

**An Overview of the Experience of the United States
with Employment and Right to Work Protections**

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Publication date: August 2, 2005

Foreword

The National Council on Disability (NCD) is an independent federal agency with 15 members appointed by the President of the United States and confirmed by the U.S. Senate. The overall purpose of NCD is to promote policies, programs, practices and procedures that guarantee equal opportunity for all individuals with disabilities regardless of the nature or significance of their disability. In addition, NCD's goal is to help empower individuals with disabilities to achieve greater economic self-sufficiency and to be part of the mainstream through attainment of employment and inclusion into all aspects of society. This topic paper is part of a series of papers designed to provide some brief background information on disability policy, as practiced in the United States and when applicable, to point out distinctions from policies of other Western Countries. The purpose of this brief report is to aid the delegates in their deliberations on the United Nations Ad Hoc Committee on a Comprehensive and Integral International Convention

on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities. Specifically, the intent of this paper is to present some examples from the U.S. experiences, as well as appropriate foreign models, concerning the issues around employment and right to work protections for individuals with disabilities. In particular, the issues, legal questions and court interpretations relating to these topics are explored with a view toward helping define the debate and providing possible solutions or cautionary advice. This paper is not meant to provide a full examination of all the legal arguments encountered around the topic of employment for people with disabilities, but instead is intended to highlight the more commonly raised questions and potential interpretations. Among the issues explored are: the definition of disability; what is a qualified worker; what is a reasonable accommodation; what is undue hardship (on the employer); and what is discrimination in hiring? In addition, examples of good models from both the public and private sectors are provided to illustrate the core values and practices that foster hiring and retention of workers with disabilities. Finally, because the American experience often differs considerably from the social and labor context of other countries, some good examples of foreign models are also discussed.

Introduction

- **The U.S. Situation: Sickness Benefit Programs and Labor Contracts**

Sickness Benefits

In order to understand the impact of the legislative protections concerning employment for people with disabilities in the U.S., it is important to know the context in which they operate, especially as that context often differs from the European formal systems as well as from those of many other countries. In contrast to the European models, for example,

that will be discussed below, the U.S. has no formalized public cash sickness benefit program, nor any mandated private programs. Employers are under no obligation to offer any paid leave for illness and are free to set their own time frames, rules and so forth and may also dismiss a worker who has been absent due to illness or injury. However, if the employer has a plan in place, then it must apply equally to all workers irrespective of their disability or health status. For illness or injury that is work-related (i.e., acquired on or as a result of the job), there is a system of mandatory workers compensation coverage that employers must provide for their workers. In actuality, each state and territory operates its own workers compensation program with differing rules, benefit levels and so forth and there is also a federal workers compensation program that provides protection for government employees irrespective of the state where they work. All of these programs provide for coverage under four possible situations: partial, total, temporary and permanent disability and of course, in the event of death of the worker, it pays survivor benefits.¹

In addition, with some very limited exceptions, all employers must contribute, on behalf of their workers, to the U.S. Social Security program that provides benefits to covered workers who become too disabled to work. The U.S. Social Security disability insurance programs do not provide partial or temporary benefits, instead, they are meant to compensate the loss of income due to full and permanent inability to work because of a severe illness or disability. In general, the American worker who develops a serious illness or health condition can seek protection under the Americans with Disabilities Act (ADA) which is discussed in the next section or s/he can request leave under the Family and Medical Leave Act (FMLA) of 1993. The FMLA applies only to businesses with at

least 50 workers and provides only unpaid leave of up to 12 weeks during any 12 month period to workers who have been employees for at least 12 months prior to the leave request. The leave can be for the worker's own illness or to provide care of a close family member (or in the case of birth or adoption). To be sure, some employers do provide supports for their ill workers and are generous in cases of serious illness or injury. However, there are no universally mandated standards.

Labor Contracts

In several ways, the experience of the United States with respect to employment rights and right to work issues runs counter to that of many industrialized countries. For example, unlike in the Western European countries, in the United States, although labor agreements do exist in certain industrial sectors such as automobile manufacturing, it is the rare U.S. worker who has any individual job protection stemming from a labor contract. Instead, typically, employers have the right to dismiss/lay off workers for any variety of reasons ranging from corporate economic strategies such as downsizing that can affect many workers in the company, to individual dismissal of a particular worker based on disapproval of the worker's performance. In short, workers in the U.S. do not enjoy the strong labor contract protections so prevalent in many European countries that mandate how the place of employment must treat the employee.² Rather, in the U.S. the prevailing philosophy is that workers serve at the pleasure of the employer. In the following sections, both the limitations and the protections of the U.S. experience with employment and right to work will be further explored as background to understand the important role played by certain key civil rights legislation such as the Americans with Disabilities Act (ADA).

Legal Protections for Workers with Disabilities in the U.S.

The United States has had a long history of setting its social policy through creation of new legislation but also of using the judicial system, particularly the Supreme Court, to hone and define the scope of the legislation. There are many examples that could be cited but among the most notable is *Brown v. Board of Education* of 1954 wherein the Supreme Court, by rejecting the notion of “separate but equal” outlawed from that point forward, racial segregation in the public school systems. The following sections concerning the employment rights of persons with disabilities examine more closely this unique American phenomenon of refining social policy legislation through the courts.

- **Title V of the Rehabilitation Act of 1973**

More than 30 years ago, American disability advocates recognized that if they were ever to achieve their goals to be part of the mainstream, they needed to gain access to all aspects of society through pressuring the government to do more to effect change. Title V of the Rehabilitation Act of 1973, as amended, laid the legal groundwork for the federal government as an employer and purchaser to ensure non-discrimination in employment, placement and accommodation of people with disabilities. Section 501 prohibits federal agencies from discriminating against their employees or applicants based on disability in their hiring practices. It also requires affirmative action in the hiring, placement, and advancement of people with disabilities. Section 503 requires affirmative action and prohibits employment discrimination by federal government contractors and sub-contractors with contracts of more than \$10,000. Perhaps the most powerful part of this legislation was initially a little noticed, tacked on section, Section

504, of what essentially was a funding bill. Section 504 became a major instrument for leveling the playing field for people with disabilities.

- **Section 504 of the Rehabilitation Act**

The importance of Section 504 of the Rehabilitation Act of 1973 is widely acknowledged as the predecessor key legislation that paved the way for the Americans with Disabilities Act (ADA), but even today it continues to function as a mechanism that, according to the National Council on Disability, "...covers a number of entities and federally funded activities not reached by the ADA [and] it is intended to make certain that tax dollars will not be used to establish, promote or reinforce discrimination against people with disabilities."³ Specifically, Section 504 makes it illegal for any federal agency, public university, defense or other federal contractor, or any other institution or activity that receives federal funds to discriminate against anyone solely for reason of the disability. In essence, by extending the non-discriminatory obligations to any entities in the private sector who received government funding, Section 504 laid the groundwork for a broad-based civil rights law for people with disabilities.

- **The Role of the Americans with Disabilities Act (ADA)**

Signed into law on July 26, 1990 this landmark legislation is frequently referred to as "the civil rights law for people with disabilities." Throughout the world, the ADA is unique among all similar anti-discrimination legislation in the breadth and depth of its reach. While several other countries have passed laws outlawing discrimination against people with disabilities in employment -- for example, the United Kingdom's Disability Discrimination Act (DDA) -- none has linked essentially every domain under one sweeping singular piece of legislation. In addition to the issue of employment

discrimination covered under Title I of the ADA, the other titles mandate non-discrimination in public accommodations, state and local government, transportation and telecommunications. Although the subject of this report will deal only with the employment aspects of the ADA (Title I), it is important to recognize that the scope of the Act helps ensure that the various sections work effectively together. For example, the most effective anti-discrimination employment provisions would have little outcome if various modes of transportation or public buildings remain inaccessible.

Employment Protections Under the Americans with Disabilities Act

As mentioned, Title I of the ADA deals with employment aspects of the law and is based largely on previously established principles in legislation under the Rehabilitation Act of 1973, its amendments and the Civil Rights Act of 1964. The U.S. Equal Employment Opportunity Commission (EEOC) issued regulations to enforce the provisions of Title I exactly one year after passage of the ADA, specifically on July 26, 1991 and the EEOC is the entity that continues to have responsibility for enforcement of those provisions. Title I prohibits private employers, state and local governments, employment agencies, and labor unions from discriminating against qualified individuals with disabilities. The prohibition against discrimination applies to: job application; procedures; hiring; firing; advancement; compensation; job training; and other terms and conditions of employment. It defines the class of individuals who are covered by stating that an individual with a disability is a person who:

- Has a physical or mental impairment that substantially limits one or more major life activities;
- Has a record of such an impairment or;

- Is regarded as having such an impairment.

It should be noted that the protected class covers every type of disability, not just people with physical disabilities – this concept is sometimes referred to as “all means all.”

Initially the law applied to employers with 25 or more employees but on July 26, 1994, it became applicable to employers of 15 or more employees.

- **Crucial Concepts Under the ADA**

There are certain legal concepts that are crucial to the functioning and enforcement aspects of Title I of the ADA. These concepts are: “Reasonable Accommodation”; “Undue Hardship”; and “Qualified Worker” and, as will be shown, they are often interdependent.

Reasonable Accommodation may include but is not limited to: (1) making existing facilities used by the employees readily accessible to and usable by persons with a disability – for example, employee bathrooms; (2) job restructuring, modifying work schedules, or reassignment to a vacant position; (3) acquiring or modifying equipment or assistive devices, adjusting or modifying tests, training materials or policies; and (4) providing sign language interpreters or readers for individuals who are blind or have low vision.

Undue Hardship is defined as an action requiring significant difficulty or expense when considered in light of factors such as the size of the company, its financial resources and the nature and structure of the operation. An employer is not required to lower production standards in order to make an accommodation nor is s/he obligated to provide personal use items such as hearing aids or glasses.

Qualified Worker is an employee or applicant who, with or without reasonable accommodation, can perform the essential functions of the job in question.

It is important to understand that these three core concepts come into play in each situation but the outcomes will vary depending on the particular circumstances. To use a hypothetical example: a worker who does computer assisted design in a small company becomes paralyzed as a result of a car accident. He wants to return to work and is still able to perform the essential functions of his job, so he asks his employer to make several accommodations for him by putting in ramps, an accessible bathroom and an elevator because his office is on the second floor. Depending on the size of the company, the cost of installing an elevator may prove to be an undue hardship to the employer, whereas the other two costs are quite low and would likely be seen as easily achieved. If the case were to need mediation, the EEOC might suggest that a reasonable solution in this situation would be simply to move the worker's office to the ground floor and install a ramp and an accessible bathroom on that level.

In short, the particular circumstances and merits of the argument are highly individualized. In the case of the notion of a "reasonable accommodation" versus an "undue hardship" much would depend on the size of the employer's business and most particularly, the financial costs of the accommodation in light of the business's revenues. However, if the employer refuses to make an accommodation, the worker or applicant can file a charge (complaint) with the EEOC which investigates every charge to see if it has merit. If it does, the EEOC then tries to work with the employer first, using education and negotiation, and turning to litigation only as a last resort. In terms of its litigator role, the EEOC participates in various appeals by filing an *amicus curiae* or

“friend-of-the-court” brief that explains the Commission’s views on basic legal questions of the case. By participating in these cases, the EEOC gains an opportunity to make known its views to the courts in more cases than it would be able to bring on its own. The Commission can also select cases that present important issues on which the lower courts are not in agreement to try to seek consistency in the interpretations of the ADA. If the EEOC declines to take any legal action itself, the complainant can ask the EEOC to issue a “right to sue” letter that then allows the individual to file a lawsuit in a federal district court. In any case, the legal right of the complainant to sue, either through the EEOC filing an amicus brief or by bringing the case to the court as an individual, gives the ADA its teeth. The next section will provide some actual case examples of the issues and the judicial interpretations around the various complexities of this legislation.

Some Examples of Court Interpretations of ADA Provisions

- **Definition of Disability**

One of the aspects of the ADA that has become an issue in the interpretations of the courts is exactly who is considered to be part of the protected class, i.e., who is a person with a disability. In fact, the EEOC states that “the three general issues that the Commission has addressed in most of its friend-of-the-court briefs are: (1) questions about whether people meet the ADA definition of “disability”; (2) whether individuals are qualified to perform the job at issue; and (3) whether the reasonable accommodations they need to work are required by the ADA.” According to the same report, “determining whether a person has an ADA “disability” has been a major focus of Commission briefs.”⁴ That the definition has turned out to be problematic is actually quite surprising

and was not initially anticipated because Congress took pains not to break new ground.

According to a recent report published by the National Council on Disability:

When Congress passed the ADA and President George H.W. Bush signed it into law, hardly anyone expected trouble in the courts with the definition of disability. Congress played it safe by adopting in the ADA a definition of disability that was the same as the definition of “handicap” under the Rehabilitation Act. That definition was enacted in 1974 and clarified in regulations issued under Section 504 of the Rehabilitation Act. Because the definition was a broad and relatively uncontroversial one, defendants seldom challenged plaintiff’s claim of having a disability. In 1984, a federal district court noted that after 10 years experience with the Rehabilitation Act definition, only one court found a Section 504 plaintiff not to have a “handicap.”⁵

Some say that part of the explanation for this difficulty may be attributable to the fact that in the preamble section of the ADA (called the Findings), there is reference to some 43,000,000 Americans who have one or more physical or mental disabilities that “substantially limit one or more of the major life activities.” Critics lament that the Court has used that 43,000,000 figure to put a ‘strict’ and ‘demanding’ approach to the definition of disability based on ill-founded assumptions that the U.S. Congress intended the figure to have a degree of mathematical exactitude and only that number of people were to be protected by the ADA.”⁶ Such an interpretation is not only illogical in that it ignores the rapid aging of the U.S. population that is likely to bring more cases of workers who develop disabilities or health limitations, but in addition, it is in direct contrast with American public policy changes over the last 10 years that are aimed at encouraging workers to stay in the labor force longer. Furthermore, setting a numerical limit on the class of people deemed to be “disabled”, also fails to consider the very real possibility that suddenly very large groups of individuals might need to seek protection because of new, serious conditions, as happened with the Human Immunodeficiency Virus (HIV) epidemic in the 1980s.

In 1988, while the original ADA bills were pending before Congress, the Presidential Commission on Human Immunodeficiency Virus (HIV) endorsed the legislation and recommended that the ADA should serve as a vehicle for protecting from discrimination people with HIV infection. The ADA has proved to be the principal civil rights law protecting people with HIV from the sometimes egregious discriminatory actions directed at them.⁷

In citing the 43 million figure, Congress no doubt intended only to highlight the magnitude of the problem at that point, but not to close the door on the probability of any new entrants.

Court Interpretations

On January 8, 2002, the U.S. Supreme Court issued a unanimous decision⁸ that was based very much on the concept of “substantially limiting a major life activity” and the decision clearly demonstrates that being substantially limited in one’s ability to perform one’s own job is not determinative of whether the individual is considered disabled. Rather, the Court stated, “the central inquiry must be whether the claimant is unable to perform the variety of tasks central to most people’s daily lives...” In its ruling on the case, the Supreme Court held that there must be an analysis of any impairment related to manual tasks beyond those related solely to employment.

The above-mentioned case illustrates one aspect of the issues surrounding the question of whether a person meets the ADA definition of “disability” but another aspect of that same question concerns whether a person’s use of *mitigating measures*, such as medications and assistive devices that eliminate or reduce the effects of an impairment should be considered in evaluating whether that person has a “disability.” In June 1999,

the Supreme Court ruled that such a determination requires looking at the person with all the mitigating measures s/he uses to decide how severely the condition limits that person.

⁹ Thus, the Court ruled that individuals whose poor eyesight is corrected to 20/20 when they wear glasses do not have a disability within the meaning under the ADA. At the same time, the Court decided similarly that a person whose hypertension is largely controlled through taking medication is not disabled under the ADA. When these decisions were announced, some legal experts and members of the disability advocacy community wondered about the ramifications of the interpretation of mitigating measures. For example, if someone who has prosthetic limbs regains some mobility, would s/he then be considered not disabled because of the mitigating measures? The Court recognized the possible conundrum created by its interpretation and did emphasize that many persons may still have covered disabilities despite the use of such measures or because of their side effects.¹⁰ However, many subsequent lower court decisions have applied these ruling in ways that have excluded people who Congress clearly intended to be covered under the ADA, leaving them no discrimination recourse.

- **The issue of being “regarded as having a disability”**

Another facet of the question of who is considered to have a disability under the ADA concerns not only those persons who currently have an impairment that substantially limits a major life activity, but also those persons who have “a record or history of having a disability or who employers regard as having a disability.” In *Sutton v United Airlines*, the Court considerably narrowed the interpretation of the ‘regarded as’ prong of the definition of disability because it focused on a mistaken belief or “misperception” by a covered entity. The Court said:

[I]t is necessary that a covered entity entertain misperceptions about the individual—it must believe either that one has a substantially limiting impairment that one does not have or that one has a substantially limiting impairment when, in fact, the impairment is not so limiting...¹¹

However, the definition of this “regarded as” prong in ADA regulations (and also in Section 504 regulations) focuses instead on how individuals are treated by covered entities. As the NCD report points out:

The difference between the Court’s standard and that of the regulations is significant. The *Sutton* description calls for a showing of something in the mental state of the covered entity---a belief or perception. In addition, it is necessary to show that the belief or perception is wrong. Proving what an employer, state or local government agency, or the operator of a private business believes, thinks, or perceives is a difficult proposition. Unless the covered entity makes the mistake of articulating the depths of its prejudices or the exact nature of its motivation, it will be difficult to produce evidence of its state of mind.¹²

- **The issue of being qualified to perform the job in question**

One of the potential policy dilemmas encountered in the U.S., that could possibly occur elsewhere, concerns the criteria for eligibility for a disability pension under social insurance in contrast to the concept in the ADA of being *qualified to perform the job at issue*. Specifically, if the criteria for eligibility for a disability pension are based on work-related functional measures i.e., inability to work, then that standard may be interpreted by some courts as in conflict with ADA protections which are based on being qualified to do the job. In actuality, the worker who is denied a work accommodation and therefore loses her or his job may have no other redress except to claim a disability pension for which s/he then must assert inability to work. That was precisely the trap in one of the first ADA cases to reach the Supreme Court.¹³ The legal question is whether individuals who seek disability benefits for which they must attest to inability to work are prevented¹⁴ from claiming they are qualified individuals with disabilities within the

meaning of the ADA. The EEOC previously had filed numerous briefs arguing that such individuals are not prevented from protection and finally, the *Cleveland* case resolved the issue. The Supreme Court agreed with the EEOC because the two statutes (ADA and the Social Security Act) define disability differently and take different approaches to considering whether someone can work. Most importantly, the Court noted that in many cases, persons can work if given the reasonable accommodations they request and which are required by the ADA.¹⁵ Regrettably, the *Cleveland* case still places on the person with a disability the burden of explaining why an individual is disabled for SSDI purposes but not for ADA purposes. Thus, individuals who experience employment discrimination still have an evidentiary hurdle to clear when claiming disability discrimination while also having applied for SSDI.

- **The Question of Requirements for Reasonable Accommodation**

The EEOC has filed many friend-of-the-court briefs on the issue of *reasonable accommodation* and various differing court decisions have shown the complexity of the issue. In a lower court case,¹⁶ the court¹⁷ agreed with the Commission that once an employee points to a possible reasonable accommodation, it is up to the employer to show that the employee is unable to “perform the essential functions of the job” with that accommodation. If the employer cannot do so, s/he is required to provide that accommodation, unless doing so would pose an undue hardship. The District of Columbia Circuit court found¹⁸ that an employer must consider reassigning an employee with a disability to a vacant position as a reasonable accommodation. Moreover, another lower court ruled¹⁹ ruled that the reassignment accommodation extends to an employee, who, due to a disability, becomes unable to perform his current job. However, a

decision²⁰ of the Supreme Court seemed to reverse the lower courts on this issue when the Court decided that seniority took precedence over the obligation of an employer to grant a request for a reasonable accommodation.

- **Discrimination in Hiring**

Thus far the examination of how courts have interpreted the ADA has only dealt with cases of individuals who were already working when an impairment or disability occurred or who were employees with disabilities who were already working. However, the ADA also provides protection against discrimination for individuals with disabilities in the hiring process. Admittedly, many believed that this aspect would be more difficult to prove and to some extent, that has been the case. If an employer has two equally qualified applicants for a position and s/he hires the person without a disability instead of the person who has a disability, it is very hard to prove that the reason is because of the disability. Employers can and do claim a myriad of reasons for their choice, ranging from the applicant with a disability's lack of work experience such as summer jobs or internships, lack of relevant work experience, and so forth. Despite these difficulties, there have been some victories in the courts for applicants who have disabilities.

On May 6, 2005, the EEOC won an \$8 million jury verdict in Denver, Colorado²¹ in the case of Dale Alton, a qualified individual who is blind, who applied for a job as a customer service representative in 1999. Prior to applying, Mr. Alton had completed training at the Colorado Center for the Blind for that very type of position.²² When Mr. Alton went to apply, he was told not to bother because the company was not set up to handle people who are blind.²³ Much of the testimony related to the company alleging that if they had tried to install assistive software, it would not have worked because of the

complexity of the environment. However, the plaintiffs presented contradictory evidence that many employers in Denver such as Norwest Bank, American Express and MCI had installed the same software and successfully employed customer service representatives who were blind at their call centers.²⁴

- **Medical Examinations and Inquiries**

Another issue that is often related to the application process and is covered in Title I of the ADA concerns medical examinations and inquiries. Specifically, employers may not ask job applicants about the existence, nature or severity of a disability. Applicants may be asked about their ability to perform specific job functions. A job offer may be conditioned on the results of a medical examination, but only if the examination is required of all entering employees in similar jobs. In addition, medical examinations of employees must be job related and consistent with the employer's business needs.

According to the EEOC, many employers continue to make pre-offer inquiries regarding individuals' medical histories and then use that information to screen out applicants with real or perceived disabilities. A jury found that a store's hiring official had illegally asked a job applicant about his disability (his arm had been amputated) in a job interview and then refused to hire him.²⁵ The EEOC was also successful against a trucking company that regularly made medical inquiries prior to job offers and then used the information to disqualify applicants. In that charge, the EEOC represented the charging party and 175 other affected applicants who were offered jobs and were awarded a lump sum settlement. The company agreed to revise its medical inquiry policy and practice and to conform with the ADA. In a similar complaint, the EEOC used mediation on behalf of 27 individuals who had complained that a pre-placement health

screening questionnaire violated the ADA by requiring them to disclose medical conditions.²⁶ Finally, it is interesting to note that the EEOC has also argued in support of individuals without disabilities to challenge pre-employment inquiries.²⁷

The Role of Labor Contracts and Formal Sickness Benefit Programs

- **The Foreign Models**

Although countries differ quite a bit regarding the amount of time an employer must hold the job open and who is responsible for paying benefits and for how long and so forth, the point in mentioning this aspect is: there is a formalized system of universally applied cash compensation for workers who become ill or injured that has many positive aspects as follows: (1) it provides a standardized, reliable safety net for workers and their families that they can count on to replace income that they would have otherwise earned had they not been too ill to work; (2) for the more serious cases, if used wisely, it provides a time for assessment of the prognosis for full recovery or, if not, for potential return to work despite the impairment or condition; (3) if full recovery is not likely, the cash sickness period also provides time when rehabilitation and retraining can be implemented and possible job accommodations can be tried; (4) during this time period, the recovering worker may try to come back to work on a gradual basis, all without risking losing cash support. As an endnote to this paper, more details are provided about how some European countries make effective use of this formal period of sickness compensation to identify and intervene when workers develop a serious illness or disabling condition.

The Role of Government

National and local governments are uniquely positioned to promote positive employment practices for people with disabilities in several ways. First, as enforcers of the relevant

laws, secondly, as model employers themselves, and finally, by using their authoritative position to champion a higher standard for the government, as well as the private sector. Governments can remove barriers and create incentives to help workers with disabilities retain their jobs or reintegrate into the general labor force. However, if governments are also model employers of workers with disabilities, they achieve a twofold purpose – first, because they directly improve the employment picture individuals with disabilities, and secondly, because in providing such employment, they can showcase best practices and are actually seen as practicing what they preach. In addition, governments can subtly help influence the rest of the society, and private sector employers, in particular, to become accustomed to the idea of workers with disabilities as part of the mainstream labor force.

The U.S. federal government has had a long history of employment promotion for people with disabilities and as of 2002, about 7.0 percent of the federal workforce of 1.8 million people are individuals with disabilities. The federal government has a number of proactive policies to attract, hire and retain individuals with disabilities and although far from perfect, it has resulted in many years of being a good employer. In the section that follows, some of the key components of the U.S. government as a model employer will be briefly discussed.

Government as a Model Employer

- *Office of Personnel Management (OPM)* is the federal government's employment and personnel agency and as such, is in a position to do a great deal to ensure hiring, retention and promotion of people with disabilities. For example, most federal jobs are competitive appointments but the federal

government also has hiring options for people with disabilities that are called excepted service appointing authorities. These Schedules, called Schedule A and Schedule B, permit federal employers to appoint individuals with severe physical, intellectual or psychiatric disabilities, or individuals who have a history of such disabilities, to positions for up to two years. These individuals must gain initial certification, typically through the State Vocational Rehabilitation system. At the end of that initial 2-year period, if the individual has performed satisfactorily, he or she may be converted to competitive service status. In addition, federal employers may use Schedule A authority to hire readers, interpreters or personal assistants for employees with severe disabilities. Disabled veterans with at least a 30 percent disability can be hired under special authorities. OPM ensures complete accessibility for all job postings, federal websites, testing accommodations and worksite accommodations. Their own website provides clear information in all formats for applicants with disabilities on how to apply for federal jobs- all of which are listed in *USA JOBS*. In addition, OPM monitors and publishes the data, by gender and type of disability, concerning how well or poorly each Branch, Department, and Agency does at employing individuals with disabilities. In 2002, the report showed that workers with disabilities made up about 7.0 percent of the 1.8 million person federal work force. For unexplained reasons, the rate has been declining gradually since the 7.4 percent rate in 1992. In any case, of the 52,577 employees with disabilities in 2002, 19,455 had EEOC specified disabilities that indicates a severe disability.²⁸

- *The Workforce Recruitment Program (WRP)* is aimed at college students with disabilities who are either still in school or who graduated within the preceding year. Coordinated by the U.S. Department of Labor's Office of Disability Employment Policy (ODEP) and the Department of Defense, the WRP provides summer work experience, and in some cases full-time employment by forming partnerships with other federal agencies, each of whom make a commitment to provide summer jobs and a staff recruiter. Every year, recruiters interview about 1,300 students with disabilities at 150-200 universities and colleges across the country and enter their qualifications into a database. Much of the work is done for the employer because students are prescreened through face-to-face interviews, and referrals are tailored to specific job requirements. Moreover, almost any assistive technology accommodation that is needed by the student with a disability who is placed in a federal agency is handled and paid for by the Computer Electronics Accommodations Program (CAP) in the Department of Defense (see following section) so that employers who hire these students temporarily or permanently need not incur any additional budgetary expenses. Since 1996, private sector employers have been able to access the program. The number of students hired has continued to increase every year since the initial 148 in 1995, reaching 362 in 2002-- of whom 23 percent were African American, 9 percent Asian or Pacific Islanders and 7 percent Latino. The overall placement rate in 2002 was 20.1 percent, down from 27 percent in 2001. A recent press release from the Department of Labor's Office of Disability

Employment Policy indicates that in 2005, the program, now in its tenth year, has placed over 300 students with disabilities in summer positions, out of a database of some 1,900 candidates seeking summer and full-time employment.²⁹

- *Computer Electronics Accommodations Program (CAP)*, established in 1990 within the Department of Defense (DOD), provides assistive technology accommodations and services to persons with disabilities. Initially CAP served only employees of DOD, but in October 2000, CAP was granted the authority to provide assistive technology, devices, and related services to any department or agency in the Federal government upon the request of the head of that agency. In FY 2001, partnerships were established with 45 federal agencies and in FY 2002, 50 partnership agreements were signed. In essence, CAP has become a centrally funded program to provide those types of accommodations for employees with disabilities in any federal agency at no charge to the employer or to the agency. This function helps ensure that federal workers with disabilities receive the proper accommodations they need and that they have the information and access to information to do their jobs and to benefit from career opportunities. In 2002, CAP provided 5,352 requests for accommodation involving assistive technology, and/or training. Of those, 3,275 were for DOD personnel and 1,941 were for partner agency personnel.
- *Job Accommodation Network (JAN)* is a free consulting service of the Office of Disability Employment Policy, U.S. Department of Labor that provides

technical assistance to employers, service providers and individuals with disabilities concerning job accommodations. JAN has a very large database on how accommodations can be provided for a variety of needs and situations as well as a website that provides “how to” information on providing accommodations. Their staff of Masters level consultants also provides training, exhibits at major employment conferences, and holds an annual national training conference.

- *The National Council on Disability* is an independent federal agency that makes recommendations to the President and to Congress on issues that affect the lives of the millions of people who have disabilities. Its 15 members, typically nationally active individuals with disabilities or parents of children with disabilities, are appointed by the President and confirmed by the U.S. Senate. NCD’s purpose is to promote policies, programs, practices and procedures to guarantee an equal opportunity to all individuals with disabilities, regardless of the type or severity of the disability, and to empower them to achieve economic self-sufficiency, independent living, inclusion and integration into all aspects of society. Originally named the National Council on the Handicapped, it was created in 1978 as an advisory board within the Department of Education. However, in 1984, the Council became an independent agency and over subsequent years, it has increasingly used its independent status to issue reports that critique the performance of governmental programs and policies meant to ensure equal opportunities for

people with disabilities. NCD takes seriously its advisory role to hold all programs and agencies accountable.

- *State Vocational Rehabilitation Programs*

The first national rehabilitation act was the Smith-Fess Act of 1920 that authorized the establishment of a state-federal vocational rehabilitation program for civilians.³⁰ The Randolph-Sheppard Act of 1936 authorized states to license qualified persons with severe visual impairments to operate vending stands in federal buildings, and it set the precedent for many states to make similar arrangements in state-owned buildings. The Vocational Rehabilitation Act Amendments of 1954 represented a major expansion of the federal government's involvement with vocational rehabilitation (VR). In the Rehabilitation Act of 1973, which included affirmative action programs under Title V, Congress, pursuant to Title I of the Rehabilitation Act gives funding to the States to provide VR services to persons with disabilities.³¹ The Rehabilitation Services Administration of the U.S. Department of Education administers the VR program through providing approximately 80 percent of the funding, in the form of grants to the states, to provide VR services to persons with disabilities. To receive funding a state must submit a plan consistent with the law³² and must designate a single agency to administer the plan, unless it designates a second agency to provide services to individuals who are blind.³³ To receive services, an individual must be disabled and must require VR services in order “to prepare for, secure, retain or regain employment.”³⁴ Thus, any service that an individual might wish to receive

must be connected ultimately to an employment goal. Therefore, VR services may be denied if, in the opinion of the VR agency, the person cannot benefit from them. However, a person is presumed capable of employment, despite the severity of the disability, unless the VR agency can show by clear and convincing evidence that the individual cannot benefit from services. In fact, if a state does not have the resources to provide VR services to all eligible individuals who apply, it must specify in its plan, the order to be followed in selecting the individuals who will receive the services. Under this process, called “Order of Selection” the state must ensure that individuals with the most significant disabilities are selected first to receive VR services.

- *Supported Employment*

For more than 20 years, many individuals with disabilities have entered the labor force or continue to be employed because of a concept called “supported employment.” In the U.S., where this model was originally conceptualized, supported employment does not mean financial support (i.e., supplements to employers who hire workers with disabilities). Instead, the support refers to that support provided to the worker with a disability who is given support on the job, typically by a job coach. The U.S. supported employment paradigm refers to a “place/train” (rather than a “train/place”) model in open mainstream settings, not in segregated or sheltered environments. The role of the job coach is to train workers in the tasks of the job and work side by side with them until they are capable of performing the tasks alone. The job coach then withdraws but is available to be an intermediary if the employer encounters any problems or

otherwise needs her/his further services. Although initially used with individuals with intellectual disabilities, supported employment is now used with individuals with many other types of disabilities such as autism, and traumatic brain injury.

Governments Using their Power in Other Sectors

In virtually every country of the world, the major purchasers of goods and services are usually the national and local governments, hence they are uniquely positioned to use this enormous purchasing power to influence the private market. As was discussed above concerning Section 504 of the Rehabilitation Act, it was essentially the funding section that proved to be such a powerful anti-discrimination tool. The sections that follow provide some brief examples of the way in which the U.S. federal government has been able to leverage its power to advocate in the private sector for better access for people with disabilities.

- *Section 508 of the Rehabilitation Act as amended in 1998* requires that when federal agencies develop, procure, maintain or use electronic and information technology, it must be accessible to people with disabilities, including employees and members of the public. The Center for Information Technology Accommodations (CITA) in the U.S General Services Administration's Office of Governmentwide Policy is charged with building the infrastructure needed to support Section 508 and in educating Federal employees. This is another way in which the federal government sets the standards for accessibility and thereby pushes the envelope. Because the Federal Government is the largest single purchaser of electronic and information technology, it is driving the manufacturers that support these

industries to develop new technologies to overcome any current limitations such as copier machines that require sight to operate them or software programs that require a mouse to operate them.

- *Telework or Telecommuting* is the government program that allows individuals to work from home. In its 1999 Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act (revised 10/17/02) the Equal Employment Opportunity Commission said that allowing an individual with a disability to work from home may constitute a form of reasonable accommodation.
- *New Freedom Initiative (NFI)*, announced by President Bush on February 1, 2001, has many components, many of which are to provide funding and access to assistive technology. In addition, NFI hopes to expand telecommuting by providing federal matching funds to states to guarantee low-interest loans for individuals with disabilities to purchase computers and other equipment necessary to work from home.
- *Social Security Administration's Ticket to Work and Work Incentives Improvement Act* passed in December 1999 as an innovative program to encourage more Social Security disability benefit recipients to try work or return to work. The aspects of the program are too complex and comprehensive to describe adequately here but it introduced far greater consumer choice by providing Social Security disability beneficiaries with a Ticket that allows them to choose their providers of employment services. Other notable aspects of the Ticket Program include: extended period of

eligibility for benefits without the need to reapply if work attempts fail; protection against being reviewed for continued eligibility as long as the Ticket is in use; greater access to health insurance coverage; benefits planning assistance and outreach for those using the Ticket to help them understand the financial impact of loss of benefits and work; and protection and advocacy for Ticket users to help them avoid being exploited or otherwise treated unfairly. The Ticket is just one of many work incentives that the Social Security Administration has established to encourage disability benefit recipients to try working while also minimizing the risks for them.³⁵

- *Tax Credits and Tax Incentives*

There are several programs that use the tax system to encourage employers to make accommodations or encourage individuals with disabilities to try working. For example, the U.S. Government offers several programs with the goal of encouraging employers to hire and accommodate individuals with disabilities. The Deduction for Removal of Barriers allows employers to deduct up to \$15,000 each year from their income taxes for “qualified architectural and transportation barrier removal expenses” meaning any expenses that are related to making a facility more accessible or usable by people with disabilities. This deduction is not permitted to be used for complete renovation nor for just replacing property that has depreciated. The Disabled Access Tax Credit is for small businesses (i.e. those with either 30 or fewer employees or with gross receipts of under \$1 million) in order to help them comply with the ADA. The tax credit is 50 percent of “eligible access

expenditures” that exceed \$250 but do not exceed \$10,250 for a taxable year. Eligible access expenditures are expenditures incurred or paid to remove architectural, physical, transportation, or communication barriers. In addition, the Work Opportunity Tax Credit and the Welfare-to-Work Tax Credit were created to encourage employers to recruit, hire and retain certain targeted groups of job seekers, including people with disabilities. Furthermore, the tax system is also used to benefit individuals with disabilities who work. Though not specifically intended for workers with disabilities, the Earned Income Tax Credit is aimed at low income workers, some of whom are persons with disabilities. The purpose is to help offset the regressive nature of the contributions to Social Security that adversely affect low income workers. There are other itemized deductions and impairment-related work expenses that persons with disabilities may be able to deduct from their taxable income depending on their individual circumstances.

The U.S. Corporate Response

Although the estimates of the employment rate of Americans with significant disabilities remain low -- most of whom say they want to be -- there are signs that corporate America is beginning to see people with disabilities as viable, productive members of the labor force. Certainly for some large and medium size companies, this is not a new phenomenon. IBM, for example, hired its first employee with a disability in 1914, 59 years before Title V of the Rehabilitation Act and 76 years before the Americans with Disabilities Act.³⁶ It is worthwhile to examine more closely the corporate philosophy of IBM, not because it is unique, but rather because it is exemplary of the business case for

hiring and retaining workers with disabilities. IBM recruited its first professional women in 1935 and hired its first African American sales people in 1946. IBM's first written Equal Opportunity Policy in 1953 stated, "It is the policy of this organization to hire people who have the personality, talent and background necessary to fill a given job, *regardless of race, color or creed.*"³⁷ When IBM hired a person with a disability more than 90 years ago, it was simply part of a larger corporate commitment to diversity that has long encompassed all races, religions and creeds and today includes sexual orientation, gender identity or expression, national origin, age or status – in short – their "concept of workforce diversity excludes no one." Its one thing for a company to say they welcome diversity but as actions speak louder than words, the real test is what they actively do to promote those goals. IBM advertises in diverse publications, such as Careers & Disabled, to attract job seekers. It posts its job openings in job banks and uses programs such as the Entry Point Program that helped them find 21 students with disabilities, whom they hired. IBM has also created national recruitment programs such as Project View, initially established in the early 1980s to bring in candidates who would be interested in summer and co-op positions in certain locations. By the late 1980 and early 90s, Project View was expanded to be used only for regular-full time hiring and to focus on identifying potential students for jobs from underrepresented groups. On a national basis, the program annually accounts for between 40 and 50 percent of IBM's college hires. The company also has other programs aimed at identifying and attracting a diverse workforce, and it puts a heavy emphasis on training its managers in diversity through several different workshops, including a focus on global rather than just U.S. efforts.

Other companies too, such as Microsoft, Hewlett-Packard, Apple Computer, Inc., and Marriott have long understood that the workforce should mirror the diversity of the society in gender, race, ethnicity and disability. The challenge in terms of increasing the number of workers with disabilities is that although the majority of Americans work for large corporations, the majority of companies are small businesses who for the most part have shied away from hiring individuals with disabilities. Hopefully the attitudinal barriers will fall away just as most of the societal infrastructure barriers have now been eliminated by the ADA. There is still much work to be done in this regard, not the least of which is to make the business case that people with disabilities make excellent employees.

An Exemplary Foreign Model

The issue of the right of people with disabilities to work is often thought of as a concept that is only practicable or applicable in countries that have high levels of employment among the general population. The argument is often advanced that “it is unrealistic to think that people with disabilities could enter the labor market when able-bodied people cannot find work.” Against this backdrop then, it is interesting to consider the case study of Brazil where the official unemployment rate has tended to fluctuate between 11 – 13 percent over the last two years. In reality, the actual rate of Brazilian unemployment is likely much higher because the official rate counts only those actively looking for work and therefore, discouraged workers do not appear in the count. Based on the above stated argument, Brazilians who have disabilities should have little to no chance of finding employment, but that is not the case. More than 25 years ago, the centers for independent living (CILs) became involved in job brokering for Brazilians with disabilities. At the

time there was a freeze on hiring in the public sector and as people left, there were increasing vacancies but no legal ability to fill them. The disability advocates proposed to the Government that they fill the vacancies with individuals who have disabilities. The CILs would recruit, train, and place the people in public sector jobs. Under that model, the independent living centers derived all their operating revenue from this arrangement and the public sector got well-trained individuals who were job ready. Brazil also has a quota system which helps promote employment of individuals with disabilities. Today, thanks to that early initiative, there are individuals with disabilities throughout the public sector in very high level positions and workforce participation by Brazilians with disabilities has become quite common – all proof that the right of people with disabilities to work can happen if there is a societal commitment to make it happen.

Concluding Remarks

The right of persons with disabilities to participate fully in the mainstream and to contribute to their own and their family's economic well-being as well as to the greater societal good should not be at issue. No country can afford to waste precious human capital nor to relegate certain members of its populace to the margins. However, the experience of the United States with the ADA court decisions demonstrates that the issues and concepts regarding the right to work for people with disabilities are complex and must be resolved by each country in accordance with its own cultural and societal mores, labor practices and legal constructs. Passing a law or becoming a signatory to an international convention is merely the first step in a long and often difficult process of educating, advocating and litigating when necessary. No country has yet to succeed in fully integrating individuals with disabilities into the work force -- various international

studies such as the one conducted on 20 countries by the Organization on Economic Cooperation and Development (OECD)³⁸ demonstrate that the goal is far from the reality, with generally no better than 30 percent of those who say they wish to work actually being part of the labor force. All countries must expend much more effort to educate the population in general and employers in particular on the value of employing people with disabilities. Among the crucial questions that delegates involved in the process of crafting the employment section of a United Nations Convention may want to consider are how to: (1) ensure that the class for whom the protection is intended is actually covered, and that the treaty applies to those who have a disability; previously had a disability; are regarded as having it; or may acquire it; (2) deal with the issue of mitigating measures so that individuals who use medications or various forms of assistive devices to help manage their condition are not then denied protection under the law because of the effect of those measures; (3) ensure that work is considered to be “a major life activity” so that discrimination in employment is seen as preventing participation in a major component of life; (4) define cogently when a worker with a disability poses a direct threat to others’ health and safety and possibly consider the question of whether they also wish to address the health and safety of the worker himself or herself; (5) provide for mechanisms that encourage cooperation, negotiation and mediation but, when necessary, also provide for sanctions or other forms of coercion or enforcement; and (6) determine definition or standards for what is a “qualified worker” “a reasonable accommodation” and an “undue hardship.” Finally, it must be recognized that changing societal attitudes, debunking stereotypes, removing paternalistic labor laws, and demystifying disability will not happen at all unless there is a societal commitment to

change the employment landscape to provide access and opportunities for individuals with disabilities.

Acknowledgments

The National Council on Disability wishes to express its appreciation to Ilene Zeitzer, President, Disability Policy Solutions, for drafting this topic paper.

REFERENCES

¹ Unlike many foreign systems, travel to and from work is not considered part of the work day and therefore accidents or injuries that might occur in commuting are not covered under the U.S. workers compensation programs unless that travel is part of the actual work of the employee.

²As mentioned, the norm for most European employees is to work under a labor contract that governs many aspects of their job including dismissal, working conditions, and job and salary retention during periods of absence due to illness or disability. The period of time that employers must hold the job open and pay benefits varies from country to country depending on the labor laws as well as whether the sickness benefit program is public or privatized. For example, in the Netherlands, employers must hold the job and pay the salary for the sick-listed worker for 24 months. The Dutch disability benefit system was long notorious for the number of people on disability benefits with nearly 1 million out of a labor force of more than 6 million drawing benefits. As part of the Dutch Government's multiple efforts at public cost containment, the responsibility was shifted to the employers to pay, originally for the first year, then it was increased to the first two years. In addition to reducing the costs of the public program, the Dutch Government also hoped to spur employers to do more to reintegrate workers who develop disabling impairments or health conditions by imposing requirements that the employer must have a specific rehabilitation plan in place after the worker has been out for six weeks. As the employers are paying anyway, they have, in fact, begun to become far more proactive in this regard. In Sweden, although the employer pays only for the first 14 days before the public sickness benefit system then takes over, the job retention requirements and proactive responsibilities on the employer are quite similar to those of the Netherlands. The Swedish system makes good use of the period of cash sickness benefits by requiring that, after four months of paying benefits, the employer must set up a reintegration plan to assist the ill worker to return to work.

³ National Council on Disability; Rehabilitating Section 504, February 13, 2003.

⁴U.S. Equal Employment Opportunity Commission; A Report on the Tenth Anniversary of the Americans with Disabilities Act (ADA), July 26, 2000; <http://www.eeoc.gov/ada/statusreport.html>; p.13.

⁵ National Council on Disability; Righting the ADA; Washington, DC; December 1, 2004; http://www.ncd.gov/newsroom/publications/2004/righting_ada.htm (p. 20).

⁶ As above; p.34.

⁷ As above; p.18.

⁸ *Toyota v. Williams*. Ms. Williams, an employee on the assembly line of Toyota Motor Manufacturing, developed carpal tunnel syndrome and as a result, asked for an accommodation. Initially, she was given a job reassignment but then later was required to rotate through four related jobs instead of being permitted to remain at a modified version of one job. She tried the new assignment, which required her to hold her arms above her head for extended periods, resulting in painful inflammation of the muscles, tendons, and nerves around the shoulders. She requested to be placed back in her previous position, which she claimed Toyota denied, and began missing work and was fired for her absenteeism. She sued her former employer for failing to provide her with a reasonable accommodation as required by the ADA. The District Court granted Toyota summary judgment, holding that Ms. Williams' disability did not qualify as a "disability" under the ADA because "it had not substantially limited any major life activity." Then the Sixth Circuit (Court of Appeals) reversed the summary judgment, because, by analyzing the severity of Ms. Williams' impairment solely in conjunction with her job tasks, they found that the impairments substantially limited her ability to do manual tasks. Her condition prevented her from doing certain job-related tasks such as gripping tools and repetitive work with hands and arms extended at or above shoulder level for extended periods of time. The court ruled that given her inability to do the manual tasks of her job, she was disabled for purposes of the ADA. However, when the case reached the Supreme Court, it ruled that there must be

an analysis of any impairment related to manual tasks beyond tasks just related to employment. The Supreme Court found that the Sixth Circuit did not apply the proper standard because it analyzed only a limited class of manual tasks and failed to ask whether her impairments prevented or restricted her from performing the activities of daily life such as washing her face, brushing her teeth etc.

⁹ *Sutton v. United Airlines; Murphy v. United Parcel Service, Inc.; & Albertsons, Inc. v. Kirkingburg* cited in: U.S. Equal Employment Opportunity Commission; “A Report on the Tenth Anniversary of the Americans with Disabilities Act (ADA), July 26, 2000”; p. 13; <http://www.eeoc.gov/ada/statusreport.html>.

¹⁰ The Court opinion in *Sutton* recognized that even with the use of mitigating measures, an individual may be “substantially” limited in a major life activity so as to be disabled under the ADA. Moreover, the Court opinion in *Murphy* noted that the side effects of medication themselves may substantially limit a major life activity rendering the person disabled. For those reasons, the Court stated that determination of disability must be made on a case by case basis. *Sutton v. United Airlines*, 527 U.S., 471, 488 (1999) and *Murphy v. United Parcel Service*, 527 U.S. 516, 521 (1999) and as discussed in: National Council on Disability, Policy Brief Series: Righting the ADA; No. 11 “The Role of Mitigating Measures in the Narrowing of the ADA’s Coverage”; March 17, 2003; <http://www.ncd.gov/newsroom/publications/2003/mitigatingmeasures.htm>

¹¹ Righting the ADA; p.25.

¹² As above; p.25.

¹³ *Cleveland v. Policy Management Systems Corp.* The lower court found that by filing for disability benefits under the U.S. Social Security Administration’s (SSA) definition of disability as being the “inability to engage in any substantial gainful activity by reason of an impairment,” the worker was attesting to an inability to perform the job at issue and therefore not entitled to protection under the ADA.

¹⁴ The legal term is “collateral estoppel” which is the legal doctrine that prevents relitigating facts or issues that were previously resolved in court.

¹⁵ It is perhaps not surprising that the SSA filed a friend-of-the-court brief in the *Cleveland* case on the basis that it is the very failure of employers to make accommodations that drives workers who develop disabilities to seek social insurance disability benefits.

¹⁶ *Benson v. Northwest Airlines*

¹⁷ the Eight Circuit

¹⁸ *Aka v. Washington Hospital Center II*

¹⁹ *Smith v. Midland Brake, Inc.*, the Tenth Circuit court also ruled that an employer may be required to reassign a disabled employee to a vacant position for which the employee is qualified even if there is a more qualified individual who could fill the position.

²⁰ *US Airways v. Barnett* Robert Barnett, a US Airways employee who suffered a back injury as a cargo handler requested a less physically demanding position in the mailroom, but two more senior employees also wanted that position. The 5-4 decision found that while “special circumstances” in particular cases of disability may override seniority, it would not in ordinary cases, because “such an exception would be too disruptive for other employees who had built their own career expectations around a company seniority plan.” For further discussion of the impact of the Barnett decision, see: “Reasonable Accommodation After Barnett”; paper No. 10 of NCD’s Policy Brief Series: [Righting the ADA](#). Papers can be found at: <http://www.ncd.gov/newsroom/publications/2003/policybrief.htm>

²¹ *Alton v. EchoStar*. Specifically, the jury awarded \$8 million in punitive damages; \$2,000 in back pay; and \$5,000 in compensatory damages.

²² Individuals who are blind can perform the job of customer service representative by using a computer program called JAWS (Job Access with Speech) that translates text into speech. A customer service representative who is blind uses a split headset, in which s/he hears the JAWS voice in one ear and the customer's conversation in the other ear. Using JAWS, people with vision impairments can process written language at 400 to 700 words per minute, which is faster than many individuals who are sighted can read

²³ However, after receiving a copy of his charge of discrimination from the EEOC, the company invited Mr. Alton back and put him through a sham interview process that included a test in Braille, which was longer and more difficult than the test given to individuals who are sighted, and a Windows skill test that consisted of a person giving him verbal direction on how to access icons by saying, "move left, move down, now click."

²⁴ The plaintiffs' specific allegations were:

- EchoStar failed to accommodate Mr. Alton in the application process;
 - EchoStar failed to accommodate Mr. Alton in the job by never trying to install adaptive software;
 - EchoStar denied Mr. Alton an employment opportunity because of his disability or because of the need to provide him an accommodation; and
- EchoStar violated a section of the ADA when it failed to use a proper testing device to determine an applicant's skills. All case details are from: "EEOC Wins \$8 Million Jury Verdict for Blind Worker in Disability Bias Case Against EchoStar"; <http://www.eeoc.gov/press/5-6-05.html>

²⁵ *EEOC v. Walmart Stores Inc.* The applicant was awarded \$7,500 in compensatory damages and \$150,000 in punitive damages. The judge also ordered the company to stop questioning applicants about their disabilities.

²⁶ In the settlement, the company agreed to stop using the questionnaire, offered the 27 individuals an opportunity to be reconsidered for employment under a modified application process, paid \$950,000 to the individuals, and augmented an internal training program to ensure compliance with the ADA.

²⁷ Two similar cases in the Tenth Circuit illustrate this issue. In *Griffin v. Steeltek Inc.*, the court agreed that a job applicant does not have to have a disability in order to challenge an employer who asks prohibited medical questions prior to offering the individual a job, if s/he then suffers an adverse employment action. In *Roe v. Cheyenne Mountain Conference Resort*, the court agreed with the EEOC that a current employee who does not have a disability may challenge an employer's illegal inquiries about lawful prescription drug use.

²⁸ Office of Personnel Management; <http://www.opm.gov/feddata/demograp/02demo.pdf>; Fig. 1-4; Table 4; Table 5; 2003.

²⁹ <http://www.dol.gov/opa/media/press/odep/odep20051050.htm>

³⁰ Prior to the Smith-Fess Act, there were three other major acts that dealt with rehabilitation for soldiers that helped pave the way for Smith-Fess. The National Defense Act of 1916 recognized the country's obligation to soldiers injured in service to their country and was intended to help facilitate their return to active life. In addition, the Smith-Sears Veterans Rehabilitation Act of 1918, also known as the Soldier Rehabilitation Act established a program of vocational rehabilitation for soldiers disabled while on active duty. To be eligible for the program, which was administered by the Federal Board for Vocational Education, the applicant had to be unable, because of his disability, to engage "successfully in gainful employment". Finally, the Smith-Hughes Act of 1917, also known as Public Law 347, established the Federal-state program in vocational education. It created the Federal Board for Vocational Education with the authority and responsibility for vocational rehabilitation of disabled veterans and provided federal assistance grants to the states on a matching basis. The effect of all of these acts and programs was to

commit the federal government to provide services to disadvantaged and disabled persons.
<http://www.region8rcep.com/mod1/materials/rehab1916-1936.htm>

³¹ 29 U.S.C. §§ 701 *et seq.*; 34C.F.R. Part 361.

³² *Id.* §721

³³ *Id.* §721(a)(2)

³⁴ *Id.* §722(a)(1)

³⁵ More information on the Social Security Ticket to Work program as well as on many other Social Security work incentives is available at: <http://www.ssa.gov/work/>

³⁶ <http://www-306.ibm.com/employment/us/diverse/index.shtml> and internal documents.

³⁷ As above.

³⁸ Transforming Disability into Ability: Policies to Promote Work and Income Security for Disabled People; Organization for Economic Cooperation and Development (OECD); Paris; 2003