODE CONG. & ADMIN. NEWS at 315. Second, Congress
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This Note first examines the historical foundation of employment discrimination against individuals with disabilities. Next, this Note discusses the theory supporting integration of individuals with disabilities into the labor market and the need for federal legislation prohibiting employment discrimination. This Note then reviews Title I of ADA and compares it to section 504 and Title VII of the Civil Rights Act of 1964. Further, this Note surveys recent judicial decisions affecting individuals with disabilities and their employers to determine whether Title I will accomplish its goal of ending employment discrimination against people with disabilities. Finally, this Note concludes that courts must continue their trend of scrutinizing employers' actions, as they have under section 504, in order that Title I will work as Congress intended.

I. A History of Discrimination Against Individuals With Disabilities

Throughout history, people with disabilities have lived with two limitations: one, the actual physical or mental impairment, and two, societies' differential treatment caused by reactions to the impairment. Primitive cultures sacrificed the crippled and disabled for the good of the group. The ancients continued sacrifices and made the practice part of their written law. The Bible marked the disabled as sinners. In medieval times, people with disabilities were segregated, excluded, or denied equal treatment.

Discrimination is not always a result of prejudice. Discrimination is also caused by patronizing behavior, carelessness, and indifference. Nevertheless, the result is segregation, exclusion, or the denial of equal treatment.

16. See infra notes 124-84 and accompanying text.
17. Id.
18. Tucker, supra note 10, at 880-81. Discrimination is not always a result of prejudice. H.R. REP. 485, supra note 1, at 28-31, reprinted in 1990 U.S. CODE CONG. & ADMIN. NEWS at 310-13. Discrimination is also caused by patronizing behavior, carelessness, and indifference. Id. Nevertheless, the result is segregation, exclusion, or the denial of equal treatment. Id.
19. tenBroek & Matson, supra note 2, at 815 (citing KESSLER, REHABILITATION OF THE PHYSICALLY HANDICAPPED 18-19 (1947)).
20. Id.
21. The Old Testament states that one who transgresses against God's commandments will be inflicted with "the botch of Egypt, and with the emerods, and with the scab, and the itch, whereof thou canst not be healed." DEUTERONOMY 28:27 (King James). In the New Testament, after healing a disabled man, Jesus reportedly stated, "Behold, thou art made whole: sin no more, lest a worse thing come unto thee." JOHN 5:14 (King James).
ple with disabilities were granted special status to beg in the streets. The poor laws of Elizabethan England, after which the United States has patterned its public assistance social security laws, made the disabled wards of the state. Thus, society has softened its treatment of people with disabilities over centuries, but the individual and collective negative reaction toward them remains.

The United States has manifested its prejudices against people with disabilities by committing the disabled to institutions, keeping them on welfare, or providing them with menial and trivial government-sponsored jobs. Over the past sixty years, however, this prejudice has faded. In particular, public and private efforts have developed to improve the status of individuals with disabilities in the United States.

The Great Depression of the 1930's triggered the creation of various federal social security programs, three of which specifically targeted persons with disabilities. None of these programs, however, encouraged rehabilitation and economic self-sufficiency. Many commentators have argued that the programs discourage rehabilitation and self-sufficiency because the programs penalize people with disabilities who seek employment.

22. tenBroek & Matson, supra note 2, at 810.
23. Id. at 821-22. "Under this system aid could not be claimed as a right founded in a theory of prior contributions." Id. at 822. Instead, it was made as charity based on the individual's need. Id. Thus, people with disabilities find themselves answering to social workers who decide what persons with disabilities do and do not need after balancing the individuals' means against their needs. Id.
24. Id.
26. See generally NATIONAL COUNCIL ON THE HANDICAPPED, TOWARD INDEPENDENCE (1986). Programs reflect an overemphasis on income support and an underemphasis on initiatives for equal opportunity, independence, prevention, and self-sufficiency. Id. at 27. In the early 1980's, persons with mental illness received treatment in 277 state hospitals for $4.5 billion. Id. at 24. "Persons with mental retardation were served in 15,633 residential facilities for $5.9 billion." Id. The elderly and physically disabled resided in 23,065 nursing homes and other long term care facilities for $12.4 billion. Id.; see SENATE COMM. ON LABOR AND HUMAN RESOURCES, QUESTIONS AND ANSWERS ON THE SUBSTITUTE AMENDMENT TO S. 933, THE AMERICANS WITH DISABILITIES ACT OF 1989, 101st Cong., 1st Sess. (August 31, 1989).
27. See infra notes 28-34 and accompanying text.
29. tenBroek & Matson, supra note 2, at 821-22.
30. NATIONAL COUNCIL ON THE HANDICAPPED, supra note 26, app. at C-7 to -16. Supplemental Security Income, Social Security Disability Insurance, Medicaid and Medicare encourage dependence and discourage gainful employment. Id.
During the Eisenhower Administration, Congress amended the social security laws to emphasize self-support and self-care but never fully implemented the amendments.31 Nonetheless, the amendments reflect a growing recognition that the psychological need for rehabilitation and self-reliance is as important as the physical need for survival.32

More recently, the federal and state governments have addressed the personal and psychological needs of people with disabilities through programs that attempt to rehabilitate and integrate people with disabilities into society.33 Custodial attitudes and limitations, however, still linger in many of the employment opportunities that various state and federal programs offer.34 Consequently, discrimination that existed centuries ago persists and

33. NATIONAL COUNCIL ON THE HANDICAPPED, supra note 26, app. at B-8 to -28. For example, the Office of Special Education and Rehabilitative Services in the Department of Education has developed a transition model which bridges the gap between school and employment. Id. app. at B-5. The model focuses on a solid educational foundation and successful transition for community-based employment opportunities. Id. app. at B-5 to -8. There are supported work programs created under authorization of the Rehabilitation Act of 1973, 29 U.S.C. § 791 (1988). Supported work programs focus on how existing services are delivered and allow local services to develop employment opportunities for persons who have more severe disabilities. Title VI of the Rehabilitation Act of 1973 also authorizes funds to allow the Commissioner of the Rehabilitation Service Administration to enter into agreements with individual employers to establish jointly funded ventures, called Projects with Industry, in the private sector. 29 U.S.C. § 795(g) (1988). The Job Training Partnership Act established programs to prepare youths, unskilled adults, and other individuals facing serious barriers to employment for entry into the labor market. 29 U.S.C. § 1501 (1988). The Targeted Jobs Tax Credit Program authorized by the Deficit Reduction Act of 1984 provides tax credits for employers of disabled individuals. I.R.C. § 51 (1988).
34. See generally NATIONAL COUNCIL ON THE HANDICAPPED, supra note 26, app. at B-8 to -27. For instance, supported work programs usually involve life-long custodial care or pre-vocational options which offer little, if any, movement to meaningful rehabilitation and employment. See id. Vocational rehabilitation agencies, which have focused on rehabilitating individuals, do not prepare the labor force to accept workers with disabilities. See id. Furthermore, most people with disabilities are placed into entry level positions with little opportunity for advancement. See id.
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prevents individuals with disabilities from becoming self-sufficient and fully integrated citizens.  

II. THE NEED FOR COMPREHENSIVE FEDERAL LEGISLATION ADDRESSING DISCRIMINATION AGAINST INDIVIDUALS WITH DISABILITIES

Employment provides a major step toward economic self-sufficiency and social integration for most people. Society generally associates employment with independence, productivity, and financial security. Yet, Congress did not address the disabled person's employment-related problems until it passed section 504 of the Rehabilitation Act of 1973. Other federal and state programs, as well as private initiatives, have attempted to eliminate employment discrimination against individuals with disabilities. Each of the attempts, however, has fallen short of this goal.

A. Section 504 of the Rehabilitation Act of 1973

Section 504 prohibits discrimination against otherwise qualified people with disabilities under any program or activity receiving federal financial assistance. One of its specific purposes is to promote and expand employment opportunities for people with disabilities. Accordingly, the regulations implementing the statute provide detailed standards governing the responsibilities of employers to applicants and employees with disabilities. The regulations require employers to determine the competence of applicants or employees with disabilities to perform the essential functions of jobs, with or without reasonable accommodations. A reasonable accommodation is any mechanical, electrical, or human device that compensates for an individual's disability. Section 504 requires employers to make ac-
commodations unless the accommodations impose undue hardships on employers.44

Section 504's grasp, however, is limited and unpredictable.45 The language of the section focuses the dispute on issues peripheral to the substantive question of employment discrimination.46 As a result, the statute fails to provide individuals with disabilities and employers with specific legal guidelines for interaction.47 Conversely, individuals who have faced discrimination because of their race, sex, national origin, or religion have enjoyed the protection of Title VII of the Civil Rights Act of 1964, a comprehensive civil rights statute prohibiting employment discrimination.48 Other federal and state programs exist but lack the strength to bridge the gap left by section 504.

B. Miscellaneous Federal and State Programs

Employment opportunities for persons with disabilities have also increased due to federal programs designed to address their particular needs.49 The federal initiatives include vocational rehabilitation programs50 and collaborations with industry,51 as well as tax incentives.52 Some of these pro-

44. Id. § 84.12.
45. According to the Equal Employment Opportunity Commission, approximately 25,000 individuals with targeted disabilities worked for the federal government in fiscal year 1983, when the federal government had a workforce of 2.9 million. NATIONAL COUNCIL ON THE HANICAPPED, supra note 26, app. at B-51. Thus, of the entire Federal Government workforce, only .86% of the employees had disabilities. Id. The Supreme Court further limited section 504's grasp by ruling that the eleventh amendment prohibits suits for monetary damages in federal court against states and state agencies under section 504. Atascadero State Hospital v. Scanlon, 473 U.S. 234 (1985). Section 504 has also generated years of litigation because the statutory language left covered entities unsure of their obligations. See infra notes 102-154 and accompanying text; Tucker, supra note 10, at 847, 883-906; see also School Board of Nassau County v. Arline, 480 U.S. 273, 285-86 (1987) (section 504 is structured to replace reflexive reactions to disability with action based on reasoned judgment, thus necessitating an individualized inquiry into each case).
46. Tucker, supra note 10, at 883-87; see Note, supra note 7, at 999; infra note 100 and accompanying text.
47. Note, supra note 7, at 999.
49. See supra note 33 and accompanying text.
50. Id. See NATIONAL COUNCIL ON THE HANICAPPED, supra note 26, app. at B-23.
51. NATIONAL COUNCIL ON THE HANICAPPED, supra note 26, app. at 24.
52. Id. app. at B-72.
grams, however, fail to accomplish their purported goals.\textsuperscript{53} One problem is that they fail to organize well or coordinate the transition from the rehabilitation or training program to the job.\textsuperscript{54} Another is that tax credit allowances under the programs are inadequate.\textsuperscript{55} Finally, the programs tend to discourage gainful employment for persons with disabilities through income eligibility requirements.\textsuperscript{56}

State laws and programs also contribute to the employment opportunities for the disabled.\textsuperscript{57} These laws and programs, however, suffer from the same inadequacies that limit the federal programs.\textsuperscript{58} Further, programs vary from state to state.\textsuperscript{59} Consequently, this divergence frustrates and confuses those individuals who are supposed to be the programs' principal beneficiaries.\textsuperscript{60}

\textbf{C. Private Initiatives}

Private efforts have also increased employment opportunities for the disabled.\textsuperscript{61} Many of America's largest corporations have established programs to hire, retain, and promote employees with disabilities.\textsuperscript{62} For example, one large company runs a program called the Disability Management Program staffed with a licensed psychologist and a certified rehabilitation counselor.\textsuperscript{63} The program provides employees with disabilities with therapeutic and rehabilitative counseling that enables them to continue full-time employment.\textsuperscript{64} Another corporation operates a program for rehabilitation and placement of employees with disabilities.\textsuperscript{65} This program allows employees with disabi-

\textsuperscript{53} \textit{Id}. app. at B-71 to -74. Projects With Industry are an exception. They provide links between business, industry and rehabilitation service agencies and facilitate the employment of the untapped potential of people with disabilities. \textit{Id}. app. at B-57.

\textsuperscript{54} \textit{Id}. app. at B-22 to -28.

\textsuperscript{55} \textit{Id}. at 24-25.

\textsuperscript{56} \textit{Id}. app. at B-72 to -73.

\textsuperscript{57} \textit{Id}. at B-9 to -20.

\textsuperscript{58} H.R. REP. 485, supra note 1, at 47, reprinted in 1990 U.S. CODE CONG. & ADMIN. NEWS at 329.

\textsuperscript{59} \textit{Id}.

\textsuperscript{60} \textit{Id}.

\textsuperscript{61} NATIONAL COUNCIL ON THE HANDICAPPED, supra note 26, at 13-69. \textit{See generally PRESIDENT'S COMMITTEE ON EMPLOYMENT OF THE HANDICAPPED AND THE DOLE FOUNDATION, DISABLED AMERICANS AT WORK} (portraying efforts of American corporations that train and employ workers with disabilities).

\textsuperscript{62} NATIONAL COUNCIL ON THE HANDICAPPED, supra note 26, app. at B-69.

\textsuperscript{63} \textit{Id}. “For the past 12 years, the Minnesota Mining & Manufacturing Company has had a rehabilitation project called the Disability Management Program.” \textit{Id}.

\textsuperscript{64} \textit{Id}.

\textsuperscript{65} \textit{Id}. app. at B-70. “The Control Data Corporation runs a selective placement and rehabilitation program for disabled employees.” \textit{Id}.
ties to train at home or at the office through a computer-based education service.66

These companies and others with similar programs report that their programs have succeeded in lowering costs and boosting morale.67 Nevertheless, these large companies represent only a fraction of the employers in the United States.68 In the end, the numerous and divergent state and federal laws and programs have not remedied the staggering levels of unemployment and poverty that individuals with disabilities experience.69 People with disabilities continue to occupy an inferior economic and social status because limited laws and inadequate programs fail to alleviate the discrimination that denies these individuals the opportunity to compete on an equal basis.70 In addition to perpetuating psychological and physical suffering, employment discrimination costs society billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.71

III. COMPREHENSIVE FEDERAL LEGISLATION ADDRESSING DISCRIMINATION AGAINST INDIVIDUALS WITH DISABILITIES

The National Council on Disability72 issued reports to Congress in 198673 and in 198874 recommending omnibus civil rights legislation to ensure equal treatment for people with disabilities.75 From these reports emerged a comprehensive statute, the Americans With Disabilities Act of 1990 (ADA), which identified and addressed specific areas in which individuals with disa-

66. Id.
67. Id. app. at B-69 to -71.
68. See id.
69. See supra notes 28-60 and accompanying text.
70. See supra notes 25-35 and accompanying text.
72. The National Council on Disability is an independent agency whose current membership consists of 15 persons appointed by the President and confirmed by the Senate. 29 U.S.C. §§ 780-780(a) (1988). The Council was originally named the National Council on the Handicapped but was renamed the National Council on Disability after Congress learned that use of the word 'handicap' is unacceptable to individuals with disabilities. H.R. REP. 485, supra note 1, at 50-51, reprinted in 1990 U.S. CODE CONG. & ADMIN. NEWS at 332-33.
74. Id.
75. Id. See generally NATIONAL COUNCIL ON THE HANDICAPED, supra note 26; and NATIONAL COUNCIL ON THE HANDICAPED, ON THE THRESHOLD OF INDEPENDENCE (1988).
bilities face discrimination. One of the areas identified, which Congress addressed in Title I of ADA, was employment discrimination.

A. An Overview of Title I of ADA: A Civil Rights Framework

Title I of ADA addresses employment discrimination and covers employers, employment agencies, labor organizations, and joint labor-management committees. Title I of ADA is similar to Title VII of the Civil Rights Act of 1964 in that it prohibits discrimination against people with disabilities with respect to hiring and all terms, conditions, and privileges of employment. More specifically, ADA protects qualified individuals with disabilities from treatment that adversely affects their employment opportunities.


77. Americans with Disabilities Act of 1990 §§ 101-108 (to be codified at 42 U.S.C. §§ 12111-12117). The remaining titles address discrimination against disabled by instruments of a State or local government, including public transit authorities (Title II id. §§ 201-245 (to be codified at 42 U.S.C. §§ 12131-12134, 12141-12150, 12161-12165); discrimination against disabled in the full and equal enjoyment of goods and services offered by any place of public accommodation by a private entity (Title III id. §§ 301-310 (to be codified at 42 U.S.C. §§ 12181-12189); Title IV specifies that telephone services offered to the general public must include telecommunication relay services to accommodate the hearing impaired. Id. §§ 401-402 (to be codified at 47 U.S.C. §§ 225, 611). Title V addresses miscellaneous issues not covered in the rest of ADA. Id. §§ 501-514 (to be codified at 42 U.S.C. §§ 12201-12213).

78. See supra note 11 and accompanying text.

79. See id.

because of their disabilities.\textsuperscript{81} ADA requires employers to adopt unbiased hiring and promotion criteria and to make reasonable accommodations for the known limitations of the disabled individual, unless the accommodation would impose an undue hardship on the employers.\textsuperscript{82} Under ADA, the Equal Employment Opportunity Commission (EEOC)\textsuperscript{83} enforces the em-

\begin{enumerate}
\item limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;
\item participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this title . . . ;
\item utilizing standards, criteria, or methods of administration—
  \begin{enumerate}
  \item that have the effect of discrimination on the basis of disability; or
  \item that perpetuate the discrimination of others who are subject to common administrative control;
  \end{enumerate}
\item excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;
\item (A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or
\item (B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;
\item using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and
\item failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).
\end{enumerate}

\textsuperscript{81} Id. \textsuperscript{82} Id. \textsuperscript{83} See supra notes 13-14 and accompanying text.
ploymnet provisions and has authority to use the remedies and procedures established under Title VII of the Civil Rights Act of 1964 to ensure compliance.84

In drafting Title I of ADA, Congress used Title VII of the Civil Rights Act of 196485 and section 504 of the Rehabilitation Act as their legislative models.86 The similarities and differences between these statutes emphasize Congress' recognition that discrimination against people with disabilities is more complex than other types of discrimination.87

1. Comparison of Title VII of the Civil Rights Act of 1964 with Title I of ADA

Both Title VII of the Civil Rights Act of 1964 and Title I of ADA are comprehensive federal statutes which prohibit private employers from discriminating against employees.88 To ensure compliance, the enforcement mechanisms of both acts provide the EEOC89 with the authority to initiate suits against employers on behalf of employees.90 Although the basic framework of both Title I of ADA and Title VII of the Civil Rights Act appears identical, Title I goes beyond the protections of Title VII. Because people with disabilities are limited not only by their disabilities, but also by discrimination from employers, Title I attempts to eliminate both limitations.91 Therefore, while Title VII requires employers to hire or promote individuals protected by the Civil Rights Act of 1964, which does not cover individuals with disabilities,92 Title I requires employers to hire or promote individuals with disabilities and to accommodate those individuals' disabilities.93


85. Id.

86. Id.; see also Note, Accommodating the Handicapped: Rehabilitating Section 504 After Southeastern, 80 COLUM. L. REV. 171, 172-76 (1984) (discussing legislative history of section 504).


88. See supra notes 13, 48 and accompanying text.

89. Id.

90. Id.


92. 42 U.S.C. § 2000e-2(a) (1988). The employer may have to make accommodations for an employee's religious practices. Id.

93. See supra notes 78-82 and accompanying text.
2. **Comparison of Section 504 of the Rehabilitation Act of 1973 With Title I of ADA**

Title I's provisions resemble the regulatory language of section 504. For instance, both section 504 and Title I seek to prohibit discrimination against individuals with disabilities. Section 504, however, protects "otherwise qualified" individuals with disabilities while Title I protects "qualified individual[s]" with disabilities. Both section 504 and Title I require employers to determine the competence of applicants or employees with disabilities to perform the essential functions of jobs with or without reasonable accommodations.

Despite the similarities between section 504 and Title I, differences between the two pieces of legislation make the effect of Title I unclear. For example, the two statutes apply to different types of employers. Title I applies to private employers that may not receive governmental funding to offset the costs of accommodation. Section 504, however, applies to federal employers or employers that receive federal funds. Thus, employers subject to section 504 may have been more willing to comply with that section because government funds may have paid indirectly for any accommodation costs. The following examination of Title I's key provisions, in light of their similarity to section 504 provisions, reveals no quick and easy answers about the impact of Title I.

### B. Key Provisions of Title I of ADA

#### 1. Who Is Protected Under Title I of ADA

Title I requires that an applicant or employee with a disability be a "qualified individual with a disability" to enjoy the protection of the law. This term differs from the language of section 504, which protects disabled indi-

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94. See *supra* notes 12-13 and accompanying text.
96. Compare Americans with Disabilities Act of 1990 § 102 (defining discrimination) with 45 C.F.R. §§ 84.11-14 (explaining the intricacies of discrimination, reasonable accommodation, employment criteria, and pre-employment inquiries).
98. Americans with Disabilities Act of 1990 § 101(8). A qualified individual with a disability is "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." *Id.*
individuals who are "otherwise qualified," because litigation under section 504 tended to prevent the parties from reaching the substantive discrimination issue by allowing employers to focus on whether section 504 covered the employees or applicants.  

For example, in School Board of Nassau County v. Arline, the United States Supreme Court declined to decide whether Arline, who had tuberculosis, was "otherwise qualified" for the job of elementary school teacher. Arline taught elementary school in Nassau County, Florida from 1966 until 1979, when she suffered her third relapse of tuberculosis within two years. The school system terminated Arline's employment because of her tuberculosis. After Arline unsuccessfully challenged her termination at the administrative level, she brought suit against the school system in federal court under section 504. The United States District Court for the District of Florida found that, despite Arline's handicap, section 504 did not protect her. Specifically, the court held that even if it covered her, the contagious nature of Arline's disease prevented her from being otherwise qualified to teach elementary school.  

The United States Court of Appeals for the Eleventh Circuit reversed and remanded the lower court's holding for further proceedings. The United States Supreme Court granted certiorari to decide whether, within the statutory and regulatory framework of section 504, it would consider Arline

99. 29 U.S.C. § 794 (1988). The term used in section 504 is "otherwise qualified individual with handicaps."

100. National Council on the Handicapped, supra note 26, at A-19. The term "otherwise qualified" allows employers to argue that the individual with a disability is not covered by the law. Id. For example, in Davis v. Southeastern Community College, 442 U.S. 397 (1979), the Supreme Court held that an otherwise qualified handicapped individual within the meaning of section 504 is one who is able to meet all of the program's requirements "in spite of" his or her handicap. Id. at 406. The plaintiff in Davis was a licensed practical nurse who had a hearing impairment. Id. at 401. Defendant rejected her from an associate degree nursing program because the college believed that her hearing impairment prevented her from performing the duties of a registered nurse. Id. The Court decided that the defendant disqualified Davis because she was hearing impaired, rather than deciding whether she met the requirements of a registered nursing candidate apart from her hearing impairment. Id. at 406.


102. Id. at 276.

103. Id.

104. Id.

105. Id. at 277.

106. Id.


a handicapped individual and, if so, whether she was otherwise qualified for the job of elementary school teacher.\textsuperscript{109}

The Court refused to distinguish between Arline's contagiousness and her physical impairment because the Court determined that the underlying conditions were the same.\textsuperscript{110} Furthermore, the Court could not find legislative history supporting a distinction between an individual's physical impairment and the underlying condition.\textsuperscript{111} Instead, the Court focused on Congressional acknowledgment of society's unfortunate apprehension about disability and disease\textsuperscript{112} and interpreted section 504 to include those with contagious diseases.\textsuperscript{113} The Court noted, however, that if the individual poses a significant risk of transmitting the infection,\textsuperscript{114} the employer may deny the individual employment for failing to meet qualification standards.\textsuperscript{115}

Although the Court found that section 504 covered Arline,\textsuperscript{116} it declined to rule on her status as otherwise qualified because the district court's factual findings were inadequate on four counts.\textsuperscript{117} Specifically, the district court failed to make findings on the duration and severity of Arline's disease,\textsuperscript{118} on whether she was contagious at the time of her discharge,\textsuperscript{119} on the probability that she would transmit the disease,\textsuperscript{120} and on whether the School Board could have reasonably accommodated her.\textsuperscript{121} Accordingly, the Court remanded the case to the district court to determine whether Arline was otherwise qualified for her former position.\textsuperscript{122}

\textsuperscript{109} Id.

\textsuperscript{110} Arline, 480 U.S. at 282 & n.7. "It would be unfair to allow an employer to seize upon the distinction between the effects of a disease on others and the effects of a disease on a patient and use the distinction to justify discriminatory treatment." Id.

\textsuperscript{111} Id. at 282.

\textsuperscript{112} Id. at 284. "Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment." Id.

\textsuperscript{113} Id. at 285-86.

\textsuperscript{114} Id. at 285.

\textsuperscript{115} Id. at 287 n.16. Whether the individual poses a significant risk of transmitting the infection will be a question for the medical profession. Id. at 288.

\textsuperscript{116} Id. at 286.

\textsuperscript{117} Id. at 287-88.

\textsuperscript{118} Id. at 288.

\textsuperscript{119} Id.

\textsuperscript{120} Id.

\textsuperscript{121} Id. at 288-89. In Arline, the Court relegated the accommodation issue to a footnote. Id. at 289 n.19. The Court declined further discussion on the issue because, without a determination on Arline's qualifications for the job, an inquiry into accommodation was speculative. Id.

\textsuperscript{122} Id. at 289.
The Court's discussion of section 504 revealed that it expects employers to follow the letter and the spirit of that law.\textsuperscript{123} Similarly, the Court will expect employers to follow the letter and spirit of Title I.\textsuperscript{124} Based on Arline, the burden is on employers to determine with particularity the nature of the disabilities, the exact limitations that the disabilities impose on individuals, the ability of individuals to perform the essential functions of particular jobs, and whether the employers can make reasonable accommodations.\textsuperscript{125}

2. The Employer's Responsibility to Use Nondiscriminatory Selection Criteria and to Make Reasonable Accommodations

Title I of ADA also directs employers to meet certain requirements before rejecting applicants with disabilities as unqualified for employment.\textsuperscript{126} First, ADA requires employers to design the employment selection procedures to assure that persons with disabilities are not excluded from job opportunities unless they are actually unable to do the job.\textsuperscript{127} Second, if employers use tests in the hiring process, ADA puts the burden on employers to select and administer the employment tests so that the tests reflect the applicants' aptitude and skills rather than the applicants' impairment.\textsuperscript{128}

In theory, Title I of ADA demands no more than that employers consider the disabled applicants for employment. Consideration of applicants with disabilities means that employers' selection criteria must be unbiased, job-related, and consistent with business necessity.\textsuperscript{129} Selection procedures must

\begin{footnotesize}
123. \textit{Id.} at 280-86.

124. \textit{Id.} at 288-89. Title I defines disability as section 504 does and implies that individuals with contagious diseases are covered. ADA defines disability as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." Americans with Disabilities Act of 1990 Pub. L. No. 101-336, § 3(2), 104 Stat. 327, 330 (1990) (to be codified at 42 U.S.C. § 12102). The legislative history of Title I, citing \textit{Arline}, makes clear that Title I covers individuals with contagious diseases. H.R. REP. 485, \textit{supra} note 1, at 53, \textit{reprinted} in 1990 \textit{U.S. Code Cong. & Admin. News} at 335; \textit{see also} 136 \textit{Cong. Rec.} S9686 (daily ed. July 13, 1990).

125. 480 U.S. at 287-88.


128. \textit{Id.}

129. \textit{Id.} § 102(b). For example, [i]f a person with a disability applies for a job and meets all selection criteria except one that he or she cannot meet because of a disability, the criterion must concern this essential, non-marginal aspect of the job, and be carefully tailored to measure the person's actual ability to do an essential function of the job. If the criterion meets this test, it is nondiscriminatory on its face and it is otherwise lawful under the legislation. However, the criterion may not be used to exclude an applicant with a disa-
\end{footnotesize}
measure the applicants' competence for essential job functions only. Furthermore, employers must make reasonable accommodations to assist applicants in meeting legitimate criteria.

The law will eventually apply to all employers who employ fifteen or more people. Many employers, particularly smaller ones, may perceive this legislation as an unjustified encroachment upon their discretion in making employment decisions. ADA not only requires employers to make reasonable accommodations for qualified individuals with a disability, but also requires employers to monitor closely selection criteria. From the employers' perspective, selection criteria and mandatory accommodation requirements affect employment decisions because they typically include financial and administrative commitments or burdens.

Generally, courts have interpreted provisions in section 504 as offering a high degree of protection to the applicant or employee. In Stutts v. Freeman, the court held that an employer cannot use a job qualification as a defense to a charge of discrimination under the ADA if the criterion can be satisfied by the applicant with a reasonable accommodation. H.R. Rep. 485, supra note 1, at 71-72, reprinted in 1990 U.S. Code Cong. & Admin. News at 353-54.

130. Id.
131. Id.
132. See supra notes 10-11 and accompanying text.
133. See, e.g., 135 Cong. Rec. S10,742 (daily ed. Sept. 7, 1989) (letter from the National Federation of Independent Business supporting an amendment to provide a refundable tax credit for $6,000 for small businesses to comply with ADA); 135 Cong. Rec. S10,954 (daily ed. Sept. 12, 1989) (discussing potentially prohibitive costs associated with Title I compliance); see also Tucker, supra note 10, at 911 (correspondence with Senators about the ADA and their constituents' concerns over cost).
134. Americans with Disabilities Act of 1990 § 102(b)(6)-(7) (to be codified at 42 U.S.C. § 12112). However, it may be a defense to a charge of discrimination under this Act that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation. S. Rep. No. 933, 101st Cong., 1st Sess. § 103(a) (1989). "The term 'qualification standards' may include a requirement that an individual with a currently contagious disease or infection shall not pose a direct threat to the health or safety of other individuals in the workplace." Id. § 103(b).
135. See sources cited supra note 133.
136. See Southeastern Community College v. Davis, 442 U.S. 397 (1979) (with respect to educational programs, "otherwise qualified" refers to academic and technical requirements and that precedent mandates accommodation even when it becomes expensive). Compare Mantolete v. Bolger 767 F.2d 1416, 1421 (9th Cir. 1985) (federal agencies must structure their procedures and programs to ensure that handicapped individuals are afforded equal opportunity in both job assignment and promotion); Stutts v. Freeman, 694 F.2d 666 (11th Cir. 1983) (whether dyslexic individual was capable of participating in training program for position of heavy equipment operator); Prewitt v. United States Postal Serv., 662 F.2d 292, 306 (5th Cir. 1981) (section 504 prohibits barrier discrimination); Nelson v. Thornburgh, 567 F. Supp. 369
man,\textsuperscript{137} the employer, Tennessee Valley Authority (TVA), denied Stutts’ application to enter a training program to become a heavy equipment operator because Stutts scored poorly on a written test.\textsuperscript{138} Stutts’ dyslexic condition prevented him from doing well on the written test, but the record reflected that he could perform the job of heavy equipment operator.\textsuperscript{139} Thus, the United States Court of Appeals for the Eleventh Circuit considered the issue of whether both the written test for admission to the program and the reading requirements of the training program itself were necessary criteria for the job of heavy equipment operator.\textsuperscript{140} The court held that the TVA had the obligation to determine whether a reasonable accommodation could enable Stutts to meet the employment criteria at issue.\textsuperscript{141} Because the TVA failed to administer nonwritten tests and to inquire about alternative accommodations, the court determined that the TVA had violated section 504.\textsuperscript{142}

Similarly, in \textit{Hall v. United States Postal Service},\textsuperscript{143} the United States Postal Service denied Hall a distribution clerk position because she was unable to meet a seventy pound lifting requirement.\textsuperscript{144} The United States Court of Appeals for the Sixth Circuit refused to accept the Postal Service’s written job description of the distribution clerk position as the sole definition of the job.\textsuperscript{145} The court held that the description denied the court the opportunity

(\textit{E.D. Pa. 1983}, \textit{aff’d}, 732 F.2d 146 (3rd Cir. 1984), \textit{cert. denied}, 469 U.S. 1188 (1985) (refusal of a state agency to provide readers for blind social workers was, despite significant expense, discriminatory) \textit{with Walker v. Attorney Gen. of the United States}, 572 F. Supp. 100 (D.D.C. 1983); \textit{Boyd v. United States Postal Serv.}, 32 Fair Empl. Prac. Cas. (BNA) 1217 (W.D. Wash. 1983), \textit{aff’d}, 752 F.2d 410 (9th Cir. 1985) (both courts held that section 504 mandates equality of treatment). \textit{See also H.R. REP. 485, supra note 1, at 68, reprinted in 1990 U.S. CODE CONG. & ADMIN. NEWS at 350 (the Committee makes clear its intention that more than de minimis costs for accommodation may be necessary for compliance with title I).}

\textsuperscript{137} 694 F.2d 666 (11th Cir. 1983).
\textsuperscript{138} \textit{Id.} at 668.
\textsuperscript{139} \textit{Id.}
\textsuperscript{140} \textit{Id.} at 668-69.
\textsuperscript{141} \textit{Id.}
\textsuperscript{142} \textit{Id.}
\textsuperscript{143} 857 F.2d 1073 (6th Cir. 1988).
\textsuperscript{144} \textit{Id.} at 1075. The applicant was reapplying to the Postal Service where she had worked before an on-the-job automobile accident caused injury to her right hip, foot, and back. \textit{Id.} These injuries prevented her from meeting the 70 pound lifting requirement. \textit{Id.} Whether Hall’s inability to lift 70 pounds made her disabled is questionable. \textit{Id.} However, Hall’s status as disabled was uncontested. \textit{Id.} Instead, the dispute centered on whether Hall was otherwise qualified for the position of distribution clerk and whether the seventy pound lifting requirement was an essential job function. \textit{Id.} at 1078.

\textsuperscript{145} \textit{Id.} at 1079. The affidavit submitted by the Employment and Placement Supervisor averred that distribution clerks must do substantial amounts of heavy lifting and thus it was an essential element of the job. \textit{Id.} The court characterized the Supervisor’s conclusion as legal. \textit{Id.} The court thought it could very well come to a different conclusion on whether it was essential after conducting an individualized inquiry. \textit{Id.}
to engage in the highly fact-specific inquiry necessary to determine the essential functions of the job. Furthermore, the court determined that section 504 obligated the Postal Service to make reasonable accommodations for Hall if the seventy pound lifting requirement was an essential job function. Accordingly, the court found that the employer’s failure to evaluate the particular function of the job in relation to the entire enterprise and to make reasonable accommodations violated section 504. The court remanded the case for a determination of whether a seventy pound lifting requirement reflected the essential functions of a distribution clerk within the business enterprise.

Both courts agreed that the employer bears the burden of designing and adopting fair, unbiased selection procedures and of providing for reasonable accommodation where the employer must consider an applicant’s disability. Title I of ADA goes further, however, by providing some guidance as to what constitutes fair selection procedures and reasonable accommodations. The accommodations provisions focus on the relationship between individuals’ disabilities and the functions of specific jobs. The legislative

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146. Id. Title I, however, warns courts to accept the employer’s written job description as some evidence of the essential functions of the job.

For the purposes of this title, 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.


147. Hall, 857 F.2d at 1080.

148. Id.

149. Id.

150. Both Stutts and Hall demonstrate that the line drawing will be done on a case-by-case basis. Indeed, a case-by-case approach is the most reasonable solution. Jobs and individuals with disabilities come in no standard mold which makes uniform and constant line drawing unworkable.

151. Americans with Disabilities Act of 1990 § 101(9), which defined reasonable accommodation as:

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

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

Id.

history of Title I of ADA suggests solutions for accommodations under three possible scenarios.\textsuperscript{153}

In the first and simplest scenario, both employers and applicants know of and agree on obvious reasonable accommodations.\textsuperscript{154} Here, employers need spend little time or money for installation or training.\textsuperscript{155}

Under the second scenario, more than one reasonable option may exist to accommodate applicants or employees.\textsuperscript{156} In this case, employers may need to consult with applicants or employees to arrive at the best solutions.\textsuperscript{157} Employers may spend extra time arriving at the best accommodations, but will eventually arrive at thoroughly investigated accommodations.\textsuperscript{158}

Under the third scenario, neither employers nor applicants or employees know of reasonable accommodations.\textsuperscript{159} This scenario may occur when employers are unfamiliar with particular disabilities, and the applicants or employees are unfamiliar with job details.\textsuperscript{160} In this case, employers and applicants must collaborate to identify the barriers to equal opportunity and the reasonableness of the possible accommodations.\textsuperscript{161}

Some employers will perceive the suggested process for reaching a reasonable accommodation as time consuming, expensive and, thus, unreasonable.\textsuperscript{162} Nevertheless, ADA permits employers to disqualify applicants or employees only when all possible accommodations prove to be unreasonable; that is, where all alternative accommodations impose an undue hardship on employers.\textsuperscript{163}

\textsuperscript{153} Id.
\textsuperscript{154} Id.
\textsuperscript{155} Id.
\textsuperscript{156} Id. Where one or more possible accommodations are identified, the Committee suggests that each be evaluated in terms of effectiveness for the employee and equal opportunity. "Factors to be considered include the reliability of the accommodation and whether it can be provided in a timely manner." Id. at 66, reprinted in 1990 U.S. CODE CONG. & ADMIN. NEWS at 348.
\textsuperscript{157} Id.
\textsuperscript{158} Generally, if accommodations work poorly or prevent employees from performing as well as possible, this makes employers lose money in man hours and works to frustrate employees. "[A] reasonable accommodation should provide meaningful equal employment opportunity. Meaningful equal employment opportunity means an opportunity to attain the same level of performance as is available to non-disabled employees having the similar skills and abilities." Id. at 66, reprinted in 1990 U.S. CODE CONG. & ADMIN. NEWS at 349.
\textsuperscript{159} Id.
\textsuperscript{160} Id.
\textsuperscript{161} Id.
\textsuperscript{163} Americans with Disabilities Act of 1990 § 102(B)(5)(a), Pub. L. No. 101-336, 104 Stat. 327, 332 (to be codified at 42 U.S.C. § 12112). Factors to be used in determining whether an accommodation would impose an undue hardship include:
3. What Factors Are Used to Determine Undue Hardship

Title I of ADA defines undue hardship as an action requiring significant difficulties or expenses for employers. Determining what constitutes a significant difficulty or expense requires an inquiry into the individual employer's overall size, including number of facilities and employees, type of operation and budget. If the accommodation that allows the applicant with a disability to perform the essential functions of a particular job is so costly as to be an undue hardship on the employer, that employer may then reject the disabled applicant in favor of a nondisabled applicant. The statutory language of Title I of the ADA is consistent with the regulations implementing section 504 of the 1973 Act. As with selection criteria and reasonable accommodation requirements, courts have generally interpreted the undue hardship provision as offering a high degree of protection to applicants or employees.

For instance, in Nelson v. Thornburgh, blind income maintenance workers brought an action against their employer, the Department of Public Welfare, for discrimination under section 504. The plaintiffs alleged that they could not perform their jobs satisfactorily without the aid of a

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(i) the nature and cost of the accommodation needed under this Act;
(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.

_id._ § 101(10)(B). Employers are "still free to select applicants for reasons unrelated to the existence or consequence of a disability." _H.R. REP._ 485, _supra_ note 1, at 56, reprinted in _U.S. CODE CONG. & ADMIN. NEWS_ at 338. Thus, employers are free to choose nondisabled applicants if faced with choices between similarly qualified disabled and nondisabled applicants. _Id._

164. _See supra_ note 163.
165. _Id._
166. _Id._
167. _See 45 C.F.R. § 84.12 (1989)._ 
168. _See supra_ notes 126-163 and accompanying text.
169. _Id._
170. Nelson v. Thornburgh, 567 F. Supp. 369, 379-81 (E.D. Pa. 1983). The court recognized that cases interpreting section 504 have been fairly consistent in holding that preventing discrimination against individuals with disabilities will entail expenditure of funds. _Id._ at 381.
172. _Id._ at 370-71.
reader. The plaintiffs incurred the expense of hiring part-time readers on their own. Each plaintiff separately requested their employer to assume the expenses of readers. The employer, however, rejected the requests for budgetary reasons. The plaintiffs challenged their employer’s decisions at the administrative level and lost. Plaintiffs then sued in the United States District Court for the Eastern District of Pennsylvania. In holding for the plaintiffs, the court relied heavily on the regulations implementing section 504. Specifically, the court noted that the provision of readers was an express regulatory example of reasonable accommodation and that the cost of providing part-time readers, although significant, was modest compared to the employer’s overall budget. Accordingly, the court determined that the employer had failed to meet its burden of showing undue hardship.

Because the undue hardship provision depends on the particular employer, courts will decide this issue under Title I on a case-by-case basis. Indeed, the nature of the definition of undue hardship will leave employers guessing about whether they are in compliance and such uncertainty may be costly. Nevertheless, the employers’ costs of guessing seem small compared to the societal cost of excluding capable and qualified people with disabilities from the workforce.

173. Id. at 370.
174. Id.
175. Id. at 370-71.
176. Id. at 374.
177. Id.
178. Id. at 371.
179. Id. at 379.
180. Id. at 382.
181. Id. at 389.
182. See supra note 163 and accompanying text.
184. See infra notes 185-94 and accompanying text. This is as it should be. Lawmakers must draw statutes to include those who deserve protection and exclude who do not. For instance, there are some people who may have psychological motives for identifying themselves as persons with disabilities and, therefore, deserving of the protection of the law. NATIONAL COUNCIL ON THE HANDICAPPED, supra note 26, at 3-4. However, an inquiry into their physical and mental condition indicates fitness. Id. These people do not want to work and are looking for a way to make someone else pay their way. Id. On the other hand, some people who are truly disabled refuse to acknowledge their disability and suffer because they are psychologically unable to accept the fact that they must compensate for the disability. Id. These people may be more willing to seek the protection of Title I because it protects civil rights without the charity of public assistance. Id.
IV. THE BENEFITS OF TITLE I OF ADA OUTWEIGH THE COSTS

Society spends billions of dollars annually supporting individuals with disabilities.\textsuperscript{185} People with disabilities, even the most severely disabled, however, can become productive members of society.\textsuperscript{186} Title I of ADA could have a direct impact on reducing the federal government's $60 billion annual expenditure on disability benefits and programs that are premised upon the dependency of individuals with disabilities.\textsuperscript{187} Title I could reduce the need of people with disabilities for supplemental security income and disability, medical, and food stamp payments.\textsuperscript{188} Each of these benefits expenditures recurs and increases annually. Training and integrating individuals with disabilities into the workforce, however, decreases both the government benefits and the training expenses for those individuals. Moreover, these individuals become self-sufficient.\textsuperscript{189}

Second, people with disabilities represent a vast untapped labor pool.\textsuperscript{190} Studies show that previously unemployed individuals with disabilities become among the most dedicated and conscientious employees once hired.\textsuperscript{191} Loyal and hard-working employees directly affect the bottom line of any organization. These employees are less likely to leave, thereby reducing costly employee turnover.

Third, studies show that most reasonable accommodations are relatively inexpensive.\textsuperscript{192} Studies anticipate that costs to businesses for reasonable accommodations will range between fifty and one hundred dollars for each employee needing accommodations.\textsuperscript{193} In addition, these studies predict that fifty-one percent of those needing accommodations will require no expenses at all.\textsuperscript{194} Consequently, the odds are heavily against businesses spending excessive amounts of money on accommodations for employees.

\textsuperscript{185} NATIONAL COUNCIL ON THE HANDICAPPED, \textit{supra} note 26, at 12.
\textsuperscript{186} \textit{Id.} app. at C-25; \textit{see, e.g., NATIONAL COUNCIL ON THE HANDICAPPED, ON THE THRESHOLD OF INDEPENDENCE} 14-16 (1988).
\textsuperscript{187} NATIONAL COUNCIL ON THE HANDICAPPED, \textit{supra} note 26, at C-21 to -25; \textit{see H.R. REP. 485, supra note 1, at 148, reprinted in 1990 U.S. CODE CONG. & ADMIN. NEWS} at 325; Tucker, \textit{supra} note 10, at 889 & n.237.
\textsuperscript{188} NATIONAL COUNCIL ON THE HANDICAPPED, \textit{supra} note 26, app. at C-21 to -25.
\textsuperscript{189} \textit{Id.}
\textsuperscript{190} \textit{Id.} at B-57.
\textsuperscript{191} See Tucker, \textit{supra} note 10, at 912-13. \textit{"[D]isabled employees often are found to be better workers than nondisabled employees."} \textit{Id.}
\textsuperscript{192} \textit{Id.} at 913 & n.350; \textit{see NATIONAL COUNCIL ON THE HANDICAPPED, \textit{supra} note 26, app. at A-16.}
\textsuperscript{193} SENATE COMM. ON LABOR AND HUMAN RESOURCES, 101ST CONG., 1ST SESS., \textit{QUESTIONS AND ANSWERS ON THE SUBSTITUTE AMENDMENT TO S.933, THE AMERICANS WITH DISABILITIES ACT OF 1989} (August 31, 1989).
with disabilities. Further, ADA requires only reasonable accommodations, thereby relieving businesses from significant difficulties or expenses. Therefore, the costs imposed by ADA are trivial when compared with the benefits that people with disabilities, society, and businesses will reap from ADA.

V. CONCLUSION

The requirements of Title I of the Americans With Disabilities Act prevent employers from relying on presumptions, stereotypes, misconceptions, and unfounded fears about increased costs and decreased productivity when making employment decisions. Employers must make particularized inquiries about the actual abilities of disabled applicants or employees. In the selection process, employers must consider impairments in an effort to reduce the manifestation of impairments or to design accommodations. The obligation to factor in the impairments, however, disappears when employers weigh the applicants' actual abilities to perform their jobs.

Nevertheless, the language of Title I gives the courts the flexibility to decide each case without restraint from rigid guidelines that might not protect truly disabled individuals. In the end, Title I simply demands that employers not shun applicants or employees with disabilities for traits over which they have no control.

ADA will not end all discrimination against persons with disabilities. The pertinent language of Title I is elastic, and the courts must rely on legislative intent to make it work. Congress intended that businesses and the courts recognize that the primary focus of Title I is to integrate the disabled into our society by giving them a workable tool with which to achieve self-sufficiency and independence. Title I of the Americans With Disabilities Act is the right tool. It makes employers more responsible for the people who happen to have impairments. Title I of ADA also makes people with disabilities less dependent on government assistance and gives them the opportunity to become integrated and productive members of society.

Elizabeth Clark Morin