Disability Law: Employment

Summary. *In 1984, there were significant gains for disabled people under section 504 of the Rehabilitation Act. Federal courts upheld coverage of all federally assisted employers and the requirement of reasonable accommodation under section 504. Disabled federal employees and applicants, however, did not fare as well in winning claims of employment discrimination under section 501. Several federal courts found disabled individuals not qualified handicapped persons for specific federal government jobs.*

I. Section 504 of the Rehabilitation Act

A. Standing

In 1984, the most significant development in disability law in the context of employment was the Supreme Court decision in *Consolidated Rail Corp. v. Darrone*.[1] A unanimous Supreme Court held that disabled people can sue under section 504 of the Rehabilitation Act for employment discrimination in all programs receiving federal aid. Plaintiff LeStrange filed suit against Conrail when the railroad refused to rehire him as a locomotive engineer after his left hand and forearm were amputated as a result of an accident. Plaintiff contended that employer had no grounds for finding him unfit to work and that its refusal to employ him violated his rights under section 504 of the Rehabilitation Act.[2] The district court followed the reasoning in *Trageser v. Libbie Rehabilitation Center, Inc.*[3] and found that plaintiff did not have standing to bring a private action under section 504. In *Trageser*, the Fourth Circuit concluded that the 1978 amendments to the Rehabilitation Act[4] incorporated the limitation of Title VI of the Civil Rights Act into section 504.[5] Section 604 of Title VI restricts coverage of employment to those federally funded programs in which the "primary objective" of the federal assistance is the provision of employment. Three other circuits had adopted the *Trageser* holding in ruling that this "primary objective" limitation applied to handicapped individuals challenging employment discrimination under section 504.[6] In reversing the district court's ruling, the Third Circuit rejected the interpretation of the *Trageser* court.[7] The Supreme Court affirmed the Third Circuit's decision.

The Supreme Court held that the language of section 504, its legislative history, executive agency interpretation, and purpose did not support the "primary objective" limitation. The Court noted that section 504's language prohibited discrimination against qualified handicapped persons under "any program or activity receiving federal financial assistance."[8] The Court stated "it is unquestionable that the section was intended to reach employment discrimination" and that the legislative history did not mention a "primary objective" limitation, but instead emphasized the importance of combating employment discrimination.[9] The Court also noted that the federal agency responsible for coordinating enforcement of section 504 has consistently interpreted that section to prohibit employment discrimination by all recipients of federal funds, regardless of the "primary objective" of that funding.

> The regulations particularly merit deference in the present case: the responsible congressional committees participated in their formulation, and both these committees and Congress itself endorsed the regulations in

The authors are Sy DuBow, Legal Director of the National Center for Law and the Deaf, Gallaudet College, 800 Florida Avenue, N.E. Washington, D.C. 20002, (202) 651-5454, and Sarah Geer and Marc Charmatz, National Association of the Deaf Legal Defense Fund, P.O. Box 2304, 800 Florida Avenue, N.E., Washington, D.C. 20002.

1. Consolidated Rail Corp. v. Darrone, 104 S. Ct. 1248 (1984) (Clearinghouse No. 35,000).
2. 29 U.S.C. § 794.
3. Trageser v. Libbie Rehabilitation Center, Inc., 590 F.2d 87 (4th Cir. 1978), *cert. denied*, 442 U.S. 947 (1979).
4. 29 U.S.C. §§ 794(a) and (b) and 29 U.S.C. § 795.
5. 42 U.S.C. § 2000d.
6. Scanlon v. Atascadero State Hosp., 677 F.2d 1271 (9th Cir. 1982); United States v. Cabrini Medical Center, 639 F.2d 908 (2d Cir. 1981); Carmi v. Metropolitan St. Louis Sewer Dist., 620 F.2d 672 (8th Cir. 1980), *cert. denied*, 449 U.S. 892 (1980).
7. Consolidated Rail Corp. v. Darrone, 687 F.2d 767 (3d Cir. 1982) (Clearinghouse No. 35,000).
8. 29 U.S.C. § 794.
9. *Consolidated Rail*, 104 S. Ct. at 1253.

Photo by Robert Serafin

their final form. Finally, application of § 504 to all programs receiving federal financial assistance fits the remedial purpose of the Rehabilitation Act "to promote and expand employment opportunities" for the handicapped.[10]

The Court also held that the 1978 amendments of the Rehabilitation Act were "designed to enhance the ability of the handicapped individuals to assure compliance with section 504."[11] The Court concluded that Congress could not have intended "silently [to adopt] a drastic limitation on the handicapped individual's right to sue federal grant recipients for employment discrimination."[12] The Court stated that, since very few programs receive federal funds for the primary purpose of employment, adoption of the narrow *Trageser* view would have severely restricted the number of disabled people who could challenge employment discrimination under section 504.

The Court further ruled that the case was not moot, despite plaintiff LeStrange's death, because section 504 authorizes backpay and his estate could recover money owed.[13]

. . . Congress could not have intended "silently [to adopt] a drastic limitation on the handicapped individual's right to sue federal grant recipients for employment discrimination."

Finally, the Court noted that "Congress incorporated the substance of the Department's [Health, Education and Welfare] regulations into the statute."[14] This incorporation is extremely significant in upholding the validity of the section 504 regulations because of the reasonable relation to the purpose of the statute.

10. *Id.* at 1255 (citing 29 U.S.C. § 701(8)).
11. *Id.* (citing S. REP. No. 890, 95th Cong. 18 (1978)).
12. *Id.*
13. Plaintiff LeStrange's Executor was substituted as Respondent before the Supreme Court.
14. *Consolidated Rail*, 104 S. Ct. at 1255 n.15.

B. Reasonable Accommodation

In *Nelson v. Thornburgh,* the Third Circuit affirmed a district court opinion requiring reasonable accommodation under section 504 for blind employees.[15] Plaintiff blind income-maintenance workers for the Pennsylvania Department of Public Welfare (DPW) needed an accommodation to do paperwork for determination of client eligibility for government benefits. Although the workers had paid for readers at their own expense in the past, they wanted DPW to assume this cost. DPW argued that the blind employees were not otherwise qualified to do the job because they could not read. The district court held that plaintiffs were qualified handicapped persons because they could perform their jobs as well as sighted co-workers with a reasonable accommodation. The court pointed out that the provision of readers is an express example of reasonable accommodation in the section 504 regulations.[16]

DPW also argued that it was not required to provide the necessary accommodation because the cost of readers or mechanical devices would be an undue burden. The district court stated that this argument was not persuasive "in view of DPW's $300,000,000 administrative budget, the modest cost of providing half-time readers, and the ease of adopting that accommodation without any disruption of DPW's services."[17] Moreover, the court noted that DPW considers handicapped applicants ineligible for government benefits if they are employable with reasonable accommodation such as readers. The court concluded "[i]t does not seem wholly unfair to impose upon DPW the same requirements that DPW apparently imposes upon its clients and their would-be employees."[18]

The Third Circuit addressed the issue of an employer's defense of safety in an employment discrimination action. In *Strathie v. Department of Transportation,*[19] the court found that the district court ignored evidence in the record that an appropriate hearing aid would enable a hearing-impaired person to drive a school bus without appreciable risk to the safety of passengers. The district court had accepted the Department's arguments supporting its ban on issuing school bus licenses to hearing aid users. The Third Circuit vacated the district court's ruling and remanded the action because there was no factual basis in the record reasonably demonstrating that accommodating plaintiff would require a modification of the essential nature of the licensing program or cause an undue burden on the Department. The Third Circuit noted that there was evidence in the record to overcome the Department's safety concerns about the possibility of the hearing aids becoming dislodged, breaking down, being turned down, or not being able to localize sound. The court held that this evidence had to be considered in determining whether in fact a driver wearing a stereo hearing aid would present an appreciable risk to the safety of school bus passengers.

II. Education of the Handicapped Act

In *Fitzgerald v. Green Valley Area Education Agency,*[20] the district court relied on the Education of the Handicapped Act (EHA)[21] in finding that an Iowa education agency had discriminatorily refused to hire a disabled person for a teaching position because of his handicap. Disabled plaintiff had applied for a position as a preschool special education teacher. Even though plaintiff was clearly qualified for the position, when he told the education agency of his handicap, a slight paralysis of his left side, he was informed that he also needed to drive a school bus. Though plaintiff can drive and has a New York chauffeur's license, Iowa law requires a person to have full use of both legs and both arms to qualify for a bus driver's permit. Defendant education agency told plaintiff that, because he could not obtain a state bus driver's permit, it would not be worth his time to interview for the position. The district court held that, since defendant receives EHA funds, it has a statutory duty to "take positive steps"[22] to employ qualified handicapped persons in its programs. The court also ruled that the education agency had failed to fulfill this duty by not considering alternatives that would have eliminated the bus driving requirement for plaintiff. The court noted that defendant had three alternatives: (1) the local school district could assume its legal responsibility for transporting the students; (2) plaintiff could be placed in a school where transportation duty was not required; or (3) an independent carrier to transport the students could be hired. The court found that all of these alternatives were within the range of "positive steps" required of recipients of EHA funds.

In 1984, federal applicants and employees have had great difficulty in establishing claims of employment discrimination under section 501.

III. Section 501 of the Rehabilitation Act

Federal employees and applicants for federal government jobs are protected against employment discrimination on

15. Nelson v. Thornburgh, 567 F. Supp. 369 (E.D. Pa. 1983), *aff'd,* 716 F.2d 230 (3d Cir. 1984), *petition for cert. filed,* U.S.L.W. (U.S. May 14, 1984) (No.83-1864).
16. *See* 34 C.F.R. § 104.12.
17. *Nelson,* 567 F. Supp at 380.
18. *Id.* at 382 n.26.
19. Strahie v. Department of Transp., 547 F. Supp. 1367 (E.D. Pa. 1982), *vacated and remanded,* 716 F.2d 227 (3d Cir. 1983).
20. Fitzgerald v. Green Valley Area Educ. Agency, 589 F. Supp. 1130 (S.D. Iowa 1984).
21. Education of the Handicapped Act, 20 U.S.C. §§ 1400 *et seq.*
22. *Id.* at § 1405.

the basis of handicap by section 501 of the Rehabilitation Act.[23] Although the underlying policy of section 501 parallels the employment provisions of section 504, there are significant procedural and substantive differences between the two sections. In 1984, federal applicants and employees have had great difficulty in establishing claims of employment discrimination under section 501.

. . . a federal employer was not required to make "reasonable accommodation" to plaintiff's handicap by assigning light duties or modifying hours and assignments.

A. Qualified Handicapped Person

Section 501 limits its protection to "qualified handicapped persons."[24] Recently, a number of courts have denied redress to federal employees and applicants on the ground that the handicapped individuals were not qualified for the jobs in question or that they were not handicapped within the meaning of the Act. In *Treadwell v. Alexander*,[25] the Eleventh Circuit adopted the prevailing view that a "qualified handicapped person" is one who, with or without reasonable accommodation, can perform the essential functions of the job. However, in *Daubert v. United States Postal Service*,[26] the Tenth Circuit concluded that a handicapped person's physical limitations prevented her from being qualified for a job; the court did not consider whether the employee could perform the essential functions of the job with reasonable accommodation.

In *Treadwell*, the Eleventh Circuit affirmed a lower court decision that the U.S. Army Corps of Engineers did not discriminate against an applicant for the position of park technician, which required the capacity to walk six hours a day, because of his heart condition. The applicant, who had had a coronary bypass operation and used a pacemaker, admitted that he could not walk more than one mile a day. The court found that the Corps acted reasonably in concluding that the applicant was not a qualified handicapped person since he could not physically perform the essential functions of the job; the applicant could not safely operate a motorboat alone, walk over rough terrain, walk for long distances, or handle unruly park visitors. The court found that the Corps was also justified in deciding that it was unable to make reasonable accommodations to applicant's disabilities since assigning other park technicians to perform his job duties would impose an "undue hardship" on the employer because of the small number of park technicians available at the worksite. The court also declared that the burden of proof on an applicant's medical condition rests with the applicant. The court held that, in meeting this burden, an applicant could not present additional evidence of his or her medical condition that was generated after the government's decision to deny employment. "A finding of discrimination cannot be predicated on information that the agency did not have before it at the time it made its decision."[27]

In *Daubert*, the Tenth Circuit ruled that, pursuant to section 504, a postal employee was not "otherwise qualified" for the job as mail sorter and mail handler because she could not perform the functions of these positions, which required the ability to lift heavy mail sacks, push loaded dollies and manually sort mail, due to back problems. The Postal Service produced sufficient evidence that plaintiff was unable to perform these functions without injury to herself. The court also accepted Postal Service claims that it was unable to alter the physical demands of the job due to union contract restrictions. As in *Treadwell*, the federal employer was not required to make "reasonable accommodation" to plaintiff's handicap by assigning light duties or modifying hours and assignments.

In reaching its conclusion in *Daubert*, the Tenth Circuit inexplicably based most of its discussion on references to section 504 and section 504 cases,[28] even though section 501 and pertinent section 501 regulations were also quoted in full.[29] Arguably, section 504 cases, applicable to federally assisted programs, have no relevance to a section 501 case. Moreover, by treating sections 504 and 501 as coextensive, the court failed to consider the major difference between the two statutes: the affirmative action provision of section 501 and the impact, if any, that that provision has on union contracts.

Federal applicants and employees were also unsuccessful in their lower court claims. In both *Treadwell* and *Daubert*, the courts looked to the handicapped applicants' medical conditions in determining that they were not qualified. In *Walker v. Attorney General of the United States*,[30] the FBI discharged an employee who reported that he had angina and a heart condition

23. 29 U.S.C. § 791. The 1978 Amendments to the Rehabilitation Act also make the provisions of section 504 applicable to "any program or activity conducted by any Executive agency or by the United States Postal Service." 29 U.S.C. § 794.
24. 29 U.S.C. § 1613.702(e).
25. Treadwell v. Alexander, 707 F.2d 473 (11th Cir. 1983).
26. Daubert v. United States Postal Serv., 733 F.2d 1367 (10th Cir. 1984).
27. *Daubert*, 707 F.2d at 475.
28. *See* Southeastern Community College v. Davis, 442 U.S. 397 (1979); Doe v. New York Univ., 666 F.2d 761 (2d Cir. 1981); Pushkin v. Regents of Univ. of Colo., 658 F.2d 1372 (10th Cir. 1981).
29. *See* 29 C.F.R. § 1613.702 (qualified handicapped person) and 29 C.F.R. § 1613.704 (reasonable accommodation).
30. Walker v. Attorney Gen. of U.S., 572 F. Supp. 100 (D.D.C. 1983).

and therefore could no longer do strenuous manual labor. Plaintiff also failed tests for less strenuous clerical positions. Even though the medical evidence relied on by the agency was found to be erroneous, the court ruled that the FBI had no duty to inquire further into employee's medical condition. The agency had acted reasonably in concluding that employee was not qualified for a job when it relied on the conclusions of the employee's own doctor and reports from a federal medical center. Therefore, the agency was justified in firing plaintiff after learning of his disabling illness.

In *Smith v. United States Navy,*[31] legitimate physical standards were upheld in the context of military service. According to regulations, since plaintiff lost his index finger, he was not eligible to serve as a commissioned officer in the Naval Reserve. The district court ruled that the general guidelines of the Rehabilitation Act did not interfere with the wide latitude and discretion Congress gave the executive branch in commissioning military officers. The court held that the Navy therefore had authority to set physical qualifications for officers and could reject an applicant due to the absence of an index finger. The district court held that the Rehabilitation Act applies to "hiring of civilian employees of the Federal Government but not to the commissioning of military officers or military programs."[32] In dictum, the court also found that plaintiff was not an "otherwise qualified" handicapped individual for an officer position because he did not meet the reasonable physical standards for entrance into naval service.

In *Stevens v. Stubbs,*[33] an employee was unable to invoke the protections of section 501 because he could not establish that he was a handicapped person. Employee offered no evidence of "physical or mental impairment that substantially limited one or more of his major life activities."[34] Although he had illnesses that required him to take sick leave, the court held that transitory illnesses that have no permanent effect on the person's health are not considered a handicap under the Rehabilitation Act. Consequently, the court rejected plaintiff's claim that his position was downgraded because of a physical handicap.

Photo by Robert Serafin

B. Affirmative Action

One of the major differences between sections 504 and 501 is that section 501 requires federal agencies to have affirmative action plans for the hiring, placement and advancement of handicapped individuals. Yet, this requirement does not always result in a measurably higher standard for federal agencies. In *Skillern v. Bolger,*[35] the Seventh Circuit affirmed the dismissal of a lawsuit brought by a disabled applicant for a custodial position. The court held that the Postal Service could limit hiring for custodial positions to veterans because of the Veterans Preference Act of 1944.[36] There were applications pending from eligible veterans. The court held that plaintiff applicant was rejected because he was not a veteran and that he presented no evidence that he was rejected because of physical disability.

31. Smith v. United States Navy, 573 F. Supp. 1361 (S.D. Fla. 1983).
32. *Id.* at 1364.
33. Stevens v. Stubbs, 567 F. Supp. 1409 (N.D. Ga. 1983).
34. 29 C.F.R. § 1613.702
35. Skillern v. Bolger, 725 F.2d 1121 (7th Cir. 1984) (Clearinghouse No. 36,002).
36. Veterans Preference Act, 39 U.S.C. § 1005(a)(2).