THE REHABILITATION ACT OF 1973: 
IMPLYING A PRIVATE CAUSE OF ACTION

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Estimated at over twenty million suffering from physical or mental disabilities\(^1\), handicapped individuals in America are underemployed, unemployed, denied equal access to transportation, buildings and housing, and are discriminated against by public policy. Fortunately, however, increasing attention is being paid to these special problems confronting the handicapped; efforts to mitigate the severity of or to resolve these problems have resulted in the passage of federal laws on physical

\(^1\) Estimates determining the size of the handicapped population vary according to the criteria used to determine what defines a "handicapped individual." The Department of Labor has calculated the handicapped populations at over 20 million (see "Who Are the Handicapped?" 2 Employment Practice Guide C.C.H. IP 5, 373 1976). However, in the Current Population Survey (CPS) (1977) conducted by the Labor Department, defining the handicapped by three basic categories (by program participation, by work limitation, and by special work program) provides a conservative estimate of 14 million individuals (see Barbara Wolfe. "How the Disabled Fare in the Labor Market." Monthly Labor Review. U.S. Department of Labor. Bureau of Labor Statistics. September, 1980, p. 50).

Similarly, Congressional estimates vary—one estimate, though, number the physically and mentally handicapped at over 27 million (118 CONG. REC. 3320-21 (1973)) (remarks of Senator Williams). Also see notes at 29 U.S.C. §701 (1976), numbering the handicapped at 28 million.
access (to buildings and public facilities) and on
discrimination and the establishment of training programs
designed to rehabilitate the handicapped. However,
particular attention needs to be channeled to the area of
job discrimination, where the unemployment rate among the
handicapped is estimated at over 50 per cent.  

Obviously, of the problems confronting the handi-
capped, the most serious is that of employment discrimination.
Since the initial recognition that the handicapped required
federal legislation designed to eliminate discrimination
and promote their employment, many laws toward this purpose
have been enacted. However, the most recent and comprehensive
legislation thus far has been the Rehabilitation Act of 1973
(hereafter referred to as the Act). The Act, which attempts
to "prevent employment discrimination and expand employment
opportunities for handicapped individuals," specifically
allows through the Office of Federal Contract Compliance
(OFCC) of the Department of Labor the filing of individual

2. Again the rate of unemployment among the handicapped
varies. However, Congressional estimates provide that out of
nearly 20 million handicapped adults, less than one million
are employed while an estimated 14 million could work if
given the opportunity. [118 CONG. REC. 3320 (1972)] (remarks
of Senator Williams) See also S. REP. No. 1297, 93rd Cong.,
2nd Sess. 34, reprinted in (1974) U.S. CODE CONG. & AD. NEWS
6573, 6408.


grievances and complaints arising from noncompliance on the part of employers contracting with the federal government. However, because of the great number of alleged violations and complaints filed, the processing of individual grievances has been slow and ineffectual. Ineffective administrative enforcement mechanisms of the OFCC restrict the handicapped in securing the benefits provided for by the Act. Department of Labor caseloads would be alleviated, the employment of the handicapped would be better promoted, and importantly, the legislative intent of the Act would be better achieved if aggrieved individuals could pursue a judicial remedy under the Act. However, the language of the Act only specifically allows for an administrative remedy of grievance, and court authority is divided on the implied private right to action issue, thus clouding conclusion as to whether an implied cause of actions exists under the Act or not.

Focus will be given to the problems of employment discrimination of the handicapped, addressing specifically

5. It has been estimated that by the end of 1980 the OFCC was confronted by a backlog of more than 2000 unresolved complaints. See Sam Zuckerman, "Handicapper's Rights: Section 503--A Special Kind of Leverage." Trial. February Vol. II , 1981, p.30-33,35.

6. Courts are divided as to whether an implied cause of action exists under the Act. So far there seems to be a majority of court authority indicating that an implied private right to action does not exist under section 503 but does exist under section 504.
the unresolved issue of the possible existence of an implied private right to action under the Rehabilitation Act of 1973. Emphasis will be directed toward sections 503 and 504 of Title V of the Act through an examination and analysis of relevant court authority addressing the implied cause of action issue. This, together with consideration and analysis of the legislative history of the Act and analysis of current social policy, will be done in an attempt to ascertain whether an individual is entitled to judicial remedy under the Act and its provisions.
At the approach of the 1970's there existed no consistent statement of legal obligation toward protecting the handicapped. While racial minorities and women had already been extended considerable legal employment protection, no explicit policies or federal legislation prohibited discriminating against the handicapped in employment. Efforts to hire and to accommodate to the special requirements of the handicapped were motivated by feelings of civic duty and responsibility rather than from a specific legal obligation.

As with other minority groups facing discrimination, steps toward providing statutory and legal protection for the handicapped came slowly and in a piecemeal fashion. Handicapped individuals were not afforded blanket legal protections with the enactment of a broad, encompassing statute but rather through a number of statutes, limited in content and nature and each dealing individually with various problems confronting the handicapped.

7. The Civil Rights Act of 1964, codified at 42 U.S.C. 2000a-2000h (1976) provided protection for individuals based on racial, religious, and gender classification. These groups were provided legal protection concerning employment, education, due process, and access to public facilities.
One of the first federal statutes to address and recognize the need for express statutory and legal protection for the handicapped, the Wagner-Peyser Act of 1933 required every local office of the state employment service system to allocate resources for the handicapped in the form of job training and job search assistance. This was accomplished through the provision requiring the conformity of State boards, departments or agencies (charged with administration of vocational rehabilitation of the handicapped) to federal guidelines as a pre-requisite to receiving federal funds and other assistance in securing such state employment services. However, the mere withdrawal of

8. This is perhaps because the handicapped are not an easily identifiable homogeneous group as are racial, gender, or religious groups. The concept of handicapped encompasses a broad range of disabilities, and often it is difficult to measure and access the extent to which a particular affliction is required in order to classify one as a "handicapped individual".

9. 29 U.S.C §§49-49c, 49d, 49g, 49l, 49j &49k (1976).

Programs initiated under this act which are still operative seek to provide the handicapped with a) equal opportunity for employment and equal pay in competition with other applicants, b) employment at the highest skill permitted by their physical abilities and other occupational qualifications; c) satisfactory adjustments to their chosen occupations and work situation, and d) employment that will not endanger others or aggravate their own disabilities. (See U.S. Department of Labor Highlights: Consumer Information Leaflet No. U.S.D.L.-7 (ETA-3), "Program for the Handicapped," Nov. 1975).

Federal funds from the development of State employment service systems was an ineffective mechanism in eliminating job discrimination against the handicapped.

In 1948 amendments to the Civil Service Act\textsuperscript{11} represented the first federal legislation dealing specifically with the problem of employment discrimination against the handicapped. The amendments, still in effect, prohibit discrimination on the basis of physical handicaps in employment in the Federal civil service.\textsuperscript{12}

The Fair Labor Standards Act\textsuperscript{13} was amended in 1966 to allow sheltered workshops to certify the employment of handicapped individuals at a rate below that for other employees as an incentive for private employers to hire handicapped individuals.\textsuperscript{14} Provisions, though, required an employer to be prepared to justify a lower wage on the basis of lower productivity of the handicapped worker.\textsuperscript{15}


\textsuperscript{12} 5 U.S.C. §7203 (1976) provides:

\begin{quote}
(that) the president may prescribe rules which shall prohibit, as nearly as conditions of good administration warrant, discrimination because of handicapping condition in an Executive agency or in the competitive service with respect to a position, the duties of which...can be performed efficiently by an individual with a handicapping condition, except that the employment may not endanger the health, safety, of the individual or others.
\end{quote}

However, there exists little evidence demonstrating that these provisions acted as incentives for employers in increasing the incidence of employment among the handicapped.

The Civil Rights Act of 1964\textsuperscript{16} was enacted with the intent of providing protection of certain groups\textsuperscript{17} against discrimination in such areas as education, employment, and access to public facilities. Some have alleged that under Title VII of the Civil Rights Act that handicapped individuals are a protected group afforded with the benefits and protections intended by the act. However, the courts have generally rejected allegation of handicap discrimination based upon Title VII, viewing only those expressed groups as protected ones.\textsuperscript{18}

\begin{itemize}
\item \textbf{14.} 29 U.S.C. \textsection 214 (1976) reads in pertinent part:

\begin{quote}
...the Secretary of Labor, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by regulation order provide for the employment under special certified individuals...whose earning or productive capacity is impaired by age or physical or mental deficiency or injury, at wages which are lower than the minimum wage applicable...under this title but not less than 50 per centum of this wage...
\end{quote}

\item \textbf{15.} 29 U.S.C. \textsection 215(1976).


\item \textbf{17.} Title VII, codified at 42 U.S.C. \textsection 2000e (1976) specifies groups which are protected under the Civil Rights Act. Title VII provides that:

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.
The Vocational Rehabilitation Act of 1970 established job training and rehabilitation services for the handicapped. The act provides that:

(the) Secretary (of Labor) is authorized to make grants as provided in Sections 31-42b of this title for the purpose of assisting States in rehabilitating handicapped individuals so that they may prepare for and engage in gainful employment to the extent of their capabilities, thereby increasing not only their social and economic well-being, but also the productive capacity of the nation.

The Vocational Rehabilitation Act was thus a significant demonstration of the increasing public awareness of and consideration of the well-being of handicapped individuals.

This act, however, was repealed and replaced by the Rehabilitation Act of 1973 in an effort to provide more extensive legislation designed to protect the handicapped.


As comprehensive and as far reaching as many of the previous federal programs have been, there remained no effective mechanism, other than private initiative, to compel the employment of the handicapped. However, the Rehabilitation Act of 1973 greatly extended the reach of federal programs for handicapped individuals and provided the statutory mechanism necessary for requiring the employment of the handicapped by private employers.

Enacted with the purpose "to develop and implement, through research, training, services, and the guarantee of equal opportunity, comprehensive and coordinated programs of vocational rehabilitation and independent living,"21 the Act and the enactment of sections 503 and 504 of Title V of the Act reflects the failure of efforts to pass legislative amendments to Title VII of the Civil Rights Act of 1964 which would have extended its coverage to the handicapped. The Act "reflects the unwillingness of Congress to provide the same broad based protections to handicapped individuals that were provided to the traditional 'protected classes' under Title VII."22

However, unlike the Civil Rights Act of 1964, section 503 of the Act, governing handicap employment, does not unilaterally extend its proscriptions to most public and private employers or labor unions. Rather Section 503 only extends its proscriptions and coverage to those handicapped individuals who are employed by private employers with federal contracts. Though limited as this coverage may seem, it has been estimated that more than 275 companies and institutions employing more than one-third of the nation's work force are affected by the Act and its regulations.

Comprised of four sections, Title V of the Act represents a complete overhaul and expansion of the original Vocational Rehabilitation Act. Section 501 of Title V requires every United States government agency to establish affirmative action programs for the handicapped; Section 502 created

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25. Section 501, codified at 29 U.S.C. §791 provides that:

...each department, agency and instrumentality... in the executive branch shall...submit to the Civil Service Commission and to the Committee an affirmative action program plan for the hiring, placement, and advancement of handicapped individuals in such department, agency, or instrumentality.
the Architectural and Transportation Barrier Compliance
Board to oversee enforcement of federal laws mandating access
of the handicapped to buildings and public facilities;26
Section 503 establishes the practice of affirmative action
for qualified handicapped individuals as a contractual
obligation for those who do business with the federal
government;27 and Section 504 outlaws discrimination against
qualified individuals in all federally funded programs and
activities.28


27. Section 503, codified at 29 U.S.C. §793 (1976) provides
in pertinent part:

Any contract in excess of $2,500.00 entered into
by any Federal Department or agency...for the
procurement of personal property or nonpersonal
services (including construction) for the
United States shall contain a provision re-
quiring that, in employing persons to carry out
such contract, the party contracting with the
United States shall take affirmative action to
employ and advance in employment qualified
handicapped individuals.

This section is defined by statute as affirmative action
program but its main thrust is nondiscrimination--the Act
does not require extensive utilization analyses or develop-
ment of goals or timetables. As noted by the Court in
intended by Section 793 to direct federal agencies to exercise
their purchasing power in such a way as to bring about improved
employment opportunities for the handicapped."

28. Section 504, codified at 29 U.S.C. §794 (1976),
provides that:

No otherwise qualified handicapped individual in
the United States...shall, solely by reason of his
handicap, be excluded from the participation in, be
denied the benefits of, or be subjected to discrim-
ination under any program or activity receiving
federal financial assistance.
Amended twice since its enactment, the Rehabilitation Act was first amended in 1974 to extend coverage under the previous handicap definition to those individuals "regarded as having such impairment." The intent of this amendment was to protect those individuals who may be denied employment because of an employer's perceptions, whether or not those perceptions are accurate.

A 1978 amendment to Section 504 provided for attorney fees to the prevailing private party "in any action or proceeding to enforce or charge a violation of this subchapter of the Rehabilitation Act that includes (sections) 503 and 504." An another 1978 amendment to the Act supports the conclusion that Section 504 was originally enacted as a model of Title VI of the Civil Rights Act and that it was the legislative intent that section 504 enforcement follow Title VI procedures. As the amendment provided:

...the remedies, procedures and rights set forth in Title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved

28. (con't).

The nondiscrimination mandates of Section 504 are not only designed to protect the handicapped in employment but also handicapped students in educational institutions and beneficiaries of providers of welfare, health, and social services.


act or failure to act by any recipient of the Federal assistance or Federal provider of such assistance under Section 504 of this act.\textsuperscript{32}

This 1978 amendment added a Section 505 administrative procedure--Congress specified different procedures for government employees and private employees; government employees have the same procedures available to them as provided for in Title VII of the Civil Rights Act; other employees have the procedures of Title VI.

ENFORCEMENT OF THE REHABILITATION ACT

Provisions and requirements of the Act are enforced in two ways--through regular compliance reviews of contractors and subcontractors by the Department of Labor and through the administrative handling of filed complaints in the Department of Labor.

Express provisions of Section 503 afford administrative remedies through the Department of Labor, rather than judicial remedy through the federal court system.\textsuperscript{33}

\begin{itemize}
\item \textsuperscript{32} 29 U.S.C. \textsection794(a)(b)(1976).
\item \textsuperscript{33} 29 U.S.C. \textsection793(b)(1976) provides in part:
\end{itemize}

(\textit{that}) if any handicapped individual believes any contractor has failed or refused to comply with the provision of his contract with the United States, relating to the employment of handicapped individuals, such individual may file a complaint with the Department of Labor. The Department shall promptly investigate such complaint and shall take
Section 503 provisions vest interpretative, investigative, and enforcement powers with the Department. Section 503 complaints are directed toward the Office of Federal Contract Compliance Programs (OFCCP) within the Department of Labor, whose enforcement procedures require that a complaint of discrimination be "filed within 180 days from the date of the alleged violation." When a complaint is filed against an employer that has an internal review procedure to cover the complaint (e.g. a grievance procedure or some less formal process) it will be first deferred to that procedure.

However, instead of using the administrative grievance procedure, the Director of the OFCCP may instead bring an action in federal court to enforce the requirements of the Act. However, whether individuals may sue under the Act remains an unresolved issue.

33. (con't)

such action thereon as the facts and circumstances warrant, consistent with the terms of such contract and the laws and regulations applicable thereto.

34. 41 C.F.R. §60-741.21(1976).


36. As provided in 41 C.F.R. §60-741.28(b)(1978):

In addition to the administrative remedies set forth herein, the Director, may within the limitations of applicable law, seek appropriate judicial action to enforce the contractual provisions (of this Act).
In an effort to provide increased effectiveness of administrative coverage, the OFCCP has shifted enforcement emphasis from the processing of individual complaints to the conduction of compliance reviews of contractor affirmative action programs. With this enforcement procedure, if a violation is found, the Department may impose certain administrative penalties, including termination of the employer's federal contract or debarrment from future contracts.

Enforcement of section 504 is administered through the Department of Health, Education and Welfare under its own regulations, which require that section 504 is to be enforced in the same manner as are Titles VI and IX of the Civil Rights Act. Therefore, the Office of Civil Rights administers section 504 of the Act. HEW regulations for section 504 and the Department of Labor regulations for section 503 are approximately the same—federal assistance


38. 45 CFR §85.5.

Enforcement procedures for Title VI at 42 U.S.C. 2000d-3 (1976) specify that individuals may be entitled to judicial review. Enforcement procedures, however, were amended recently to restrict judicial review to matters where the primary objective was to create federal employment. Enforcement procedures for Title IX (at 20 U.S.C. §1682) also allow an individual to seek appropriate judicial review after improper administrative review.
may be terminated with respect to the discriminating program or activity, or the grantor agency may sue the employer to compel specific performance of its agreement not to discriminate against the handicapped.
UNANSWERED ISSUES

While the Act was enacted with the recognition that "lack of legislative action in areas related to rehabilitation... limit(s) a handicapped individual's ability to function in society," the legislative purpose of the Act is yet unfulfilled, partly because of the substantial number of policy problems associated with the Act's language and provisions. Existing primarily because of often imprecise language and definition in the Act, at present there are many unresolved issues concerning various aspects of the Act which have been the bases for much litigation. The most debated issues center upon analyses of defining "reasonable accommodation" to the handicapped, of determining the extension of coverage to contractors with multiple facilities, of defining a handicapping condition, and of determining whether an implied private right to action exists under the Act. The issues of reasonable accommodation, multiple facilities, and handicap definition will be introduced only briefly with no attempt to provide extensive coverage of the issue or exhaustive attempt to

resolve it. The last issue—that of the existence of an implied private right to action—will be examined specifically, with attention being given to arguments being made for and against an implied private right to action interpretation. After analysis of legislative history, analysis of relevant court authority, and analysis of prevailing social policy concerns, a conclusion will be drawn that an implied private right to action should be interpreted under the Rehabilitation Act of 1973.
REASONABLE ACCOMMODATION

One of the issues unresolved under the Act and specifically under Section 503 of the Act is the extent of the government contractor's obligation to make "reasonable accommodation" to the physical and mental impairments of handicapped employees and applicants.

Reasonable accommodation involves modification allowing a handicapped individual to perform a job task (e.g. adaptation of work site, provision of special aids or devices, etc.). For contractors, reasonable accommodation is not a voluntary practice but rather represents a contractual obligation that must be offered to qualified handicapped individuals. If an employer initially finds that the handicapped person is not capable of performing the job, he must determine whether some type of reasonable accommodation would enable the person to perform the job task and duties. The issue unresolved with the reasonable accommodation provisions of the Act is based upon the lack of any precise definition of "reasonable" withing section 503.

40. 41 C.F.R. §§60-741.4 and 60-741.2(1976) provide that the Act protects only handicapped persons who are capable of performing a particular job or who are capable of doing so if the employer makes "reasonable accommodation" to their handicap.

41. Unlike section 503, section 504 on government contracts contains no express requirement of reasonable accommodation. The Court has generally considered the
Because the courts have not yet given their interpretation on the issue, attempts to resolve the question of reasonable accommodation depends upon a reliance upon consideration of the regulatory provisions of the Department of Labor governing the Act.

Regulations imply that the Department of Labor will make a case-by-case determination of what degree of accommodation is reasonable and thereby necessary in the employment of a handicapped individual. According to the Labor Department Reports, what the Department will deem "reasonable" will vary depending upon the nature of the handicapped involved, the size of the contractor, and the size and frequency of his government contracts. Regulations promulgated by the Labor Department also state the extent

41. (con't):

reasonable accommodation issue applicable only for Section 503 rather than Section 504. On a Supreme Court decision on a nonemployment case, the Court's holding appears to have eliminated the possibility of implying such a reasonable accommodation requirement under Section 504. Here, the Court decided that Section 504 did not require affirmative action to accommodate to the handicapped. See Southeastern Community College v. Davis (99 S. Ct. 2362)(1979).

42. Courts have not yet ruled on the reasonable accommodation issue for employment purposes under the Act. However, a Supreme Court decision in Transworld Airlines v. Hardison (432 U.S. 63)(1977) concerning the issues of reasonable accommodation under Title VII of the Civil Rights Act held that an employer need not accommodate the religious beliefs of an employee costing more than a "de minimus amount". However, it is uncertain to what extent this ruling can be generalized by implication to the Rehabilitation Act.

of reasonable accommodation will be determined by "business necessity, and financial costs and expenses." Therefore, under this regulation, prohibitive expense may render a particular type of accommodation unreasonable. Further, it appears that until such a time occurs that the courts approach the issue defining what degree and to what extent accommodation is reasonable, each case will be pursued on an individual basis by the Department of Labor.

44. 41 C.F.R. §60.741.6(d)(1976).
MULTIPLE FACILITIES

Unresolved under section 503 of the Act is whether the affirmative action obligations of an employer with a facility having a government contract or subcontract are to be extended to all facilities of the employer, regardless of whether these facilities are involved in the performance of fulfilling that government contract. The OFCCP's regulations issues pursuant to section 503 state, however, that if one facility is covered, all are covered. This requirement would place an excessive burden upon employers—a burden that may actually impede with enforcement of the Act. As of yet, courts have not yet addressed the issue.

Some employers, however, would argue that comparison of the language of Section 503 with that of Section 402 of the Vietnam Era Veterans Readjustment Assistance Act (codified at 38 U.S.C. § 2012(a) (1976)) would lead to the conclusion that Congress had intended Section 503 to only apply to those facilities which were actually involved in an employer's fulfilling a government contract. 46

45. 41 C.F.R. §§ 60.741.3(a)(5) & 741.5(a) (1976).
HANDICAP DEFINITION

To be covered under the Act, an individual must not only be handicapped but also qualified. The Act construes the definition of handicapped in a very broad and comprehensive manner. Generally, a handicapped individual is broadly defined to include any person who:

a) has a physical or mental impairment that substantially interferes with any major activity; b) has a record of such impairment; or c) is thought of as having such an impairment, whether or not the impairment actually exists.

However the handicap definition lacks precision due to the fact that nowhere in either the Act or its

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47. 41 C.F.R. §60.741.4 (1976). Also the OFCCP states what is meant by a handicapped individual--"an individual who is capable of performing a particular job with reasonable accommodation." (at 41 C.F.R. §60.741.75(1976).

48. 29 U.S.C. §706(7)(1976, Sup. III 1979), regulations at 41 C.F.R. §60.741.2 (1976). The third qualifying definition concerning the language "as having such impairment" has been interpreted to refer to those individuals who are perceived of as having such a handicap, whether or not a handicap exists, but who, because of social attitudes or other reasons, are regarded by employers as handicapped. See E.E. Black v. Marshall (497 F. Supp. 1088)(1981).
regulations is the term "impairment" defined. Impairment has been defined by the OFCC as "any condition which weakens, diminishes, restricts, or otherwise damages an individual's health or physical or mental activity." 49

Such imprecise and general definition of the term suggests that each determination of impairing handicap shall be done in a case-by-case procedure. This interpretation is further supported if reasonable accommodation is defined in a similar manner in determining what individuals are covered by the Act. Together with those regulations on reasonable accommodation, it is implied that each handicapped individual is entitled to an individual determination of his or her qualification to work.

Experience to date has been one of inclusion—the courts have been very liberal in allowing aggrieved individuals to claim coverage under the Act. Those individuals afflicted with such diverse and unrelated conditions as blindness 50, diabetes 51, alcoholism 52, and


52. Fraser Shipyards V. Department of Industry, Labor and Human Relations (13 FEP Cases 1980) (Cir. Ct. Dane Co. Wis. 1976)
53 have been extended coverage under the Act and its regulating provisions.

PRIVATE RIGHT TO ACTION

A final issue that has been unresolved and that has been the basis for much litigation is that of an implied private right to action allowing for judicial remedy of grievance instead of only administrative remedy of grievance through the Department of Labor as expressly provided for in the Act. Aggrieved handicapped individuals have sought judicial relief on numerous occasions. However, currently, no judicial consensus exists on the implied private right to action issue--some courts have quickly dismissed cases seeking judicial remedy under the Act while other courts have upheld cases contending a right to judicial review.

This issue is the focus of this paper and will be examined in detail. Attention will be directed toward the legislative history and case law of the Act so as to detail the arguments for and against an implied private right to action interpretation. While the argument that the Act

54. Unlike Title VII of the Civil Rights Act of 1964 Section 503 and 504 and the implementing regulations of the Rehabilitation Act omit any explicit provision providing aggrieved handicapped individuals with a private right to action remedy. The express provisions of Section 503 afford a handicapped employee or applicant an administrative remedy through the OFCC, rather than a judicial remedy through the federal court system. See U.S.C. 29§793(b)(1976).
does not imply and allow for judicial remedy of grievance and complaints will be presented, a conclusion will be drawn supporting the implied right to action interpretation based upon analysis of the legislative history of the Act, relevant court authority, and awareness of issues regarding current social policy.
HISTORY OF IMPLIED RIGHT TO ACTION

Implication of a private right to action has been defined as "the extension of civil remedy to one injured by another's breach of a statute or regulation not providing for such relief." In trying to determine whether an implied private right to action exists in a statute or regulation not expressly providing one, courts have usually centered their analyses upon the legislative history and the legislative intent of the statute or regulation in question.

The Supreme Court's decision in *Texas & Pacific Railway v. Rigsby* is usually viewed as the first contemporary decision inferring an implied private right to action from a statute. Here, the court inferred a private remedy under the Federal Safety Appliance Act and treated the intent of Congress as a key indicating that the statute implicitly created a private right to action.


56. 24 U.S. 33 (1916).


Since **Rigsby**, the Supreme Court has found a private right to action to seek grievance and remedies under constitutional provisions 59, statutes 60, and administrative rule 61.

Most recently, in **Cort v. Ash** 62 a legal framework was established for determining whether a private right to action should be implied under a particular statute. In **Cort**, the court developed four standards or criteria against which a particular statute must be examined and measured in determining whether a private remedy is implicit if that statute in question does not expressly provide one. Here, the Supreme Court applied a test based upon four criteria to determine whether the **Cort** plaintiffs had a right to bring a private action:

In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is

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59. For example see **Davis v. Passman** (442 U.S. 228, 244) (1978). In **Davis** the court held that a woman alleging sex discrimination in violation of the 5th amendment was the appropriate party to invoke federal question in the jurisdiction of the court.

60. For example see **Rogers v. Frito-Lay** (611 F. 2d 1074)(1980).

61. For example see **Blue Chips Stamps v. Manor Drug Stores** (421 U.S. 723, 727)(1975) where action for damages was brought under SEC Rule 10-b-5.

the plaintiff "one of Class for whose especial benefit the statute was enacted,"... that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? ...Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?...and finally, is the cause of action one traditionally relegated to state law... so that it would be inappropriate to infer a cause of action based solely on federal law.63

Since the Court laid this groundwork down, several courts have applied the Cort test in determining whether Congress intended to imply a private right enforcement under a statute not expressly providing one.64

63. Ibid., 78.

One method of determining whether an implied private cause of action should be interpreted in a statute not expressly providing one is to analyze the legislative history of the statute in question. By determining what events lead up to the enactment of the statute and what factors determined the language of the Act, one can infer whether an implied private right to action interpretation would be consistent with regulations governing the Act's enforcement. Indeed, in determining the legislative intent of a particular statute, courts have generally examined and analyzed its legislative history before drawing a conclusion.  

The existing legislative history of the Act relevant upon which a basis for concluding the implied right question is ambiguous at best. As the Court noted in Drennon v. Philadelphia General Hospital, no where in the conference

65. For example see Clarke v. FELEC Services, Inc. (489 F. Supp. 165) (1980) and Lloyd v. Regional Transportation Authority (548 F. 2d 1277) (1977)

committee reports that accompanied the Act are there any references denying a private right to action. However, neither are there any direct references permitting a private right to judicial remedy. However, what references there are to this issue in Senate and Senate Committee reports that have accompanied the Act seem to support a private cause of action interpretation.

Little mention to a private cause of action is found in the Committee reports that accompanied the Act when it was originally enacted in 1973. The Cort court, though, noted that although the legislative history does not mention or refer to the section disputed, that factor does not necessarily negate the existence of a private right to action under the act. Extending Cort v. Ash:

...in situations in which it is clear that federal law has granted a class of persons certain rights, it is not necessary to show an intention to create a private cause of action, although an explicit purpose to deny such a cause would be controlling.

Any explicit statements of Congressional intent are found in connection with other legislation. Most references to this private right occurred during reports that accompanied the 1978 amendments to the Act. In a Senate report accompanying the 1978 amendments, the


committee stated that it believed that "the rights extended to the handicapped individuals under Title V...are and will continue to be in need of constant vigilance, and the availability of attorney's fees should assist in vindicating private rights of action in the case of Section 502 and 503 cases, as well as those arising under sections 501 and 504." An additional Senate Report added that Section 504 will "permit a judicial remedy through private action." It was further intended by the Committee that "sections 503 and 504 be administered in such a manner that a consistent, uniform and effective federal approach to discrimination against handicapped persons would result." Therefore, if a private remedy was to be permitted and allowed under Section 504 of the Act, a private remedy should be allowed under Section 503 in order that enforcement be "consistent, uniform, and effective." Another Senate report stating that Section 504 of the Act was patterned after Title VII of the Civil Rights Act would also imply Congress had intended a private judicial enforcement under the Rehabilitation Act.

72. Ibid.
INTERPRETING AN IMPLIED PRIVATE RIGHT TO ACTION: CASE LAW

On determining an implied private right to action in a particular statute, close analysis discloses that the courts have generally centered their inquiry upon analysis of two aspects—legislative intent and an evaluation of the expressly provided administrative remedies designed to redress individual grievances.

The Court is most likely to infer private rights of action when there is some indication of a legislative intent to create or protect such individual rights. As the Supreme Court emphasized in *Touche Ross Co. v. Redington*, its "task is limited solely to determining whether Congress intended to create the private right to action asserted."\(^\text{74}\) adding that the "ultimate question is one of congressional intent."\(^\text{75}\) Similarly, in *Transamerica Mortgage Advisors, Inc. v. Lewis\(^\text{76}\), the Supreme Court

\[\begin{align*}
73. & \quad 442 \text{ U.S.} \ 560 \ (1979). \\
74. & \quad \text{Ibid.}, \text{ at 568}. \\
75. & \quad \text{Ibid.}, \text{ at 578}. \\
76. & \quad 100 \text{ S. Ct} 242 \ (1979). 
\end{align*}\]
again emphasized the importance of legislative intent:

The question of whether a statute creates a cause of action, either expressly or by implication, is basically a matter of statutory construction...what must ultimately be determined is whether Congress intended to create the private remedy asserted. 77

The Court also usually reviews and considers the expressly provided administrative remedies designed to redress individual grievances when determining an implied private right to action. The mere presence and expression of a provided administrative enforcement procedure does not necessarily preclude the possibility of an implied right to action. 78 The court is likely to infer a private cause when the administrative remedies provided are either inadequate or are not designed to secure the individual rights so created or protected. 79 Also the courts have

77. Ibid., at 245. See also Texas and Pacific Railway v. Rigsby (241 U.S. 33, at 39-40)(1916) In Rigsby, the Supreme Court relied on the language, purpose, and the scope of the statute in interpreting an implied private right to action.


declined to infer a private cause if there is any indication that doing so would interfere with the provided administrative remedies, though they may be inadequate.  

In their attempts to secure judicial review of alleged employer violations, aggrieved handicapped individuals have based their claims to this right upon authority based on constitutional issues, upon authority ruling on statutes similar in language and provisions to the Rehabilitation Act, or upon authority drawn directly upon the Act itself and its regulations. However, of these three sources upon which contentions have been based, it appears that the most convincing ground upon basing claims to judicial review would be upon the Rehabilitation Act rather than upon constitutional issues and other statutes.

**AUTHORITY CONSTITUTIONALLY BASED**

The leading case dealing with constitutional aspects of employment discrimination against the handicapped is *Gurmakin v. Costazo*. 81 Here, the Supreme Court held that refusal of a Philadelphia school district to allow a blind person to take its teacher's examination was a violation of the due process clause of the 14th amendment, holding that employment discrimination brought under Section 1983 requires the same equitable remedies under Title VII cases.

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Also claims of handicap discrimination have been brought under the due process clause of the 5th amendment. For the most part, though, these claims have not been entirely successful. For example, in Coleman v. Darden a blind man sought relief from an employer refusing to allow him the opportunity to demonstrate his ability to perform the work of a position sought. Coleman contended that he was deprived of his due process under the 5th amendment. The District court held, however, that it was "not arbitrary or capricious for a government agency to (detail) physical requirements which are job related" and that "the requirements of procedural due process apply only to the deprivation of those liberties and properties encompassed by the 5th and 14th amendments." 

AUTHORITY BASED ON OTHER STATUTES

Aggrieved handicapped individuals have attempted to seek judicial review under the Administrative Procedure Act. The purpose of the act was to permit a limited review of agency actions to determine whether a government agency has exercised its discretion within permissible bounds. As Section 702 provides:

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by

82. 15 FEP Cases 273 (D. Col) (1977)
83. Ibid.
84. 5 U.S.C. §§701 et seq. (1976)
agency action within the meaning of a relevant statute, is entitled to judicial review thereof. However, courts have held that the purpose of the Administrative Procedure Act, pertaining to judicial review of administrative action, is to define procedures and the manner of judicial review of agency action, rather than confer jurisdiction. 85

Claims of handicap discrimination have been based upon the rights and privileges provided by the Civil Rights Act of 1964, particularly those provided by Titles VI, VII and IX of the act. Relevant to the interpretation of the existence of a private cause of action under the Rehabilitation Act is authority ruling upon the same issue under Titles VI and IX. Because a 1978 amendment to the Act provided that Section 504 was to be enforced in a manner similar and consistent with enforcement of Titles VI and IX, by extension, if a private cause of action is determined under Titles VI and IX, one should be found under Section 504 of the Rehabilitation Act.

The Supreme Court in Lau v. Nichols 86 held that Section 601 of Title VI convers a private right to action. Accordingly, because of the 1978 amendment and its similarity in language to


86. 414 U.S. 563 (1974)
Section 601 of Title VI\textsuperscript{87}, Section 504 should allow for judicial review. However, some courts have been reluctant to determine the private right to action issue under Title VI--the Supreme Court in \textit{Regents of University of California v. Bakke}\textsuperscript{88} refused to decide whether a private cause of action was created by Title VI.

Relevant also are cases decided under Title IX--relevant because of its similar language to Section 503 of the Act.\textsuperscript{89}

Decisions make under this title would have implications relevant to determining issues similar under the Act. In \textit{Cannon v. University of Chicago} (441 U.S. 677) (1979) the Supreme Court implied a private cause of action in favor of an aggrieved female medical school applicant under Title IX.\textsuperscript{90}.

While Title IX only provided for administrative action by the

\begin{itemize}
\item \textsuperscript{87} Title 601, codified at 42 U.S.C. §2000d (1974) provides:
\begin{quote}
(that) 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.
\end{quote}

\item \textsuperscript{88} 483 U.S. 265, 283 (1978).

\item \textsuperscript{89} Title IX, codified at 20 U.S.C. §1681 (1974) provides:
\begin{quote}
No person in the United States shall on the ground of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.
\end{quote}

\item \textsuperscript{90} 441 U.S. 677, 679 (1979).
\end{itemize}
government agency providing funds, the Court held provision of such a judicial remedy would be consistent with the enforcement of the act.91

Also, claims of discrimination have been brought under Title VII based upon the contention that handicaps belong to the groups expressly protected by the Civil Rights Act. However, the Court in Coleman v. Darden, supra, held that Title VII affords no basis for relief for discrimination based on physical handicap.92.

AUTHORITY BASED ON REHABILITATION ACT

The Rehabilitation Act has proved to be a broad base upon which many aggrieved handicapped individuals have based contentions that the Act confers a private right to judicial review. The majority of cases ruling upon the implied private right to action issue have been decided primarily on Sections 503 and 504 of the Act, rather than Sections 501 and 502. Courts have made little or no reference to extending a private right to action under these sections. For example, the Court in Ryan v. FDIC93 declined to decide whether Section 501 afforded any basis implying a private right to action.

91. Ibid.
92. 15 FEP Cases 272, 273 (D. Col 1977).
Case authority finding an implied right to action existing under the Act can easily be organized into the Cort test framework. Because the first Cort criterion, that of determining a federal right in favor of the complaining party, involves an individual case-by-case determination, it will not be a basis for review.

Similarly, because of the recency of the awareness of the handicapped issue, the forth issue concerning the relevancy of traditional state law will also not be a basis for review.

94. Courts attending to definition of a handicapped class have emphasized that there is "no readily identifiable class of handicapped persons." [see Moon v. Roadway Express, Inc. (439 F. Supp. 1308)(1977); also Rogers v. Frito-Lay (611 F. 2d 1074, 1980)].

The Cannon court recognized the difficulty of defining a single homogeneous class of handicapped individuals. Here, the Supreme Court considered the statutory language of an act to be the "most accurate indicator of the propriety of implication of a cause of action" for a class of individuals. The court noted that it "has been especially reluctant to imply causes of action under statutes that create duties on the part of persons for the benefit of the public at large."
The Court emphasized the importance of the first Cort criterion but conceded that it must be determined on an individual basis (See Cannon v. University of Chicago, 441 U.S. 677, 1979).

95. Courts utilizing the Cort criteria have generally considered the area of handicap discrimination one not traditionally relegated to state law. The Court in Anderson v. Eric Lackawanna Ry. Co. (468 F. Supp. 934 (1979) held that "both laws favoring the handicapped and those preventing discrimination against the handicapped are of too recent an origin to be considered state law." (at 939). The Court in Clark v FELEC Services, Inc. [489 F. Supp. 165 (1980)] notes that handicapped statutes are of recent vintage and that existence of a state statute protecting the handicapped can hardly be illustrative of an area "traditionally relegated to state law." (Also see Lloyd v. Regional Transportation Authority, Supra, at 286).
Cort Criterion #2

Is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one?

Legislative intent, if not explicit at the time of the statute's enactment, can usually be extracted from the statute's legislative history, typically in the form of Senate and Committee reports. However, determining legislative intent from the Rehabilitation Act is not an easy task. Although the conference committee reports that accompanied the Act in 1973 contain no specific expression of intent to allow a private cause of action under Sections 503 or 504, there is no indication of Congressional disapproval of such a private action.

The Court in *Clarke v. FELEC Services, Inc.* addressed this question of legislative intent through a consideration of the legislative history of the Act. Upon analysis of Section 505 provisions of the 1978 amendment providing for the discretionary award of attorney's fees to the prevail-

95. (con't).

While the courts have not usually considered handicap discrimination an area traditionally related to state law, at present time over 40 states and the District of Columbia have enacted statutes extending varying degrees of protection to handicapped employees. As noted by Schlei and Grossman [Employment Discrimination Laws. Washington, D.C.: Bureau of National Affairs, 1976 (Supp. 1978)] the various courts of these states have generally tended to interpret broadly the state statutes protecting the handicapped (see footnote 16, p. 64, Supp. 1978).
ing private part, the Court held that this (provision) "unmistakeably presupposes the existence of a private right to action." Holding that "an implied private right to action under Section 503 of the Rehabilitation Act of 1973 has existed since, at the least, the effective date of section 505 of the Act," 99 the Court noted that what uncertainty may have existed as to the existence of this implied private right to action under Section 503 was eliminated by the enactment of Section 505.

In Lloyd v. Regional Transportation Authority, supra, the Court held that an indication of legislative intent to create a private right remedy existed in Section 504 through analysis of Senate Labor and Public Welfare Committee Reports. The Lloyd Court recognized that Section 504 was patterned after Title VII and that accordingly, "the approach to implementation of Section 504...would ensure...administrative due process...and permit a judicial remedy through private action."

98. Ibid., 168.
99. Ibid., 169.
100. 548 F. 2d 1277 (1977).
The Court in Drennon v. Philadelphia General Hospital, Supra, also reviewed the legislative history of the Act, specifically of Section 504, and concluded that Congress had clearly anticipated the inclusion of a private right to action to enforce its provisions through the amendment providing attorney's fees.

Cort Criterion #3

Is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?

The Court in Davis v. Bucher noted that one of the underlying purposes detailed by the Act included the enhancement of employment possibilities for handicapped individuals. The Davis Court held that a private cause is "therefore not only compatible with the legislative intent, but also is necessary to secure the Act's remedial purposes."

The Lloyd Court, as in the Davis Court, concluded that implication of such a private right to judicial review would not be inconsistent with the legislative scheme of the Act. The Court held that a private

103. Ibid., 798.
cause of action would serve not only to enforce the "uniform substantive standards" laid down by HEW governing Section 504, but also those laid down by the Urban Mass Transit Administration (UMTA) governing Section 502.

The District Court in Hart v. County of Alameda, Supra, while holding that not only was the Congressional intent criteria (Cort criterion #2) overwhelmingly satisfied, also added that a private remedy would be "completely consistent" with the goals and the purposes of Section 504. According to the Court, the "limited resources" of HEW, as well as the Department's unwillingness to enforce the sole sanction available (i.e., terminating program funds) necessitated private enforcement of the Section. Therefore, denial of a private right to judicial remedy would, if anything, be inconsistent with the underlying legislative scheme of the Act.

106. Ibid.
DENYING A PRIVATE CAUSE OF ACTION

LEGISLATIVE HISTORY

While there are no express provisions providing judicial review for aggrieved handicapped individuals, there are also no express provisions denying the right to judicial review. It seems significant, though, that Congress has rejected perennial attempts to amend either Title VII of the Civil Rights Act of 1964 to extend coverage to the handicapped or Section 503(b) of the Rehabilitation Act of 1973 to afford handicapped individuals and applicants the right to private enforcement of the Act. As noted by the Rogers Court, it would seem that if Congress had intended a private right under the Act, it would have amended Title VII, the Act itself, or its regulations.

Again the legislative history of the Rehabilitation Act is sparse—what references are made to any type of private enforcement is either contradictory (with other provisions of the Act) or ambiguous. Courts denying a private right to action have recognized and emphasized this factor in determining the Act's legislative intent.

107. 611 F. 2d 1074 (1980).
For this reason, evidence within the legislative history to indicate that a private right should not be interpreted can be best presented along with consideration of court authority denying a private right.
DENYING A PRIVATE RIGHT TO ACTION:

COURT AUTHORITY

Court authority denying a private right to action under the Act can easily be organized into the Cort analysis framework. For reasons previously cited, the first and fourth criteria will not be bases for review.

Cort Criterion #2 (Legislative Intent) and
Maxium of"Expresio Unius est Exclusio Alterius"

Court interpretations holding that an implied right to action is not provided in the Act have generally centered their analysis upon the legislative history and development of the Act. Courts that have applied the second Cort criterion in determining this question of right to judicial review have typically applied the maxim of "expresio unius est exclusio alterius."108

Courts have analyzed the specific provisions within the Act which delineate through what methods an aggrieved handicapped individual may seek proper relief and enforcement of the Act. Some courts have held that the

108. The Court in Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers (414 U.S. 453, 458) first used the doctrine of expresion unius est exclusio (con't)
statutory provision of a specific remedy of grievance indicates a congressional intent not to grant further remedies. As the Court held in *Langman v. Western Electric Co.*:

Section b of 793 makes clear that Congress considered the question, not only of enforcement but of how an aggrieved handicapped individual could both initiate and participate in that enforcement. Applying the doctrine of unius est exclusio alterius, we conclude that Congress did in fact address itself to the issue of remedies and determined that Section 793(b) should be the exclusive method by which aggrieved individuals may proceed.109

The *Langman* Court also analyzed the history of the Act and despite the language of the 1978 amendment providing for attorney fees and the Senate reports directing that Sections 503 and 504 be administered in a consistent manner held that neither of these indications of legislative intent amount to "clear and contradictory evidence." The Court emphasized that in determining jurisdiction under the Act, its weight must be upon the construction of the "plain words of the statute."110

108. (con't)

alterius. As the Court ruled:

when legislation expressly provides a particular remedy or remedies, courts should not expand coverage of the statute or to subsume other remedies...even the most basic general principles of statutory construction must yield to clear contrary evidence of legislative intent (at 458).
The *Langman* Court also inferred legislative intent through a comparison of Sections 503 and 504 of the Act, which were enacted the same day. The *Langman* Court drew a distinction between the two sections and while holding that a private right exists under Section 504, it does not exist under 503. According to the Court:

Section 794, unlike 793, speaks directly to prohibition of discrimination. Likewise, unlike 793, 794 does not provide a method by which it may be enforced by aggrieved individuals... (One) must assume that Congress having enacted both statutes the same day, was well aware of what sort of clear anti-discrimination language was necessary to create a private right to action and that it chose to do so in the case of 794 but not in the case of 793. 111

The Court in *Moon v. Roadway Express, Inc.*, Supra, also applied the doctrine of "expresio unius est exclusio alterius" 112 and rejected allegation that a private cause of action was an intent of Congress, stating that "the limited range of the statute does not include the creation

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111. *Ibid.*, 685. Note: again Sections 793 and 794 refer to Section 503 and 504 of the Act, respectively.

of a private cause of action."\textsuperscript{113} The Court held that the purview of Section 503 was the encouragement of employment of handicapped in government jobs and not a nondiscrimination provision.\textsuperscript{114} Thus, the Moon Court held that the Act and its regulations clearly enumerate the circumstances under which a judicial remedy is appropriate and that neither the Act or its regulations permit private enforcement.

Similarly, the Court in \textit{Anderson v. Lackawana}, \textit{Supra}, noted the present regulations for enforcement of Section 503 contain no provisions concerning a private right to action.\textsuperscript{115} The Court held that these regulations "are entitled to weight in construing the intent of Congress in enacting the Section."\textsuperscript{116} The Court further held that because Section 503 specifically provided for a sequence of sanctions that may be utilized by the Secretary of Labor to enforce compliance with Section 503, there was no legislative intent indicated in either the Act's history

\begin{itemize}
\item \textsuperscript{113} \textit{Ibid.}, 1310.
\item \textsuperscript{114} \textit{Ibid.}, 1309.
\item \textsuperscript{115} 468 F. Supp. 934, 935 (1979).
\item \textsuperscript{116} \textit{Ibid.}, 938.
\end{itemize}
or its regulations to indicate that remedies under Section 503 extend or include a private cause of action. The Court instead stressed that the statutory pattern favors conciliation and persuasion by the Department of Labor and that the interjection of private suits would impair the effectiveness of this process.\textsuperscript{117}

The Court in \textit{Wood v. Diamond State Telephone Co.}\textsuperscript{118} also applied the "expresio unius" doctrine and in analysis of the Act, found that the Congressional approach suggests that "the exposure of the contractor is to be limited to the terms of his contract and any statutes and regulations applicable thereto".\textsuperscript{119} Therefore, by its mere exclusion, a provision of private right to action was not an intent of Congress.

The Rogers Court viewed the repeated failures of Congress to amend Title VII of the Civil Rights Act of 1964 that would protect the handicapped as demonstrations of legislative intent to deny implication of a private right to action:

\begin{quote}
The repeated defeats of efforts to amend Title VII to add coverage for handicapped persons, coupled with the explicit grant of a private administrative remedy in Section 793(b), make it quite clear\end{quote}

\begin{flushright}\textsuperscript{117. Ibid., 939.} \textsuperscript{118. 440 F. Supp. 1003 (1976).} \textsuperscript{119. Ibid., 1009.}\end{flushright}
that Congress did not intent to bestow a private right to bring suit in Courts upon qualified handicapped employees.\textsuperscript{120}

\textbf{Court Criterion III--Consistency}

The Anderson Court found the enforcement and the functions of Sections 503 and 504 to be separate and distinct (i.e., with the Department of Labor enforcing Section 503 in affirmative action and the Secretary of HEW enforcing Section 504 on antidiscrimination).\textsuperscript{121}

Because they are separate and distinct in nature, administering Sections 503 and 504 in a "uniform, consistent, and effective federal approach" (as specified in S. REP. No. 93, 93rd Cong., 2d Sess. 1297, reprinted in (1974) U.S. CODE CONG. & AD. NEWS 6389,6390) does not require a finding of a private right to action under Section 503; the Court added that "a private right to action would be of marginal utility in enforcing Section 503."\textsuperscript{122}

The Wood Court also addressed the question of the consistency of an implied private right to action with the basic purposes of the Act. Here, the Court held that a private judicial remedy would be inconsistent because of the possible danger of contractors being subjected to de novo litigation with remedies beyond those

\textsuperscript{120.} 611 F. 2d 1074, 1077 (1980)

\textsuperscript{121.} 468 F. Supp. 934, 936 (1979).

\textsuperscript{122.} \textit{Ibid.}, 939
which would be provided by the Department of Labor. The Wood court viewed the purpose of Section 503 as only affirmative action—not a purpose founded on antidiscrimination. The Court emphasized the contract-based nature of the section and emphasized that the statute clearly expresses that the Department of Labor acts against violations.\textsuperscript{123}

Finally, the Rogers Court, relying upon the doctrine of "expresio unius", contended that adequate provision of an administrative remedy would necessarily make the finding of a private right to action inconsistent with the purpose of Section 502\textsuperscript{124}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{123} 440 F. Supp. 1003, 1009 (1976).
\item \textsuperscript{124} 611 F. 2d 1074, 1077 (1980).
\end{enumerate}
\end{footnotesize}
SOCIAL POLICY

This International Year of the Handicapped symbolizes a public consciousness and commitment to address the special problems confronting the nation's handicapped. However, it remains only a symbol until the effective mechanism is obtained for securing and affording the handicapped basic rights and privileges if they are to be truly rehabilitated and socialized. Unfortunately, at this time, this mechanism does not exist. The most comprehensive legislation providing benefits and rights to handicapped individuals, the Rehabilitation Act of 1973, is weakened in its effect and intent by the unresolved issue as to whether the Act provides for an implied private right to action. Without provision of this right to judicial review, meaningful protection of the employment rights of the handicapped cannot be achieved—the implied purpose and intent of the Act would only be nominal, a symbol, and a contradiction since of all categories of discrimination victims, the handicapped are most in need of such a right.

Analysis of both case law deciding on the implied right issue and the legislative history of the Act only cloud the issue as to whether the implied right exists
or even should exist. Court consensus is far from existing on this issue. These differing interpretations can be attributed to the fact that courts do not agree on the factors which indicate legislative intent or which factors should be weighed in interpreting a private cause of action. Even when an express framework is utilized in determining an unresolved issue, dissention still occurs---Courts utilizing the Cort analysis criteria have focused on different factors and events in indicating consistency and congressional intent. Also some courts have liberally interpreted the Act while other courts chose to rely only on the "express language of the Act". Thus, it appears that unless some amending provision or statute resolves the question of the implied private right, differing and conflicting court interpretations will occur.

Similarly, the legislative history of the Act is not adequate by itself in resolving the private right to action issue---the varying courts have construed the same Senate reports in different indications of intent. The same reports have been alternatively interpreted by the courts to allow for and to deny a private cause of action.

Further, what evidence may exist to support an implied private right to action interpretation may be undermined by an amendment to Title VI procedures which limits remedies only to grants expressly made for the purpose of creating employment.
This would drastically affect contentions based on Section 504 in attempts to secure judicial remedy.

Despite lack of court consensus and conflicting indications of legislative intent, the implied private right to action issue can be concluded if certain social policy concerns are analyzed. Even if previous court authority does not allow for an implied private remedy, an implied right can still be interpreted on the basis of pressing social welfare concerns which would compel such an interpretation.

The need for a private right to action first manifests itself through recognition of the shortcomings of the Act itself. The Act is limited in coverage (covering only those employed by contractors of the federal government); there is an absence of any effective enforcement mechanism short of reliance upon administrative procedures hampered by agency delays, building caseloads and backcases, and conflicting regulations; and the Act is hampered and impeded in implementation by restricting and inconsistent judicial interpretations. Provision of a private remedy would alleviate the shortcomings of the Act and provide a more effective means through which the legislative intent can be realized.

125. The Comptroller General Reporter notes that the Office of Civil Rights which administers Section 504 lacks any comprehensive and reliable information system, any uniform policy guidelines and compliance standards, and a qualified investigative staff. Comptroller General Report, issue March 30, 1977, CGR, B-164031-1.
Because of changing social roles and needs and the changing focus of public policy, a statute should not be forever locked into the timeframe in which it was enacted. At the time the Civil Rights Act of 1964 was enacted identification of the handicapped as a minority or separate distinct group did not exist. However, because of the shift of public awareness and perhaps because of the handicapped becoming more vocal, the handicapped has become recognized as a separate minority. If no amendments are made within existing statutes to accommodate to changing social roles and needs, it is up to the Courts, in the best interest of society, to initiate such changes. The Supreme Court has shown the greatest tendency to find private rights of action in the area of civil rights, inferring private rights under Title VI\(^{126}\) and IX\(^{127}\) of the Civil Rights Act and inferring the same rights under the 14th\(^{128}\) and 5th\(^{129}\) amendments.

\(^{126}\) For example see Lau v. Nichols (414 U.S. 563)\(^{(1974)}\) (by implication) and Blackshear Residents Organization v. Housing Authority (342 F. Supp. 1138, 1140)\(^{(1972)}\).

\(^{127}\) For example see Cannon v. University of Chicago (441 U.S. 677, 717)\(^{(1979)}\).

\(^{128}\) See Bivens v. 6 Unknown Named Agents (403 U.S. 388, 397)\(^{(1971)}\).

\(^{129}\) See Davis v. Passman (442 U.S. 228, 243-44)\(^{(1979)}\).
An individual should be evaluated on his ability to perform a particular task--not evaluated in accordance with prevailing public conceptions that because a person belongs to a certain class of individuals that it necessarily precludes what that individual can do and how he will perform accordingly. Yet, that is how the handicapped are still being evaluated--they are seen first and foremost as handicapped, impaired, not as someone who may have ability to contribute something to society. Despite such negative social conditions, some outstanding handicapped persons have made themselves heard and contributed greatly to society in the form of literature, art, and music.

However, an individual should not be outstanding to be recognized and guaranteed procedural due process. Fortunately, though, steps, however small, are being made in securing rights and privileges for the handicapped (mostly at the state level); it would seem, though, that the most effective means for providing these rights would be provision of some guarantee granting judicial review to allegations of employment discrimination.
BIBLIOGRAPHY


Senate Reports


BIBLIOGRAPHY (con't)

Senate Reports (con't)
