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## Addiction As Disability: The Protection of Alcoholics and Drug Addicts Under the Americans with Disabilities Act of 1990

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# Addiction As Disability: The Protection of Alcoholics and Drug Addicts Under the Americans with Disabilities Act of 1990

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## I. INTRODUCTION

With the passage of the Americans with Disabilities Act of 1990 (ADA),<sup>1</sup> Congress finally acknowledged that employment discrimination against the disabled continues to be a serious problem in the United States. Approximately forty-three million Americans are disabled.<sup>2</sup> As many as two-thirds of disabled individuals of working age are unemployed, and half of all adults with disabilities have household incomes of fifteen thousand dollars or less.<sup>3</sup> Although most unemployed disabled individuals depend on insurance payments or government benefits for support,<sup>4</sup> polls reveal that a majority would rather work than depend on such assistance.<sup>5</sup> The ADA provides a comprehensive plan for mainstreaming disabled individuals into American society.<sup>6</sup> Congress drafted the various provisions of the ADA—covering transportation,<sup>7</sup> public accommodations,<sup>8</sup> telecommunications,<sup>9</sup> and employment discrimination<sup>10</sup>—to remove the physical and attitudinal barriers preventing qualified individuals with disabilities from obtaining employment.<sup>11</sup>

Not all disabilities, however, are considered equally worthy of protection; the ADA specifically excludes some conditions recognized as "handicaps" under its predecessor,<sup>12</sup> the Rehabilitation Act of 1973.<sup>13</sup>

1. Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended in scattered sections of 29, 42, and 47 U.S.C.) [hereinafter ADA].

2. *Id.* § 2(a)(1), 104 Stat. at 328.

3. 136 CONG. REC. H2428 (daily ed. May 17, 1990) (statement of Rep. Wayne Owens); see also H.R. REP. NO. 485, 101st Cong., 2d Sess., pt. 2, at 32 (1990) (stating that by 1988 disabled persons earned between 36% and 38% less than other workers).

4. See H.R. REP. NO. 485, *supra* note 3, at 33.

5. See 135 CONG. REC. S10,791 (daily ed. Sept. 8, 1989) (statement of Sen. Donald W. Riegle).

6. See H.R. REP. NO. 485, *supra* note 3, at 22 (stating that "[t]he purpose of the ADA is to provide a clear and comprehensive national mandate to end discrimination against individuals with disabilities and to bring persons with disabilities into the economic and social mainstream of American life").

7. ADA, *supra* note 1, §§ 201-246, 104 Stat. at 337-53.

8. *Id.* §§ 301-310, 104 Stat. at 353-65.

9. *Id.* §§ 401-402, 104 Stat. at 366-69.

10. *Id.* §§ 101-108, 104 Stat. at 330-37.

11. For a general overview of the various provisions of the ADA, see Tucker, *The Americans with Disabilities Act: An Overview*, 1989 U. ILL. L. REV. 923.

12. Compare ADA, *supra* note 1, § 511(b), 104 Stat. at 376 (excluding, among other things, transvestism and compulsive gambling from the definition of "disability") with *Blackwell v. United States Dep't of Treasury*, 639 F. Supp. 289 (D.D.C. 1986) (recognizing transvestism as a handicap under the Rehabilitation Act) and *Rezza v. United States Dep't of Justice*, 698 F. Supp. 586 (E.D. Pa. 1988) (recognizing compulsive gambling as a handicap under the Rehabilitation Act); see also Note, *Government Drug Testing: A Question of Reasonableness*, 43 VAND. L. REV. 1343, 1373-74 (1990) (discussing employees' attempts to argue that "drug addiction" is a handicap protected from discrimination by the Rehabilitation Act of 1973).

13. Pub. L. No. 93-112, 87 Stat. 357 (1973) (codified as amended at 29 U.S.C. §§ 701-796 (1988)) [hereinafter Rehabilitation Act].

To add to the confusion, Title I of the ADA excludes some alcoholics and drug addicts<sup>14</sup> from its protections, but does not exclude others. Specifically, section 104 excludes all individuals “currently engaging in” the use of illegal drugs,<sup>15</sup> but leaves protected those individuals who previously used illegal drugs but have been rehabilitated or have entered rehabilitation. It also protects those whom employers erroneously identify as drug users.<sup>16</sup> Establishing whether Congress intended section 104 to codify judicial interpretations of the Rehabilitation Act’s provisions regarding addicts<sup>17</sup> or to create a new standard will determine how employers must treat applicants and employees with alcohol or drug abuse problems, past or present.<sup>18</sup>

This Note explores the ramifications of the ADA’s “currently engaging in” standard for alcoholic and drug-addicted employees and applicants. Part II reviews the employment discrimination provisions of the ADA. Part III outlines the protection previously afforded addicts under section 504 of the Rehabilitation Act of 1973. Part IV examines the ADA’s new “currently engaging in” standard as articulated in section 104 of Title I. Part V explores the policy considerations behind the “currently engaging in” standard and discusses the effects it is likely to have on addicts in the workplace. Finally, Part VI suggests an analytical approach that would avoid the confusion created by the Rehabilitation Act. This Note concludes in Part VII that the ADA’s “currently

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14. Title I excludes drug users rather than drug addicts; thus, addicts are excluded only if they currently use illegal drugs. See ADA, *supra* note 1, § 104(a), 104 Stat. at 334. More confusing is the difference between the terminology of the Rehabilitation Act, *supra* note 13, § 706(8)(B) (“drug abusers”), and that of the agencies and courts interpreting that act. See, e.g., *Burka v. New York City Transit Auth.*, 680 F. Supp. 590 (S.D.N.Y. 1988) (“drug addicts”); 45 C.F.R. § 85.3 (1989) (Department of Health and Human Services (HHS) regulations) (“drug addicts”). At least one court has suggested, however, that these terms are interchangeable. See *Burka*, 680 F. Supp. at 600 n.18. Throughout this Note the term “drug addicts” means both “drug abusers,” as Congress used that term in the Rehabilitation Act, and “drug addicts,” as federal agencies and courts have used that term in the regulations and case law, on the assumption that Congress, federal agencies, and the courts are referring to the same class of individuals.

15. ADA, *supra* note 1, § 104(a), 104 Stat. at 334. Section 104(a) reads, in pertinent part: “the term ‘qualified individual with a disability’ shall not include any employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.” *Id.* (emphasis added); see also *infra* Part IV.

16. ADA, *supra* note 1, § 104(b), 104 Stat. at 335. Section 104(b) reads, in pertinent part: Nothing in subsection (a) shall be construed to exclude as a qualified individual with a disability an individual who—(1) has successfully completed a supervised drug rehabilitation program [or has otherwise been rehabilitated successfully] and is no longer engaging in the illegal use of drugs . . . ; (2) is participating in a supervised rehabilitation program and is no longer engaging in such use; or (3) is erroneously regarded as engaging in such use . . . . *Id.*; see also *infra* subpart III(C).

17. See *infra* notes 126-55 and accompanying text.

18. This Note focuses exclusively on the employment discrimination provisions of the ADA and primarily on Title I. For a general overview of the ADA’s other provisions, see Tucker, *supra* note 11.

engaging in" standard strikes a fair balance between the legitimate concerns of employers and employees and that, if interpreted properly, the standard will clarify the scope of protection afforded addicts.

## II. THE EMPLOYMENT DISCRIMINATION PROVISIONS OF THE AMERICANS WITH DISABILITIES ACT

Section 102 of the ADA prohibits discrimination<sup>19</sup> in employment and employment-related decisions<sup>20</sup> by all covered entities<sup>21</sup> against any qualified individual with a disability<sup>22</sup> on the basis of that disability.<sup>23</sup> Title I of the ADA incorporates many of the standards of discrimination that the Department of Health and Human Services set forth in regulations implementing section 504 of the Rehabilitation Act.<sup>24</sup> Consequently, the case law under section 504 together with the committee reports on the ADA provide insight into the scope of protection afforded by Title I.

Plaintiffs bringing a private action under Title I must prove four elements to establish a prima facie case:<sup>25</sup> (1) that they are disabled

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19. For a discussion of the acts prohibited by the ADA as discrimination, see *infra* subpart II(C).

20. Section 102 lists the following as employment or employment-related decisions: "job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." ADA, *supra* note 1, § 102(a), 104 Stat. at 331-32.

21. Title I defines a covered entity as: "an employer, employment agency, labor organization, or joint labor-management committee." *Id.* § 101(2), 104 Stat. at 330. "Employer" is further defined 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 [July 26, 1992], 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.

*Id.* § 101(5)(a), 104 Stat. at 330.

22. The ADA defines "qualified individual with a disability" as "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.* § 101(8), 104 Stat. at 331. For a definition of the term "disability," see *infra* text accompanying note 32.

23. ADA, *supra* note 1, § 102(a), 104 Stat. at 331-32. Section 102(a) reads: "No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." *Id.*

24. S. REP. NO. 116, 101st Cong., 1st Sess. 2 (1989). Section 504 of the Rehabilitation Act prohibits discrimination against otherwise qualified individuals with a handicap in all programs receiving federal financial assistance. Rehabilitation Act, *supra* note 13, § 504, 87 Stat. at 394 (codified as amended at 29 U.S.C. § 794 (1988)).

25. See ADA, *supra* note 1, § 102(a), 104 Stat. at 331; *cf.* *Strathie v. Department of Transp.*, 716 F.2d 227, 230 (3d Cir. 1983) (applying the Rehabilitation Act and stating that a § 504 claimant must prove each of four elements to establish a prima facie case).

within the meaning of the ADA;<sup>26</sup> (2) that they are qualified for the position in question;<sup>27</sup> (3) that the employer discriminated against them solely on the basis of their disability;<sup>28</sup> and (4) that the employer is a covered entity within the meaning of Title I.<sup>29</sup> With the exception of the fourth element, these requirements are identical to those for a private action under section 504 of the Rehabilitation Act.<sup>30</sup> This Note will discuss only the first three elements because an employee's alcoholism or drug addiction does not enter into the straightforward calculation of the fourth.<sup>31</sup>

#### A. "Individual with a Disability"

Under section 3 of the ADA an individual has a "disability" if he or she: (1) has a physical or mental impairment that substantially limits a major life activity of the individual; (2) has a record of such impairment; or (3) is regarded as having such an impairment.<sup>32</sup> This definition, comparable to the Rehabilitation Act's definition of the term "individual with handicaps" for purposes of section 504,<sup>33</sup> encompasses all disabled individuals, including those who have recovered or been rehabilitated.<sup>34</sup>

##### 1. Impairments that Substantially Limit a Major Life Activity

According to the committee reports on the ADA, impairments include a broad range of physical and mental ailments.<sup>35</sup> Physical impair-

26. See *infra* subpart II(A).

27. See *infra* subpart II(B).

28. See *infra* subpart II(C).

29. See *supra* note 21.

30. Claimants under § 504 of the Rehabilitation Act must show that the employer is a recipient of federal financial assistance. *Strathie*, 716 F.2d at 230.

31. In other words, an employee's alcoholism or drug addiction has no relevance to whether the employer is a covered entity under the ADA. As will be shown below, however, such a condition is relevant to whether the plaintiff is disabled, qualified, and a victim of discrimination within the meaning of the ADA.

32. ADA, *supra* note 1, § 3(2), 104 Stat. at 229-30.

33. Compare *id.* with 29 U.S.C. § 706(8)(B) (1988) (defining "individual with handicaps" in substantially the same language used in the ADA).

34. See Comment, *Section 504 of the Rehabilitation Act of 1973: Protection Against Employment Discrimination for Alcoholics and Drug Addicts*, 28 AM. U.L. REV. 507, 510 (1979).

35. While noting that a comprehensive list of all conditions that constitute physical or mental impairments is impossible, the committee reports state that the term includes such conditions, diseases, and infections as: "orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, infections with the Human Immunodeficiency Virus [AIDS], cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, drug addiction, and alcoholism." H.R. REP. NO. 485, *supra* note 3, at 51; see S. REP. NO. 116, *supra* note 24, at 22.

ments range from cosmetic disfigurement to anatomical loss,<sup>36</sup> and mental impairments include conditions such as learning disabilities and organic brain syndrome.<sup>37</sup> These impairments, however, do not constitute disabilities unless their severity causes a substantial limitation of one or more major life activities.<sup>38</sup> Major life activities include walking, hearing, speaking, breathing, and working.<sup>39</sup>

What constitutes substantial limitation of these major life activities has not been defined fully.<sup>40</sup> The committee reports on the ADA state that an individual is substantially impaired when a disability restricts the conditions, manner, or duration under which the individual can perform important life activities as compared to most people.<sup>41</sup> For example, an individual who begins to experience pain after walking continuously for ten miles is not substantially limited in the major life activity of walking because most people could not walk that distance without experiencing some discomfort.<sup>42</sup>

Courts applying section 504 of the Rehabilitation Act struggled with the "substantially limits" requirement, particularly when the major life activity alleged to be impaired was the ability to obtain employment.<sup>43</sup> Rather than develop a uniform standard, courts determined on

36. H.R. REP. NO. 485, *supra* note 3, at 51; S. REP. NO. 116, *supra* note 24, at 22. The House report defines a physical impairment as:

any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine. . . .

H.R. REP. NO. 485, *supra* note 3, at 51.

37. The committee reports define a mental impairment as: "any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities." H.R. REP. NO. 485, *supra* note 3, at 51; S. REP. NO. 116, *supra* note 24, at 22.

38. H.R. REP. NO. 485, *supra* note 3, at 52; S. REP. NO. 116, *supra* note 24, at 22.

39. The committee reports list all of the following as constituting major life activities: "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." H.R. REP. NO. 485, *supra* note 3, at 52; S. REP. NO. 116, *supra* note 24, at 22.

40. See H.R. REP. NO. 485, *supra* note 3, at 52; S. REP. NO. 116, *supra* note 24, at 22; *cf.* 45 C.F.R. § 84 app. A, subpt. A-4 (1990) (appendix to the HHS regulations implementing § 504 of the Rehabilitation Act) (stating that a definition of the term "substantially limits" is not feasible at this time).

41. H.R. REP. NO. 485, *supra* note 3, at 52; S. REP. NO. 116, *supra* note 24, at 23.

42. H.R. REP. NO. 485, *supra* note 3, at 52; S. REP. NO. 116, *supra* note 24, at 23.

43. Compare *E.E. Black, Ltd. v. Marshall*, 497 F. Supp. 1088 (D. Haw. 1980) (holding that the plaintiff's spinal anomaly substantially limited him in obtaining employment because even though it did not affect his ability to work, it was perceived by employers as making him a higher risk for serious injury) with *Jasany v. United States Postal Serv.*, 755 F.2d 1244 (6th Cir. 1985) (finding that the plaintiff with strabismus, or crossed eyes, was not substantially limited in his ability to obtain work because an impairment that affects only a narrow range of jobs does not substantially limit a major life activity). See generally *Haines, E.E. Black, Ltd. v. Marshall: A*

a case-by-case basis whether a given individual's impairment substantially limited a major life activity.<sup>44</sup> As a result, employers and persons bringing claims under section 504 had very little guidance on the degree to which an impairment must limit a major life activity in order to qualify as a handicap.

## 2. Having a "Record of Impairment"

The committee reports on the ADA define "a record of such impairment" as a history of having, or being misclassified as having, a physical or mental impairment that substantially limits a major life activity.<sup>45</sup> This prong of the definition protects individuals who have recovered from a physical or mental impairment that substantially limited them in a major life activity in the past.<sup>46</sup> It also protects individuals who have been diagnosed erroneously as having a disability.<sup>47</sup> Thus, Title I would protect an individual who has recovered from mental illness, or who has been misclassified as mentally retarded.<sup>48</sup>

## 3. Being "Regarded as" Disabled

The third prong of the ADA's definition of disability covers individuals that employers treat as disabled even though the employees are not substantially limited in a major life activity.<sup>49</sup> These individuals typically have a physical or mental impairment that does not substantially limit a major life activity or may have no impairment at all, but their employers mistakenly believe them to be disabled and discriminate against them based on these misconceptions.<sup>50</sup> This prong of the

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*Penetrating Interpretation of "Handicapped Individual" for Sections 503 and 504 of the Rehabilitation Act of 1973 and for Various State Equal Employment Opportunity Statutes*, 16 Loy. L.A.L. Rev. 527 (1983) (discussing the Marshall court's analysis of when an impairment constitutes a substantial limitation on employment).

44. See, e.g., *Forrisi v. Brown*, 794 F.2d 931, 933 (4th Cir. 1986); *Jasany*, 755 F.2d at 1249; *Marshall*, 497 F. Supp. at 1100.

45. H.R. REP. No. 485, *supra* note 3, at 52; S. REP. No. 116, *supra* note 24, at 23.

46. H.R. REP. No. 485, *supra* note 3, at 52; S. REP. No. 116, *supra* note 24, at 23.

47. See H.R. REP. No. 485, *supra* note 3, at 52; S. REP. No. 116, *supra* note 24, at 23.

48. H.R. REP. No. 485, *supra* note 3, at 52-53; S. REP. No. 116, *supra* note 24, at 23; cf. *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 281 (1987) (finding in a case under § 504 of the Rehabilitation Act that an employee with tuberculosis who was hospitalized once for the condition had a record of substantial impairment of her major life activity of breathing).

49. H.R. REP. No. 485, *supra* note 3, at 53; S. REP. No. 116, *supra* note 24, at 23.

50. The committee reports state that being regarded as disabled means that the individual: (1) has a physical or mental impairment that does not substantially limit major life activities but that 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 attitudes of others toward such impairment; or (3) has no impairment within the meaning of the ADA, but is treated by an employer as having such an impairment.

H.R. REP. No. 485, *supra* note 3, at 53; see S. REP. No. 116, *supra* note 24, at 23.



definition is particularly important for individuals with stigmatic conditions, such as severe burn scars, that are viewed as physical impairments even though they do not produce a substantial limitation of a major life activity.<sup>51</sup>

### B. Being "Qualified" for the Position in Question

Title I of the ADA protects only "qualified" individuals with disabilities from discrimination in employment.<sup>52</sup> Congress limited protection to "qualified" employees to protect an employer's ability to choose and maintain qualified workers. Although an employer may not base hiring decisions on an applicant's disability, an employer may consider qualifications such as typing speed in determining whether to hire an applicant.<sup>53</sup> Thus, a qualified individual is one who can perform the essential functions of the job held or sought, with or without reasonable accommodation to his disability.<sup>54</sup>

#### 1. Essential Functions

"Essential functions" refers to job tasks that are fundamental rather than marginal.<sup>55</sup> The term is included within the definition of a "qualified individual with a disability" to ensure that the law requires employers to hire disabled individuals only if they are able to perform the functions that the job requires.<sup>56</sup> Thus, essential functions are the various tasks critical to the position.

The committee reports on the ADA suggest that identifying the essential functions of a position is a factual inquiry to be conducted on a case-by-case basis.<sup>57</sup> In their analyses, courts should consider the employer's judgment concerning which functions of a job are essential.<sup>58</sup> If

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51. H.R. REP. No. 485, *supra* note 3, at 53; see S. REP. No. 116, *supra* note 24, at 23; cf. *Mahoney v. Ortiz*, 645 F. Supp. 22, 24 (S.D.N.Y. 1986) (finding in a § 504 case that a policeman who had dislocated his shoulder two or more times was handicapped because the city terminated him on the basis of his potential for a future shoulder dislocation on the job).

52. ADA, *supra* note 1, § 102(a), 104 Stat. at 331. "Qualified" refers to individuals' current qualifications and not their potential for future incapacitation. H.R. REP. No. 485, *supra* note 3, at 55; S. REP. No. 116, *supra* note 24, at 26.

53. H.R. REP. No. 485, *supra* note 3, at 56; S. REP. No. 116, *supra* note 24, at 26.

54. ADA, *supra* note 1, § 101(8), 104 Stat. at 331. Section 101(8) reads, in pertinent part: "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." *Id.* This definition is comparable to the definition used in the HHS regulations implementing § 504 of the Rehabilitation Act. Compare *id.* with 45 C.F.R. § 84.3(k)(1) (1989).

55. H.R. REP. No. 485, *supra* note 3, at 55; S. REP. No. 116, *supra* note 24, at 26.

56. See H.R. REP. No. 485, *supra* note 3, at 55; S. REP. No. 116, *supra* note 24, at 26.

57. See H.R. REP. No. 485, *supra* note 3, at 55; S. REP. No. 116, *supra* note 24, at 26.

58. See ADA, *supra* note 1, § 101(8), 104 Stat. at 331.

the employer prepared a written description of the position before advertising for or interviewing applicants, either the employer or the plaintiff may offer that description as evidence of the essential functions of the job.<sup>59</sup>

## 2. Reasonable Accommodation

Once the court identifies the essential functions of a position and determines that the plaintiff can perform these functions, the plaintiff is qualified, and the court can proceed to consider whether the employer discriminated against the plaintiff.<sup>60</sup> If, however, the plaintiff cannot perform the essential functions of the job as it currently is structured, the plaintiff must prove that he can perform the essential functions of the job with "reasonable accommodation."<sup>61</sup> Title I's definition of reasonable accommodation includes making existing facilities readily accessible to individuals with disabilities, restructuring the particular position in question, and modifying work schedules.<sup>62</sup> Failure to provide reasonable accommodation to qualified applicants and employees is prohibited as discrimination under the ADA.<sup>63</sup> Thus, employers must accommodate the disabilities of otherwise qualified<sup>64</sup> applicants or employees unless to do so would impose an undue hardship on the employer's business.<sup>65</sup>

### C. Discrimination on the Basis of a Disability

Title I of the ADA prohibits many forms of employment discrimination against the disabled.<sup>66</sup> Like many other provisions of Title I, the list of prohibited activities in section 102(b) borrows heavily from the regulations implementing section 504 of the Rehabilitation Act.<sup>67</sup> A plaintiff can establish discrimination within the meaning of section 102 under any one of three theories: (1) that the employer discriminated against the plaintiff intentionally (intentional discrimination); (2) that

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59. *Id.*; see also 136 CONG. REC. H2623 (daily ed. May 22, 1990) (statement of Rep. Hamilton Fish).

60. See H.R. REP. NO. 485, *supra* note 3, at 55-58; S. REP. NO. 116, *supra* note 24, at 25-28; see also *Strathie v. Department of Transp.*, 716 F.2d 227, 230 (3d Cir. 1983).

61. See H.R. REP. NO. 485, *supra* note 3, at 56; S. REP. NO. 116, *supra* note 24, at 27.

62. ADA, *supra* note 1, § 101(9), 104 Stat. at 331. For further discussion of the reasonable accommodation requirement, see *infra* notes 95-106 and accompanying text.

63. ADA, *supra* note 1, § 101(9), 104 Stat. at 331.

64. Congress used the term "otherwise qualified" to describe individuals who meet all of an employer's job-related hiring criteria, including those that are difficult to meet because of a disability, if the employer makes reasonable accommodations for their disabilities. See H.R. REP. NO. 485, *supra* note 3, at 64-65.

65. ADA, *supra* note 1, § 102(b)(5)(A), 104 Stat. at 332.

66. See *id.* § 102(b), 104 Stat. at 332.

67. Compare *id.* with 45 C.F.R. §§ 84.4(b)(4), 84.11(a)(3)-(4), 84.12(a), 84.13 (1989).

the employer enforced an employment criterion that was not job related or required by business necessity and that had a disparate impact on individuals with disabilities (disparate impact discrimination); or (3) that the employer failed to accommodate a known disability of the plaintiff (surmountable barrier discrimination).<sup>68</sup>

### 1. Intentional Discrimination

Like other victims of discrimination, individuals with disabilities suffer exclusion for reasons of social bias.<sup>69</sup> Some employers are hostile to individuals with disabilities and deny employment to the disabled solely because of personal bias.<sup>70</sup> More often employers deny employment opportunities to disabled persons because of the employer's often erroneous assumption that the disability renders the individual incapable of working.<sup>71</sup> In short, individuals with disabilities suffer primarily from the benign instincts of the able-bodied majority.<sup>72</sup>

Title I prohibits several forms of discrimination that might be characterized as intentional. For example, section 102(b) prohibits limiting, segregating, or classifying applicants or employees on the basis of their disabilities in ways that adversely affect their opportunities or status.<sup>73</sup> Employers must make employment decisions based on the abilities of the individual and not on the employer's assumptions regarding what the individual can do.<sup>74</sup> In addition, section 102 requires employers to conduct employment activities in an integrated manner: employ-

68. In analyzing cases under § 504 of the Rehabilitation Act, courts and commentators have found that individuals with disabilities actually face four types of exclusionary barriers: the three types listed in the text accompanying this note and insurmountable barriers. See *Prewitt v. United States Postal Serv.*, 662 F.2d 292, 305 n.19 (5th Cir. 1981); *Nelson v. Thornburgh*, 567 F. Supp. 369, 378 (E.D. Pa. 1983); Note, *Accommodating the Handicapped: The Meaning of Discrimination Under Section 504 of the Rehabilitation Act*, 55 N.Y.U. L. REV. 881, 883-84 (1980). Insurmountable barriers are not discussed in the text because they are not a form of discrimination prohibited by § 504. See *Nelson*, 567 F. Supp. at 378; Note, *supra*, at 885. Thus, these barriers probably are not prohibited by Title I either.

69. Note, *supra* note 68, at 883.

70. See *id.*; U.S. CIVIL RIGHTS COMM'N, ACCOMMODATING THE SPECTRUM OF INDIVIDUAL DISABILITIES 17-45 (1983) [hereinafter ACCOMMODATING THE SPECTRUM].

71. ACCOMMODATING THE SPECTRUM, *supra* note 70, at 29 (quoting Kaplan, *Employment Rights: History, Trends and Status*, in 2 LAW REFORM DISABILITY RIGHTS E-4 (1981)); see also H.R. REP. NO. 485, *supra* note 3, at 58; S. REP. NO. 116, *supra* note 24, at 28.

72. The Supreme Court stated, "Discrimination against the handicapped was perceived by Congress to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference—of benign neglect." *Alexander v. Choate*, 469 U.S. 287, 295 (1985); see also Tucker, *supra* note 11, at 925.

73. ADA, *supra* note 1, § 102(b)(1), 104 Stat. at 332.

74. H.R. REP. NO. 485, *supra* note 3, at 58; S. REP. NO. 116, *supra* note 24, at 28. Thus, the ADA obligates employers to consider persons with disabilities as individuals rather than prejudging their abilities on the basis of their appearance or the label that society attaches to persons with their disabilities.

ers may not segregate employees with disabilities into particular work areas, and nonwork areas such as break rooms must be integrated whenever possible.<sup>75</sup> Employers also may not deny or offer disabled employees less health insurance coverage than other employees receive.<sup>76</sup>

In addition to proscribing discrimination based on the disability of the applicant or employee, Title I prohibits discrimination based on a relationship with an individual who is disabled.<sup>77</sup> For example, an employer may not refuse to hire a qualified applicant whose spouse has a disability on the assumption that the applicant will miss work frequently to care for the spouse.<sup>78</sup> The employer, however, legitimately may fire an employee who violates a neutral absenteeism policy to care for a disabled spouse.<sup>79</sup>

## 2. Disparate Impact Discrimination

Another form of discrimination suffered by individuals with disabilities is denial of employment because of neutral standards that have a disparate impact on disabled persons.<sup>80</sup> Although the employer's purpose may not be to discriminate against disabled persons, the standard as applied may have a discriminatory effect.<sup>81</sup> Examples of neutral standards with a disparate impact include architectural barriers that restrict the access of persons in wheelchairs and prohibitions of animals in buildings that effectively bar blind individuals who rely on seeing-eye

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75. H.R. REP. No. 485, *supra* note 3, at 58; S. REP. No. 116, *supra* note 24, at 28. If existing nonwork areas are inaccessible, employers may provide comparable facilities in an area accessible to employees with disabilities. H.R. REP. No. 485, *supra* note 3, at 58; S. REP. No. 116, *supra* note 24, at 28.

76. H.R. REP. No. 485, *supra* note 3, at 59; S. REP. No. 116, *supra* note 24, at 29. The committee reports state that the employer may offer insurance policies that limit coverage for certain procedures or treatments. Thus, a hemophiliac employee who exceeds the limit on the number of blood transfusions covered in a single year, for example, may be denied reimbursement for transfusions over the limit. That same employee, however, may not be denied coverage for other procedures such as heart surgery merely because he is a hemophiliac. *See* H.R. REP. No. 485, *supra* note 3, at 59; S. REP. No. 116, *supra* note 24, at 29.

77. ADA, *supra* note 1, § 102(b)(4), 104 Stat. at 332. It is not clear from the language of the ADA, however, how these individuals would establish the "disability" element of a *prima facie* case because their claims are based on the disability of a third party and not of themselves. The legislative history does not indicate that Congress ever considered this question. One possibility is that individuals with a relationship to a disabled person fall within the third prong of the statutory definition—being regarded as disabled—when the employer takes adverse action against these individuals on the assumption that their relationship with the disabled person will cause excessive absences or otherwise hamper their job performance. *See* H.R. REP. No. 485, *supra* note 3, at 61; S. REP. No. 116, *supra* note 24, at 30.

78. H.R. REP. No. 485, *supra* note 3, at 61; S. REP. No. 116, *supra* note 24, at 30.

79. H.R. REP. No. 485, *supra* note 3, at 61-62; S. REP. No. 116, *supra* note 24, at 30.

80. Note, *supra* note 68, at 883.

81. *Id.*

dogs.<sup>82</sup>

At least two antidiscrimination provisions of Title I incorporate a disparate impact standard.<sup>83</sup> Section 102(b)(3) prohibits the use of standards, criteria, or methods of administration that effectively discriminate on the basis of disability or that perpetuate past discrimination.<sup>84</sup> Section 102(b)(6) prohibits the use of qualification standards, employment tests, and other selection criteria that screen out, or tend to screen out, individuals with disabilities, unless the employer can show that the particular standard is job related and consistent with business necessity.<sup>85</sup> Section 102(b)(7), which prohibits the use of tests that reflect the existence of certain impairments rather than the skills that the test purports to measure, prohibits acts that may be intentional or neutral with a disparate impact.<sup>86</sup>

The experience of the Rehabilitation Act suggests that a plaintiff must prove two things to establish disparate impact discrimination under Title I: (1) that the challenged criterion had a disparate impact on the protected group of which the plaintiff is a member;<sup>87</sup> and (2) that all the employment criteria except the allegedly discriminatory criterion were met.<sup>88</sup> Once a plaintiff makes this showing, the burden shifts to the employer to demonstrate that the criterion in question was job related and consistent with business necessity.<sup>89</sup> When the employer fails to make such a showing, the plaintiff prevails on grounds of disparate impact discrimination.<sup>90</sup>

On the other hand, if the employer proves that the challenged criterion was job related and required by business necessity, then the plaintiff must demonstrate that he met the criterion in question, either with or without reasonable accommodation.<sup>91</sup> If the plaintiff met the challenged criterion without accommodation, and the employer had no other valid reason for denying the employment opportunity in ques-

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82. *Id.*

83. See H.R. REP. NO. 485, *supra* note 3, at 61 (stating that § 102(h)(3) incorporates a disparate impact standard).

84. ADA, *supra* note 1, § 102(b)(3), 104 Stat. at 332.

85. *Id.* § 102(b)(6), 104 Stat. at 332.

86. See *id.* § 102(b)(7), 104 Stat. at 332.

87. *Prewitt v. United States Postal Serv.*, 662 F.2d 292, 306 (5th Cir. 1981) (applying the Rehabilitation Act). Of course, the plaintiff need not prove that the employer acted with discriminatory intent. *Id.*

88. *Id.* at 306-07. Claimants are qualified if they can perform the essential functions of the position in question without endangering their own or another individual's health or safety. *Id.* at 307.

89. *Id.* at 306; see also *Wallace v. Veterans Admin.*, 683 F. Supp. 758, 765 (D. Kan. 1988) (adopting the *Prewitt* court's approach to disparate impact claims under the Rehabilitation Act).

90. *Prewitt*, 662 F.2d at 306-07.

91. *Id.* at 307.

tion,<sup>92</sup> the employer discriminated against the plaintiff within the meaning of Title I.<sup>93</sup> If, however, the plaintiff met the criterion only with accommodation, the plaintiff may prevail only if he demonstrates that the accommodation would not burden the employer unduly.<sup>94</sup>

### 3. Surmountable Barrier Discrimination

If a plaintiff cannot perform the essential functions of the job as it is currently structured, the plaintiff still may prevail under Title I if he demonstrates that "reasonable accommodation" by his employer would enable him to overcome the barrier created by his disability.<sup>95</sup> While the disability creates the initial obstacle to performance, the employer's unwillingness to make adjustments to help an individual overcome his disability reinforces what otherwise might be a surmountable barrier.<sup>96</sup> For example, blind individuals may become effective employees if their employers provide part-time readers to help them complete some of their duties.<sup>97</sup>

Employers are not required to go to unlimited lengths to accommodate a disabled applicant or employee. Title I requires employers to make only those accommodations that are "reasonable";<sup>98</sup> a proposed accommodation is not reasonable if it would cause the employer "undue hardship."<sup>99</sup> Actions that entail significant difficulty or expense,<sup>100</sup> or

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92. For example, the ADA does not prohibit an employer from taking action against an employee on the basis of improper off-duty conduct, even if this conduct is related to a protected disability. For treatments of this issue under the Rehabilitation Act, see *Richardson v. United States Postal Serv.*, 613 F. Supp. 1213, 1215-16 (D.D.C. 1985) (involving criminal assault) and *Huff v. Israel*, 573 F. Supp. 107, 110 (M.D. Ga. 1983) (involving driving under the influence).

93. See H.R. REP. No. 485, *supra* note 3, at 67; S. REP. No. 116, *supra* note 24, at 35.

94. When the plaintiff cannot meet the criterion even with accommodation, no illegal discrimination can be proved. See *Prewitt*, 662 F.2d at 307.

95. See Note, *supra* note 68, at 884.

96. *Id.*

97. *Nelson v. Thornburgh*, 567 F. Supp. 369, 380 (E.D. Pa. 1983) (applying the Rehabilitation Act).

98. ADA, *supra* note 1, § 102(b)(5), 104 Stat. at 332. Title I states that "reasonable accommodation" may include:

(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.* § 101(9), 104 Stat. at 331. For a detailed discussion of the reasonable accommodation requirement under Title I, see H.R. REP. No. 485, *supra* note 3, at 62-70 and S. REP. No. 116, *supra* note 24, at 30-36.

99. ADA, *supra* note 1, § 102(b)(5), 104 Stat. at 332.

100. *Id.* § 101(10), 104 Stat. at 331.

that require fundamental alteration of the position in question,<sup>101</sup> create undue hardship within the meaning of Title I. To determine whether a given accommodation would cause undue hardship, the court must consider factors such as the nature and cost of the accommodation, the overall financial resources of the facility involved and of the covered entity, and the character of the covered entity's operation.<sup>102</sup>

Establishing a *prima facie* case under the surmountable barrier discrimination theory requires proof of three elements: (1) that the plaintiff meets all of an employer's job-related selection criteria except those that he is unable to meet without accommodation;<sup>103</sup> (2) that the accommodations proposed by the plaintiff are reasonable (that is, that they do not cause undue hardship);<sup>104</sup> and (3) that the employer refused to make any of the proposed accommodations.<sup>105</sup> After proof of these elements, the burden shifts to the employer to demonstrate that the proposed accommodations would impose an undue hardship on the business.<sup>106</sup> If the employer fails to establish undue hardship, the plaintiff prevails.

Proving each of the elements discussed above normally should entitle plaintiffs to relief under Title I. Plaintiffs do not have a cause of action, however, if the employer proves that the plaintiff currently uses illegal drugs.<sup>107</sup> As demonstrated below, Congress created much confusion when it attached a similar exclusion to the Rehabilitation Act in 1978.<sup>108</sup>

101. H.R. REP. NO. 485, *supra* note 3, at 64.

102. ADA, *supra* note 1, § 101(10)(B), 104 Stat. at 331. Section 101(10)(B) states that the factors to be considered in the undue hardship analysis include:

(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 work force of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

*Id.*

103. H.R. REP. NO. 485, *supra* note 3, at 64; S. REP. NO. 116, *supra* note 24, at 33.

104. H.R. REP. NO. 485, *supra* note 3, at 65; S. REP. NO. 116, *supra* note 24, at 34; *cf. also* *Prewitt*, 662 F.2d at 305 (applying the Rehabilitation Act).

105. *See* ADA, *supra* note 1, § 102(b)(5), 104 Stat. at 332.

106. *Prewitt*, 662 F.2d at 308.

107. *See* 135 CONG. REC. S10,778 (daily ed. Sept. 7, 1989) (statement of Sen. Thomas R. Harkin).

108. *See infra* subpart III(C).

### III. COVERAGE AFFORDED ADDICTS UNDER THE REHABILITATION ACT OF 1973

#### A. *Addiction As Handicap*

Nothing in the original language of the Rehabilitation Act indicated whether Congress intended to include addicts within the definition of "individual[s] with handicaps."<sup>109</sup> Furthermore, congressional debates on the Rehabilitation Act made little mention either in favor of or opposed to including alcoholism or drug addiction within the definition of a handicap.<sup>110</sup> In the process of drafting regulations to implement section 504, the Department of Health, Education, and Welfare (HEW)<sup>111</sup> solicited an opinion from the United States Attorney General on this question.<sup>112</sup> The Attorney General concluded that Congress's expressed desire to broaden the scope of individuals covered by section 504 suggested that Congress intended to include addicts within the definition.<sup>113</sup>

Courts reached the same conclusion as the Attorney General. For example, in *Davis v. Bucher*<sup>114</sup> a federal district court held that Philadelphia's policy of automatically rejecting all job applicants with a history of drug abuse violated section 504.<sup>115</sup> The court concluded that individuals with histories of drug use, including current participants in methadone maintenance programs, were handicapped within the meaning of the Rehabilitation Act.<sup>116</sup> The court emphasized, however, that

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109. See Rehabilitation Act of 1973—Coverage of Alcoholics and Drug Addicts, 43 Op. Att'y Gen. No. 12, at 3 (1976) [hereinafter Attorney General Opinion]. The Rehabilitation Act defined "individual with handicaps" the same way the ADA currently defines "individual with disabilities." Compare *id.* at 2-3 with text accompanying note 32, *supra*. Congress did not add the limited exceptions for alcoholics and drug addicts until 1978. See *infra* subpart III(B).

110. See Attorney General Opinion, *supra* note 109.

111. President Gerald Ford designated HEW as the coordinating agency for establishing guidelines, standards, and procedures for government-wide implementation of § 504. Exec. Order No. 11,914, 41 Fed. Reg. 17,871 (1976). These regulations were published in January 1978, 43 Fed. Reg. 2116 (1978), and are now codified at 45 C.F.R. § 84 (1989) (HHS regulations). The agencies currently charged with enforcement of § 504 include the Offices of Civil Rights, the Department of Education, and the Department of Health and Human Services. Tucker, *Section 504 of the Rehabilitation Act After Ten Years of Enforcement: The Past and the Future*, 1989 U. ILL. L. REV. 845, 848.

112. 45 C.F.R. § 84 app. A, subpt. A-4; Attorney General Opinion, *supra* note 109, at 1.

113. Attorney General Opinion, *supra* note 109, at 9-10.

114. 451 F. Supp. 791 (E.D. Pa. 1978).

115. *Id.* at 795.

116. *Id.* at 796. In rejecting the city's argument that Congress did not intend to include drug addiction in the definition of a handicap for purposes of § 504, the court cited the Attorney General's opinion, see *supra* note 109, and concluded that Congress intended to protect recovered and recovering alcoholics and drug addicts from discrimination in order to encourage these individuals to seek treatment for their addictions. 451 F. Supp. at 796; see also *Whitaker v. Board of Higher Educ.*, 461 F. Supp. 99, 106 n.7 (E.D.N.Y. 1978) (finding that the provisions of the Rehabilitation Act protect alcoholics and drug addicts).



section 504 protects addicts—like other handicapped individuals—only when an employer discriminates because of the handicap.<sup>117</sup> If an employer can show that the addict's current or prior drug use prevents successful performance of the job in question, then the employer is not liable under section 504.<sup>118</sup>

Thus, by 1978 the United States Attorney General, HEW,<sup>119</sup> and the courts had assured employers that section 504 of the Rehabilitation Act did not require them to hire or maintain addicts who were unqualified for their positions. Despite these reassurances, many employers worried that they could face liability for refusing to hire addicts regardless of the individual's competence to perform the job. As a result, employer groups lobbied Congress for statutory clarification of the definition.

### B. The 1978 Amendment

In response to requests by numerous employers' groups,<sup>120</sup> Congress passed the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978 (1978 Amendment).<sup>121</sup> The 1978 Amendment redefined "individual with handicaps" to exclude alcoholics and drug addicts whose current use prevents them from performing the duties of their job or poses a direct threat to the property or safety of others.<sup>122</sup> According to the legislative history, Congress drafted the amendment to reassure employers and the public that section 504 does not protect employees whose alcohol or drug abuse problems impair their ability to function on the job, particularly when their condition might threaten the lives or well-being of others.<sup>123</sup>

117. *Davis*, 451 F. Supp. at 797 n.4.

118. *Id.*

119. See 45 C.F.R. § 84 app. A, subpt. A-4 (stating that employers may hold a drug addict or alcoholic to the same standard of performance and behavior to which they hold other employees, and that if the employer can show that the individual's addiction or alcoholism prevents successful performance of the job, § 504 does not protect that individual).

120. 124 CONG. REC. S30,323 (daily ed. Sept. 20, 1978) (remarks of Sen. Harrison A. Williams).

121. Pub. L. No. 95-602, 92 Stat. 2955 (1978) (codified as amended at 29 U.S.C. § 706 (1988)) [hereinafter 1978 Amendment]. Some senators doubted the need for a clarifying amendment. See, e.g., 124 CONG. REC. S30,324 (daily ed. Sept. 20, 1978) (statements of Sens. Harrison A. Williams and William D. Hathaway).

122. 29 U.S.C. § 706 (1988). To the original definition the amendment added:

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

*Id.*

123. 124 CONG. REC. S30,323-24 (daily ed. Sept. 20, 1978) (statements of Sens. Harrison A.

The 1978 Amendment reinforced the position that the provisions of section 504 protect addicts as handicapped individuals only as long as they are qualified for the position in question.<sup>124</sup> The 1978 Amendment essentially codified the interpretation of the United States Attorney General and the courts that addicts are individuals with handicaps, but may or may not be otherwise qualified depending on their degree of impairment.<sup>125</sup> Unfortunately, the courts did not interpret the 1978 Amendment consistently to reflect this sensible conclusion.

### C. Application of the 1978 Amendment

Courts interpreting the Rehabilitation Act after the 1978 Amendment generally found alcoholism<sup>126</sup> and drug addiction<sup>127</sup> to be handicaps within the meaning of the Rehabilitation Act. Some courts have held, however, that addicts who have not been rehabilitated,<sup>128</sup> or whose condition renders them unfit for the job in question<sup>129</sup> are not handicapped.<sup>130</sup> In addition, courts have held that mere use of drugs, as dis-

Williams and William D. Hathaway).

124. See *id.*; see also H.R. REP. NO. 1149, 95th Cong., 2d Sess. 22-23, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 7312, 7333-34 (stating that rehabilitated alcoholics and drug users are protected under § 504).

125. 124 CONG. REC. S37,509-10 (daily ed. Oct. 14, 1978) (statement of Sen. Harrison A. Williams).

126. See, e.g., *Crewe v. United States Office of Personnel Management*, 834 F.2d 140, 141 (8th Cir. 1987); *Simpson v. Reynolds Metals Co.*, 629 F.2d 1226, 1231 n.8 (7th Cir. 1980); *Whitlock v. Donovan*, 598 F. Supp. 126, 129 (D.D.C. 1984), *aff'd sub nom. Whitlock v. Brock*, 790 F.2d 964 (D.C. Cir. 1986); *Tinch v. Walters*, 573 F. Supp. 346, 348 (E.D. Tenn. 1983), *aff'd*, 765 F.2d 599 (6th Cir. 1985).

127. See, e.g., *Heron v. McGuire*, 803 F.2d 67, 68 (2d Cir. 1986); *Wallace v. Veterans Admin.*, 683 F. Supp. 758, 761 (D. Kan. 1988); *McCleod v. City of Detroit*, 39 Fair Empl. Prac. Cas. (BNA) 225, 228 (E.D. Mich. 1985); cf. *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 285 n.14 (1987) (stating that the 1978 Amendment demonstrates that Congress did not intend to exclude categorically all drug addicts from the coverage of the Rehabilitation Act).

128. See, e.g., *Burka v. New York City Transit Auth.*, 680 F. Supp. 590, 600 n.18 (S.D.N.Y. 1988).

129. See, e.g., *Heron*, 803 F.2d at 69 (holding that a heroin addict was not handicapped because his addiction rendered him unfit for police work); cf. *American Fed'n of Gov't Employees v. Dole*, 670 F. Supp. 445, 447 (D.D.C. 1987) (stating that freedom from drug effects is a proper standard for critical jobs). But see *Wallace*, 683 F. Supp. at 761 (suggesting that drug addiction is always a handicap, but that the court must determine whether the addict also is "otherwise qualified").

130. These courts misinterpreted the 1978 Amendment. The literal wording of the 1978 Amendment excluded any individuals who could not perform the duties of the job from the definition of the term "individual with handicaps," and the legislative history indicated that all addicts who had not entered or completed successfully a rehabilitation program at the time of their termination were excluded as well. H.R. REP. NO. 1149, 95th Cong., 2d Sess. 22-23 (1978), reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 7312, 7333-34. It is equally clear, however, that Congress approved of the administrative and judicial interpretations of the term "individual with handicaps" as including alcoholics and drug addicts, 124 CONG. REC. S30,325 (daily ed. Sept. 20, 1978) (statement of Sen. William D. Hathaway), and that Congress enacted the 1978 Amendment merely

tinguished from abuse or addiction, is not a handicap under section 504.<sup>131</sup> Most of the cases after the 1978 Amendment, however, focused on the addict's qualifications and whether the employer's actions were discriminatory. Often, these issues were inextricably intertwined.<sup>132</sup>

To prevail under section 504 after the 1978 Amendment, an addict generally had to have been rehabilitated or in rehabilitation.<sup>133</sup> If an addict committed acts that, standing alone, constituted sufficient grounds for dismissal, the addict was not protected regardless of whether the addiction contributed to the behavior.<sup>134</sup> Additionally, section 504 required employers to accommodate addicts only when the employer had notice of the addiction.<sup>135</sup> Courts did not make clear, however, how far section 504 required employers to go in accommodating an addict before accommodation became an "undue hardship" on their business operations.<sup>136</sup>

Often, a finding of discrimination depended heavily on the facts

to clarify the fact that only addicts who are "otherwise qualified" are entitled to the protections of § 504. *Id.* at 30,323-25 (statements of Sens. Harrison A. Williams and William D. Hathaway); *see also* 124 CONG. REC. S37,509 (daily ed. Oct. 14, 1978) (statement of Sen. Harrison A. Williams). Thus, properly interpreted, the 1978 Amendment does not exclude addiction from the definition of handicaps; rather, it excludes from the definition of "otherwise qualified" those addicts who fall within one of the specific exceptions of the 1978 Amendment. Hence, all addicts are individuals with handicaps for purposes of the Rehabilitation Act, and the exceptions enacted by the 1978 Amendment are actually clarifications of what it means to be unqualified under § 504.

131. *See, e.g., Burka*, 680 F. Supp. at 601 n.20 (holding that use of illegal narcotics does not, per se, constitute a handicap under § 504); *cf. McCleod*, 39 Fair Empl. Prac. Cas. (BNA) at 228 (finding that individuals identified as current drug users by a urinalysis test had failed to show that their ability to perform a major life activity had been impaired substantially).

132. The analytical structure developed by courts to implement § 504 suggests the reason for this overlap. As an element of disparate impact discrimination, for example, the plaintiff in one case had to prove that he met all the employment criteria except the challenged one. *See Prewitt v. United States Postal Serv.*, 662 F.2d 292 (5th Cir. 1981). The employer had to demonstrate that the criterion was job related. If the employer failed, it meant not only that the criterion was discriminatory but that the plaintiff was qualified because he had met all the legitimate criteria for the job. *Id.* at 306-07.

Similarly, when the plaintiff alleged surmountable barrier discrimination, he had to prove that he met all the criteria for the job, including the one alleged to be surmountable albeit with accommodation. If the plaintiff made his case and the employer failed to prove undue hardship, the plaintiff thereby demonstrated both that he was qualified and that the employer discriminated against him. *Id.* at 307-08.

133. *See, e.g., Whitlock*, 598 F. Supp. at 129-30 n.3; *Tinch*, 573 F. Supp. at 348.

134. *See, e.g., Fong v. United States Dep't of Treasury*, 705 F. Supp. 41, 47 (D.D.C. 1989); *Richardson v. United States Postal Serv.*, 613 F. Supp. 1213, 1216 (D.D.C. 1985); *Huff v. Israel*, 573 F. Supp. 107, 110 (M.D. Ga. 1983).

135. *See Fong*, 705 F. Supp. at 47. The *Fong* court held that the mere fact that the employer raised the possibility that alcoholism was responsible for an employee's absences did not trigger the protections of § 504, particularly when the employee consistently gave other explanations for his absences. Rather the employer should be held to an objective "should have known" standard with regard to the employee's alcoholism. *Id.*

136. For a discussion of the undue hardship limitation on the employer's reasonable accommodation duty, *see supra* notes 98-102 and accompanying text.

and circumstances of the individual case. In *Copeland v. Philadelphia Police Department*,<sup>137</sup> for example, the Third Circuit found no discrimination under section 504 even though the only ground for the plaintiff's dismissal was that he had tested positive for marijuana use on one occasion.<sup>138</sup> The court reasoned that for the plaintiff to be qualified as a police officer, he must do more than satisfy the physical aspects of the job: for certain critical positions employers were entitled to consider additional factors such as the employee's moral qualifications.<sup>139</sup> Because unlawful behavior on the part of a police officer would cast doubt on the integrity of the police force,<sup>140</sup> the court concluded that section 504 did not require the police department to accommodate drug users within its ranks.<sup>141</sup> To do so would amount to substantial modification of the essential functions of a police officer.<sup>142</sup>

Conversely, in *Nisperos v. Buck*,<sup>143</sup> a section 501 case,<sup>144</sup> the court found an Immigration and Naturalization Service (INS) attorney to be qualified despite his cocaine addiction.<sup>145</sup> The court cited the attorney's evaluations, which showed that he had performed his duties successfully,<sup>146</sup> and noted that he had entered a rehabilitation program at the time he was terminated.<sup>147</sup> The court held that requiring the INS to accommodate the attorney was reasonable because the agency could reassign those duties for which it considered the plaintiff to be unqualified without undue hardship.<sup>148</sup>

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137. 840 F.2d 1139 (3d Cir. 1988).

138. *Id.* at 1149.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. 720 F. Supp. 1424 (N.D. Cal. 1989).

144. Rehabilitation Act, *supra* note 13, § 501, 87 Stat. at 390 (codified as amended at 29 U.S.C. § 791 (1988)). Section 501 required federal executive agencies to implement affirmative action programs to employ handicapped individuals. *Lemere v. Burnley*, 683 F. Supp. 275, 276 n.1 (D.D.C. 1988). Section 501 obligated federal agencies to meet a higher level of accommodation than § 504 required of federal aid recipients. *See Whitlock v. Donovan*, 598 F. Supp. 126, 129-30 (D.D.C. 1984). *But cf. Wallace v. Veterans Admin.*, 683 F. Supp. 758, 763 (D. Kan. 1988) (finding that because both § 501 and § 504 imposed a duty of reasonable accommodation on an employer, a separate analysis of employers' actions under each section is not required). For example, § 501, unlike § 504, protected alcoholics currently using alcohol who are not in rehabilitation. *See Lemere*, 683 F. Supp. at 276 n.1; *Whitlock*, 598 F. Supp. at 129. Thus, courts finding that a particular accommodation was required by § 501 might have reached a different result under § 504. Conversely, if a court found that an accommodation was not required by § 501, it almost certainly would have reached the same conclusion under § 504.

145. *Nisperos*, 720 F. Supp. at 1428.

146. *Id.* at 1428 & n.7.

147. *Id.* at 1427.

148. *Id.* at 1432; *see also Wallace*, 683 F. Supp. at 765 (holding that an employer could reasonably accommodate a recovering chemically dependent nurse who was unable to administer narcotics to patients because of her condition by allowing another registered nurse to administer

Even courts interpreting section 501 have found definite limits to an employer's duty to accommodate an addict. For example, when the Federal Aviation Administration (FAA) granted an alcoholic employee two extended leaves-of-absence to seek rehabilitation and offered a third in lieu of termination, a reviewing court found the agency's efforts "more than reasonable."<sup>149</sup> The court reasoned that the employee's unreliable and erratic conduct had become an undue hardship on the agency and that the FAA was not required to rescind its termination decision after learning that the plaintiff had reentered a treatment program.<sup>150</sup> In another case, the Eighth Circuit held that an alcoholic applicant for federal employment was not qualified for the position, given an extensive history of rehabilitative failure and the lack of evidence to suggest that future efforts at rehabilitation would be more successful.<sup>151</sup>

The rationale behind many of these decisions was well articulated in a case involving civilian employees of the armed forces.<sup>152</sup> In announcing a five-step procedure for federal agencies to follow when encountering problems with alcoholic employees, the Fourth Circuit identified two concerns that arose when the Rehabilitation Act was applied to addicts.<sup>153</sup> On the one hand, the court emphasized the need to make some allowance for rehabilitative failure so that addicts have a reasonable opportunity to overcome their addictions.<sup>154</sup> On the other hand, the court underscored the importance of confronting addicts firmly with the consequences of their addictions rather than requiring employers to bear indefinitely the expense of accommodating them.<sup>155</sup> The Fourth Circuit concluded that reasonable accommodation entails finding the proper balance between these two concerns.<sup>156</sup>

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narcotics when necessary).

149. *Lemere*, 683 F. Supp. at 278.

150. *Id.* at 279.

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

152. *Rodgers v. Lehman*, 869 F.2d 253 (4th Cir. 1989).

153. *Id.* at 259.

154. *Id.*; see also *Callicotte v. Carlucci*, 698 F. Supp. 944, 950 (D.D.C. 1988) (finding that an agency was not justified in concluding that it could not reasonably accommodate an alcoholic employee based on a single instance of rehabilitative failure); *Burchell v. Department of the Army*, 679 F. Supp. 1393, 1401-02 (D.S.C. 1988) (holding that the Army could not terminate an alcoholic employee who had entered and failed a rehabilitation program when the Army had not determined whether it could accommodate the employee's condition by permitting him to use accumulated sick leave or allowing him to take disability retirement).

155. *Rodgers*, 869 F.2d at 259.

156. *Id.*

## IV. THE ADA'S "CURRENTLY ENGAGING IN" STANDARD

Section 104(a) of the ADA provides that, for purposes of Title I, the term "qualified individual with a disability" does not include individuals who currently use illegal drugs<sup>157</sup> or abuse alcohol.<sup>158</sup> As long as the employer acts on the basis of drug or alcohol use—and not a protected disability—the addict is without protection under the ADA.<sup>159</sup> If, however, an addict has been rehabilitated or entered rehabilitation and no longer uses drugs or alcohol, Title I protects that addict from discrimination.<sup>160</sup> Title I also protects individuals whom employers erroneously identify as illegal drug users.<sup>161</sup>

Section 104 authorizes employers to take reasonable measures, including drug testing, to ensure that individuals in rehabilitation no longer use illegal drugs.<sup>162</sup> Employers may require applicants to take a drug test before making an offer of employment.<sup>163</sup> Employers also may require current employees to take a drug test without showing that the test is job related or a business necessity.<sup>164</sup> Employers, however, must

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157. ADA, *supra* note 1, § 104(a), 104 Stat. at 334. Individuals are currently engaging in the illegal use of drugs if they have used drugs recently enough to support a reasonable belief that their drug use is "current." H.R. CONF. REP. No. 558, 101st Cong., 2d Sess. 60 (1990); *see also* 135 CONG. REC. S10,782 (daily ed. Sept. 7, 1989) (colloquy between Sens. William L. Armstrong and Thomas R. Harkin) (concluding that termination for alcohol abuse off the job may be permitted when the abuse is relevant to the employee's qualifications for the job).

158. Confusingly, § 104(a) does not mention alcoholics, *see* ADA, *supra* note 1, § 104(a), 104 Stat. at 334, but the title of § 104—"Illegal Use of Drugs and Alcohol"—and most of its subsections do refer to alcohol abuse. *See id.* § 104(c)-(e), 104 Stat. at 334-36. The legislative history indicates, moreover, that Congress intended § 104(a) to apply to alcoholics as well as drug addicts. *See* 135 CONG. REC. S10,753 (daily ed. Sept. 7, 1989) (colloquy between Sens. Thomas R. Harkin and William L. Armstrong); *id.* at S10,777 (colloquy between Sens. Thomas R. Harkin and Daniel R. Coats).

159. H.R. REP. No. 485, *supra* note 3, at 77. In other words, current drug users who are otherwise disabled under the ADA still are protected against discrimination on the basis of that disability. If the employer acts on the basis of illegal drug use or alcohol abuse, however, that individual is not protected simply by virtue of a disability. *Id.*

160. ADA, *supra* note 1, § 104(b), 104 Stat. at 335. Section 104, however, does not require an employer to provide a rehabilitation program or even an opportunity for rehabilitation when an employee's current use is discovered. Addicts already must be rehabilitated or in rehabilitation at the time their employers take adverse action against them. S. REP. No. 116, *supra* note 24, at 41-42.

161. ADA, *supra* note 1, § 104(b), 104 Stat. at 335; H.R. REP. No. 485, *supra* note 3, at 77.

162. ADA, *supra* note 1, § 104(b), 104 Stat. at 335. In fact, nothing in the ADA prohibits an employer from giving a test to any applicant or employee and refusing to hire the applicant or taking action against the employee because this result indicated illegal drug use. H.R. REP. No. 485, *supra* note 3, at 79-80.

163. H.R. REP. No. 485, *supra* note 3, at 79. *But cf. id.* at 79-80 (stating that § 102(c) prohibits administration of a drug test prior to a conditional offer of employment for the purpose of detecting the use of prescription drugs).

164. H.R. REP. No. 485, *supra* note 3, at 79; *cf.* H.R. CONF. REP. No. 558, *supra* note 157, at 60 (stating that individuals covered by Department of Transportation (DOT) regulations described in § 104(c)(5) are not covered by the ADA if they test positive on an employment-related drug test).

use the tests to identify illegal drug use and not the legal use of prescription medication.<sup>165</sup> In addition, the test results must be accurate.<sup>166</sup> When an employer takes adverse employment action against an individual on the basis of inaccurate test results, that individual may challenge the adverse employment action as discrimination.<sup>167</sup> Unfortunately, the ADA does not provide a standard to evaluate the accuracy or validity of a drug test result.<sup>168</sup>

Section 104 authorizes employers to adopt certain measures to ensure that their workplaces remain free from the effects of alcohol and drug use. For example, employers may prohibit the use of illegal drugs or alcohol at the workplace<sup>169</sup> and require employees to be free from the influence of alcohol or drugs while at work.<sup>170</sup> In addition, employers may hold addicts to the same hiring and job-performance standards to which they hold other employees, even if the addict's addiction contributes to an inability to meet such standards.<sup>171</sup> These provisions and the authorization of drug testing suggest that the ADA allows employers

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165. H.R. REP. NO. 485, *supra* note 3, at 80.

166. *Id.* at 79; S. REP. NO. 116, *supra* note 24, at 41; *cf.* H.R. CONF. REP. NO. 558, *supra* note 157, at 60 (stating that employers must verify drug tests of individuals covered by the DOT regulations described in § 104(c)(5) in conformity with applicable federal regulations or guidelines).

167. *See* H.R. CONF. REP. NO. 558, *supra* note 157, at 60 (stating that the conferees did not intend to prevent individuals covered by the employment provisions of the ADA from challenging a positive drug test result by invoking the protection of § 104(b)(3), which protects those erroneously regarded as engaging in the illegal use of drugs); H.R. REP. NO. 485, *supra* note 3, at 80 (stating that individuals who test positive for use of illegal drugs may challenge adverse employment action taken against them on the grounds that the positive result was caused by medication taken under medical supervision).

168. H.R. CONF. REP. NO. 558, *supra* note 157, at 60. Most commentators encourage employers to use a two-tiered approach to drug testing: (1) conduct initial screenings with relatively inexpensive enzyme immunoassay tests such as the Syva Company's desk-top sized kit called EMIT; and (2) confirm any positive results with more accurate—but more expensive—techniques such as Gas Chromatography/Mass Spectrometry (GC/MS). *See, e.g.,* Rothstein, *Drug Testing in the Workplace: The Challenge to Employment Relations and Employment Law*, 63 CHI-KENT L. REV. 683, 691-93 (1987); *Survey of the Law on Employee Drug Testing*, 42 U. MIAMI L. REV. 553, 563-66 (1988) [hereinafter *Survey*]; Note, *Drug Testing in the Workplace: The Need for Quality Assurance Legislation*, 48 OHIO ST. L.J. 877, 878-80 (1987) [hereinafter Note, *Need for Quality*]; Note, *Employee Drug Testing—Balancing the Interests in the Workplace: A Reasonable Suspicion Standard*, 74 VA. L. REV. 969, 987-89 (1988) [hereinafter Note, *Balancing the Interests*]. This approach is reasonable because it enables employers to screen employees at a relatively low cost and protects employees against being identified falsely as drug users. *See* Rothstein, *supra*, at 692; *Survey, supra*, at 564-65 & n.51; Note, *Need for Quality, supra*, at 880; Note, *Balancing the Interests, supra*, at 988-89 & n.121.

169. ADA, *supra* note 1, § 104(c)(1), 104 Stat. at 335.

170. *Id.* § 104(c)(2), 104 Stat. at 335.

171. *Id.* § 104(c)(4), 104 Stat. at 335. Section 104(c) also permits employers to require employees to comply with the Drug-Free Workplace Act of 1988 and any other relevant federal laws or regulations. *See id.* § 104(c), 104 Stat. at 335.

broad discretion to identify addicts in the work force and take action against them as the employer deems appropriate.<sup>172</sup>

## V. ADDICTION AS DISABILITY: POLICY CONSIDERATIONS AND LIKELY EFFECTS OF SECTION 104

### A. Congressional Policy Behind the "Currently Engaging in" Standard

Alcoholism and drug addiction impose enormous costs on American society. As many as twenty-three million Americans currently use some type of illegal substance, and ten million are cocaine-dependent.<sup>173</sup> Approximately eighteen million adults in the United States are alcoholics.<sup>174</sup> Alcohol and drug abuse on and off the job costs employers billions of dollars annually in lost productivity and employment-related costs.<sup>175</sup> Alcohol and drug impairment contribute significantly to accidents on the job causing deaths, injuries, and millions of dollars in property damage.<sup>176</sup> Impairment-related accidents expose employers to further costs in the form of higher insurance rates and respondeat superior liability.<sup>177</sup>

Congress drafted section 104 to meet these legitimate concerns of the business community.<sup>178</sup> Members of Congress expressed concern that Title I might hamper employers' efforts to rid their work forces of recalcitrant addicts.<sup>179</sup> Congress acted to enable employers to imple-

172. See H.R. REP. NO. 485, *supra* note 3, at 79; 135 CONG. REC. S10,782 (daily ed. Sept. 7, 1989) (colloquy between Sens. Thomas R. Armstrong and William L. Harkin).

173. Rothstein, *supra* note 168, at 684-85. In addition, from 1977 to 1987, cocaine-related deaths in the United States increased 200%, and admissions to drug abuse treatment programs rose 500%. *Id.* at 685.

174. *Id.* at 685. Nearly half of all automobile accidents, one-fourth of all suicides, and four-fifths of all family court cases involved alcohol. *Id.*

175. Estimates of the combined costs of alcoholism and drug addiction to American business range from \$99 billion, M. ROTHSTEIN, *MEDICAL SCREENING AND THE EMPLOYEE HEALTH COST CRISIS* 98 (1989), to as high as \$120 billion. *OSHA Oversight Hearing on the Impact of Alcohol and Drug Abuse on Worker Health and Safety: Hearings of the House Subcomm. on Health and Safety of the Comm. on Education and Labor*, 99th Cong., 1st Sess. 5 (1985) (statement of Robert L. DuPont, M.D., Vice President, Bensigner, DuPont & Associates and President, Center for Behavioral Medicine); see also Note, *Balancing the Interests*, *supra* note 168, at 971.

176. Between 1975 and 1984, drug and alcohol use by railroad employees caused 48 accidents that in turn caused 37 deaths, 80 nonfatal injuries, and over \$34 million in property damage. According to some estimates, drug users have three to four times as many accidents as nonusers. M. ROTHSTEIN, *supra* note 175, at 98. Indeed, drug abuse has been called the most common health hazard in the American workplace. Note, *Employee Drug Testing—Issues Facing Private Sector Employers*, 65 N.C.L. REV. 832 (1987) (quoting D. COPUS, *ALCOHOL AND DRUGS IN THE WORKPLACE* 1 (Aug. 8, 1986) (unpublished manuscript available from the National Employment Law Institute)).

177. M. ROTHSTEIN, *supra* note 175, at 98-100.

178. 135 CONG. REC. S10,777 (daily ed. Sept. 7, 1989) (statement of Sen. Thomas R. Harkin).

179. See *id.* at S10,775 (statement of Sen. Jesse A. Helms).



ment "zero tolerance" policies regarding alcohol and drug abuse without fear of liability under the ADA.<sup>180</sup>

On the other hand, Congress recognized that treatment for those addicted to drugs is not only compassionate but also essential to a comprehensive attack on drug use.<sup>181</sup> Congress drafted section 104 to protect individuals who enter rehabilitation from adverse employment action in order to encourage drug addicts to seek treatment for their condition.<sup>182</sup> Congress recognized that taking action against addicts based on assumptions about their abilities is as discriminatory as taking action against other disabled persons because of similar foundationless assumptions.<sup>183</sup>

One example of a congressional attempt to facilitate employers' efforts to maintain drug-free workplaces is the authorization of drug testing for employees and applicants.<sup>184</sup> By insisting that tests be accurate, however, Congress recognized the injustice of allowing employers to terminate individuals who are not drug users or alcohol abusers on the basis of erroneously positive test results.<sup>185</sup> Committees reporting on the ADA stated very plainly that drug tests must be designed to detect accurately the presence of illegal drugs rather than the presence of legal prescription medication.<sup>186</sup>

Thus, Congress drafted section 104 to strike a delicate balance between the interests of employers and their employees.<sup>187</sup> It recognized the need to protect employers, other workers, and the public from persons whose current drug use either impairs their ability to perform a job or threatens to cause serious harm to the lives or property of others.<sup>188</sup> At the same time, it acknowledges that effective treatment for addicts is an essential component of the war on drugs.<sup>189</sup> This approach effectively reconciles the needs of addicts with the rights and legitimate interests of others.<sup>190</sup>

180. See *id.* at S10,777 (statement of Sen. Daniel R. Coats).

181. 136 CONG. REC. H2443 (daily ed. May 17, 1990) (statement of Rep. Charles D. Rangel). Congressman Rangel stated: "Treatment can save the lives of individual abusers, and it can also return them to productive roles in society. . . ." *Id.*

182. *Id.*

183. See *id.* at H2443-44.

184. 135 CONG. REC. S10,777 (daily ed. Sept. 7, 1989) (statement of Sen. Thomas R. Harkin).

185. H.R. REP. NO. 485, *supra* note 3, at 80.

186. *Id.*; see *supra* notes 165-68 and accompanying text.

187. 136 CONG. REC. H2443 (daily ed. May 17, 1990) (statement of Rep. Charles D. Rangel).

188. *Id.*

189. *Id.*; see also Note, *Drug Diplomacy and the Supply-Side Strategy: A Survey of United States Practice*, 43 VAND. L. REV. 1259, 1308-09 (1990) (concluding that the United States should place more emphasis on treatment of drug addicts in its efforts to combat the drug problem).

190. "Rights" refers to the rights of other workers and the public not to have their lives, health, or property jeopardized by drug-impaired individuals. "Legitimate interests" means the

### B. Likely Effects of Section 104

As noted above,<sup>191</sup> Congress confused the status of addicts by making the 1978 Amendment applicable to the definition of an "individual with handicaps" rather than the definition of a "qualified individual."<sup>192</sup> This quirk in the language of the statute led to decisions finding that addicts were not handicapped because they fell within a statutory exception or had not been rehabilitated or entered a rehabilitation program.<sup>193</sup> Section 104 clarifies the situation by expressly excluding individuals who currently use illegal drugs from the definition of "qualified individual with a disability."<sup>194</sup>

On the other hand, section 104 is somewhat ambiguous with regard to current and former alcoholics. Because of its literal wording, the "currently engaging in" standard may apply only to individuals currently engaging in the use of illegal drugs.<sup>195</sup> While alcoholics bringing claims under section 504 of the Rehabilitation Act remain subject to the standard enacted by the 1978 Amendment,<sup>196</sup> it is not clear from the face of the statute which standard Congress intended to apply to alcoholics bringing claims under Title I of the ADA.<sup>197</sup> Congress should amend section 104 to avoid further confusion.

On its face, section 104 appears to exclude more addicts from the protections of the ADA than the 1978 Amendment excluded under the Rehabilitation Act.<sup>198</sup> Section 104 applies not only to addicts whose current use renders them unqualified or a threat to property or safety; it

interest of employers in taking disciplinary action against unproductive—and in some cases dangerous—workers.

191. See *supra* note 130.

192. The exclusions for individuals who could not perform the duties of the position and for individuals whose employment posed a direct threat to the property or safety of others implicate their job qualifications, not their status as handicapped or not handicapped. The same is true of the employee's seeking or failing to seek rehabilitation. By making the statutory exceptions for certain classes of alcoholics and drug users applicable to the definition of "individual with handicaps," Congress collapsed the separate inquiries into the existence of a handicap and the individual's qualifications into a single inquiry, thus creating a situation in which it was unclear from the language of the statute whether an individual falling within one of the exceptions should be considered handicapped but not qualified or, alternatively, not handicapped at all. See *id*

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

194. See ADA, *supra* note 1, § 104(a), 104 Stat. at 334. The faulty language from the 1978 Amendment, however, remains in effect for alcoholics bringing suit under § 504 of the Rehabilitation Act. See *id.* § 512(a), 104 Stat. at 377.

195. See *supra* note 158.

196. ADA, *supra* note 1, § 512(a), 104 Stat. at 377.

197. But see 135 CONG. REC. S10,753 (daily ed. Sept. 7, 1989) (colloquy between Sens. Thomas R. Harkin and William L. Armstrong); *id.* at S10,777 (colloquy between Sens. Thomas R. Harkin and Daniel R. Coats).

198. See 135 CONG. REC. S10,775 (daily ed. Sept. 7, 1989) (statement of Sen. Jesse A. Helms); 136 CONG. REC. H2443 (daily ed. May 17, 1990) (statement of Rep. Charles D. Rangel).

also excludes all current users who have not been rehabilitated or entered a rehabilitation program.<sup>199</sup> In addition, section 104 authorizes employers to test applicants and employees for drugs<sup>200</sup> and make employment decisions based on the results.<sup>201</sup> In actual application, however, the ADA should not provide narrower coverage than the Rehabilitation Act given that courts have held that the latter also excludes unrehabilitated addicts<sup>202</sup> and permits drug testing and employer action based on positive results.<sup>203</sup>

## VI. RECOMMENDATIONS

The difficulty with enforcing laws designed to eliminate discrimination against disabled individuals is that, unlike most civil rights legislation, precise definition of the protected class is necessary to accomplish the purposes of the legislation.<sup>204</sup> Interpreting the definition of "disability" too broadly encompasses persons with only minor ailments or who are not truly disabled.<sup>205</sup> Including such individuals trivializes the importance of the protection the law affords. On the other hand, interpreting the definition too narrowly might exclude individuals who truly are disabled and who require protection from discrimination. When applying the ADA to specific cases, courts must avoid the two extremes of overinclusiveness and underinclusiveness.

While congressional intent behind section 104 is fairly clear, ambiguities such as those noted above<sup>206</sup> may confuse courts the same way the 1978 Amendments did. To avoid confusion, courts should focus

199. A drug addict who has not been rehabilitated possibly could be qualified for the position and not be a direct threat to the property or the safety of others. *See, e.g., Nisperos v. Buck*, 720 F. Supp. 1424, 1431 (N.D. Cal. 1989) (finding that an Immigration and Naturalization Service attorney had demonstrated that he was qualified for his position despite his drug use). Thus, to the extent that the Rehabilitation Act protected these individuals, the ADA reduces the protections afforded addicts. As explained below, however, this reduction should affect a relatively small number of individuals. *See infra* text accompanying notes 202-03.

200. ADA, *supra* note 1, § 104(b), (d)(1), 104 Stat. at 335-36.

201. H.R. REP. No. 485, *supra* note 3, at 79.

202. *See, e.g., Burka*, 680 F. Supp. at 599.

203. *See id.* at 601; *American Fed'n of Gov't Employees v. Dole*, 670 F. Supp. 445, 447 n.6 (D.D.C. 1987).

204. O'Connor, *Defining "Handicap" for Purposes of Employment Discrimination*, 30 ARIZ. L. REV. 633 (1988). O'Connor states:

More than in any other area of civil rights litigation, the effectiveness of [federal and state laws prohibiting discrimination against the handicapped] has turned on the definition given to the protected class—both in the manner in which the legislature has chosen to define "handicap," and in the ways in which the courts have construed and interpreted that definition."

*Id.* at 633.

205. *See* H.R. REP. No. 485, *supra* note 3, at 52 (stating that a person with a temporary, trivial impairment like an infected finger is not disabled for purposes of the ADA).

206. *See supra* notes 195-97 and accompanying text.

their inquiry on the four basic elements of a prima facie case.<sup>207</sup> Courts should incorporate the special provisions of the ADA and the Rehabilitation Act regarding addicts into the four-part analysis as factors relevant to the "qualified" element of a prima facie case. Addicts always should be considered disabled for purposes of Title I or section 504, but still must be required to prove the other elements of a prima facie case before being eligible for the protections of either act.<sup>208</sup> Focusing the inquiry on the elements of a prima facie case avoids the confusion of applying one test for addiction and another for other disabilities. More important, this approach more accurately reflects Congress's intent when it enacted the special provisions regarding addicts.<sup>209</sup>

Finally, courts should interpret section 104's exception for rehabilitated and rehabilitating addicts as creating a presumption that a given addict's prior drug use does not affect the addict's qualifications for the job in question. As explained above,<sup>210</sup> Congress wanted to give addicts an opportunity to reform their lives rather than have them forever face stigmatization for a history of addiction. Furthermore, prior addiction does not disqualify an individual in most situations.<sup>211</sup> Thus, such a presumption should be rebuttable only by evidence that prior drug use is relevant to a valid, job-related criterion for the position in question.<sup>212</sup>

## VII. CONCLUSION

Section 104 of the Americans with Disabilities Act of 1990 clarifies the coverage of addicts under disability discrimination law, but leaves unclear the status of alcoholics under the ADA. Although it excludes current drug addicts from the protections of Title I, section 104 otherwise should provide the same level of protection to addicts provided by 504 of the Rehabilitation Act. Properly interpreted, section 104 strikes a reasonable balance between the legitimate interest of employers in a drug-free workplace and the interests of applicants and employees whether or not they have alcohol or drug problems. Overall, section 104 should provide a workable standard for courts to employ in resolving

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207. See *supra* notes 25-29 and accompanying text.

208. See *supra* note 130.

209. This conclusion is reflected by the fact that § 104's exclusionary rule applies to the definition of a "qualified individual with a disability." See *supra* notes 191-94 and accompanying text.

210. See *supra* notes 181-83 and accompanying text.

211. See, e.g., *Nisperos v. Buck*, 720 F. Supp. 1424, 1429 (N.D. Cal. 1989); *Davis v. Bucher*, 451 F. Supp. 791, 797 & n.4 (E.D. Pa. 1978).

212. Cf. *Copeland v. Philadelphia Police Dep't*, 840 F.2d 1139, 1149 (3d Cir. 1988).

the clash between society's rights and the rights of the individual addict.

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