

**Chai R. Feldblum, *The (R)evolution of Physical Disability Anti-discrimination Law: 1976-1996, 5 MDPLR (1996).***

## **INTRODUCTION**

In 1976, John Wodatch and Ann Beckman had finished their draft of regulations to implement section 504 of the Rehabilitation Act of 1973. These lawyers, from the Office of Civil Rights and from the General Counsel's office in the Department of Health, Education and Welfare, respectively, had not been long-time disability rights lawyers when they began the endeavor of regulation writing in 1975. Indeed, Wodatch was a staff attorney with only five years experience in the Office of Civil Rights who felt the job provided him with a good opportunity to be in charge of a big project from start to finish.<sup>i</sup>

Twenty years later, Wodatch heads a Disability Rights Section in the Department of Justice, comprised of approximately 30 lawyers, 20 technical assistance staff members, 10 investigators, four architects, and countless support staff. Wodatch and his staff are responsible for promulgating regulations under several titles of the Americans with Disabilities Act (ADA), and for investigating, mediating, and/or litigating hundreds of disability discrimination complaints in public employment and services and in public accommodations. Across town, Wodatch's counterparts in the Equal Employment Opportunity Commission (EEOC) head staffs that develop disability policy in private employment, promulgate regulations, and mediate or litigate employment cases in the private sector.

A great deal has happened in 20 years with regard to physical disability law and policy. The evolution of physical disability law has, in many respects, been a revolution in law, attitudes, and results. The project Wodatch and others began 20 years ago has been a big project--with the final end not yet in sight.

Both the evolutionary and *revolutionary* aspects of the development of physical disability law and policy are worth taking note of at this 20th anniversary of the *Mental and Physical Disability Law Reporter*. Indeed, an assessment of the past may help guide us to a better understanding of the legal and policy challenges and opportunities of the future.

## **ACKNOWLEDGMENT OF DISABILITY IN A SOCIAL CONTEXT**

In 1973, as part of a massive Vocational Rehabilitation Act, Congress added a brief sentence stating:

No otherwise qualified handicapped individual in the United States, as defined in section 7(6), shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

This sentence, which would become section 504 of the Rehabilitation Act, has served as the primary source of civil rights protection for over 15 years for people with disabilities. In one respect, the statement of non-discrimination in section 504 is clear and simple: no otherwise qualified individual with a disability may be subjected to discrimination solely on the basis of his or her disability.<sup>ii</sup> But, in many respects, this simple sentence leaves many questions unanswered. What does non-discrimination on the basis of disability actually mean? Does it mean *ignoring* the fact that a person has a disability when a recipient of federal funds provides services to that person or considers that person for employment? Certainly, that has been the *traditional* understanding of anti-discrimination law: Federal law requires employers and other businesses to ignore a person's race (or sex or religion, etc.) and simply judge the person on his or her merits. But would that approach to anti-discrimination be sufficient to ensure true, equal opportunity for people with disabilities? Is it not possible that a nondiscrimination mandate on the basis of disability might actually require some *affirmative* efforts on the part of recipients of federal funds in order to create a system that would offer *real*, equal opportunity for people with disabilities?<sup>iii</sup>

Not surprisingly, Congress neither considered nor answered these hard questions when it passed section 504 in 1973. In classic Washington, D.C. political style, Members of Congress were relatively comfortable with extending to disability something they had done before with regard to race and gender.<sup>iv</sup> The language of section 504 thus was simply altered, apparently relatively unselfconsciously, from language that had referred to race, religion, national origin, and sex. The idea that nondiscrimination based on disability might pose certain *unique* challenges and questions was not explored in any depth by Members of Congress or their staffs.

The exploration of those challenges, and the resolution of those questions as a matter of law, fell to the drafters of the regulations implementing section 504. Wodatch, Beckman, and others within the government agencies absorbed the experiences and perspectives of people with disabilities and disability rights advocates as they drafted the regulations.<sup>v</sup> The result was regulations that, when finally issued in 1977, broke significant new ground in developing the concept of non-discrimination on the basis of disability.

Understanding the novelty of the original section 504 regulations, reviewing how courts dealt with those regulations, and finally, considering how the significant conceptual aspects of those regulations were ultimately incorporated into the ADA lie at the core of understanding the past 20-year development of disability law and policy. The significant, revolutionary aspect of this development was a recognition that disability must often be *acknowledged*, rather than *ignored*, and that the acknowledgment must occur with a critical eye cast on the *social context* in which people with disabilities are forced to operate.

## **The Section 504 Regulations**

Under the a General Provisions subpart of the 1977 section 504 Health, Education and Welfare (HEW) regulations, recipients of federal funds were prohibited from denying qualified people with disabilities the opportunity to participate in a program or benefit (including employment), from affording such individuals unequal opportunities to participate in such benefits, or from providing different or separate benefits to such individuals.<sup>vi</sup> All these prohibitions sound as if they could have been lifted directly from regulations setting forth the prohibitions of the Civil Rights Act of 1964 or the Education Amendments of 1972, with regard to race, religion, national origin, or sex. Under these laws, a recipient of federal funds is prohibited from taking into account extraneous characteristics (such as race or gender) that do not affect an individual's ability to participate in employment, services, or other aspects of society.

But in the separate subparts of the HEW section 504 regulations, some new concepts began to emerge. In employment, an entire section introduced the concept of “reasonable accommodation” and provided that a recipient of federal funds was required to “make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program.”<sup>vii</sup> While neither “reasonable accommodation” nor “undue hardship” was defined in the regulations, examples of reasonable accommodation (such as making facilities accessible to people with disabilities, modifying work schedules, or acquiring devices) were provided, and several factors for determining whether an undue hardship had occurred were set forth as well.

In the post-secondary education section, the regulations included a section titled “academic adjustments.” This section required recipients to make modifications to their academic requirements to ensure they did not have the effect of discriminating on the basis of disability. Examples of such modifications included “changes in the length of time permitted for the completion of degree requirements, substitution of specific courses required for the completion of degree requirements, and adaptation of the manner in which specific courses are conducted.”<sup>viii</sup> This section, as well as one governing health, welfare, and social services programs, also required recipients to provide “auxiliary aids” if aids were necessary to ensure a person with a disability could enjoy the education or service being offered. Again, “auxiliary aids” were defined through example: they included various means of making materials or services available to individuals with hearing, visual, or manual impairments.<sup>ix</sup>

The regulations also included a subpart titled “Program Accessibility.” This section addressed the difficult question of inaccessible facilities. Did a nondiscrimination mandate mean every building operated by a recipient of federal funds had to be renovated to ensure accessibility? If such a requirement went beyond section 504’s mandate of nondiscrimination, was *anything* affirmative required in the area of accessibility and if so, on what conceptual basis?

To answer these questions, the regulators created the concept of “program accessibility.” Under this requirement, the overall program or activity carried out by the recipient had to be readily accessible to people with disabilities “when viewed in its entirety.” In practice, this meant that not every building operated by a recipient had to be accessible, as long as the recipient was able to ensure that, in some manner, people with disabilities were given the same access to the overall program or activity as people without disabilities enjoyed.<sup>x</sup>

## **Court Interpretations of Section 504 Regulations**

In 1979, the U.S. Supreme Court considered the first section 504 case, *Southeastern Community College v. Davis*.<sup>xi</sup> The Court’s decision was incredibly muddled in its interpretations of such concepts as “otherwise qualified” people with disabilities, and necessary accommodations designed to ensure equal opportunity on the basis of disability. But a combination of forward-looking lower court decisions and innovative student notes in law reviews led to the Supreme Court’s clarification of the *Davis* decision six years later, which ameliorated the potential harms of the *Davis* decision.

The Court in the *Davis* case was presented with a woman who (in its view) had a “serious hearing disability,” requiring use of lipreading skills, and who wished to be trained as a registered nurse.<sup>xii</sup> The entire nursing faculty of the school that denied admission to Davis was united in its view that Davis could not safely perform the duties of a registered nurse because of her hearing limitations, and that any modifications to the program would “prevent [Davis] from realizing the benefits of the program.”<sup>xiii</sup>

The Court rejected Davis’ claim that she had been subjected to discrimination in violation of section 504 using language that was *completely consistent with a traditional view of nondiscrimination*:

Section 504 by its terms does not compel educational institutions to disregard the disabilities of handicapped individuals or to make substantial modifications in their programs to allow disabled persons to participate. Instead, it requires only that an “otherwise qualified handicapped individual” not be excluded from participation in a federally funded program “solely by reason of his handicap,” indicating *only that mere possession of a handicap is not a permissible ground for assuming an inability to function in a particular context*.<sup>xiv</sup>

This sentence reflects a view of anti-discrimination protection for people with disabilities equivalent to the protection traditionally conceived as necessary to guard against race, gender, or religious discrimination. In each of these cases, the predominant form of discrimination has been a societally-based, but untrue, assumption that the characteristic at issue (race, gender, religion etc.) would impair the person’s ability to function in a particular context. Thus, federal law prohibits the denial of employment, education, benefits or services against certain groups based on false

assumptions as to the effect of the characteristic held by the group.<sup>xv</sup>

The flip side of such reasoning, of course, is that if the characteristic at issue-- here disability--*does*, in fact, *impede* a person's ability to function in the context of employment, education, services, or benefits, it should not be considered a discriminatory act to deny that person access to such employment, education, services, or benefits. Such reasoning presumably underlay the Court's pronouncement in *Davis* that the language and structure of section 504 "reflect a recognition by Congress of the distinction between the *evenhanded treatment* of qualified handicapped persons and *affirmative efforts* to overcome the disabilities caused by handicaps."<sup>xvi</sup> The same reasoning would explain the Court's ruling that "[a]n otherwise qualified person is one who is able to meet all of a program's requirements *in spite of his handicap*."<sup>xvii</sup>

What is fascinating about the *Davis* opinion, however, is that the Court was not uniformly tied to the traditional view of anti-discrimination protection. Although the Court adamantly noted that "neither the language, purpose, nor history of section 504 reveals an intent to impose an affirmative-action obligation on all recipients of federal funds,"<sup>xviii</sup> the Court also pointed out it was not suggesting "that the line between a lawful refusal to extend affirmative action and illegal discrimination against handicapped persons always will be clear."<sup>xix</sup> For example, the Court noted that:

situations may arise where a refusal to modify an existing program might become unreasonable and discriminatory. Identification of those instances where a *refusal to accommodate* the needs of a disabled person *amounts to discrimination* against the handicapped continues to be an important responsibility of HEW.<sup>xx</sup>

To the extent the Court had an opinion on the matter, it appeared to be that modifications that "impos[ed] undue financial and administrative burdens" would not be required.<sup>xxi</sup>

*Davis* thus represents a fascinating example of Supreme Court Justices "looking through the glass darkly." The main thrust of the Court's opinion was to reinforce a traditional view of anti-discrimination protection and to apply that view simplistically to disability anti-discrimination. Yet, at the same time, the Court seemed to perceive that such a view might not do full justice to the realization of equal opportunity that, many people believe, is inherent in true anti-discrimination protection. While the Court in *Davis* gave little direction as to how such equal opportunity was to be achieved, it provided in its final few paragraphs an opening to the future in an opinion that was, on its face, a pure reflection of the past.

Setting the groundwork for that future became the job of lower federal courts and academic commentators. The Fifth Circuit took the lead in rejecting both a literal and a broad reading of the Supreme Court's decision in *Davis*. In *Camenisch v. University of Texas*, the Fifth Circuit ruled section 504 HEW regulations required educational

institutions “to provide services in their academic programs to accommodate the handicapped, including the provision of such services as sign language interpreters.”<sup>xxii</sup> The court distinguished *Davis* as standing solely for the proposition that schools were not required to provide services to people whose disabilities “preclude [them] from ever realizing the principal benefits of the training.”<sup>xxiii</sup> Because it was undisputed that the plaintiff, Mr. Camenisch, could benefit from and complete the master’s program at issue with the aid of an interpreter, the court held *Davis* to be inapplicable.

Similarly, in *Tatro v. Texas*,<sup>xxiv</sup> the Fifth Circuit held section 504 required a school to perform a daily, simple catheterization for a four-year-old child. The court again distinguished *Davis* by noting that, unlike *Davis*, if the young child received the simple catheterization process, she could “perform well in school and thus realize the principal benefits of the school district’s program.”<sup>xxv</sup>

While these cases began the trend of limiting *Davis* to its facts, judicial cases do not normally set forth expansive, theoretical analyses. Thus, not surprisingly, these cases did not critically analyze the theoretical limitations inherent in the *Davis* opinion, nor did they proffer an affirmative, theoretical argument in support of the obligations imposed by the section 504 HEW regulations. Those regulations had broken new ground by requiring recipients of federal funds to engage in affirmative accommodations as a form of nondiscrimination. But regulations, like judicial opinions, are rarely accompanied by extensive, theoretical explications--even of new and significant concepts. Hence, the Supreme Court in *Davis* had managed to merge the concepts of “affirmative action” and “affirmative accommodations,” while still citing to the HEW regulations throughout its opinion.

Academic commentary on *Davis* zeroed in on the Court’s confused merger of these two concepts and the resulting inadequacy of the Court’s analysis for carrying out section 504’s goal of providing equal opportunity for people with disabilities. Two of the most lucid commentaries were student notes: Donald Olenick, *Accommodating the Handicapped: Rehabilitating Section 504 After Southern [v. Davis]* 80 COL. L. REV. 171 (1980), and Mark Martin, *Accommodating the Handicapped: The Meaning of Discrimination Under Section 504 of the Rehabilitation Act*, 55 N.Y.U. LAW REV. 881 (1980).

Olenick’s piece offered a clear distinction between “affirmative action” and “modifications to accommodate” the needs of people with disabilities.<sup>xxvi</sup> Olenick pointed out that affirmative action “generally connotes a plan to change the composition of a particular group . . . by means of . . . preferential treatment that serves to achieve a desired rate of participation by members of the class that has been injured by discrimination.”<sup>xxvii</sup> By contrast, the accommodations required by section 504 were “not aimed at achieving any particular rate of participation” by people with disabilities. Rather, they were intended to ensure that capable individuals with disabilities were not “denied an education or employment because of physical barriers or because they [could not] meet nonessential program or job requirements.”<sup>xxviii</sup>

Martin picked up on the distinction offered by Olenick and developed a further conceptual framework that included four “classes of exclusionary barriers” confronting people with disabilities. Two of Martin’s categories, exclusion based on simple social bias and exclusion based on the application of neutral standards with disproportionate impacts, are forms of exclusion suffered equally by individuals based on race or sex. But Martin also identified two other types of exclusionary barriers experienced primarily by people with disabilities: (1) “surmountable impairment barriers,” which could be successfully overcome by accommodations; and (2) “insurmountable impairment barriers,” which could not be overcome even with accommodations.<sup>xxix</sup>

While Martin’s four categories are not referred to extensively now in disability cases or theory, they served two important purposes at the time they were introduced. First, they helped provide a theoretical approach for limiting *Davis* to its facts. Borrowing from Olenick’s work and the *Camenisch* case, Martin framed *Davis*’ case as one presenting an “insurmountable impairment barrier.” While the facts of *Davis*’ case may not seem to us now as fitting such a category, the Court indeed had stated *Davis* was unlikely to benefit from “any affirmative action that the regulation reasonably could be interpreted as requiring.”<sup>xxx</sup> Milking the Court’s statement for everything it was worth, Martin concluded that “*Davis* thus resolves that section 504 does not require accommodation to eliminate the fourth class of exclusionary barriers, handicaps that, even if accommodated, would continue to prevent full program participation.” This, of course, was no different from what the HEW regulations and guidance had required from the very beginning; such a reading of *Davis* thus represented no significant restriction on section 504’s mandate to provide accommodations that would be effective in allowing a person with a disability to participate in employment or services.

Second, the concept of a “surmountable impairment barrier” made it easier to understand the idea of “reasonable accommodation” as a requirement of *nondiscrimination* necessary to ensure that a person with a disability could realistically overcome the barrier. Martin noted the Supreme Court had taken the first step toward developing such a theory in its 1974 ruling in *Lau v. Nichols*.<sup>xxxi</sup> In that case, the Court had interpreted Title VI’s prohibition on discrimination based on national origin by federal fund recipients as requiring schools to provide supplemental English language instruction to non-English-speaking Chinese students. As Martin observed: “*Lau* recognized that uniform treatment does not satisfy an antidiscrimination directive when particular circumstances deny protected individuals a meaningful opportunity to participate.... *Lau* provides support for construing section 504 to expand the meaning of discriminatory treatment beyond that premised on social bias.”<sup>xxxii</sup> In this framework, reasonable accommodation is effectively presented as an integral aspect of avoiding the liability of discrimination, rather than as a remedy for past discrimination such as affirmative action.<sup>xxxiii</sup>

In January 1985, six years after it handed down its unanimous decision in *Davis*, the Supreme Court, in an opinion by Justice Thurgood Marshall, handed down another

unanimous decision interpreting section 504, *Alexander v. Choate*.<sup>xxxiv</sup> The Court held that section 504 allowed plaintiffs to challenge neutral rules that had a disproportionate impact on people with disabilities, but ruled against the plaintiffs in *Choate*, on the grounds that the decision by the state of Tennessee to limit its coverage of annual inpatient hospital days under Medicaid did not violate section 504's disparate impact prohibition.<sup>xxxv</sup> The Court adopted the limited reading of *Davis* that had been devised by some of the lower courts and the academic commentary explaining that *Davis* was not qualified because "it appeared unlikely that she could benefit from any modifications that the relevant HEW regulations required . . . and because the further modifications *Davis* sought . . . would have compromised the essential nature of the college's nursing program."<sup>xxxvi</sup>

Recasting the analysis of a prior Supreme Court decision, without ever explicitly overturning the previous decision, is nothing new in Supreme Court jurisprudence. But the Court's explanation of what it *really* meant in *Davis* regarding reasonable accommodation is an intriguing example of the evolution of a disability law concept, and the attendant ability of the Supreme Court to ignore that an evolution has ever actually occurred. The Court went on to explain what it *really* had meant:

In *Davis*, we stated that "504 does not impose an "affirmative-action obligation on all recipients of federal funds." Our use of the term "affirmative action" in this context has been severely criticized for failing to appreciate the difference between affirmative action and reasonable accommodation; the former is said to refer to a remedial policy for the victims of past discrimination, while the latter relates to the elimination of existing obstacles against the handicapped. [Citing *Martin*, 55 N.Y.U. LAW REV. 881 (1980); *Olenick*, 80 COLUMBIA L. REV. 171 (1980), and *Dopico v. Goldschmidt*, 687 F.2d 644 (CA2 1984).] Regardless of the aptness of our choice of words in *Davis*, it is clear from the context of *Davis* that the term "affirmative action" referred to those "changes, adjustments, or modifications" to existing programs that would be "substantial," or that would constitute "fundamental [alterations] in the nature of [the] program . . ." rather than to those changes that would be reasonable accommodations.<sup>xxxvii</sup>

While Justice Marshall may have found it difficult to contradict directly the analysis of the *Davis* Court (all but one of the nine Justices who joined *Choate* had also joined *Davis*), it is unfortunate he chose not to do so. Long after *Choate* was decided, many cases have continued to cite *Davis* for the proposition that people with disabilities needed to be qualified for services or employment *in spite of* their disabilities. Moreover, Justice Marshall lost a golden opportunity to provide a theoretical explication of reasonable accommodation as an integral aspect of nondiscrimination--an explanation that was now available in the academic literature.<sup>xxxviii</sup>

In March 1987, the Supreme Court decided *School Bd. of Nassau County, Fla. v. Arline*,<sup>xxxix</sup> concerning the firing of a teacher who had tuberculosis. This case is notable primarily for its ruling that people with contagious diseases are covered by section 504

(even if the employer claims to have fired the individual because of “fear of contagion” and not because of the underlying disability); for its explanation of the disability definition prong, which covers individuals who are “regarded as” having a disability; and for its analysis of risk and safety under the requirement of “otherwise qualified.”<sup>xli</sup>

In the final paragraphs of the *Arline* opinion, the Court noted that the final step in an “otherwise qualified” determination is for a court to determine whether the “employer could reasonably accommodate the employee under the established standards for that inquiry.”<sup>xlii</sup> In an accompanying footnote, the Court briefly reviewed these “established standards,” quoting equally from *Davis* and *Choate* with no apparent awareness of the pre-existing tension between the two opinions. Nor did the *Arline* opinion evidence any understanding of the controversial, and indeed revolutionary, aspect of considering reasonable accommodation to be an integral aspect of nondiscrimination.<sup>xliii</sup>

### **The ADA: The Progeny of Reasonable Accommodation**

In 1987, a group of advocates began meeting to refine a new, proposed piece of legislation that we called the Americans with Disabilities Act (ADA). The initial draft had been written by Robert Burgdorf, a staff person for the National Council on the Handicapped, a 12-member council appointed by President Reagan. Burgdorf’s proposed bill explicitly included the concept of reasonable accommodation, and also included numerous changes from the requirements established by the section 504 regulations. The bill did not read like the section 504 regulations; it was shorter, clearer, and more onerous on businesses.

Many of us did not expect this version of the ADA to move forward, given its significant divergence from several section 504 regulations. Indeed, this version of the ADA died at the conclusion of the 100th Congress, and a substantially different version emerged for introduction in the 101st Congress. This version was drafted primarily by Robert Silverstein, then-staff director of the Senate Subcommittee on the Handicapped, with input from many of us who had provided suggestions to the first ADA draft.

Silverstein’s draft was more along the lines of what many of us viewed as politically realistic for ensuring forward movement in Congress. The bill read, in part, as if it had been lifted directly from the Health and Human Services (HHS) section 504 regulations (the successor to the HEW regulations). This was no illusion; in many sections, it was lifted directly from the regulations.

The reason the ADA parrots the section 504 regulations was largely pragmatic. Members of Congress feel most comfortable extending something “they have done before.”<sup>xliii</sup> Advocates of this version of the ADA could thus comfortably assure supporters that the ADA merely would require employers and business in the private sector to abide by rules that recipients of federal funds had been complying with for over 15 years.<sup>xliii</sup>

The pragmatic realities of Congress meant the language of the section 504 regulations was often imported directly into the ADA's statutory language, even if clarity or precision would have counseled for a redrafting of the language. But at the same time, the advantage of adopting almost wholesale a previous regulatory regime meant the requirement of reasonable accommodation as an integral aspect of anti-discrimination could be placed in the text of the ADA without significant controversy. Given the somewhat troubled path of Supreme Court jurisprudence on reasonable accommodation, this was no small matter.

Comparing the actual text of the section 504 regulations regarding "reasonable accommodation," to the comparable text of the ADA, highlights some of the specific issues that arose during passage of the law. Remarkably, neither the business community negotiators nor Bush Administration negotiators raised a concern with the basic concept of providing a reasonable accommodation as a form of nondiscrimination. That underlying battle was never engaged. But with Congress now legislating directly on the issue of reasonable accommodations, a series of detailed questions arose that understandably had been absent during passage of section 504 in 1973.

The HHS regulations provide that "no qualified handicapped person shall, on the basis of handicap, be subjected to discrimination in employment under any program or activity" receiving federal funds.<sup>xiv</sup> In a separate section, the regulations state that a recipient of federal funds "shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of the program."<sup>xvi</sup> Examples of reasonable accommodations are then provided, and a series of factors to consider in determining whether provision of an accommodation would constitute an undue hardship are listed.<sup>xvii</sup> There is no definition of either "reasonable accommodation" or "undue hardship."

Not surprisingly, the ADA follows a structure similar to that of the HHS regulations. The general rule of the ADA provides that "no covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual" in various employment opportunities.<sup>xviii</sup> In a "*Construction*" section, the ADA explicitly notes that:

the term "discriminate" includes . . . not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless [the] covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity.<sup>xix</sup>

Use of a construction section was quite intentional on the part of the drafters of the ADA. Such a structure makes clear that a failure to provide a reasonable accommodation is a form of *discrimination*; it is not a remedy for discrimination in the

way that various forms of affirmative action might serve as remedies. Moreover, despite the clear burden placed by the HHS regulations on the recipient of federal funds to demonstrate “undue hardship,” not all courts had uniformly abided by this burden of proof. The ADA text made clear that the burden of demonstrating undue hardship fell on the employer.

The ADA text also follows the HHS regulations in not providing a definition of “reasonable accommodation.” Although the drafters considered and formulated various possible definitions, the decision ultimately was made to retain the section 504 approach of merely providing *examples* of forms of reasonable accommodation. While this may not have been the optimal way to draft a statute, it was certainly the safer course politically.

The drafters of the ADA added only one modification to the list of examples lifted from the section 504 regulations: “reassignment to a vacant position.” Originally, the drafters had simply added the term “reassignment.” Negotiators for the business community subsequently requested, and received, the clarification “to a vacant position.” The reason for this addition was to ensure that the ADA’s reasonable accommodation provision would be understood as including reassignment in appropriate situations. Some, albeit not all, federal courts had interpreted the section 504 regulations as not ever requiring reassignment as a reasonable accommodation<sup>l</sup>--an interpretation many of us believed to be erroneous.

The initial drafts of the ADA also did not include a definition of “undue hardship,” for the same pragmatic reason that no definition had been included for “reasonable accommodation.” But the ADA did include a completely *new* term in a separate title of the legislation: the term “readily achievable” in the title governing public accommodations. The presence of the term “readily achievable” ultimately resulted in a statutory definition being drafted for “undue hardship.”

The term “readily achievable” was used in the public accommodations title of the ADA to set the standard for what businesses were required to do in making their physical facilities accessible to customers and clients with disabilities. If the section 504 regulations and case law had been used as a model, a “program access” requirement would have governed these businesses in their obligations to their clients or customers.<sup>li</sup> Under this requirement, if a business could not ensure that its program, in its entirety, was accessible to people with disabilities, it would have been required to make its physical facility accessible unless doing so would impose an “undue burden.”

The pragmatists among us who were assisting in the drafting of the ADA were skeptical that the relatively high standard of “program access” (with its “undue burden” limitation) could be a politically feasible approach to apply to existing physical structures of private businesses. Hence, the term “readily achievable” was coined, specifically to create a more lenient standard. The factors to consider in determining whether an action met the more lenient standard of “readily achievable” were then lifted directly

from the factors used in determining whether a reasonable accommodation in employment met the higher standard of “undue hardship.”

Negotiators for the Bush Administration welcomed a lenient standard for ensuring accessibility to the existing structures of private businesses, but balked at the idea of including a new term without any accompanying definition. So, a definition was constructed: “readily achievable” was defined as “easily accomplishable and able to be carried out without much difficulty or expense.”<sup>lii</sup> That left “undue hardship” in the employment title appearing incredibly bare; that term referenced the same factors as “readily achievable,” but had no accompanying definition. The Bush Administration negotiators agreed that clarity would be useful for the “undue hardship” term as well. So, a definition was constructed, based on an amalgam of existing section 504 cases. The definition copied the structure used in the definition of “readily achievable,” but used terms that effectively highlighted the difference between the two standards. The term “undue hardship” thus was defined as “an action requiring significant difficulty or expense.”<sup>liii</sup>

While there was no protracted battle during passage of the ADA over the basic, underlying concept of reasonable accommodation, it is intriguing to note the battles that were fought. One of the most intense ones concerned the concept of “essential functions.” The HHS regulations define a “qualified handicapped person,” with respect to employment, as “a handicapped person who, with reasonable accommodation, can perform the essential functions of the job.”<sup>liv</sup> The ADA definition of “qualified individual with a disability” is slightly different. The term is defined 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. . . . [C]onsideration shall be given to the employer’s judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.<sup>lv</sup>

The ADA’s definition of “qualified individual with a disability” represents a classic case of how the thrust and parry of political fighting can result in textual language that is either redundant or misleading. The first sentence of the definition was included in the initial draft of the ADA. The minor changes from the HHS regulations were designed to clarify that not every person with a disability necessarily requires a reasonable accommodation in order to perform a job effectively, and that both employees and applicants are covered under the definition.

The first part of the definition’s second sentence was included during the consideration of the ADA by the House Judiciary Committee, and the second part of the sentence was added when the ADA was considered by the full House of Representatives. Neither part of the second sentence added anything new to the

existing section 504 jurisprudence concerning the definition of “essential functions.” If anything, the second sentence merely sent a confusing and erroneous message that employers must have job descriptions listing all essential functions of a job before hiring anyone for a position.<sup>lvi</sup>

The reason the second sentence of the definition exists is that lawyers for the business community were frightened, to an amazing degree, by the concept of “essential functions.” It did not seem to matter to them that the concept had not been difficult for recipients of federal funds to apply under section 504, or that there was almost no litigation on “essential functions” under section 504.<sup>lvii</sup> These lawyers desperately wanted to ensure that complete control remained in employers' hands to decide what constituted the necessary functions of a job.

Unfortunately for the business community, their efforts to ensure control may have backfired. In the House Judiciary Committee, a champion for the business community offered an amendment providing that an employer's judgment regarding the functions of a job that are essential was to be “determinative.” That amendment was successfully parried with a substitute amendment providing that “consideration” should be given to the employer's judgment. On the House floor, the same business community champion wished to offer an amendment providing that essential functions listed in a *job description* were to be considered determinative. That amendment was met with the parry of a negotiated amendment that provided job descriptions would be “considered evidence” of essential functions.<sup>lviii</sup>

Although lobbyists for the business community spent an inordinate amount of time worrying about “essential functions,” they also were concerned about the fact that no bright lines indicated when an “undue hardship” would be reached. Several alternatives to section 504's flexible approach were proposed during passage of the ADA, including: a requirement that employers spend up to ten percent of their gross income on reasonable accommodations; a requirement that employers spend up to ten percent of their net income on reasonable accommodations; or a requirement that tied the accommodation limit to ten percent of an employee's salary.<sup>lix</sup> Only the last alternative (advocated by the business community) received any serious attention in Congress; this approach was offered as an amendment during consideration of the ADA by the full House of Representatives, but was defeated. In the final analysis, Congress chose to continue the flexible approach of the section 504 regulations, which allows employers to take into account various factors specific to their unique situations, including the size of their businesses and the cost of the requested accommodations.

In rejecting the amendment that would have tied “undue hardship” to a percentage of an employee's salary, Congress appeared to explicitly reject a cost-benefit approach to determining undue hardship. But there was one modification to the reasonable accommodation provision that the drafters of the ADA should have made. Many disability advocates, including myself, automatically substitute the word “effective” for the word “reasonable” when we discuss the concept of “reasonable

accommodation.” The reason is that the “reasonable” part of “reasonable accommodation” has nothing at all to do with whether a requested accommodation is unduly burdensome as a matter of finances or operational impact. Those considerations are encompassed under the *defense* of “undue hardship.” The “reasonable” part of “reasonable accommodation” refers to whether a requested accommodation is *effective* in ensuring the person with a disability can perform the job up to the standards required by the employer.

This “effectiveness” concept aids both the employer and the person with the disability. If an employee with a disability requests a particular job modification, but that modification will *not* ultimately result in the employee being able to performing the job up to the employer’s standards, that accommodation is not a “reasonable” accommodation and the employer is not required to provide such a modification. (This is analogous to an “insurmountable impairment barrier.”) Conversely, if an employer wishes to provide only one particular job modification, but that modification will *not* be *effective* in enabling the employee to perform the job up to the employer’s standards, that modification is not a “reasonable” accommodation for the employee and the employer must consider other possible accommodations.

The drafters of the ADA retained the term “reasonable accommodation” and did not substitute the term “effective accommodation.” I agreed with that decision at the time, but believe it to be wrong now. We assumed the ADA’s legislative history would be adequate to inform courts what the term “reasonable” actually meant. Instead, some courts, such as the Seventh Circuit, have interpreted the word “reasonable” as including a form of “cost-benefit” analysis in determining what accommodations are required.<sup>ix</sup> This is an unfortunate reading of a critical component of the ADA.

## **CONCLUSION**

The history of physical disability law and policy over the past 70 years is rich and complex. This piece has presented but one facet of the story--a review of the evolution of a simple, but revolutionary aspect of disability civil rights law. This is the idea that disability should be acknowledged, rather than ignored, in particular circumstances. It is the recognition that societal norms should not assume the *absence* of people with disabilities, but rather should assume that people with disabilities are just as much a part of society as are people without disabilities. Given such a framework, it is appropriate to place an affirmative responsibility on employers and businesses to *counteract* obstacles that have been created by a society that has had as its societal norm solely nondisabled people. Such a society builds physical facilities with steps, manufactures phones without built-in amplifiers, and constructs work schedules without flexibility.

The regulations issued by HEW to implement section 504 laid down a challenge to such a society. It required recipients of federal funds to engage in affirmative efforts to counteract the obstacles created by employers, businesses, governments, and all

other components of the society. While the Supreme Court initially resisted this concept, it ultimately embraced the reasonable accommodation requirement--albeit without much theoretical analysis. In 1990, Congress embraced the concept as well, with more attention paid to logistics rather than to overarching concepts. With the implementation of the ADA, this concept is perhaps beginning to penetrate and influence societal thinking about disability and society.

The idea that a characteristic that elicits discrimination should be viewed with a critical eye on the *social context* in which individuals who bear that characteristic are forced to operate should not necessarily be restricted to the area of disability. As commentators pointed out in the 1980's, the basis for such a concept was first presented in the Supreme Court decision in *Lau v. Nichols*, requiring the provision of supplemental English language instruction to nonEnglish-speaking Chinese children. Any group defined by a characteristic that places it outside an accepted norm of society is likely to bear some burdens, some disabilities, when interacting with society. The lessons learned from the context of disability anti-discrimination law may well be useful in widening our understanding of other forms of discrimination.

## End-Notes

<sup>i</sup> Richard Scotch, FROM GOOD WILL TO CIVIL RIGHTS: TRANSFORMING FEDERAL DISABILITY POLICY, at 64 (1984).

<sup>ii</sup> The Rehabilitation Act initially used the term "handicap" rather than "disability." Because both the Rehabilitation Act and the Americans with Disabilities (ADA) now use the term "disability," that term is used throughout this piece.

<sup>iii</sup> See Feldblum, *Antidiscrimination Requirements of the ADA*, in IMPLEMENTING THE AMERICANS WITH DISABILITIES ACT: RIGHTS AND RESPONSIBILITIES OF ALL AMERICANS, at 35-36, (Gostin & Breyer, ed. 1993) (describing two concepts of civil rights).

<sup>iv</sup> See Feldblum, *Tenets of Legislative Lawyering*, FEDERAL LEGISLATION CLINIC HANDBOOK, at Tab 1 (1996).

<sup>v</sup> Scotch, *supra* n.1, at 60-101.

<sup>vi</sup> 45 C.F.R. sec. 84.4 (b)(1)(i)-(v).

<sup>vii</sup> *Id.* at sec. 84.12 (a).

<sup>viii</sup> *Id.* at sec. 84.44 (a).

<sup>ix</sup> *Id.* at sec.84.44 (d) and sec.84.52 (d).

<sup>x</sup> 45 C.F.R. sec. 84.22

<sup>xi</sup> 422 U.S. 397 (1979), 3 MDLR 240.

12 422 U.S. at 401. Sy Dubow, one of the lawyers in the case, has pointed out that Ms. Davis was only mildly hearing impaired. Personal communication, Spring 1993.

<sup>xiii</sup> 422 U.S. at 401-02.

<sup>xiv</sup> *Id.* at 405 (footnote omitted) (emphasis added).

<sup>xv</sup> Often, the discrimination may be motivated by animus against the group or by discomfort with the idea of associating with members of the group. Even if such cases, however, the discriminatory act is often *explained* by reference to an assumption about capability (and the animus thereby masked): for example, "black people are lazy," "Jews aren't trustworthy," "women are incapable of sophisticated thought."

<sup>xvi</sup> *Id.* at 410 (emphasis added).

<sup>xvii</sup> *Id.* at 6 (emphasis added).

<sup>xviii</sup> *Id.* at 411.

- xix. *Id.* at 412.
- xx. *Id.* at 412-13 (emphasis added).
- xxi. *Id.* at 412.
- xxii. 616 F.2d 127, 133 (1980), 4 MDLR 245.
- xxiii. *Id.* at 133 & n.12.
- xxiv. 625 F.2d 557 (5th Cir. 1980), 4 MDLR 402.
- xxv. *Id.* at 563.
- xxvi. Donald Olenick, *Accommodating the Handicapped: Rehabilitating Section 504 After Southeastern* [v, Davis], 80 COL. L. REV. 171, 184-86 (1980).
- xxvii. *Id.* at 185 (citing Wasserstrom, *Racism, Sexism, and Preferential Treatment: An Approach to the Topics*, 24 U.C.L.A. L. REV. 581 (1977)).
- xxviii. *Id.* at 186.
- xxix. Mark Martin, *Accommodating the Handicapped: The Meaning of Discrimination Under Section 504 of the Rehabilitation Act*, 55 N.Y.U. LAW REV. 881, 882-84 (1980).
- xxx. 422 U.S. at 409.
- xxxi. Martin, *supra* n.29, at 895-96.
- xxxii. Martin, *supra* n.29, at 896.
- xxxiii. Martin, *supra* n.29, at 897-900; Olenick, *supra* n.26, at 185-86.
- xxxiv. 469 U.S. 287 (1985), 9 MPDLR 57.
- xxxv. *Id.* at 292-398.
- xxxvi. *Id.* at 300.
- xxxvii. *Id.* at 300, n.20 (internal citations omitted).
- xxxviii. Another excellent document that could have been used by the Court was the monograph published by the United States Commission on Civil Rights, *Accommodating the Spectrum of Individual Abilities* (1983). This monograph, written by Christopher Bell and Robert Burgdorf, then-staff attorneys at the U.S. Commission on Civil Rights, provided a comprehensive review of forms of disability discrimination and a clear explication of the theoretical bases for non-discrimination, including the provision of reasonable accommodation.
- xxxix. 480 U.S. 273 (1987), 11 MPDLR 110.
- xl. A review and analysis of the definition of disability under Section 504 and the Americans with Disabilities Act over the past twenty years, and a review and analysis of the evolution of the risk standard under these laws over that same time period, would merit attention. Unfortunately, such reviews and analyses are beyond the scope of this piece.
- xli. *School Bd. of Nassau County, Fla. v. Arline*, 480 U.S. 273, 288 (1987), 11 MPDLR 110.
- xlii. On a personal note, I served as a law clerk to Justice Harry A. Blackmun during the term the *Arline* case was decided. While I prepared extensive information on the *Arline* case, I have no memory of any awareness at the time regarding the complexity or controversy regarding “reasonable accommodation” as a component of section 504’s mandate of non-discrimination. That simply was not a major issue litigated in the case. Fascinating.
- xliii. See *supra* n. 4, describing one of Feldblum’s Tenets of Legislative Lawyering.
- xliv. See generally, Feldblum, *Medical Examinations and Inquiries under the Americans with Disabilities Act: A View from the Inside*, 64 TEMPLE L. REV. 521 (1991) (describing political and pragmatic evolution of the ADA.)
- xlv. 45 C.F.R. sec. 84.11(a)(1).
- xlvi. *Id.* at sec. 84.12(a).
- xlvii. *Id.* at sec. 84.12(b)-(c).
- xlviii. 42 U.S.C. sec. 2112(a).
- xliv. 42 U.S.C. sec. 12112(b)(5)(A).
- <sup>1</sup> *Compare Carter v. Tisch*, 822 F.2d 465, 467-68 (4th Cir. 1987), 11 MPDLR 411 (reassignment not required) and *Dancy v. Kline*, 639 F. Supp. 1076, 1079 (N.D. Ill. 1986), 10 MPDLR 552 (same), with *Arneson v. Heckler*, 879 F.2d 393 (8th Cir. 1989), 13 MPDLR 523, and *Rhone v. U.S. Dept. of the Army*, 665 F. Supp. 734 (E.D.Mo. 1987), 12 MPDLR 166.
- <sup>ii</sup> See *supra* n.46 and 47 for explanation of “program access.”
- <sup>lii</sup> 42 U.S.C. sec. 12181(9).
- <sup>liii</sup> 42 U.S.C. sec. 12111(10)(A).

<sup>liv.</sup> 45 C.F.R. sec. 84.3(k)(1).

<sup>lv.</sup> 42 U.S.C. sec. 12111(8).

<sup>lvi.</sup> See Feldblum, *The Employment Sector*, Milbank 2 at 88-89 (noting employer confusion regarding obligation to develop detailed job descriptions).

<sup>lvii.</sup> See Feldblum, *Essential Functions*, in ROBERT BURGDORF, *DISABILITY DISCRIMINATION LAW* (1995) at 191-205 (describing application of “essential functions” under Section 504).

<sup>lviii.</sup> A good legislative lawyer for the business community would have stepped back to review the compromise language at that point and determine whether some potential hidden, adverse consequences existed in the new language. See Feldblum, *supra* n. 4, describing tenets of legislative lawyering. On its face, the compromise language could be read to imply that job descriptions prepared after interviewing applicants for a job cannot be considered as evidence of essential functions. That result is clearly adverse to employer interests, given that some employers may not develop such descriptions in time, even when they are acting in good faith. Moreover, no such limitation ever existed in Section 504 case law. It is unlikely, however, that any judge, other than a strict textualist, would read such a limitation into the ADA’s provision.

<sup>lix.</sup> See Feldblum, *Employment Requirements of the Americans with Disabilities Act*, *THE AMERICANS WITH DISABILITIES ACT: FROM POLICY TO PRACTICE* 95 (J West ed, 1991).

<sup>lx.</sup> *Vande Zande v. State of Wisconsin*, 44 F.3d 538 (7th Cir. 1995), 19 MPDLR 189. Ironically, the result in *Vande Zande* was probably correct, but the extensive and far-ranging opinion by Judge Posner dramatically misunderstood and misinterpreted basic concepts of the ADA.