COMMENTS

SECTION 504 OF THE REHABILITATION ACT:
ANALYZING EMPLOYMENT DISCRIMINATION CLAIMS

Section 504 of the Rehabilitation Act of 1973 prohibits the administrators of federally funded activities and programs from discriminating against "otherwise qualified" handicapped persons. This Comment discusses the differences among the courts in their interpretation of the private right of action under section 504.

Part I of the Comment first gives a brief history of the congressional policies behind the enactment of the Rehabilitation Act. Part I also describes both the agency enforcement of section 504 and the private right of action to enforce section 504. In part II the Comment discusses the Supreme Court's interpretation of section 504 in South-

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1 The section provides:

No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, 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 or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.


2 According to the Department of Health and Human Services (HHS), four types of federally funded activities are covered under § 504: (1) employment practices; (2) preschool, elementary, and secondary education; (3) postsecondary education; and (4) health, welfare, and social services. 45 C.F.R. §§ 84.11-.14, .31-.39, .41-.47, .51-.54 (1983). This Comment focuses on the application of § 504 to employment discrimination cases.

3 A handicapped person is defined under the Act as "any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment." 29 U.S.C. § 706(7)(B) (1982). "Major life activities" are defined as "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 45 C.F.R. § 84.3(j)(2)(ii) (1983).

4 See infra text accompanying notes 12-24.


6 See infra text accompanying notes 40-50.

7 See infra text accompanying notes 51-64.

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eastern Community College v. Davis.  

Finally, in part III, the Comment analyzes the different approaches taken by lower courts in section 504 cases since the Supreme Court’s decision in Southeastern Community College v. Davis. Some courts require plaintiffs bringing section 504 suits to show discriminatory intent, while others explicitly reject the need for such a showing. Some courts believe that section 504 is not violated as long as there is a reasonable basis for the decision to reject a handicapped applicant, while others find such an approach overly deferential to section 504 defendants. Finally, the courts disagree on the appropriate allocation of burdens of proof between the plaintiff and the defendant in a section 504 case. In part III these differences are analyzed in light of the language and policies of the Rehabilitation Act, the agency regulations interpreting section 504, and the Supreme Court’s opinion in Southeastern Community College v. Davis. The results of this analysis are summarized in the Conclusion, which gives an overview of how section 504 cases should be litigated.

I. THE ENACTMENT AND IMPLEMENTATION OF SECTION 504

A. Congressional Purpose Behind the Enactment of Section 504

Large numbers of mentally and physically handicapped individuals capable of working are underemployed or unemployed. In 1972, immediately prior to the enactment of the Rehabilitation Act of 1973, Congress recognized that only an estimated 800,000 of the 22 million physically handicapped adults in the United States were employed, although an estimated 14 million would work if provided with the opportunity to do so. One of the major legislative purposes behind the enactment of Title V of the Rehabilitation Act was to "promote and

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9 See infra text accompanying notes 66-100.
10 See infra text accompanying notes 101-42.
11 See infra text accompanying notes 143-87.
14 Title V includes: (1) section 501, which prohibits discrimination by the federal government in its own hiring practices, 29 U.S.C. § 791 (1982); (2) section 503, which
expand employment opportunities in the public and private sectors for handicapped individuals.\textsuperscript{15}

Congress recognized that although most handicapped adults were unemployed many of them could work if provided with adequate training and job opportunities.\textsuperscript{16} Congress noted that in many instances discrimination, and not a deficiency of training, prevented handicapped individuals from finding and retaining meaningful employment.\textsuperscript{17} Employers' stereotyped assumptions concerning the limitations of handicapped individuals contributed to handicapped Americans' being an oppressed and hidden minority.\textsuperscript{18}

The Rehabilitation Act is the major federal mechanism upon which the handicapped may rely for statutory relief from employment discrimination.\textsuperscript{19} The final goal of the Rehabilitation Act is the "complete integration of all individuals with handicaps into normal community living, working, and service patterns."\textsuperscript{20}

mandates nondiscrimination and requires affirmative action by federal contractors receiving more than $25,000 from the federal government, 29 U.S.C. § 793(a) (1982); and (3) section 504, which requires nondiscrimination in any program that receives federal funding, 29 U.S.C. § 794 (1982).


\textsuperscript{18} Senator Williams stated that:

The handicapped live among us. They have the same hopes, the same fears, and the same ambitions as the rest of us. ... Yet, they are today a hidden population because their problems are different from most of ours. Only the bravest risk the dangers and suffer the discomforts and humiliations they encounter when they try to live what we consider to be normal, productive lives. In their quest to achieve the benefits of our society they ask no more than equality of opportunity.


\textsuperscript{19} Title VII of the Civil Rights Act prohibits employment discrimination in the private sector against applicants or employees based on race, religion, sex, or national origin. 42 U.S.C. § 2000e-2 (1976). Amendments that would have added handicapped persons to that list of protected classes have been proposed but never enacted. See, e.g., H.R. 461, 95th Cong., 1st Sess. (1977).

\textsuperscript{20} White House Conference on Handicapped Individuals Act, Pub. L. No. 93-
In contrast to other sections of the Act, there was an absence of bona fide legislative history directed specifically at section 504. The congressional reports that were published in conjunction with the Act do nothing more than restate the wording of section 504. But, in 1974, Congress recognized this lack of legislative history and amended the Rehabilitation Act to clarify its intended effect and included an after-the-fact legislative history for section 504. The Senate report stated:

Section 504 was patterned after, and is almost identical to, the antidiscrimination language of section 601 of the Civil Rights Act of 1964 . . . and section 901 of the Education Amendments of 1972 . . . . The section therefore constitutes the establishment of a broad government policy that programs receiving Federal financial assistance shall be operated without discrimination on the basis of handicap.

B. Regulatory Enforcement

The Rehabilitation Act, in its original form, did not expressly require agency regulations to effectuate the policies of the Act. The 1974 amendments to the Act, however, produced a legislative history indicating that Congress contemplated implementation of section 504 through regulations. Finally, in 1978, the Act was amended expressly to require federal agencies to issue regulations implementing the nondiscrimination requirements of section 504.

The Department of Health, Education, and Welfare [HEW] (now the Department of Health and Human Services [HHS]) was first given the responsibility for establishing guidelines and coordinating enforcement of the Act, but in 1980 responsibility for coordinating agency


27 President Gerald R. Ford issued an executive order directing the Secretary of
enforcement of section 504 was transferred to the Attorney General.\textsuperscript{28}

Each agency providing federal funding to recipients who must comply with the provisions of section 504 implements those provisions through regulations modeled after the HHS guidelines.\textsuperscript{29} Agencies' regulations prohibit employment discrimination against qualified handicapped persons,\textsuperscript{30} require employers to make reasonable accommodation to the physical and mental limitations of otherwise qualified handicapped employees and applicants,\textsuperscript{31} and require that any employment criterion that tends to screen out handicapped persons must be job-related.\textsuperscript{32} According to the regulations, a handicapped person is "qualified" with respect to federally funded employment if he or she, "with reasonable accommodation, can perform the essential functions of the job in question."\textsuperscript{33} The term "essential functions" is used to "emphasiz[e] that handicapped persons should not be disqualified simply because they may have difficulty in performing tasks that bear only a marginal relationship to a particular job."\textsuperscript{34}

Thus, a handicapped person is "qualified" if he or she is able to meet the employment standards related to the essential functions of the job in question. In the event employment standards cannot be met, a handicapped person is still considered "qualified" if the standards could be satisfied with reasonable accommodation by the employer. HHS analysis of its regulations indicates that employers bear the burden of showing that employment criteria are job related and that a physical or


\textsuperscript{29} 28 C.F.R. § 41.4 (1983). A list of the agency regulations implementing section 504 can be found in B. \textsc{Schlei} \& P. \textsc{Grossman}, \textit{Employment Discrimination Law} 260 n.52 (2d ed. 1983).

\textsuperscript{30} E.g., 45 C.F.R. § 84.11 (HHS regulations; "Discrimination prohibited").

\textsuperscript{31} E.g., id. § 84.12 (HHS regulations; "Reasonable accommodation"). Reasonable accommodation includes: "(1) Making facilities used by employees readily accessible to and usable by handicapped persons, and (2) job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, the provision of readers or interpreters, and other similar actions." \textit{Id.}

\textsuperscript{32} E.g., id. § 84.13 (HHS regulations; "Employment criteria"). The Department of Labor regulations provide that job qualifications "which would tend to exclude handicapped individuals because of their handicap . . . shall be related to the specific job or jobs for which the individual is being considered and shall be consistent with business necessity and safe performance." 29 C.F.R. § 32.14(b) (1983).

\textsuperscript{33} 28 C.F.R. § 41.32 (1983) (Dep't of Justice "Standards for Determining Who Are Handicapped Persons"); definition of "Qualified handicapped person").

\textsuperscript{34} 45 C.F.R. pt. 84, app. A at 299 (1983).
mental characteristic that caused the denial or termination of employment is essential for the position in question.35

The administrative procedures for effecting compliance with the requirements of section 504 are the same as those "applicable to title VI of the Civil Rights Act of 1964."36 Those procedures call for the submission of a written complaint to the appropriate agency official, who then investigates the complaint and, if possible, resolves the problem through informal means.37 If compliance cannot be achieved through informal methods, the agency may impose the sanction of "suspension or termination of or refusal to grant or continue Federal financial assistance"38 after the employer has been given appropriate opportunity for a hearing.39

C. Private Right of Action

Section 504 does not expressly grant private citizens a cause of action for violation of its provisions. The Supreme Court in Southeastern Community College v. Davis40 declined to reach the issue of whether section 504 creates a private cause of action.41 Every lower court that has considered this question, however, has agreed that Congress intended to create an implied cause of action under section 504.42 In 1978 the Rehabilitation Act was amended43 to grant individuals

35 See id. The HHS analysis of its regulations states:

Certain commenters urged that the definition of qualified handicapped person be amended so as explicitly to place upon the employer the burden of showing that a particular mental or physical characteristic is essential. Because the same result is achieved by the requirement contained in paragraph (a) of § 84.13, which requires an employer to establish that any selection criterion that tends to screen out handicapped persons is job-related, that recommendation has not been followed.

45 C.F.R. § 80.7 (1983).
46 Id. § 80.8.
47 See id. §§ 80.9-.11, 81.1-.131.
49 Id. at 404 n.5.
50 See, e.g., Miener v. Missouri, 673 F.2d 969, 973-74 (8th Cir.), cert. denied, 103 S. Ct. 215 (1982); Pushkin v. Regents of the Univ. of Colo., 658 F.2d 1372, 1377 (10th Cir. 1981); see also NAACP v. Medical Center, Inc., 599 F.2d 1247, 1258-59 (3d Cir. 1979); Lloyd v. Regional Transp. Auth., 548 F.2d 1277, 1284-87 (7th Cir. 1977).
the rights, remedies, and procedures available under Title VII\textsuperscript{44} as against federal agencies violating the provisions of section 504\textsuperscript{45} and under Title VI\textsuperscript{46} as against federally funded private parties violating section 504.\textsuperscript{47} Despite this bifurcation, private actions against the federal government and those against federally funded private parties tend to be very similar.\textsuperscript{48} Perhaps the two remain virtually identical because the language of section 504 and the regulations implementing it provide enough guidance as to how actions should be litigated that there is little need to resort to the rights, remedies, and procedures of either Title VII or Title VI.\textsuperscript{49} Such an assessment is supported by the recent Supreme Court decision in \textit{Consolidated Rail Corp. v. Darrone}.\textsuperscript{50} Thus,

\textsuperscript{48} One dissimilarity is that a plaintiff suing the federal government may be required to exhaust administrative remedies whereas one suing a federally funded private party may not. \textit{Compare Prewitt v. United States Postal Serv.}, 662 F.2d 292, 303-04 (5th Cir. 1981) (suit against federal government; exhaustion of administrative remedies required) \textit{with Pushkin v. Regents of the Univ. of Colo.}, 658 F.2d 1372, 1380-82 (10th Cir. 1981) (suit against private party; exhaustion of alternative remedies not required). In the Fifth Circuit there is a great deal of disparity between suits against the federal government under § 505(a)(1) and those against private parties under § 505(a)(2). \textit{Compare Prewitt}, 662 F.2d at 305-10 (section 504 violation can be made out against federal government by showing of discriminatory impact) \textit{with Doe v. Region 13 Mental Health-Mental Retardation Comm'n}, 704 F.2d 1402, 1408-12 (5th Cir. 1983) (without evidence of discriminatory animus a private party violates § 504 only if there is no reasonable basis for its allegedly discriminatory action). The differences between \textit{Prewitt} and \textit{Doe v. Region 13} seem to be based more on the deciding judges' views of § 504 generally than on distinctions between enforcement under § 505(a)(1) and § 505(a)(2). The later decision, \textit{Doe v. Region 13}, does not even cite \textit{Prewitt}, let alone attempt to distinguish it.

This Comment focuses primarily on cases against private parties simply because there are more of such cases reported and the disagreement among different courts on how to analyze such cases is great. But, for the most part, the Comment's conclusions are also applicable to cases against the federal government.

\textsuperscript{49} See Pushkin v. Regents of the Univ. of Colo., 658 F.2d 1372, 1384 (5th Cir. 1981) ("The standards for determining the merits of a case under § 504 are contained in the statute.").
\textsuperscript{50} 104 S. Ct. 1248 (1984). In \textit{Consolidated Rail Corp.} the Court decided that § 504 covered employment discrimination committed by private parties receiving federal funds even if promoting employment was not a primary objective of the financial assistance. This result conflicted with an express limiting provision of Title VI, 42 U.S.C. § 2000d-3 (1976) ("Nothing contained in this subchapter shall be construed to authorize action . . . with respect to any employment practice . . . except where a primary objective of the Federal financial assistance is to provide employment."), but the Court held that the 1978 amendments to the Rehabilitation Act, designed to enhance private enforcement of § 504, could not be construed to limit available remedies in a way that would conflict with the language, agency interpretation, and policy of the Rehabilitation Act. 104 S. Ct. at 1253-55.
private rights of action are governed by the provisions of the Rehabilitation Act, with Title VI or Title VII providing a model to guide courts only on questions left unanswered by the Rehabilitation Act itself.

II. THE SUPREME COURT'S OPINION IN Southeastern Community College v. Davis

A. The Major Issues in Davis

Southeastern Community College v. Davis is the sole Supreme Court case addressing the substantive merits of a section 504 action. In that case Davis, a severely hearing-impaired person with bilateral sensori-neural hearing loss, sought to be trained as a registered nurse. Following the results of a medical exam, the defendant Southeastern Community College, a state institution receiving federal funds, refused to admit Davis into its associate degree nursing program. The college asserted that the plaintiff's involvement in the clinical aspect of the nursing program would result in unsafe conditions for the patients involved since she needed to rely on lip reading for effective communication.

The major issue before the Supreme Court was the meaning of the words "otherwise qualified handicapped individual" under section 504. In a unanimous decision, the Court held that Southeastern College's conclusion that Davis was not "otherwise qualified" for admission to its nursing program did not violate the provisions of section 504.

Justice Powell, writing for the Court, rejected the Fourth Circuit's construction of section 504, which interpreted "otherwise qualified" as requiring federally funded programs to consider handicapped persons'
qualifications without regard to the handicap. The Supreme Court stated that "[a]n otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap."

Having established that a person's handicap must be taken into account in determining whether that person is qualified for the federally funded program, the Court went on to discuss why Southeastern Community College's refusal to admit Davis did not violate Davis's rights under section 504. The Court first noted that the physical characteristics the College demanded of an applicant were, in this case, "necessary for participation in [the] program." The Court also rejected the interpretation that section 504 placed an absolute duty on administrators of federally funded programs to take "affirmative action" to ensure that any handicapped person could participate in their programs. Instead, the Court suggested that section 504 required only reasonable modifications of programs to accommodate handicapped persons. Thus, the Supreme Court found that the district court was correct in its determination that Davis was not "otherwise qualified" because she could not perform the functions necessary for participation in the program (and for performance of the duties of a registered nurse) and the program could not reasonably be modified to accommodate her handicap.

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57 Id. at 406. The Fourth Circuit had held that the college had to "reconsider plaintiff's application for admission to the nursing program without regard to her hearing ability." Davis v. Southeastern Community College, 574 F.2d 1158, 1160 (4th Cir. 1978), rev'd, 442 U.S. 397 (1979). The court decided that the defendant college had to make its decisions based solely on plaintiff's academic qualifications. Id. at 1161.

58 442 U.S. at 406 (emphasis added).

59 Id. at 407.

60 Id. at 407-12. It was argued that if the plaintiff were provided with individual supervision during direct contacts with patients or if she were exempted from taking several required courses, the severity of her handicap would not affect her ability to function within the nursing program. Id. at 407. The Court found that § 504 did not mandate affirmative action, holding that "neither the language, purpose, nor history of § 504 reveals an intent to impose an affirmative-action obligation on all recipients of federal funds." Id. at 411 (footnote omitted).

The Court stated:

We do not suggest that the line between a lawful refusal to extend affirmative action and illegal discrimination against handicapped persons always will be clear. It is possible to envision situations where an insistence on continuing past requirements and practices might arbitrarily deprive genuinely qualified handicapped persons of the opportunity to participate in a covered program. . . . Situations may arise where a refusal to modify an existing program might become unreasonable and discriminatory.

Id. at 412-13.
B. Section 504 Issues Not Resolved in Davis

The Supreme Court in *Southeastern Community College v. Davis* did not resolve many important issues involved in the litigation of section 504 claims. Most of the opinion seems to be limited to an affirmance of the district court's factual finding that the plaintiff in this case was not "otherwise qualified" under section 504.62

In particular, the Supreme Court failed to establish the burdens of proof applicable in a section 504 action. The Court did not articulate the elements of a section 504 claim; most significantly, it did not discuss whether discriminatory intent is relevant.63 The Court also did not provide lower courts with much guidance as to how much deference, if any, should be given to the determinations made by administrators of federally funded programs that particular handicapped individuals are not "otherwise qualified" for participation or employment.64

Since the Supreme Court's decision in *Davis* these unresolved issues have been considered by lower courts, and their decisions have yielded conflicting interpretations of the section 504 private cause of action. The next part of this Comment addresses the conflicts that have arisen and suggests how such conflicts should be resolved.

III. Interpreting "Otherwise Qualified" After Davis

Following *Southeastern Community College v. Davis*65 the lower courts have diverged significantly in their approaches to section 504 employment discrimination cases. Three specific issues on which the circuits disagree are the role of intent in section 504 cases, the level of deference given to the employment decisions of federally funded employers, and the allocation of the burdens of proof between plaintiffs and defendants in section 504 cases. This part of the Comment discusses the results reached on these issues by different circuits and analyzes the conflicting conclusions of the circuits in light of the language, policy, and history of the Rehabilitation Act; the regulations promul-

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62 See id. at 403, 406, 414.

63 But see id. at 413 ("This type of purpose [to train persons who could serve the nursing profession in all customary ways], far from reflecting any animus against handicapped individuals, is shared by many if not most of the institutions that train persons to render professional service.").

64 The Court does provide at least some guidance on how to review the decisions of administrators. It indicated that a trial court, after an independent review of the facts, see 442 U.S. at 403, should determine whether a federally funded program administrator has shown that the physical characteristics it requires are "necessary for participation in [the] program," id. at 407 (emphasis added).

A. Discriminatory Intent

1. Cases Using Discriminatory Intent as a Factor in Section 504 Actions

In Doe v. Region 13 Mental Health-Mental Retardation Commission the Fifth Circuit upheld the trial court's judgment for the defendant notwithstanding the jury's verdict awarding the plaintiff employee money damages. The plaintiff, a former psychiatric worker, had brought suit under section 504 of the Rehabilitation Act challenging her dismissal for alleged psychological problems.

The court found that the plaintiff was "handicapped" and was therefore entitled to invoke section 504. The court decided, however, that although the federally funded employer's only basis for terminating Doe was her psychological handicap, the Mental Health Center's employment decision did not constitute a violation of section 504. Crucial to the Fifth Circuit's decision was the determination that the plaintiff produced no evidence of discriminatory animus on the part of the employer against persons with impairments similar to the plaintiff's.

The Fifth Circuit interpreted the Supreme Court's decision in Southeastern Community College v. Davis to support judicial deference to employment decisions made by administrators of federally funded programs as long as such decisions are not skewed by discriminatory animus. In the words of the court, "In determining whether Ms. Doe

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68 704 F.2d 1402 (5th Cir. 1983).
67 Id. at 1407, 1409.
66 The jury had awarded Doe $25,000 in damages and found that she should be reinstated. Id. at 1407. Proof of intentional discrimination in order to recover money damages may be considered as a separate issue from whether proof of intentional discrimination is required to make out an underlying violation. See, e.g., Guardians Ass'n v. Civil Serv. Comm'n, 103 S. Ct. 3221 (1983) (Title VI racial and national origin discrimination; intent not required to establish violation of the law, but is required to recover money damages recover money damages); see also Consolidated Rail Corp. v. Darrone, 104 S. Ct. 1248 (1984) (section 504 plaintiff could recover back pay at least in a case alleging intentional discrimination). In Doe v. Region 13 the Fifth Circuit dealt only with intent as a requirement to establish a violation of § 504.
69 704 F.2d at 1407-08.
70 Id. at 1409-10. The court found it significant that testimony was presented showing that the employer had several other employees who also suffered from depression and had undergone psychiatric counseling but who were not discharged. Id. at 1409.
71 The Fifth Circuit seemed to base this reading on Southeastern Community College v. Davis's holding that § 504 did not mandate affirmative action to the degree of extensive modifications of programs and that a person's handicap could be considered
was 'otherwise qualified' under the Act, we believe that, in the absence of any evidence of . . . discriminatory animus . . . , we must analyze the actions by [the defendant] to determine whether there was a substantial, reasonable basis for its decision. 72 Finding that the record presented "uncontroverted evidence of a chronic, deteriorating situation which is reasonably interpreted to pose a threat to the patients with whom the employee must work," the court upheld the trial court's judgment for the defendant. 73

Doe v. Region 13 is not alone in its holding that intent plays a role in establishing a section 504 violation. 74 No court seems to have gone so far as to hold that discriminatory intent must be proved in order to make out a section 504 violation. The deferential approach taken by some courts to decisions not shown to be accompanied by discriminatory animus, however, is often just as fatal to otherwise valid section 504 claims.

2. Cases Rejecting Discriminatory Intent as a Factor in Section 504 Actions

In Pushkin v. Regents of the University of Colorado 75 the Tenth Circuit decided that the defendant University of Colorado had discriminated against the plaintiff because of his multiple sclerosis by denying him admission into its Psychiatric Residency Program. The court re-

in determining whether that person was "otherwise qualified" for participation. See Doe v. Region 13, 704 F.2d at 1410. The Supreme Court in Southeastern Community College v. Davis, for the most part, did not use language of discriminatory intent or of judicial deference. But see 442 U.S. at 413 (noting in passing that Southeastern's program did not "reflect[ ] any animus against handicapped individuals"). Rather, despite its lack of citation to the source, Doe v. Region 13's intent requirement and its deference to the decisions of employers seem to have their genesis in the Supreme Court case holding that discriminatory intent is required in order to establish that an employment decision violates the equal protection clause of the Constitution, Washington v. Davis, 426 U.S. 229, 246-47 (1976). See infra notes 93-100 and accompanying text.

72 Doe v. Region 13, 704 F.2d at 1410.
73 Id. at 1412.
74 In Doe v. New York Univ., 666 F.2d 761 (2d Cir. 1981), the Second Circuit supported New York University's refusal to readmit a medical student because of psychiatric problems by holding that "considerable judicial deference" should be paid to the evaluations made by a federally funded institution, "absent proof that its standards and its application of them serve no purpose other than to deny an education to handicapped persons." Id. at 776.

In Guerriero v. Schultz, 557 F. Supp. 511 (D.D.C. 1983), the District of Columbia district court ruled that the Foreign Service was justified in its decision to fire a foreign service officer who suffered from acute alcohol addiction and a schizoid personality disorder. The court held that the plaintiff failed to carry his prima facie burden of proof because he was unable to show "the Secretary's discriminatory motive or his own qualification for retention." Id. at 513.

75 658 F.2d 1372 (10th Cir. 1981).
jected the University's argument that discrimination could not be found under section 504 in the absence of recognized discriminatory intent. The court stated:

It would be a rare case indeed in which a hostile discriminatory purpose or subjective intent to discriminate solely on the basis of handicap could be shown. Discrimination on the basis of handicap usually results from more invidious causative elements and often occurs under the guise of extending a helping hand or a mistaken, restrictive belief as to the limitations of handicapped persons. A claim under § 504 would be analyzed more readily under a "disparate impact" theory where it is claimed that a facially neutral practice has a discriminatory impact on persons within a protected class.\textsuperscript{76}

The court went on to say, however, that section 504 should not be analyzed only in terms of either disparate treatment\textsuperscript{77} or disparate impact.\textsuperscript{78} Rather, section 504 "sets forth its own criteria for scrutinizing claims under [the] statute."\textsuperscript{79} Accordingly, the court held that a handicapped individual establishes a prima facie case of discrimination by showing that he or she is otherwise qualified and was rejected for the

\textsuperscript{76} Id. at 1385.

\textsuperscript{77} Disparate treatment is a term used to refer to one type of discrimination that violates Title VII. To prove disparate treatment a plaintiff must establish that he or she was not hired or was fired because of his or her race, sex, religion, or national origin. Thus, it is essential that the plaintiff establish that there was discriminatory intent on the part of the employer, although intent may be inferred from the mere effects of discrimination. International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977). The burden is on the plaintiff to establish a prima facie case. The plaintiff can satisfy this burden by proving that he or she (1) is within a protected class, (2) applied for a job for which the employer was seeking applicants and for which he or she was qualified, (3) was denied the job, and (4) that the employer continued to seek applicants for the position. If the plaintiff is successful in establishing a prima facie case, the employer must prove legitimate and nondiscriminatory reasons for the plaintiff's rejection. The plaintiff finally can override the rebuttal by establishing that the defendant's proffered reasons were merely a pretext for an underlying discriminatory motive. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973).

\textsuperscript{78} Disparate impact is a term used to describe an alternative form of discrimination that also violates Title VII. To make a successful disparate impact claim a plaintiff need not prove discriminatory intent. Rather, he or she must establish that the employer in question was using hiring criteria that resulted in the elimination of applicants in a class protected by Title VII. If the plaintiff establishes adverse impact, the employer must prove that the criteria were used out of business necessity and were reasonably accurate indicators of future performance in the jobs in question. Once the employer has established that the qualifications used were related to job performance, the plaintiff can still win the case by showing that the "necessary" criteria were used as a pretext for discrimination against a protected class. It is only at this point that discriminatory motive becomes relevant in disparate impact cases. See Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Griggs v. Duke Power Co., 401 U.S. 424 (1971).

\textsuperscript{79} Pushkin, 658 F.2d at 1385.
position in question solely on the basis of his or her handicap.\textsuperscript{80}

Many courts agree with the approach most forcefully advocated in \textit{Pushkin}. Some courts explicitly state that section 504 does not require any showing of discriminatory intent.\textsuperscript{81} Other courts demonstrate implicit agreement with that approach by deciding section 504 cases without mention of discriminatory intent or animus in their analysis.\textsuperscript{82} The analysis in these cases clearly conflicts with the approach adopted by the Fifth Circuit in \textit{Doe v. Region 13}. In \textit{Doe v. Region 13} intent was relevant to the determination whether section 504 has been violated. In \textit{Pushkin} and in other section 504 cases discriminatory intent is irrelevant to that determination.

3. Analysis of the Intent Requirement

The Rehabilitation Act does not explicitly state whether a showing of discriminatory intent is relevant in establishing a section 504 violation. The Act does not require courts to consider or not to consider evidence of discriminatory animus in deciding how to examine the employment decisions of federally funded employers. The policy of the Act, the legislative history, and the regulations implementing section 504, however, all point to the conclusion that intent should be irrelevant to the determination of a section 504 violation.

Section 504 is part of a civil rights statute and as such should be interpreted broadly so as to effectuate its remedial purposes.\textsuperscript{83} The section was enacted in an effort to halt a long history of discrimination against handicapped individuals. Congress proclaimed that the final goal of the Rehabilitation Act is "the complete integration of all individuals with handicaps into normal community living, working, and service patterns."\textsuperscript{84} Requiring a showing of discriminatory animus in section 504 actions would frustrate the legislative aim of eliminating

\textsuperscript{80} Id.
discrimination against handicapped persons.

Only rarely, if ever, could a handicapped individual prove that exclusion from employment occurred as a result of hostile discriminatory purpose or subjective intent to discriminate solely on the basis of handicap. Rather, discriminatory actions against the handicapped are often based on employers' paternalistic, stereotyped assumptions concerning the inability of handicapped persons to contribute fully to the work force. Many well-meaning employers misapprehend the abilities and limitations of handicapped persons. Section 504 was meant to correct these mistakes, not just to prohibit hostile animus.

In order fully to effectuate the policy of the Rehabilitation Act to "promote and expand employment opportunities . . . for handicapped individuals," a claim under section 504 should not depend on a showing of discriminatory intent or animus. The policy of section 504 indicates that if a handicapped individual can perform a job, it is improper for the administrator of a program receiving federal funds not to hire that person. Intentions, good or bad, are irrelevant.

In addition to general policy reasons, Congress indicated more specifically its intention that a showing of discriminatory intent should not be required for a violation of section 504 by patterning section 504 after Title VI of the Civil Rights Act of 1964. Congress added section 505(a)(2) to the Rehabilitation Act in order to make Title VI rights and remedies applicable to section 504. In doing so, Congress indicated its approval of the interpretation that a showing of intent should not be required in order to make out a section 504 violation.

88 Gittler, supra note 12, at 967-70; see also Pushkin, 658 F.2d at 1385.
87 Section 601 of the Civil Rights Act of 1964 provides, "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d (1976).
85 Cf. Larry P. v. Riles, 495 F. Supp. 926, 962 (N.D. Cal. 1979) (noting that the
In construing a federal statute, courts typically grant a great deal of deference to the interpretations of the federal agency charged with enforcement of that statute. The regulations implementing section 504 clearly contemplate that the section is violated by actions resulting in discriminatory effects without any showing of discriminatory intent. For example, HHS regulations provide that recipients of federal funds "may not limit, segregate, or classify applicants or employees in any way that adversely affects their opportunities or status because of handicap." Employers "may not make use of any employment test or other selection criterion that screens out or tends to screen out handicapped persons or any class of handicapped persons" unless the criterion is shown to be job-related and alternative criteria that do not tend to screen out handicapped individuals are not available. It is the effect of employment criteria that matters, not the employers' intentions. Thus, the policy behind the enactment of the Rehabilitation Act, the legislative history of the Act, and the regulations implementing section 504 all indicate that intent should be irrelevant in establishing a section 504 violation.

The courts that require a showing of discriminatory animus in section 504 cases appear to be grafting equal protection clause jurisprudence onto section 504. In *Washington v. Davis*, the Supreme Court held that a violation of the equal protection clause can be made out only if discriminatory intent, and not just discriminatory impact, can be shown. The Court noted, however, the difference between establishing a violation of Title VII of the Civil Rights Act of 1964 and a violation of the equal protection clause:

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1974 Rehabilitation Act amendments “made it clear that Congress expected and intended that words similar to Title VI would be interpreted as they impliedly had been in *Lau v. Nichols*, 414 U.S. 563 (1974)” to allow a private right of action; *id.* at 962 n.73 (quoting the 1978 amendments to the Rehabilitation Act adding § 505(a)(2) and noting that “[t]hese amendments further show the Congressional intent to have section 504 construed in the same manner as Title VI”). Intent is not required to establish a violation of the law under Title VI according to both *Lau* and the more recent case of *Guardians Ass’n v. Civil Serv. Comm’n.*, 103 S. Ct. 3221 (1983). See infra notes 96-100 and accompanying text.

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91 45 C.F.R. § 84.11(3) (1983).
Under Title VII, Congress provided that when hiring and promotion practices disqualifying substantially disproportionate numbers of blacks are challenged, discriminatory purpose need not be proved, and that it is an insufficient response to demonstrate some rational basis for the challenged practices. . . . This process . . . involves a more probing judicial review of, and less deference to, the seemingly reasonable acts of administrators and executives than is appropriate under the Constitution where special racial impact, without discriminatory purpose, is claimed. We are not disposed to adopt this more rigorous standard for the purposes of applying [the equal protection clause to employment discrimination cases].

Rehabilitation Act cases adopting an intent requirement for a section 504 violation seem to carry the approach of Washington v. Davis over into employment discrimination cases under section 504. They hold that absent discriminatory intent, deference is due to the employment decisions of administrators of federally funded programs.

Instead of following the standards for a violation of the equal protection clause, courts interpreting section 504 should use the standards of Title VI as their starting point, as they are explicitly instructed to do in section 505(a)(2). As established in Lau v. Nichols, no showing of intent is required in order to establish a violation of Title VI. The lack of an intent requirement under Title VI was reaffirmed in the employment discrimination context last Term in Guardians Association v. Civil Service Commission. This Term, in Consolidated Rail Corp. v. Darrone, the Court indicated that, at least to the extent they further the purposes of the Rehabilitation Act, Title VI standards—including

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86 426 U.S. at 246-48.
97 103 S. Ct. 3221, 3223 & n.2 (1983). Although Guardians Ass'n reaffirms the lack of an intent requirement under Title VI, it holds that discriminatory intent must be shown in order to recover compensatory damages under Title VI. Id. at 3223.
96 The main issue in Consolidated Rail Corp. v. Darrone was whether an employer could be sued under § 504 even if promoting employment was not a primary objective of the federal funding received. 104 S. Ct. at 1251-52. Despite § 505(a)(2)'s incorporation of the rights, remedies, and procedures of Title VI and Title VI's express limitation of its coverage to "employment practice[s] . . . where a primary objective of the Federal financial assistance is to provide employment," 42 U.S.C. § 2000d-3 (1976), the Supreme Court held that an employer could be sued under § 504 regardless of whether a primary objective of its federal funding is to promote employment. 104 S. Ct. at 1253-56. The Court believed that "it would be anomalous to conclude that [§ 505(a)(2)], 'designed to enhance the ability of handicapped individuals to assure compliance with [§ 504],' . . . silently adopted a drastic limitation on the handicapped
those stated in *Guardians Association*—would be applied to section 504 actions. Thus, recent Supreme Court decisions, as well as the history and policy of the Rehabilitation Act, indicate that there should be no requirement of a showing of discriminatory intent in order to establish a violation of section 504.

**B. Judicial Deference to the Decisions of Administrators of Federally Funded Programs**

1. Applying a "Rational Basis" Test in Section 504 Actions

In *Doe v. New York University* the Second Circuit decided that NYU was justified in its decision to deny readmission of a psychologically impaired applicant into its medical school program. The court stated that the plaintiff's fine record for five years preceding reapplication was not sufficient to overcome the school's legitimate concerns that her past behavioral problems might recur.

Essential to the court's analysis was its determination that judicial deference must be paid to decisions made by administrators of federally funded programs. Even though the Second Circuit admitted that section 504 requires the court, and not the federally funded institution, to make the final decision as to whether a handicapped individual is "otherwise qualified," the court insisted that "considerable judicial deference must be paid to the evaluation made by the institution itself, absent proof that its standards... serve no purpose other than to deny participa-

individual's right to sue federal grant recipients for employment discrimination." *Id.* at 1255 (quoting S. REP. NO. 890, 95th Cong., 2d Sess. 18 (1978)). Thus, it appears that the rights, remedies, and procedures of Title VI will only be applied to § 504 to the extent that they are consistent with the purposes of the Rehabilitation Act.

In order to reach the "primary objective" limitation issue in *Consolidated Rail Corp.*, the Supreme Court had to consider whether the case was mooted by the death of the handicapped individual who sought employment. The Court held that the case was not moot because the original plaintiff's estate could recover back pay under § 504. Although the Court did not say that a plaintiff *must* allege intentional discrimination to recover back pay, it said that at least in this case, in which intentional discrimination was alleged, back pay was an available remedy. The Court stated:

In *Guardians Ass'n*... a majority of the Court expressed the view that a private plaintiff under Title VI could recover backpay; and no member of the Court contended that backpay was unavailable, at least as a remedy for intentional discrimination. It is unnecessary to review here the grounds for this interpretation of Title VI. It suffices to state that we now apply this interpretation to § 505(a)(2), that, as we have noted, provides to plaintiffs under § 504 the remedies set forth in Title VI. Therefore, respondent, having alleged intentional discrimination, may recover backpay in the present § 504 suit.

104 S. Ct. at 1252-53. (footnotes omitted).

101 666 F.2d 761 (2d Cir. 1981).
tion to handicapped individuals."102 According to the Second Circuit, the "pivotal" issue that should be addressed by the courts in their review of suits brought under section 504 is whether, under all the circumstances presented, the federally funded institution had a "reasonable basis for finding the plaintiff not to be qualified or not as well qualified as other applicants."103

The reasonable or rational basis standard has been applied by other courts in their review of suits brought under section 504 against the administrators of federally funded programs.104 In response to an action brought under section 504 against a federally funded employer, the Fifth Circuit in Doe v. Region13105 stated that the case should be decided by looking at the totality of the evidence to see if the employer was "reasonably justified in believing that [the handicapped employee] was not 'otherwise qualified.'"106 The court held that there was no violation of section 504 because "[s]ubstantial, rational bases existed for [the employer's] action."107

Closely connected to judicial deference to employment decisions is the tendency of some courts to be swayed by evidence of vague predictions of future performance as a basis for employment decisions adversely affecting the handicapped. In Doe v. Region 13 the Fifth Circuit affirmed a judgment for the defendant notwithstanding the jury verdict favorable to the plaintiff. The case involved the discharge of a staff psychologist at a mental health center. The employer admitted that the plaintiff had done an excellent job. She had carried one of the heaviest caseloads at the center, had seen more patients than the other psychiatric workers, and had done a good job as local school board consultant.108 She was seen as diligent and hard working, and her patients were reported to have liked her.109 In fact, the plaintiff had continued to do an "outstanding" job by all objective standards until her discharge.110

Despite her excellent performance the plaintiff was discharged be-

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102 Id. at 776.
103 Id. (emphasis added).
105 704 F.2d 1402 (5th Cir. 1983).
106 Id. at 1412 (emphasis added).
107 Id.
108 Id. at 1404.
109 The plaintiff received very favorable work evaluations during the time she was employed by the clinic and while she was allegedly suffering from her psychological problems. Id.
110 Id.
cause her depressive neurosis caused her superiors to be "concerned about the well-being of [her] patients." The defendant’s "concern was for [the plaintiff’s] future performance, not her past performance." The court held that no violation of section 504 could be found because the plaintiff’s condition could be "reasonably interpreted to pose a threat to the patients with whom the employee must work." Thus, despite plaintiff’s outstanding work record, vague predictions of possible consequences of her handicap for her future job performance were held to preclude the possibility of a finding of a section 504 violation.

2. Rejection of Judicial Deference in Section 504 Actions

In contrast to the high level of deference given to administrators of federally funded programs by some courts, the Third Circuit in Strathie v. Department of Transportation rejected the deferential approach. The court decided that, although federally funded administrators are entitled to some judicial deference due to their experience, "broad judicial deference resembling that associated with the 'rational basis' test would substantially undermine Congress' intent in enacting section 504 that stereotypes or generalizations not deny handicapped individuals equal access to federally-funded programs." The court decided that, under section 504, the following standard should replace the rational basis test in the review of decisions by administrators of federally funded programs:

A handicapped individual who cannot meet all of a program’s requirements is not otherwise qualified if there is a factual basis in the record reasonably demonstrating that accommodating that individual would require either a modification of the essential nature of the program, or impose an

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111 Id. at 1406.
112 Id. at 1409.
113 Id. at 1412.
114 See also Treadwell v. Alexander, 707 F.2d 473 (11th Cir. 1983). In Treadwell a handicapped plaintiff brought suit under §§ 501 and 504 alleging that the Army Corps of Engineers office did not have adequate basis for determining that the plaintiff could not do the work of a park technician due to his heart condition. The basis for the decision not to hire the plaintiff was a prediction that, due to his heart condition, the plaintiff could not safely operate a motor boat alone or handle certain types of disorderly park visitors. Even though these types of skills were only marginally necessary for the job, the Eleventh Circuit decided that they served as an adequate basis for not hiring the plaintiff.
115 716 F.2d 227 (3d. Cir. 1983).
116 Id. at 231 (footnote omitted).
undue burden on the recipient of federal funds.\textsuperscript{117}

Under this standard it is unacceptable for recipients of federal funds to demonstrate merely a subjective, reasonable basis for making decisions that exclude handicapped individuals. The mere fact that the recipient of federal funds acted in a rational manner is not seen as a defense to a discriminatory act.\textsuperscript{118}

In \textit{Strathie} a school bus driver was denied state licensing due to a hearing impairment. Applying its standard to this situation the Third Circuit first determined for itself the essential nature of the school bus driver licensing program. The court did not accept the defendant's view that the essential purpose of its licensing standards was "to ensure the highest level of safety."\textsuperscript{119} Rather, the Third Circuit found that "the essential nature of the program is to prevent any and all appreciable risks that a school bus driver will be unable to provide for the control over and safety of his passengers."\textsuperscript{120} Having determined the essence of the program, the court examined the record for a factual basis upon which to find that accommodating Strathie's handicap would conflict with that essential nature of the program or impose an undue burden on the defendant. The court considered each of the reasons proffered by the defendant but found that the plaintiff had presented evidence arguably rebutting each one.\textsuperscript{121} It therefore reversed the district court's summary judgment for the defendant.\textsuperscript{122}

By requiring a factual basis on the record the Third Circuit in \textit{Strathie} adopted an approach contrasting sharply with that of courts that rely on vague predictions of possible future consequences of handicaps on job performance. The Third Circuit noted that its standard would find unlawful any exclusion of handicapped individuals that was based on nothing more than "a remote possibility" of a future hazard.\textsuperscript{123}

The Eighth Circuit in \textit{Simon v. St. Louis County}\textsuperscript{124} arrived at a similar standard to the one delineated by the Third Circuit in \textit{Strathie}. In \textit{Simon}, an action was brought by a former commissioned county police officer who was discharged after sustaining a gun-shot wound that

\textsuperscript{117} Id.
\textsuperscript{118} Cf. \textit{Pushkin}, 658 F.2d at 1383 ("The rational basis test is not applicable where there is an alleged violation of a statute, § 504, which prohibits discrimination on the basis of handicap.").
\textsuperscript{119} 716 F.2d at 232.
\textsuperscript{120} Id.
\textsuperscript{121} Id. at 232-34.
\textsuperscript{122} Id. at 234.
\textsuperscript{123} Id. at 231.
\textsuperscript{124} 656 F.2d 316 (11th Cir. 1981).
left him paraplegic. He alleged that the discharge was a violation of the Rehabilitation Act. In this case the court scrutinized the employment requirements as set forth by the defendant employer to see if they were "necessary and legitimate requirements of the job." It was therefore insufficient for the defendant to show it had some reasonable basis for a decision to exclude the handicapped plaintiff. *Simon*, like *Strathie*, requires that defendants demonstrate a direct link between selection criteria and the essential nature of the program involved.

The viewpoint of the Third Circuit is also supported by the positions adopted by the Ninth Circuit in *Bentivegna v. United States Department of Labor*, and the Tenth Circuit in *Pushkin v. Regents of the University of Colorado*. In both cases, the courts decided that broad assumptions of future performance were an unacceptable basis for decisions that excluded the handicapped individuals. The courts held that "weak and inadequate threads" of evidence could not be used to support decisions having important consequences for handicapped persons.

3. Analysis of Judicial Deference to Program Administrators' Decisions

Due to the unique relationship between handicaps and work function, most handicaps "reasonably" could be viewed as having some possible effect on future job performance. Unlike race in the racial discrimination context, for example, the characteristic that gives rise to

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125 *Id.* at 320.
126 694 F.2d 619 (9th Cir. 1982).
127 658 F.2d 1372 (10th Cir. 1981).
128 In *Bentivegna* the court decided that there was insufficient evidence to support the City of Los Angeles's decision to require certain blood sugar levels for diabetics to be allowed participation in its job training program. There was not enough concrete, factual evidence to make the prediction that diabetics with elevated blood sugar levels are at greater risk of injury than well-controlled diabetics. The court decided that the City's evidence showed "'weak and inadequate threads' to support a decision having important consequences for a handicapped person." 694 F.2d at 622. In *Pushkin* the court decided that the conclusion of the examining board in deciding that the plaintiff was not "otherwise qualified" for acceptance into a psychiatric residency program because of multiple sclerosis was based on psychological theories that were derived from incorrect assumptions and inadequate factual grounds. The court decided that such rationales could not be used to make decisions that would affect the entire future of the plaintiff. 658 F.2d at 1391.
129 Title VII provides that it is illegal for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2 (1976). If, as with race under Title VII, Congress insisted that employers ignore the protected characteristic, the statute would not permit an employer of bus drivers to
the legally protected status in handicap discrimination cases may also
directly limit the individual's actual job performance. A plaintiff
bringing an action under section 504 is required to prove the substanti-
ality of his or her handicap in order to meet the Act's definitional re-
quirements of a person who is handicapped, but simultaneously the
plaintiff is also required to show that he or she is not so handicapped
as to be unqualified to perform the job.

If handicapped individuals may be excluded from opportunities on
the basis of vague factual predictions and unproven assumptions merely
because they are "reasonable," employment and other opportunities for
the handicapped will be severely restricted. It is exactly because handi-
caps can be inextricably tied in with work function that courts must be
careful to require accurate factual grounds on the record showing that a
handicapped person is unable to meet the essential functions of the job.
Employment decisions should be based on focused attention to the qual-
ifications and limitations of the individual job seeker and not solely
on generalized predictions of possible consequences of the impairment
in question.

Congress passed the Rehabilitation Act with the express purpose
to "promote and expand employment opportunities in the public and
private sectors for handicapped individuals." It would be contrary to
the policies of the Act to allow employers to base employment decisions
against the handicapped on vague predictions of future performance.
This type of deference would encourage the use of stereotypes and gen-
eralizations as a basis for making important employment decisions hav-
ing serious implications for handicapped workers.

Section 504 expressly provides that "[n]o otherwise qualified
handicapped individual . . . shall, solely by reason of his handicap, be
excluded from the participation in, be denied the benefits of, or be sub-
jected to discrimination under any program or activity receiving Federal
financial assistance." It does not create any exception to its provi-
sions for "reasonable" actions that deny handicapped individuals the
right to participate in a program.

The regulations implementing section 504 require employers to
"make reasonable accommodation to the . . . limitations of an other-

130 See Gittler, supra note 12, at 967; see also Garrity v. Gallen, 522 F. Supp.
131 See Doe v. Region 13, 704 F.2d at 1408 n.6.
133 See supra note 15 and accompanying text.
wise qualified handicapped applicant or employee."\textsuperscript{135} To be free of the duty to accommodate, the employer must "demonstrate that the accommodation would impose an undue hardship on the operation of its program."\textsuperscript{136} The regulations also prohibit employment criteria that tend to exclude handicapped individuals and are not "shown to be job-related for the position in question."\textsuperscript{137} The Department of Labor requires such criteria to "be related to the specific job or jobs for which the individual is being considered and [to] be consistent with business necessity and safe performance."\textsuperscript{138} These regulations, far from being deferential to program administrators, require administrators to prove that they are not discriminating.

Perhaps more importantly, the regulations define a "[q]ualified handicapped person" with respect to employment as "a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question."\textsuperscript{139} The basic issue that courts must decide in section 504 cases is whether a handicapped individual is "otherwise qualified" for the position sought. In order to make this determination a court must ascertain the essential functions of the job in question and then decide whether the handicapped plaintiff, with reasonable accommodation, can perform those essential functions. Careful attention must be paid to what is essential in order that handicapped individuals not be excluded where they need not be. The determination of what accommodation is reasonable is a difficult one, but if section 504 is to have any effect, that determination must ultimately be made by the court weighing all the evidence on both sides and not by the program administrator who has a vested interest on one side of the issue.

The Supreme Court in \textit{Southeastern Community College v. Davis} interpreted section 504 in a manner consistent with the regulations described above. The Court found that the criteria for qualification required by Southeastern did not violate section 504 because they were clearly "necessary for participation in its nursing program"\textsuperscript{140} and the program could not reasonably be modified to accommodate the plaintiff.\textsuperscript{141} This case does not support a deferential approach to the decisions of administrators. Rather it requires the courts to determine de novo the issues of necessity and reasonable accommodation. The Su-

\begin{thebibliography}{11}
\item \textsuperscript{135} 45 C.F.R. § 84.12(a) (1983).
\item \textsuperscript{136} \textit{Id.}
\item \textsuperscript{137} \textit{Id.} § 84.13(a)(1).
\item \textsuperscript{138} 29 C.F.R. § 32.14 (1983).
\item \textsuperscript{139} 45 C.F.R. § 84.3(k)(1) (1983).
\item \textsuperscript{140} 442 U.S. at 407.
\item \textsuperscript{141} \textit{Id.} at 412-13.
\end{thebibliography}
preme Court specifically noted that "the District Court found [the physical qualifications] . . . indispensable for many of the functions a registered nurse performs." Ultimately, the court, not the program administrator, must determine whether a section 504 plaintiff was "otherwise qualified."

Courts approving of the actions of administrators of federally funded programs as long as they have a rational basis are condoning precisely the kind of discrimination section 504 was meant to alleviate. The Rehabilitation Act, by its provisions, nowhere suggests that a federally funded employer may act in any reasonable manner even if discrimination would result. Both the regulations implementing section 504 and the Supreme Court decision in Southeastern Community College v. Davis require reasonable accommodation of handicaps in the workplace and prohibit selection criteria that exclude handicapped persons and are not necessary for the position in question. Finally, by its very nature, discrimination against handicapped individuals can only be recognized and remedied by careful attention to the specific limitations of the individual involved and the requirements of the position sought. Such careful attention to the details of allegedly discriminatory actions cannot be provided by courts that grant undue deference to the judgment of federally funded program administrators. Those courts are abdicating their responsibilities under the Rehabilitation Act.

C. Burdens of Proof

One final issue on which the circuits are divided is the allocation of the burdens of proof in section 504 cases. The courts appear to be in agreement that the disparate treatment model of allocation of burdens established in McDonnell Douglas Corp. v. Green is not applicable to section 504. Those that have addressed the issue, however, also seem to be in agreement that the general three-part framework of the McDonnell Douglas allocation—with a prima facie showing by the plaintiff, a showing by the defendant, and then a chance for the plaintiff to rebut the defendant's proof—is applicable. The two courts that are in open disagreement are the Tenth Circuit in Pushkin v. Regents of the University of Colorado and the Second Circuit in Doe v. New

142 Id. at 407.
143 411 U.S. 792, 802-04 (1973).
144 See, e.g., Doe v. New York Univ., 666 F.2d at 776-77; Pushkin, 658 F.2d at 1384-87.
145 See Doe v. Region 13, 704 F.2d at 1408 n.6; Doe v. New York Univ., 666 F.2d at 776-77; Pushkin, 658 F.2d at 1385-87.
146 658 F.2d 1372 (10th Cir. 1981).
York University. The basic disagreement is over whether and when the burden of persuasion falls upon the defendant to establish that the plaintiff was not "otherwise qualified."

1. Burden of Persuasion on Defendant

In Pushkin the Tenth Circuit held that once a plaintiff establishes a prima facie case "defendants have the burden of going forward and proving that plaintiff was not an otherwise qualified person." According to the court in Pushkin, a plaintiff must establish a prima facie case by showing that he or she is qualified apart from the handicap and was rejected under circumstances giving rise to the inference that the handicap was the reason for the rejection. The court found that Pushkin had established a prima facie case because his academic and work records satisfied the standards demanded for the position he sought and the reports on which his rejection was based appeared to "focus on his handicap." Next the defendants in section 504 cases are required to prove "that plaintiff was not an otherwise qualified handicapped person." The court listed the reasons articulated by defendants for rejecting the plaintiff but affirmed the district court's finding that the plaintiff was "otherwise qualified" because the plaintiff presented evidence to rebut each of the defendant's articulated reasons. Thus, it found that the plaintiff had met his burden of rebutting the reasons articulated by the defendant. The court described this final phase of the analysis as plaintiff's "burden of going forward with rebuttal evidence showing that the defendants' reasons for rejecting the plaintiff are based on misconceptions or unfounded factual conclusions, and that reasons articulated for the rejection other than the handicap encompass unjustified consideration of the handicap itself." Thus, under Pushkin, after the prima facie case is established, the defendant has the burden of persuasion to prove that the plaintiff was not "otherwise qualified," and that burden remains on the defendant although the plaintiff may have a burden of production to "go[ ] forward with rebuttal evidence."

147 666 F.2d 761 (2d Cir. 1981).
148 658 F.2d at 1387.
149 Id. at 1384-85, 1387.
150 Id. at 1387-88.
151 Id. at 1387.
152 Id. at 1388-89.
153 Id. at 1389-91.
154 Id. at 1387.
155 Id.
2. Burden of Persuasion on Plaintiff

In *Doe v. New York University* the Second Circuit held that the plaintiff in a section 504 case must "bear the ultimate burden of showing by a preponderance of the evidence that in spite of the handicap he is qualified."\(^{156}\) According to *Doe v. New York University* the plaintiff must make a prima facie showing similar to that in *Pushkin*.\(^{157}\) The prima facie case creates "an inference that the handicap was improperly taken into account."\(^{158}\)

The defendant can then rebut this inference "by going forward with evidence that the handicap is relevant to qualifications for the position sought."\(^{159}\) Once the initial inference is rebutted the plaintiff must prove "by a preponderance of the evidence" that he or she is otherwise qualified.\(^{160}\) According to *Doe v. New York University* the defendant never has the burden of persuasion to show that the plaintiff is not otherwise qualified. It must only rebut the initial inference by showing "that the handicap is relevant to reasonable qualifications."\(^{161}\)

3. Establishing the Appropriate Allocation of Burdens of Proof

a. The Prima Facie Case

Courts have identified four elements that must be shown to make out a prima facie case of a violation of section 504. A plaintiff must show: (1) that he or she is handicapped under the definition of the Act; (2) that he or she is "otherwise qualified" for employment or participation; (3) that he or she was rejected solely by reason of his or her handicap; and (4) that the program he or she was rejected from receives federal financial assistance.\(^{162}\)

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156 666 F.2d at 776-77.
157 Id. at 776.
158 Id.
159 Id.
160 Id. at 776-77.
161 Id. at 777 n.7. Doe had been denied readmission to NYU Medical School because of a personality disorder that had in the past manifested itself in self-destructive behavior. Despite her past, Doe had not had any recurrence of symptoms for four years. Under these circumstances the court held that she had not "established any likelihood of success in proving that despite her handicap she is qualified for acceptance as a medical student or to engage in the practice of medicine." Id. at 779. The Second Circuit therefore reversed the district court's preliminary injunction that had required NYU to admit Doe. Id.
162 See Strathie, 716 F.2d at 230; Doe v. New York Univ., 666 F.2d at 773. Other courts have stated the prima facie case with less than the four parts listed in the text, but the omitted elements were satisfied in each case. Bentivegna v. United States Dep't
A person is considered handicapped if he or she "has a physical or mental impairment which substantially limits one or more of such person's major life activities, has a record of such an impairment, or is regarded as having such an impairment." Major life activities are defined by HHS regulations as "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." The regulations specifically recognize that individuals with histories of mental or emotional illnesses are beneficiaries of the Act.

The second part of the prima facie case, that the plaintiff is "otherwise qualified" for the position sought, is generally held to be established by a showing that the handicapped individual is qualified for the position apart from his or her handicap. Only if a handicapped individual is not qualified for the position even if his or her handicap is completely disregarded will the suit be dismissed for failure to make out a prima facie case on the issue of whether the plaintiff is "otherwise qualified."

The third part of the prima facie case, that the plaintiff was rejected solely because of his or her handicap, is generally not difficult to establish. Section 504 cases tend to center around the question whether a person with a particular handicap can perform in a particular capacity. Typically the defendant claims that a person with the plaintiff's handicap cannot perform the required functions, and thus essentially admits that the handicap was the basis for the rejection. Even when defendants attempt to deny that a handicap was the basis for rejection, courts only require a showing that the plaintiff "was rejected under circumstances which gave rise to the inference" that the rejection was...

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166 E.g., Pushkin, 658 F.2d at 1387.
167 It is vital to the establishment of a prima facie case for the plaintiff to show he or she can meet all standards for employment except for the handicap. In Guertin v. Hackerman, a physics professor with a hearing deficiency was fired from his position. The court concluded that the reason for the discharge was the plaintiff's failure to meet certain requirements for appropriate research topics rather than discrimination arising from the hearing impairment. 25 Fair Empl. Prac. Cas. (BNA) 207 (S.D. Tex. 1981); see also Upshur v. Love, 474 F. Supp. 332, 341-42 (N.D. Cal. 1979) (aside from the problems presented by blindness, plaintiff was still not qualified for an administrative position).
168 E.g., Strathie, 716 F.2d at 229-30 (person with hearing defect alleged unsuitable to be a school bus driver).
based solely on his or her handicap.\textsuperscript{169}

The requirements of the final part of the prima facie case, that the defendant receives federal funds, were recently clarified in \textit{Consolidated Rail Corp. v. Darrone}.\textsuperscript{170} In that case the Supreme Court resolved what had been a split among the circuits by holding that a section 504 plaintiff can sue an employer who receives federal funds even if providing employment is not a primary objective of the federal financial assistance.\textsuperscript{171} This broad reading of section 504, which the Court found supported by the language, legislative history, executive interpretation, and purpose of the Act,\textsuperscript{172} makes it relatively easy for a plaintiff to establish this part of the prima facie case.

Some courts seem to imply that a showing of discriminatory intent is somehow relevant to a section 504 plaintiff’s prima facie case.\textsuperscript{173} Unlike the elements discussed above, there is no requirement of intent in the language of section 504.\textsuperscript{174} For all the reasons already discussed in the section on intent,\textsuperscript{175} intent should not be part of a section 504 plaintiff’s prima facie case.

Section 504 cases tend to arise because of disputes over the limits imposed by particular handicaps. Thus, although a few cases are dismissed for a failure to establish a prima facie case,\textsuperscript{176} the typical case progresses quickly past that stage and into the merits of whether the plaintiff is otherwise qualified in spite of his or her handicap. Once the prima facie case is established, that is the issue that must be litigated.

b. \textit{Determining Whether the Plaintiff Is Otherwise Qualified}

If a plaintiff establishes a prima facie case of discrimination under section 504, the burden of persuasion should then be on the defendant to prove that the plaintiff was not otherwise qualified for the position sought. An employer can establish that a handicapped person is not otherwise qualified for a job only by showing that the handicap prevents the person from performing essential functions of the job and that the handicap cannot reasonably be accommodated. Once such a showing has been made, the plaintiff can offer evidence demonstrating that the functions the employer is concerned about are not essential or that

\begin{thebibliography}{99}
\bibitem{169} \textit{Pushkin}, 658 F.2d at 1387.
\bibitem{170} 104 S. Ct. at 1248 (1984).
\bibitem{171} \textit{Id.} at 1253-56.
\bibitem{172} \textit{Id.} at 1253-55.
\bibitem{173} \textit{See supra} notes 66-74 and accompanying text.
\bibitem{174} \textit{Cf. Pushkin}, 658 F.2d at 1384 (“The standards for determining the merits of a case under § 504 are contained in the statute.”).
\bibitem{175} \textit{See supra} notes 83-100 and accompanying text.
\bibitem{176} \textit{See supra} note 167.
\end{thebibliography}
there is a way for the employer reasonably to accommodate the plaintiff's handicap. This allocation of burdens is supported by the history and policy of the Rehabilitation Act, the applicable HHS regulations, and the Supreme Court decision in Southeastern Community College v. Davis.

Section 504 was intended to open up employment opportunities for handicapped people. Its design is to remedy misconceptions about the limits of the ability of handicapped individuals actively to participate in the work force and in other aspects of society. In order for section 504 to accomplish this task, defendants should have the burden of persuasion on the issue of whether a handicapped person is otherwise qualified to perform a particular job. If a defendant can rebut the plaintiff's prima facie case merely by presenting some generalized reason why it would be difficult for a person with the plaintiff's handicap to perform the job in question, then misconceptions will remain uncorrected.

Allowing the defendant to rebut the inference of discrimination established by the prima facie case by a lesser showing leads to the same results reached by granting excessive deference to the employment decisions of federally funded program administrators. If the defendant's burden is phrased, as it was in Doe v. New York University, as "show[ing] that the handicap is relevant to reasonable qualifications," then section 504 is reduced to an admonition to employers that they should be able to come up with plausible justifications for their judgment that it would be difficult for a handicapped person to perform a particular job. Section 504 does much more than that. It prohibits federally funded employers from refusing to hire qualified handicapped persons. An employer who refuses to hire a handicapped person must be prepared to show that that person is not qualified by proving that he or she cannot perform essential functions of the job and that there are no reasonable accommodations that might enable him or her to perform those functions. The employer, after all, possesses

177 See supra notes 12-24 and accompanying text.
178 See supra notes 101-42 and accompanying text; see also infra note 180.
179 666 F.2d at 777 n.7.
180 The Third Circuit in Strathie reached this same conclusion despite its contrary indications with respect to burdens of proof. Strathie held that a § 504 plaintiff "bears the ultimate burden of proof as to [the issue whether the plaintiff was 'otherwise qualified']." 716 F.2d at 230-31. Due to the posture of the case, however, it refused to "consider whether a § 504 plaintiff or defendant may have any preliminary burdens of persuasion or production." Id. at 230 n.5. Instead of phrasing accountability for employment decisions in terms of a defendant's burden of proof, the court held that a handicapped individual should be considered otherwise qualified unless "there is a factual basis in the record reasonably demonstrating that accommodating that individual
better knowledge of what the job requires than does a handicapped applicant. Thus, an employer who refuses to hire a handicapped person but cannot articulate what the handicapped person is incapable of doing is discriminating on the basis of handicap.

Only after the defendant has established the specific essential functions that the handicapped applicant cannot perform and has demonstrated effectively that the potential accommodations of the applicant's handicap would impose an undue burden should the plaintiff have a burden of coming forward with evidence showing that the employer's assessment is based on misconceptions of the plaintiff's actual abilities. This burden should be a burden of production, not a burden of persuasion. Given the policy of the Rehabilitation Act to promote employment opportunities for handicapped individuals and the Act's goal of the "complete integration of all individuals with handicaps into normal community living, working, and service patterns," the burden of persuasion that a plaintiff is not qualified for the position sought should remain on the defendant. Where there is uncertainty, the policy of the Act dictates that the handicapped individual be given the benefit of the doubt.

At issue in section 504 cases is whether a handicapped person is qualified to perform a certain job. The HHS regulations provide that "[q]ualified handicapped person' means: (1) With respect to employment, a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question." For purposes of agency enforcement of the nondiscrimination mandate of section 504, the burden is on the federally funded employer to prove to the agency that employment criteria that screen out handicapped persons are job-related and necessary. A similar scheme should apply to private actions to enforce section 504.

The Supreme Court in Southeastern Community College v. Davis indicated that only qualifications "necessary for participation" should be allowed to exclude handicapped people. It also said that unreasonable "refusal to accommodate the needs of a disabled person" could...
amount to discrimination violating section 504. This interpretation of section 504 is consistent with the regulations defining a qualified handicapped person as one "who, with reasonable accommodation, can perform the essential functions of the job in question." Thus, in a private action to enforce section 504, the determination whether the plaintiff is otherwise qualified should also depend on whether the handicap disables the plaintiff from performing functions essential to the job in question and on whether such disability can be overcome by some reasonable accommodation by the employer. As in the agency enforcement context, the employer should bear the burden of proof as to these issues.

CONCLUSION

Large numbers of mentally and physically handicapped individuals capable of working are underemployed or unemployed. In many instances, discrimination, and not a deficiency in training, prevents handicapped people from finding and retaining meaningful employment. Handicapped individuals suffer from employment discrimination because they have been incorrectly stereotyped by employers as a group that lacks the prerequisite capabilities needed for full participation in the work force.

Congress, recognizing the second-class status of handicapped individuals in the work force, enacted section 504 of the Rehabilitation Act in an effort to expand employment opportunities for handicapped persons in both the public and private sectors. Section 504 prohibits federally funded activities and programs from discriminating against "otherwise qualified" handicapped individuals. Agency regulations effectuating the policies of section 504 specifically define the provisions of the statute and provide for agency enforcement.

In Southeastern Community College v. Davis the Supreme Court decided that section 504 does not require federally funded programs to disregard handicaps, but the Court did require that programs that receive federal funds must show that standards that exclude handicapped individuals be necessary for participation in the program. It also indicated that programs must provide reasonable accommodations enabling handicapped individuals to participate.

Following Davis some lower courts have adopted approaches to section 504 cases that are deferential to the employment decisions of the

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186 Id. at 412-13.
administrators of federally funded programs and thus impose undue burdens on plaintiffs attempting to enforce their rights under the Rehabilitation Act. Some courts have read section 504 to require the plaintiff to show discriminatory intent. Another way of granting undue deference to the decisions of section 504 defendants is the practice of some courts to refuse to find discrimination as long as there is some rational basis for making the decision to reject the handicapped applicant. Both the intent requirement and rational basis review belong (if they have any place at all) in constitutional equal protection clause cases; they should play no part in section 504 actions. A third way courts have weakened section 504 is by reducing the burden of proof on the defendant to rebut the plaintiff’s prima facie case.

In order to effectuate the policy of section 504, all of these approaches, which are overly and overtly deferential to section 504 defendants, should be rejected. A case should not be tried on the basis of how much or how little deference should be given to a party against whom a prima facie case of discrimination has been made out. Once the prima facie case has been established, the court, and not the employer, must determine whether the plaintiff is qualified for the position sought. The defendant should have the burden of proving that the plaintiff cannot perform essential functions of the job and that any potential accommodation of the plaintiff’s handicap would impose an undue, unreasonable burden on the defendant. The plaintiff then can come forward with evidence demonstrating that the employer’s concerns are based on misconceptions of the plaintiff’s abilities and of the potential for accommodation. The policy of the Act, which encourages employment of handicapped individuals, counsels that the burden of persuasion should remain on the defendant.

Adopting an approach deferential to section 504 defendants would leave discrimination against handicapped individuals unremedied. The allocation of the burdens of proof described above would enable courts to determine whether a plaintiff actually can perform the functions required by the job in question. Courts must make that determination if they are to carry out the mandate of section 504.