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Russell A. Janis

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A UNIFIED THEORY FOR SECTION 504 EMPLOYMENT DISCRIMINATION ANALYSIS: EQUIVALENT COST-BASED STANDARDS FOR "OTHERWISE QUALIFIED" AND "REASONABLE ACCOMMODATION"

RUSSELL A. JANIS*

INTRODUCTION

The passage of the Rehabilitation Act of 1973¹ (the Act) ushered in a new legal era for individuals with handicaps.² Section 504 of the Act protects all "otherwise qualified" handicapped persons from discrimination by recipients of federal funds,³ and has been subject to extensive litigation.⁴ Two

* Assistant Professor of Economics, Amherst College; Visiting Scholar, Center for Law and Health Sciences, Boston University Law School; A.B., Princeton University; M.A., J.D., Ph.D., Northwestern University. I would like to thank Henry Beyer and Mark W. Janis for helpful comments on this article. The ultimate responsibility for its contents is, of course, my own.

1. 29 U.S.C. §§ 701-715 (1982 & Supp. 1985) (Pub. L. No. 93-112; codified by Pub. L. No. 93-516 (1974); amended by Pub. L. No. 95-602 (1978)).

2. United States Commission on Civil Rights, *Accommodating the Spectrum of Individual Abilities*, Clearinghouse Publication 81, at 47 (Sept. 1983) [hereinafter cited as *Accommodating the Spectrum*]. One of the stated purposes of the Rehabilitation Act as enacted was to "promote and expand employment opportunities in the public and private sectors for handicapped individuals and to place such individuals in employment." Rehabilitation Act of 1973, Pub. L. No. 93-112, § 2(8), 87 Stat. 357 (1973). The Act defines "handicapped individual" to mean "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 impairment, or (iii) is regarded as having such an impairment." 29 U.S.C. § 706(7)(B) (1982 & Supp. 1985). For further discussion of the term "handicapped individual," see *Accommodating the Spectrum* at 7-10.

3. 29 U.S.C. § 794. The text of § 504 states, in part, "No otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal Financial assistance. . . ." *Id.* The language of § 504 was patterned after that of § 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1982) (see *Community Television of Southern California v. Gottfried*, 459 U.S. 498, 509 (1983); *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624 (1984); and *Alexander v. Choate*, ___ U.S. ___ (1985)), and is also similar to that of § 901 of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a) (1982). Two other sections of the Rehabilitation Act relating to employment discrimination are § 501 which relates to employment by the government, 29 U.S.C. § 791, and § 503 which relates to employment by government contractors, 29 U.S.C. § 793. As noted by another commentator, "§ 504 probably has its foundations in proposals to amend titles VI and VIII of the Civil Rights Act of 1964 to include prohibitions of discrimination against the handicapped." Note, *Accommodating the Handicapped: Rehabilitating Section 504 After Southeastern*, 80 Colum. L. Rev. 171, 174 n.19 (1980) [hereinafter cited as *Accommodating After Southeastern*].

4. Section 504 has been the source of more litigation than either § 501 or § 503. See *Accommodating the Spectrum*, *supra* note 2, at 49.

major foci of litigation alleging employment discrimination⁵ have been the identification of the class afforded protection by Section 504, and the standards of protection to be applied to that class. Unlike the more "traditional" types of discrimination law, such as that based on race or sex, the very characteristic which may place an individual in the protected class may also be that factor which justifies the refusal to hire. That is, while a contention of "She's black, and so cannot do the job," would never be a valid defense for an employer refusing to give a job to an applicant; whereas, a claim of "He's paraplegic, and so cannot do the job," might.⁶ Another difference from race or sex discrimination is in the treatment of employment criteria which are "handicap blind" (as in "color blind" or "sex blind") or otherwise "neutral." If the only disability a person had were getting his or her wheelchair to the entrance of a building or hearing a voice loud enough over a phone, such an individual might never be employed unless an employer were required to do something "affirmative" such as build a ramp or install a phone amplifier. From this, then, comes the notion of "reasonable accommodation," which is generally not applicable in the more traditional types of discrimination law.⁷

Two factors relatively unique to handicap law therefore come into play: the question of whether an individual is "otherwise qualified" and whether "reasonable accommodation" is required of the employer. Although these two standards are clearly interrelated (Is a person who is able to carry out the duties of a job only with reasonable accommodation otherwise qualified?), courts often strain to keep the two issues separate.⁸ Courts also have had great difficulty determining whether an individual who can currently be a model employee, but faces a heightened risk of future injury or deterioration in abilities, is otherwise qualified.

This article proposes a unified, cost-based analysis which takes the ambiguity out of the otherwise-qualified/reasonable-accommodation relationship and provides a consistent standard by which to determine whether or not a given employer should be required to hire a given job applicant. Part I gives a brief overview of the existing standards used in Section 504 case law. Part II then lays out the basis for the proposed cost-based approach by outlining the various motivations an employer might have for refusing to

5. This article focuses on the rights of individuals with handicaps to be free of employment discrimination, but has implications for other cases. See *infra* note 54.

6. See, e.g., *Pushkin v. Regents of University of Colorado*, 658 F.2d 1372, 1385-86 (10th Cir. 1981):

Thus, the issue is not merely whether the handicap played a prominent part in [the plaintiff's] rejection, as in cases dealing with alleged discrimination on the basis of race, for example (where race is never expressly mentioned as a consideration), the issue is whether rejecting Dr. Pushkin after expressly weighing the implications of his handicap was justified.

Id.

7. See *infra* text accompanying notes 25-36; see also *Accommodating the Spectrum*, *supra* note 2, at 153-54, regarding neutral standards.

8. See *infra* text accompanying notes 25-36.

hire a particular person. In Part III, the cost-based standard is described, and then is applied to selected cases in Part IV. Further implications of this new approach, including the relationship between reasonable accommodation and affirmative action, are discussed in Part V.

I. EXISTING STANDARDS

The standards by which to decide Section 504 cases are still at an early stage of development. Much of the early litigation dealt with whether a private right of action existed under Section 504,⁹ and whether or not the federal funding involved had to be specifically job-related.¹⁰ The Supreme Court first applied Section 504 standards in *Southeastern Community College v. Davis*.¹¹ In *Davis*, the Supreme Court upheld the decision by the defendant college to turn away an applicant to a nursing program based on her hearing impairment. The Court held that an "otherwise qualified handicapped individual" is one who can "meet all of a program's requirements *in spite of*" the handicap¹² (a standard the plaintiff did not meet), and that Southeastern need not make "substantial modification of standards"¹³ or a "substantial change in [its] program"¹⁴ to accommodate Davis. The Court did note that "situations *may* arise where a refusal to modify an existing program *might* become unreasonable and discriminatory."¹⁵ In effect, the Court's decision was structured as follows: It discussed in Section II of the decision what "otherwise qualified" means,¹⁶ in Section III what reasonable accommodation is *not*,¹⁷ and in Section IV the possibility of what reasonable accommodation *might be*.¹⁸ The Court did not make clear if "otherwise qualified" could mean meeting all requirements only with reasonable accommodation, or what the standard for reasonable accommodation would be, other than its "substantial modifications" or "substantial change" language and a reference made to "undue financial and administrative burdens."¹⁹

9. The broad consensus is that a private right of action does exist. See, e.g., Pushkin v. Regents of University of Colorado, 658 F.2d 1372, 1376-80 (10th Cir. 1981) and cases cited therein; Prewitt v. United States Postal Service, 662 F.2d 292, 301-04 (5th Cir. 1981); *Accommodating the Spectrum*, *supra* note 2, at 51; Wegner, *The Antidiscrimination Model Reconsidered: Ensuring Equal Opportunity Without Respect to Handicap Under Section 504 of the Rehabilitation Act of 1973*, 69 CORNELL L. REV. 401, 412-16 (1984).

10. See *Consolidated Rail Corp. v. Darrone*, 465 U.S. _____ (1984) (Supreme Court decided federal funding need not be specifically job related).

11. 442 U.S. 397 (1979).

12. *Id.* at 406 (emphasis added).

13. *Id.* at 413.

14. *Id.* at 414.

15. *Id.* at 412-13 (emphasis added).

16. *Id.* at 405-07.

17. *Id.* at 407-12.

18. *Id.* at 412-14.

19. *Id.* at 412. For further discussion of *Southeastern Community College v. Davis*, see *Accommodating After Southeastern*, *supra* note 3 at 884-7; Note, *Accommodating the Handicapped: The Meaning of Discrimination Under Section 504 of the Rehabilitation Act*, 55

The only other case in which the Supreme Court applied Section 504 standards was the recent decision of *Alexander v. Choate*.²⁰ In *Alexander*, the Court upheld Tennessee's cost-cutting decision to reduce the number of days per year the state Medicaid program would pay for inpatient hospital services, in spite of a disparate impact on individuals with handicaps. The Supreme Court first held that although the Medicaid coverage reduction from twenty to fourteen days would affect individuals with handicaps to a greater degree,²¹ those individuals were still provided "meaningful and equal access" to the hospitalization benefits.²² In response to an argument that other equally cost-effective measures could be devised which would impact less adversely on individuals with handicaps, the Court also held that "the administrative costs of implementing such a regime would be well beyond the accommodations that are required under *Davis*,"²³ costs which would be "far from minimal."²⁴

Lower courts continue to grapple with the appropriate Section 504 standard. Some of the case law deals solely with the question of whether individuals are otherwise qualified without bringing in the issue of reasonable accommodation, often because of the apparent inadequacy of any accommodation. These cases typically deal with some condition which may affect future ability, such as diabetes²⁵ or a history of epilepsy.²⁶

N.Y.U.L. Rev. 881, 884-87 (1980) [hereinafter cited as *Accommodating Under Section 504*]; Wegner *supra* note 9, at 452-59; Note, *Defining the Rights of the Handicapped Under Section 504 of the Rehabilitation Act of 1973: Southeastern Community College v. Davis*, 24 ST. LOUIS U. L. J. 159, 167-72 (1979); Note, *Discrimination on the Basis of Handicap: The Status of Section 504 of the Rehabilitation Act of 1973*, 65 IOWA L. REV. 446, 453-67 (1980); Note, *Employment Discrimination Against the Handicapped and Section 504 of the Rehabilitation Act: An Essay on Legal Evasiveness*, 97 HARV. L. REV. 997, 1008-09 (1984); [hereinafter cited as *Legal Evasiveness*]; and *Accommodating the Spectrum*, *supra* note 2, at 108-14.

20. *Alexander v. Choate*, ___U.S.____, 105 S. Ct. 712 (1985). Other Supreme Court cases in which § 504 claims have been made include *University of Texas v. Camenisch*, 451 U.S. 390 (1981) (remanded on procedural grounds); *Community Television of Southern California v. Gottfried*, 459 U.S. 498 (1983) (§ 504 does not impose new obligations when FCC considers renewal of television station's license); *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89 (1984) (remanded for possible consideration of § 504 claims); *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624 (1984) (employment cases brought under § 504 are not limited to instances where primary purpose of federal aid is to promote employment, and § 504 can allow for recovery of backpay); *Irving Independent School Dist. v. Robinson*, 468 U.S.____ (1984) (§ 504 does not expand upon remedies available under Education of the Handicapped Act, 84 Stat. 175, as amended, 20 U.S.C. § 1400 *et seq.* (1982)); and *Atascadero State Hospital v. Scanlon*, ___U.S.____, 105 S. Ct. 3142 (1985) (§ 504 does not overcome eleventh amendment bar against suing states, nor does a state's acceptance of Rehabilitation Act funds serve as consent by state to be sued in federal court).

21. *Alexander v. Choate*, ___U.S.____, 105 S. Ct. 712, 715 (1985). According to facts cited by the Court, "27.4% of all handicapped users of hospital services who received Medicaid required more than 14 days of care, while only 7.8% of nonhandicapped users required more than 14 days of inpatient care." *Id.*

22. *Id.* at 721-22.

23. *Id.* at 725.

24. *Id.* at 724.

25. See *Bentivegna v. Department of Labor*, 694 F.2d 619 (9th Cir. 1982).

26. See *Duran v. City of Tampa*, 430 F. Supp. 75 (1977), *final order* 451 F. Supp. 954

Another line of decisions addresses both the issue of otherwise qualified and the issue of reasonable accommodation. Not unlike *Davis*, many of these cases employ a two-step analysis: Is the job applicant an otherwise qualified individual? Does reasonable accommodation exist which would make that individual qualified? Though the language of Section 504 may require a finding that the plaintiff is "otherwise qualified" to be afforded protection under the statute, these are not unrelated questions, and the logic of such decisions becomes strained. For example, the key determination in deciding whether or not someone is otherwise qualified has sometimes been whether or not the individual could perform the "essential"²⁷ or "legitimate"²⁸ functions of a job. This implicitly imposes reasonable accommodation in the definition of otherwise qualified in the form of a modification of the job description to eliminate "non-essential" or "non-legitimate" tasks which the individual could not perform.²⁹ These decisions nevertheless go on to discuss separately the issue of reasonable accommodation.³⁰

Other courts have been more straightforward in recognizing the overlapping nature of "otherwise qualified" and "reasonable accommodation." In *Prewitt v. United States Postal Service*,³¹ an applicant with limited mobility of an arm and shoulder initially was denied employment as a clerk/carrier. The Fifth Circuit in *Prewitt* first looked to qualifications in the absence of any accommodations using the disparate-impact analysis developed in *Griggs v. Duke Power Co.*³² The *Prewitt* court, however, then went on to recognize a duty of reasonable accommodation.³³ According to the *Prewitt* court, the "ultimate test" for determining if an individual has been unlawfully denied employment due to physical handicap is whether, "with or without reasonable accommodation," an individual can safely and competently perform

(M.D. Fla. 1978); *Smith v. Administrator of Veterans Affairs*, 32 FEP Cases 986 (C.D. Cal. 1983).

27. See *Bey v. Bolger*, 540 F. Supp. 910, 926 (E.D. Pa. 1982).

28. See *Simon v. St. Louis County*, 656 F.2d 316, 320 (8th Cir. 1981).

29. See *infra* text accompanying notes 41-42.

30. See *Bey v. Bolger*, 540 F. Supp. 910, 926 (E.D. Pa. 1982). In *Bey*, an individual with hypertension applied for reinstatement as a postal clerk. *Id.* After the job applicant was found to be not otherwise qualified (in terms of job-relatedness in a disparate impact analysis) due to a heightened risk of injury, the court rejected a light duty status as being unreasonable accommodation. *Id.* at 926-27; see also *Simon v. St. Louis County*, 656 F.2d 316, 320 (8th Cir. 1981). The court in *Simon* remanded the case brought by a paraplegic ex-police officer, in part to determine whether the ability to make "a forceful arrest and render emergency aid" and "the capacity to be freely transferred to all positions in the police department" were "necessary and legitimate requirements." 656 F.2d at 320. Only after that determination was made could the trial court consider reasonable accommodation. *Id.* at 321.

31. 662 F.2d 292 (5th Cir. 1981) (decided largely under § 501).

32. See *id.* at 306-07, citing *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). The Supreme Court in *Alexander v. Choate* stated that "[w]hile we reject the boundless notion that all disparate-impact showings constitute prima facie cases under § 504, we assume without deciding that § 504 reaches at least some conduct that has an unjustifiable disparate impact upon the handicapped." *Alexander v. Choate*, ___ U.S. ___, 105 S. Ct. 712, 720 (1985).

33. See *Prewitt v. United States Postal Service*, 662 F.2d 292, 307 (5th Cir. 1981) (duty under § 501); *id.* at 307 n.21 (duty under § 504).

the essential functions of the position.³⁴ In dealing with an individual with a hearing impairment who applied for a position as a school bus driver, the Third Circuit merged reasonable accommodation into the definition of otherwise qualified when it held in *Strathie v. Department of Transportation*³⁵ that an individual would be "not otherwise qualified if . . . accommodating . . . would require either a modification of the essential nature of the program, or impose an undue burden" on the employer.³⁶ More recently, the Supreme Court in *Alexander v. Choate* stated that:

. . . the question of who is "otherwise qualified" and what actions constitute "discrimination" under . . . Section [504] would seem to be two sides of a single coin; the ultimate question is the extent to which a grantee [of federal funds] is required to make reasonable modifications in its programs for the needs of the handicapped.³⁷

Given this developing recognition of the dual and overlapping nature of what constitutes a Section 504 violation,³⁸ a unifying standard by which to measure "otherwise qualified" and "reasonable accommodation" must be developed. As will be shown below, both criteria can be reduced to a cost basis and so facilitate a consistent handling of Section 504 employment cases. The following part of this article examines employers' motives for not hiring handicapped individuals. This analysis of employers' motives will lay the foundation for the unified cost approach developed in Part III of this article and applied in Part IV.

II. EMPLOYER MOTIVATIONS

Why would an employer refuse to hire a handicapped applicant? One reason might be pure prejudice or bad animus, a situation clearly forbidden by Section 504,³⁹ and a justification to which employers are unlikely to admit. Reasons employers give for not hiring handicapped applicants fall into four categories, each of which will be discussed below. First, employers argue that the handicapped applicant cannot currently perform the job as

34. *Id.* at 310 (emphasis added).

35. 716 F.2d 227 (3d Cir. 1983).

36. *Id.* at 231. See *Treadwell v. Alexander*, 707 F.2d 473 (11th Cir. 1983) (applicant for park technician job who had had quadruple bypass operation and pacemaker implanted): "A plaintiff who could perform the essentials of the job if afforded reasonable accommodation would be entitled to relief." 707 F.2d at 477.

37. *Alexander v. Choate*, ___U.S.___, 105 S. Ct. 712, 720 n.19 (1985).

38. See *Accommodating the Spectrum*, *supra* note 2, at 117-18.

39. See *Bey v. Bolger*, 540 F. Supp. 910, 925 (E.D. Pa. 1982); *Doe v. Region 13 Mental Health-Mental Retardation Commission*, 704 F.2d 1402, 1409-10 (5th Cir. 1983), *motion to proceed in forma pauperis denied sub nom. Ordway v. Region 13 Mental Health-Mental Retardation Commission*, ___U.S.___, 104 S. Ct. 971, *reconsideration denied*, ___U.S.___, 104 S. Ct. 1589 (1984). This is also referred to as "social bias" discrimination. See *Accommodating Under Section 504*, *supra* note 19, at 883; see also *Prewitt v. United States Postal Service*, 662 F.2d 292, 305, n.19 (5th Cir. 1981) (discussing "social bias" discrimination); *Bey v. Bolger*, 540 F. Supp. 910, 925 (E.D. Pa. 1982) (referring to "social bias" discrimination).

well as non-handicapped individuals. Second, employers fear that while the handicapped applicant currently can perform the typical tasks of a job, he or she may be unable to handle an extraordinary or emergency event which might occur. This is what is referred to as the "risk of an external event." Third is the "risk of internal deterioration;" that is, while the applicant can handle all aspects of the job now, employers perceive that there is a risk that a condition of the individual may worsen at some time in the future, thereby diminishing his or her ability to perform. Fourth, given the existence of a handicap, employers suggest that it may be very costly to determine the actual abilities of a given individual.

What these four concerns have in common is that they all entail *cost* to the prospective employer. Hiring someone at a given wage whose performance or productivity is substandard, or who has a higher than normal chance of failing at the job in the future imposes a cost on an employer. Similarly, forcing an employer to make accommodations for individuals so that they can overcome disabilities, or to utilize certain pre-employment tests also is costly when a non-handicapped pool of applicants exists for whom the accommodations or tests are not needed.

A. *Current Inability*

An employer may refuse to hire a given handicapped applicant because the applicant is currently less able to perform the tasks of a job as well as non-handicapped applicants.⁴⁰ A current inability may also present itself as a case in which an individual can perform several or many of the tasks of a job, but cannot perform others (such as answering telephones or lifting certain weights). To hire such an individual, an employer would have to lose the output or productivity of the impossible tasks, hire someone else to do them, or reshuffle the tasks of current employees so that the handicapped worker can have a job in which all tasks can be performed.⁴¹ These options all involve cost to the employer (and could all be labeled "accommodations"), either in terms of foregone output, additional wages, or administrative costs of job reclassification. Other factors, such as wages, equal, a

40. It should be noted that misperceptions about productivity, absenteeism and the like may exist. See, e.g., Miller, *Hiring the Handicapped: An Analysis of Laws Prohibiting Discrimination Against the Handicapped in Employment*, 16 GONZ. L. REV. 23, 53 n.116 (1980): "A 1973 study of 1,452 handicapped employees conducted by the DuPont Company . . . showed that: 91% were rated by their supervisors as average or better than average in terms of job performance; 79% had average or better attendance records, and; 96% had average or above average safety records." Other potential benefits for employers who hire individuals with handicaps include the improvement of the company's public image and the establishment and development of the company's good will.

41. See, e.g., *Nelson v. Thornburgh*, 567 F. Supp. 369 (E.D. Pa. 1983) (readers hired for blind workers); *Treadwell v. Alexander*, 707 F.2d 473, 478 (11th Cir. 1983) ("doubling up" of employees to protect worker from heart condition).

profit-maximizing employer would prefer to hire a non-handicapped individual because of lower costs.⁴²

Another example of current inability may be that, without accommodation, the individual physically could not enter the facilities or operate the necessary equipment.⁴³ Even if after a ramp were built, a door widened, or a special attachment put on the equipment, the individual were fully able to perform the job, the necessary accommodations still impose a cost on an employer. Again, an employer lacking traditional prejudice but focusing on cost still would prefer hiring an individual not requiring accommodations.⁴⁴

B. Risk of External Event

The risk that some event will occur which will be beyond the capabilities of a handicapped worker is similar to current inability because the characteristics of the worker remain unchanged over time. What makes this risk different is that the individual can perform *all current* functions of the job, but may not be able to perform adequately and safely if some outside event occurs. For example, a handicapped police officer may be able to perform all tasks of a desk job. The possibility exists, however, that an emergency could arise in which all desk officers would be called upon to perform tasks the handicapped officer is unable to perform.⁴⁵ This risk would impose the same type of costs on the employer as do the current-inability cases in which an individual could not perform all tasks of a job. Unlike the current-inability cases, however, the actual cost would arise only if the event which causes the need to perform the impossible task occurred; something which might never happen.⁴⁶

42. Accommodations may be costly to persons other than the employer. For example, changed work schedules or adapted equipment may inconvenience co-workers. On the other hand, co-workers could benefit from some changes (ramps and elevators, for example) as could other current and future handicapped workers.

43. In the classification system in *Accommodating Under Section 504*, *supra* note 19 at 883-84, these would be "neutral" or "surmountable" barriers, or perhaps "insurmountable" if accommodation would be "drastic" or not sufficiently effective.

44. These accommodations are often not very costly. See *Accommodating the Spectrum*, *supra* note 2, at 106; Wegner *supra* note 9, at 446 n.135; see also United States Dept. of Labor, Employment Standards Administration, *A Study of Accommodations Provided to Handicapped Employees by Federal Contractors*, Final Report, Volume I, 28 (17 June 1982):

A striking finding of this study [of employers covered by § 503] was that accommodations rarely involved much expense. . . . Thus, no cost was involved for 51% of the accommodations reported, and an additional 30% of all workers received packages of accommodations for which the total cost was between \$1 and \$500. . . . Only 8% of accommodated workers received packages of accommodation with a total cost exceeding even the low figure of \$2,000.

45. See, e.g., *Simon v. St. Louis County*, 656 F.2d 316, *heard on remand* 563 F. Supp. 76 (E.D. Mo. 1983) (applicant with paraplegia).

46. Another related cost to an employer may arise if the job in question is used to train employees for higher positions which are beyond the current abilities of the job applicant with a handicap.

C. Risk of Internal Deterioration

The more common case involving risk arises when a job applicant has some condition which currently is under control, but which may worsen or reoccur in the future. Examples of such cases are when the individual has diabetes,⁴⁷ hypertension,⁴⁸ a back condition,⁴⁹ or a history of epilepsy.⁵⁰ The employer must decide whether to hire such an individual who faces the risk of future debilitation. The costs the employer could face might include a drop in productivity due to increased absenteeism or time off for recuperation, possible increases in workman's compensation expenditures, the cost of rehiring and retraining another employee if the handicapped individual could not return to work,⁵¹ or any damage to property or injury to persons which may occur from an accident resulting from the worker's deteriorating condition.⁵² This risk can be related to the risk of external event when the possible external event causes deterioration of an otherwise controlled internal condition.

D. Need for Individualized Determinations

Before hiring any individual, an employer is likely to ask for information regarding the applicant such as education and experience, or perhaps will give the applicant a written or hands-on test. The employer does this to ascertain the qualifications of the applicant both as to current abilities and future risks. This process entails some cost to the employer, but is undertaken so long as the cost of getting the information is less than the costs the information would avoid.

If, *on average*, people with a given handicap are less able to perform a job than those without the handicap, the employer likely would choose an otherwise-equally-qualified applicant without the handicap, rather than undertake the further cost of determining the handicapped applicant's actual abilities.⁵³ A requirement that the employer examine applicants on an individualized basis, therefore, would impose an extra cost on the employer. In some sense, the issue of individual determination is related to the issue of risk: If the evaluation is not undertaken, there is a risk that the individual's

47. See, e.g., *Bentivegna v. Department of Labor*, 694 F.2d 619 (9th Cir. 1982).

48. See, e.g., *Bey v. Bolger*, 540 F. Supp. 910 (E.D. Pa. 1982).

49. See, e.g., *E.E. Black, Ltd. v. Marshall*, 497 F. Supp. 1088 (D. Hawaii, 1980) (§ 503 case).

50. See, *supra* note 26; *Costner v. United States*, 720 F.2d 539 (8th Cir. 1983) (equal protection case). Employers also would tend to view job applicants with Acquired Immune Deficiency Syndrome (AIDS) as having a heightened risk of internal deterioration. See *infra* note 118; see also Tarr, *The Legal Issues Widen: AIDS*, 8 NAT'L L.J. 1 (November 25, 1985).

51. See R. EHRENBERG AND R. SMITH, *MODERN LABOR ECONOMICS*, 137-39 (1982) (discussing employers' investments in employees).

52. These costs would not be borne directly by the employer if the employer did not own or were not held responsible for the property damaged or persons injured.

53. See, e.g., A.M. SPENCE, *MARKET SIGNALING* (1974); EHRENBERG AND SMITH, *supra* note 51, at 136, 271-75, 407-09.

condition (or apparent condition) will impose costs on the employer, now or in the future.

III. PROPOSED COST-BASED STANDARD

All of the above justifications for refusing to hire a handicapped individual are based on cost; whether it is the cost of making accommodations for a disability, the risk of future costs, or the cost of making individualized determinations of ability. This article proposes that all determinations of the legality of employment decisions when dealing with handicapped individuals, therefore, should be based explicitly on costs.⁵⁴ As the United States District Court for the Eastern District of Pennsylvania in *Nelson v. Thornburgh*⁵⁵ characterized this issue, the question of legality comes down to: "[W]ould the cost [of the remedy] . . . be greater than [Section 504] demands?"⁵⁶

It is left to the courts to determine what burden should be placed on employers.⁵⁷ The three types of costs to consider are those involving accommodations, risk, and screening. Besides avoiding the difficulty of making separate determinations of otherwise qualified and reasonable accommodation, a cost-based approach also would lead towards a more consistent application of the law. For example, a cost-based analysis would facilitate addressing the consistency of requiring an employer to spend thousands of dollars to make accommodations for a blind employee, while not requiring the hiring of an individual with a slightly-heightened risk of future injury.

A. Cost of Accommodation

The first type of cost to be included in the total cost of employment is that of accommodation. Of accommodation, risk, and screening, accom-

54. This is not meant to suggest that a fixed-dollar figure be the sole criterion used to determine legality in all cases. Other factors can enter the decision such as the magnitude of the cost relative to the employer's ability to bear it (see *infra* notes 101 and 128 and accompanying text) or the existence of discriminatory animus.

It also should be noted that the proposed standard has applications to handicap employment cases based on laws other than § 504 as well as to non-employment cases, though the utility of the cost approach will be somewhat diminished in non-employment cases. In employment cases, individuals with handicaps are being hired to provide specific services to profit-conscious employers. In non-employment cases, such as *Southeastern Community College v. Davis*, 442 U.S. 397 (1979), the individual no longer is viewed as a factor of production but, rather, as a recipient of services. Costs of accommodation, risk (for example, of injury to persons or property), and screening are still relevant. Other costs, however, such as an inability to benefit from a given educational curriculum as fully as individuals without handicaps, are more difficult to quantify.

Applications of the proposed approach also exist for employment discrimination cases based on age. See Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1982 & Supp. 1985); see also *infra* note 120.

55. 567 F. Supp. 369 (E.D. Pa. 1983).

56. See *id.* at 379; see also *Legal Evasiveness*, *supra* note 19, at 1012: "The only real issue is how great a cost an employer should bear."

57. But see *supra* note 54 (qualifying the role of costs).

modation is the only one which typically is considered by courts explicitly to be a cost.⁵⁸ Accommodation costs include the expenses incurred as a result of special equipment or assistance for the handicapped individual, or providing access to facilities. Also included in accommodation costs are the administrative expenses involved in restructuring job tasks or schedules,⁵⁹ often the remedy discussed in cases stressing the "essential" tasks of a job.⁶⁰ Some costs of accommodation may be largely one-time expenses (such as widening a door for wheelchair access), whereas some costs may involve continuing obligations (such as paying the salaries of interpreters for a deaf employee), but the costs can be compared by discounting the stream of future expenses to the present, using an appropriate discount rate.⁶¹ The level of accommodation to which the cost standard should be applied would be that necessary to bring the worker up to the level of ability of a non-handicapped worker,⁶² subject, of course, to constraints put on by accommodations such as job restructuring where impossible tasks are taken out of the job description.

B. Cost of Risk

There is a cost associated with taking a risk with an employee, whether it is an external risk of an event occurring that is beyond the worker's capability⁶³ or an internal risk that the worker's abilities will deteriorate.⁶⁴ There are certainly risks of these types involved when employing non-handicapped persons; risks which may be considered as part of the normal costs of doing business. Additional risks may exist, however, when dealing with handicapped individuals, and this increase in risk is the cost to the

58. The same can be said of commentators. For example, in the section titled "The Problem of Cost" in Wegner, *supra* note 9, at 445-51, the only costs discussed are those of accommodation. While a recent note goes further and recognizes that a drop in productivity can be considered a cost, there is still no discussion of risk as a cost. *See Legal Evasiveness*, *supra* note 19, at 1013 (proposed amendment § (a)(2)). *But see Accommodating the Spectrum*, *supra* note 2, at 131 n.167 (noting that heightened risk might be viewed as "a reasonable price for handicapped people's full participation in society").

59. *See* § 84.12(b) of the Regulations of the Department of Health and Human Services (HHS) implementing § 504: "Reasonable accommodation may include: (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." 45 C.F.R. § 84.12(b) (1983).

60. *See supra* notes 27-29, 36, & 41-42 and accompanying text.

61. *See infra* note 66. Two additional costs of accommodation also may exist: costs (and benefits) imposed on other workers, *see supra* note 42, and *Vickers v. Veterans Administration*, 549 F. Supp. 85 (W.D. Wash. 1982) (impact of smoking rules on fellow employees); and lower (or higher) productivity by the handicapped individual. *See supra* note 40 and text accompanying note 41.

62. *See Accommodating Under Section 504*, *supra* note 19, at 897-900, for a similar "equal-burdens" standard.

63. *See supra* notes 45-46 and accompanying text.

64. *See supra* notes 47-52 and accompanying text.

employer of hiring such a person. At this stage, it is not important whether the risk is "external" or "internal," only that a heightened risk exists.

Three elements factor into determining the level of cost associated with these risks.⁶⁵ The first element is the *probability* that the undesirable outcome will occur; the higher the probability, the more costly the risk. The second factor is the *actual cost if the event occurs*. Again, the higher the cost if the event occurs, the more costly will be the risk. Given these two considerations, it might be the case that the risk entailed in hiring an individual with a small probability of causing high damages (say as a bus driver or airline pilot) is greater than that when there is a higher probability of causing slight damage. The third element is *when* the undesirable event is likely to occur. The sooner it may happen, the greater the cost of risk.⁶⁶ If there is a 10% chance every year that an event will occur costing the employer \$1000, the expected cost each period would be \$100.⁶⁷ Since this is a continuing risk, it must be discounted over time to determine the present value of the cost of the risk, just as any continuing cost.⁶⁸

C. Cost of Screening

One goal of statutes forbidding employment discrimination is that handicapped applicants be treated on an individualized basis and not as average members of some class.⁶⁹ This individualized treatment, however, can be costly to an employer. For example, if individuals with a given disease are on average more likely to have high absentee rates, it would be easier and less costly for the employer to screen out and reject all applicants with that disease rather than determine individually if a particular applicant might be the exceptional case where high absenteeism is unlikely.⁷⁰ Another more

65. The notion of "risk aversion," (that is, where the very existence of risk imposes a cost) will not be dealt with here. The implicit assumption is that of "risk neutrality." See, e.g., W. NICHOLSON, *MICROECONOMIC THEORY*, 156-60 (2d ed. 1978); H. KOHLER, *INTERMEDIATE MICROECONOMICS*, 290-93 (1982).

66. More rigorously, the "expected cost" (E_i) of the event occurring at any specific time period (i) in the future is the product of probability of occurrence (P) and the cost if it does occur (C_i): $E_i = (P_i)(C_i)$. To determine the present value of the risk, each expected value must be discounted to the present time and then the expected cost for all time periods must be summed. Note that, for example, with a discount rate of 8%, the present discounted value of \$100 from the present year is \$92.59 ($= 100 (\frac{1}{1.08})$), whereas that of \$100 in ten years is \$46.32 ($= 100 (\frac{1}{1.08})^{10}$). See EHRENBERG AND SMITH, *supra* note 51, at 126-28, (discussing present discounted value). Note also that if the occurrence is totally debilitating, the probabilities used must be conditional probabilities; that is, the probability of occurrence given that it has not occurred in the past; see also *infra* note 114.

67. See *supra* note 66.

68. See *supra* note 66 and text accompanying note 61.

69. See *Accommodating the Spectrum*, *supra* note 2 at 100-01; see also 45 C.F.R. § 84.13(a) (1984) (Health and Human Services regulation prevents employers from using tests to screen out handicapped applicants unless test is job related and alternative tests are unavailable).

70. See *Kling v. County of Los Angeles*, 633 F.2d 876 (9th Cir. 1980). In *Kling*, nursing school officials denied admission to the plaintiff because she was suffering from Crohn's disease. *Id.* at 877. The school chose to deny admission to the plaintiff despite the fact that, according to the head of the school's admissions committee, if the plaintiff had been evaluated individually,

direct case of increased costs for determining a handicapped individual's fitness occurs when the handicap keeps the individual from taking a standard pre-employment test.⁷¹ Requiring the employer to give a special test for this one individual entails extra cost.

IV. APPLICATION TO CASES

It seems clear that Congress understood that Section 504 would impose some additional costs on employers.⁷² The approach proposed above asks the courts to ascertain first the total costs to an employer arising from hiring a handicapped individual, and then determine if this level of cost is appropriate to impose on the employer; all on a case-by-case basis. In this part of the article, the proposed approach is applied to selected federal Section 504 employment cases. The employers' reasons for not wanting to hire the handicapped applicant are first examined. These reasons, as outlined in Part II above, are current inability, risk of external event, risk of internal deterioration, and need for individualized determinations.⁷³ The judicial determination of what burdens are appropriate to place on the employer are then examined. These burdens are the costs of accommodation, risk, and screening.⁷⁴

A. Employer Motivations

1. Current Inability

In most of the cases surveyed, the employer alleged that, without accommodation, the potential employee currently lacked the ability to fully

the school would have allowed her to enroll. *Id.* at 879. The *Kling* court held that § 504 of the Rehabilitation Act of 1973 required the school to consider individually the case of the potential student suffering from Crohn's disease. *Id.* at 878.

71. See *Stutts v. Freeman*, 694 F.2d 666 (11th Cir. 1983) (employer denied employment to job applicant with dyslexia on basis of poor score on written test); see also 45 C.F.R. § 84.13(b). Section 84.13(b) states:

[An employer] shall select and administer tests concerning employment so as best to insure that, when administered to an applicant or employee who has a handicap that impairs sensory, manual, or speaking skills, the test results accurately reflect the applicant's or employee's job skills, aptitude, or whatever other factor the test purports to measure, rather than reflecting the applicant's or employee's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure).

72. See *Nelson v. Thornburgh*, 567 F. Supp. 369, 381 (E.D. Pa. 1983) (noting that Congress realized that § 504 of Rehabilitation Act of 1973 would entail expenditures of money by employers); *Southeastern Community College v. Davis*, 442 U.S. 397, 411 n.10 (noting that elimination of discrimination may involve costs); see also *Accommodating After Southeastern*, *supra* note 3, at 174-76; *Accommodating Under Section 504*, *supra* note 19, at 882, 888-91. *But cf. The Antidiscrimination Model*, *supra* note 9, at 450-51.

73. See *supra* notes 39-53 and accompanying text.

74. See *supra* notes 54-71 and accompanying text.

perform the tasks involved in the job in question.⁷⁵ For example, in *Nelson v. Thornburgh*, the public agency considered the ability to read to be an important element of the job of income maintenance worker, and so considered the blind plaintiffs to be lacking in ability.⁷⁶ The cost of the current inability, therefore, could be considered to be the cost of readers or the cost of lowered productivity. In *Strathie v. Department of Transportation*, the plaintiff was not hired as a school bus driver because of a hearing impairment.⁷⁷ Paraplegia was the cause of the alleged inability to function as a police officer in *Simon v. St. Louis County*.⁷⁸

2. Risk of External Event

The inability to deal with a potential external event also is a common concern of employers. For example, the employer in *Strathie* was concerned that even if a hearing aid were sufficient to bring the plaintiff's ability up to a non-handicapped level, the hearing aid might fail or become dislodged.⁷⁹ In *Simon*, even if the plaintiff could fulfill the functions of a desk job, the employer feared that an emergency might arise in which the handicapped employee could not perform the non-desk jobs requested of him.⁸⁰ The employee in *Bentivegna v. Department of Labor*⁸¹ had diabetes mellitus. Although already having worked satisfactorily as a building repairer, he was fired because of the perceived risk involved. In addition to the possibility of future internal deterioration, the employer feared a heightened risk of infection or other complications which could arise from "relatively minor injuries."⁸²

Though not an employment case, the situation in *Davis* can be viewed as one in which the hearing-impaired applicant was perceived to have a heightened risk of being unable to deal with external events, as well as having a current inability to complete the educational requirements of the nursing program.⁸³ Though the plaintiff in *Davis* might have been able to perform certain nursing functions well, her employer foresaw situations in which she might not function adequately, such as when people wore surgical masks

75. See *infra* Appendix.

76. *Nelson v. Thornburgh*, 567 F. Supp. 369, 377 (E.D. Pa. 1983).

77. 716 F.2d 227, 228 (3d Cir. 1983).

78. 563 F. Supp. 76, 77 (E.D. Mo. 1983), *on remand from*, 656 F.2d 316 (8th Cir. 1981). *Accord* *Crane v. Lewis*, 551 F. Supp. 27, 30 (D.D.C. 1982). In *Crane*, the employer believed that the applicant's hearing, even with hearing aids, was insufficient to qualify him as an information specialist for the Federal Aviation Administration. *Id.* *Accord* *Stutts v. Freeman*, 694 F.2d 666, 666 (11th Cir. 1983). The *Stutts* case could be interpreted as an employer's belief, based on the results of a written test, that the applicant with dyslexia was currently unable to carry out the functions of the job of heavy equipment operator. *Id.*

79. 716 F.2d at 232-33.

80. *Simon v. St. Louis County*, 563 F. Supp. 76, 78-79 (E.D. Mo. 1983).

81. 694 F.2d 619 (9th Cir. 1982).

82. *Id.* at 622.

83. See *Southeastern Community College v. Davis*, 442 U.S. 397, 401-02 (1979); see also *infra* text accompanying note 110.

making lip reading impossible, or when she might be unable to respond instantly to a physician's orders.⁸⁴

3. Risk of Internal Deterioration

A history of epilepsy was the basis for denying the applicant a job as a police officer in *Duran v. City of Tampa*.⁸⁵ Regardless of a current ability to perform, the employer perceived a heightened risk of future epileptic seizures. In *Bey v. Bolger*,⁸⁶ the job applicant with earlier experience as a mail clerk was denied reinstatement because of hypertension. The future risk was acknowledged by the court: "[A] person suffering hypertension is susceptible to stroke, heart attack, or other physical ailments."⁸⁷

The case of *Doe v. Region 13 Mental Health-Mental Retardation Commission*⁸⁸ presented a situation in which all three of the employer motivations discussed so far might pertain. The plaintiff had been a case worker for the defendant and had received excellent job reviews. She had a history of being depressed and suicidal, and after a series of further episodes was fired. At the time of the employee's discharge, there existed a question of current ability to carry out the requirements of her job, that is, to successfully treat any patient.⁸⁹ Alternatively, it might be hypothesized that even if the discharged employee were able to treat her current patients, one might come to her with problems with which she, the caseworker, would be unable to cope. This would be a possible external event, the particular patient, pushing the plaintiff beyond her capabilities. There was also concern expressed that the handicapped employee's condition would worsen over time,⁹⁰ a case of internal deterioration.

*Treadwell v. Alexander*⁹¹ presented another interesting combination of motives. In *Treadwell*, the plaintiff, who underwent quadrupal bypass surgery and had had a pacemaker implanted, applied for a job as a park technician. The employee could have been considered currently unable to perform because evidence was presented that the employee was unable to walk the distance required by the job.⁹² This disability also could be characterized as one with a high risk of internal deterioration. The disability would not be classified as a risk in response to an external event, however, because the

84. *Id.* at 403.

85. 430 F. Supp. 75, 76 (M.D. Fla. 1977). *Accord* Costner v. United States, 720 F.2d 539 (8th Cir. 1983) (truck driver with history of epileptic seizures as youth unsuccessfully brought equal-protection suit challenging job standards which kept him from being reinstated as interstate driver).

86. 540 F. Supp. 910 (E.D. Pa. 1982).

87. *Id.* at 916.

88. 704 F.2d 1402 (5th Cir. 1983).

89. *Id.* at 1409.

90. *Id.* at 1409 and 1412.

91. 707 F.2d 473 (11th Cir. 1983).

92. *Id.* at 476.

external event (the need for extensive walking) apparently would be certain to occur.⁹³

4. Need for Individual Determination

Other cases exist in which, if the actual capabilities of an applicant were known, the employer would hire the individual, but in which that information is too costly to ascertain.⁹⁴ Often these cases arise when an employer sets up a specific job criteria which the applicant fails to meet. For example, the employer in *Bentivegna* set up blood-sugar levels as a job requirement, but refused to make individualized determinations beyond that.⁹⁵ Similarly, in *Duran*, the employer refused to waive a policy of not hiring applicants with a history of epilepsy, even though the plaintiff had not had any seizures in over fifteen years and had not taken or needed any drugs to control his condition for over ten years, and even though two physicians testified that he was no more likely to have future seizures than those without such a history of epilepsy.⁹⁶ In *Doe v. Syracuse School Dist.*, the defendant turned down the plaintiff's application to become a teacher's assistant and substitute teacher after he had indicated in response to a pre-employment inquiry that he had a nervous breakdown when in the military and had been diagnosed as suffering from schizophrenic reaction.⁹⁷ In all three cases, the employers preferred to make employment decisions based on the *average* member of the class of persons with diabetes or a history of epilepsy or of a nervous breakdown and schizophrenia rather than taking the additional step of making individual determinations.

93. *Id.* *Accord* *Cook v. United States Dept. of Labor*, 688 F.2d 669 (9th Cir. 1982), *cert. denied*, 464 U.S. 832 (1983). The plaintiff in *Cook* was told by a physician that he "might have" angina pectoris, a condition the plaintiff conceded would make him "unable to perform adequately as a jailer." 688 F.2d at 670. As in *Treadwell v. Alexander*, 707 F.2d 473, this disability could be considered as a current inability to perform or as a high risk case of internal deterioration. It is interesting to note that the plaintiff in *Cook* did not in fact have angina pectoris, but the court nevertheless held for the defendant, noting that "faced with this substantial and uncontroverted [at the time of application] evidence, the [defendant] had no duty to investigate further." 688 F.2d at 671. *Cook*, therefore, also may be read as a case in which the court did not require the employer to undertake a further individual determination of ability.

94. See *supra* notes 69-71 and accompanying text.

95. See *Bentivegna v. Department of Labor*, 694 F.2d 619, 623 (9th Cir. 1982).

96. See *Duran v. City of Tampa*, 430 F. Supp. 75, 76 (M.D. Fla. 1977). *Accord* *Smith v. Administrator of Veterans Affairs*, 32 FEP cases 986, 988 (C.D. Cal. 1983) (applicant for nursing assistant job was unlawfully turned down because of existence of epileptic seizures consisting of "few seconds of staring"); *Costner v. United States*, 720 F.2d 539, 542-43 (8th Cir. 1983) (employer refused to hire truck driver with epilepsy despite fact that driver had had no seizure in over 20 years).

97. 508 F. Supp. 333 (N.D.N.Y. 1981). The employer's cost concerns were not extensively discussed in the case, but questions were raised as to "present ability to perform the tasks to which he might be assigned," and ability to "deall] with various emotionally demanding situations." *Id.* at 337. All four types of cost motivations, therefore, may come into play.

A related situation arises when the handicap makes the taking of a standard pre-employment test impossible, which keeps any resulting information as to predicted on-the-job performance from the employer. An inability to take a pre-employment test spawned the litigation in *Stutts v. Freeman* when a worker with dyslexia scored poorly on a written test which the employer conceded did "not accurately reflect" his abilities.⁹⁸ The employer, however, was unwilling to undertake the additional costs necessary to determine more accurately the applicant's abilities.

B. Cost-Based Standard

1. Cost of Accommodation

The first of the three burdens which a court must consider in applying the proposed cost-based standard is the cost of accommodation. The case law here is developing under the rubric of what constitutes "reasonable accommodation,"⁹⁹ and tends to deal with the question in two ways: whether the immediate financial outlay is too burdensome, and whether the accommodation brings the job applicant up to non-handicapped capabilities. When the latter is at issue, the court's discussion also often is couched in terms of "otherwise qualified."

The court in *Nelson v. Thornburgh* suggested that reasonable accommodation for blind income maintenance workers could be the provision of part-time readers at the annual cost of about \$6,638 per blind employee.¹⁰⁰ The court in part relied on Health and Human Services regulations which suggest that in determining whether an accommodation is reasonable, a court may consider the overall size of the employer.¹⁰¹ In *Nelson*, the employer had an administrative budget of \$300 million.¹⁰² The court in *Treadwell*,

98. See *Stutts v. Freeman* 694 F.2d 668 (11th Cir. 1983). There was also some doubt whether the worker would be able to "successfully complete the training program, either with the help of a reader or by other means." *Id.* at 669; see also *Upshur v. Love*, 474 F. Supp. 332, 334 n.2 (N.D. Cal. 1979) (recognition by defendant that a written exam administered to blind applicant with use of reader "would not necessarily provide an accurate reflection" of ability).

99. See *supra* notes 9-38 and accompanying text; see also *Accommodating the Spectrum*, *supra* note 2, at 102-140.

100. See *Nelson v. Thornburgh* 567 F. Supp. 369, 376 (E.D. Pa. 1983).

101. See *id.* at 379, citing 45 C.F.R. § 84.12(c) (1984):

In determining . . . whether an accommodation would impose an undue hardship on the operation of [an employer's] program, factors to be considered include:

- (1) The overall size of the [employer's] program with respect to number of employees, number and type of facilities, and size of budget;
- (2) The type of the [employer's] operation, including the composition and structure of the [employer's] workforce; and
- (3) The nature and cost of the accommodation needed. 45 C.F.R. § 84.12(c)(1984).

102. See *Nelson v. Thornburgh*, 567 F. Supp. 369, 380 (E.D. Pa. 1983).

however, held that doubling up personnel to accommodate a plaintiff handicapped by a heart condition was unreasonable.¹⁰³

In *Strathie*,¹⁰⁴ a particular type of hearing aid (already used by the job applicant, there being no direct dollar cost to the employer here) was sufficient to overcome the handicap, at least to the extent that remaining risk was at an acceptable level.¹⁰⁵ In *Simon*, the accommodation suggested for the applicant with paraplegia was to allow him to perform desk jobs only. The court, however, held that transferability of police officers "promotes morale and efficiency, curbs stagnation and 'burnout,' and produces well-rounded officers,"¹⁰⁶ and so would be unreasonable to waive.¹⁰⁷ The accommodation also would leave excessive risk.¹⁰⁸ The court in *Doe v. Region 13 Mental Health—Mental Retardation Commission* could be interpreted as saying that no accommodation existed (and so any accommodation would be unreasonable) which could permit the plaintiff to perform adequately as a caseworker.¹⁰⁹ In the nonemployment case of *Davis*, the Supreme Court was clear in not requiring the "fundamental alteration" which would be needed as accommodation for the prospective nursing student, such as providing individual instruction or requiring her to take only academic and not clinical classes.¹¹⁰

2. Cost of Risk

When dealing with risk, usually done when considering the notion of "otherwise qualified" or the effectiveness of accommodation, the courts basically ask whether or not the risk is too great. Whether the source of the risk is external or internal has, and should have, little bearing on results. It is the three elements of risk which determine its cost (probability, cost if it occurs, and timing),¹¹¹ and not the causes of the risk.

103. See *Treadwell v. Alexander*, 707 F.2d 473, 478 (11th Cir. 1983). The accommodation also would leave potential risk.

104. 716 F.2d 227 (3d Cir. 1983).

105. See *infra* text accompanying note 115 (employer must only eliminate appreciable risks when accommodating handicapped). See also *Crane v. Lewis*, 551 F. Supp. 27 (D.D.C. 1982). In *Crane*, the court held that the employer had "not met its burden of proposing reasonable methods of facilitating the plaintiff's handicap," and so remanded the case to the administrative agency. 551 F. Supp. at 31. The plaintiff in *Crane*, who was suffering from hearing impairment, was applying for the position of information specialist for the Federal Aviation Administration. *Id.* at 28.

106. See *Simon v. St. Louis County*, 563 F. Supp. 76, 80 (E.D. Mo. 1983).

107. *Id.* at 81. The court in *Bey v. Bolger* also refused to redefine the job description of a handicapped employee who was seeking light duty status. 540 F. Supp. at 927.

108. See *supra* text accompanying note 80 (proposed accommodation would not remove risk of inability to perform in emergency situations).

109. See *Doe v. Region 13 Mental Health-Mental Retardation Commission*, 704 F.2d 1402 (5th Cir. 1983).

110. See *Southeastern Community College v. Davis*, 442 U.S. 397, 409-10 (1979).

111. See *supra* notes 66-67 and accompanying text; *infra* note 114.

Courts have not required that risks be reduced to zero. The court in *Bentivegna* noted that "almost all handicapped persons are at greater risk,"¹¹² and that "allowing remote concerns to legitimate discrimination . . . would vitiate the effectiveness of section 504. . . ."¹¹³ The *Bentivegna* court, therefore, invalidated the application of a blood-sugar standard to the plaintiff, though in a footnote stated that, "We do not hold that a non-imminent risk of injury cannot justify rejecting a handicapped individual."¹¹⁴ The Third Circuit in *Strathie*, in vacating a summary judgment that permitted the employer to refuse to hire a hearing-impaired bus driver, rejected the proposed standards of "highest level of safety" and "eliminate[ing] as many potential safety risks" as possible, and settled for "prevent[ion] of any and all appreciable risks."¹¹⁵

While recognizing that risks need not be zero, courts have permitted employers to refuse to hire handicapped applicants when risks of employment were too high. The risk has included injury to the worker himself or herself such as the risk involving the postal worker with hypertension in *Bey*,¹¹⁶ or of injury to others, such as the risk involving the depressive caseworker in *Doe v. Region 13 Mental Health—Mental Retardation Commission*,¹¹⁷ or the hearing-impaired nursing school applicant in the *Davis* case.¹¹⁸

3. Cost of Screening

Some employment requirements relate directly to what physical tasks must be encountered on the job.¹¹⁹ Other requirements, however, set certain

112. See *Bentivegna v. Department of Labor* 694 F.2d 619, 622 (9th Cir. 1982).

113. *Id.* at 623.

114. See *id.* at 622, n.3; see also *E.E. Black, Ltd. v. Marshall*, 497 F. Supp. 1088 (D. Hawaii 1980). In a case brought under § 503, the *E.E. Black* court said:

[An earlier administrative decision] can be read as holding that risk of future injury . . . can never be the basis for rejecting a qualified handicapped individual, irrespective of the likelihood of injury, the seriousness of the possible injury or the imminence of the injury. Such a holding is clearly contrary to law. If, for example, it was determined that if a particular person were given a particular job, he would have a 90% chance of suffering a heart attack within one month, that clearly would be a valid reason for denying that individual the job. . . .

497 F. Supp. 1088 (D. Hawaii 1980). Note that all three elements of the cost of risk are identified here: probability of occurrence, cost if it occurs, and the timing of the occurrence.

115. See *Strathie v. Department of Transportation* 716 F.2d 227, 232 (3d Cir. 1983) (emphasis in original). Cf. *Duran v. City of Tampa*, 430 F. Supp. 75 (M.D. Fla. 1977) (finding substantial likelihood of success for plaintiff with history of epilepsy); *Costner v. United States*, 720 F.2d 539 (8th Cir. 1983) (standard screening out those with epilepsy meeting equal protection test of rationality).

116. See *Bey v. Bolger*, 540 F. Supp. 910, 916 (E.D. Pa. 1982).

117. See *Doe v. Region 13 Mental Health-Mental Retardation Commission*, 704 F.2d 1402, 1412 (5th Cir. 1983) (possible injury to patients).

118. See *Southeastern Community College v. Davis*, 442 U.S. 397, 409 (1979) (possible injury to patients). A perceived risk of injury to others can also be at issue when hiring employees with AIDS. See *supra* note 50.

119. See *Prewitt v. United States Postal Service*, 662 F.2d 292 (5th Cir. 1981) (employer

standards which focus more on general physical well-being. Questions of importance here include whether the standard is an accurate measure of and is relevant to job requirements; if relevant, what percentage of individuals not meeting the standard might actually be qualified for the job; and if some do qualify, how difficult, or costly, is it to identify who they are.¹²⁰ The no-history-of-epilepsy standard passed the equal-protection rational-basis test in *Costner v. United States*,¹²¹ but under due process and Section 504, the *Duran* court¹²² could be read as requiring a more individualized analysis. The court in *Bentivegna* was not convinced that the blood-sugar test met Section 504 standards,¹²³ although the blood pressure standard in *Bey* passed muster under Section 501 and Section 504.¹²⁴ The court in *Syracuse School District*, following agency regulations, held that a pre-employment inquiry as to experience with or treatment for "migraine, neuralgia, nervous breakdown, or psychiatric treatment"¹²⁵ violated Section 504 since it inquired as to the existence of a handicap and not as to the level of ability.¹²⁶ Decisions for the plaintiffs in such cases impose extra costs on the employers by forcing individualized determinations or acceptance of the risk that the individual is not qualified. Such a choice also was imposed on the employer in *Stutts* when the court required that the employer do more than simply give the applicant with dyslexia a written test.¹²⁷

used standard of reaching ability); *Treadwell v. Alexander*, 707 F.2d 473 (11th Cir. 1983) (employer used standard of walking ability).

120. See *Accommodating the Spectrum*, *supra* note 2, at 99; Burgdorf and Bell, *Eliminating Discrimination Against Physically and Mentally Handicapped Persons: A Statutory Blueprint*, 8 MENT. & PHYS. DISABILITY L. REP. 64, 68 (1984). The efficacy of testing for the existence of AIDS is one of the "key areas of legal concern" when hiring workers suspected of having AIDS. See Tarr, *supra* note 50, at 1. See also 45 C.F.R. § 84.13(a) (1984); *supra* note 69; *Western Air Lines v. Criswell*, ___U.S.____, 105 S. Ct. 2743, 2753 (1985). In *Western Air Lines*, the Court adopted the two-part discrimination test of *Usery v. Tamiami Trail Tours*, 531 F.2d 224 (5th Cir. 1976), in a case brought under the Age Discrimination in Employment Act. ___U.S.____, 105 S. Ct. at 2753. The Supreme Court noted that age cannot be used as a "proxy" for job qualifications "[u]nless an employer can establish a substantial basis for believing that all or nearly all employees above an age lack the qualifications required for the position. . . [or] it is highly impractical for the employer to insure by individual testing that its employees will have the necessary qualifications. . . ." 105 S. Ct. at 2756 (emphasis added). Also part of the test is a requirement that the job qualifications are "reasonably necessary" for the operation of the business. *Id.* at 2751 and 2753-54.

121. 720 F.2d 539, 542-43 (8th Cir. 1983). According to the Eighth Circuit in *Costner*: "[T]he individual qualifications of the plaintiff are immaterial to the analysis." *Id.*

122. See *Duran v. City of Tampa*, 430 F. Supp. 75 (M.D. Fla. 1977).

123. See *Bentivegna v. Department of Labor*, 694 F.2d 619 (9th Cir. 1982).

124. See *Bey v. Bolger*, 540 F. Supp. 910 (E.D. Pa. 1982).

125. See *Doe v. Syracuse School District*, 508 F. Supp. 333, 335 (N.D. N.Y. 1981).

126. See *id.* at 337; see also 45 C.F.R. § 84.14(a) (1984) (prohibiting employer from inquiring as to existence or severity of handicap as opposed to individual ability of applicant).

127. See *Stutts v. Freeman* 694 F.2d 666 (11th Cir. 1983); see also *supra* note 71 (discussing Health and Human Services regulations).

V. IMPLICATIONS

The approach proposed examines the costs that employers would and should bear when employing individuals with handicaps. These costs are not composed solely of immediate, out-of-pocket, dollar expenses, but also include costs involved with further screening and future risks. The latter two costs, and particularly that of risk, are not necessarily easy to quantify. Even if these costs were easily quantifiable, however, a specific dollar cut-off for legality still would be inappropriate, since employers vary so greatly in their ability to bear costs.¹²⁸

Nevertheless, even lacking precision, a cost approach can allow for more consistent handling of cases. A cost approach takes the difficulty out of trying to keep "otherwise qualified" purely distinct from "reasonable accommodation."¹²⁹ It also facilitates precedential comparisons of cases, something necessary for a consistent, predictable standard. In attempting to decide whether or not to impose the costs of a given accommodation, such as a ramp, hearing aid, or reader, on an employer, courts could look to precedent involving risk or screening instead of being limited to those cases proposing only accommodations. Given a wider pool of cases, there can be a more systematic handling of factors such as the size of the employer, thereby leading to a more consistent application of Section 504.

Additionally, this expanded ability to make comparisons should make it easier to decide the risk-type cases. That is, rather than attempting to assign an exact dollar amount to the cost of risk, a court could look to cases with similarly sized employers, for example, where non-risk accommodations were considered. A court then could inquire into the fairness of imposing the risk in question on the employer, given that specific dollar burdens were placed on certain other employers, but other dollar burdens were not. If, for example, it is appropriate to impose a \$6,638 burden of accommodation on the employer in *Nelson*,¹³⁰ perhaps the court in *Bey*¹³¹ was inconsistent in comparison when it decided that the risk of hiring an individual with hypertension was too costly. Or given that the court in *Treadwell* was

128. See *supra* notes 54 and 101 and accompanying text. Other questions not solved by the ability to assign a specific dollar value to risk are the valuation of risk aversion and whether it is appropriate in a larger sense to impose these costs on the employer rather than directly on the government or elsewhere. See *supra* note 65 (discussing term "risk aversion").

129. A commentator has used the same approach to interpret *E.E. Black, Ltd. v. Marshall*, 497 F. Supp. 1088 (D. Hawaii 1980) and its application of § 503 as imposing upon the employer the burden of justifying the refusal to hire a carpenter's apprentice with a back condition "regardless of whether the issue is framed as whether the employee is 'otherwise qualified,' or whether the employer has made out a 'business necessity' defense." Rothstein, *Employee Selection Based on Susceptibility to Occupational Illness*, 81 MICH. L. REV. 1379, 1444 (1983).

130. See *Nelson v. Thornburgh*, 567 F. Supp. 369, 376 (E.D. Pa. 1983); see also *supra* text accompanying notes 100-02 (court in *Nelson* determined that employer should provide readers to accommodate employees with sight impairment).

131. 540 F. Supp. 910 (E.D. Pa. 1982).

unwilling to hire an extra employee as an accommodation,¹³² perhaps the *Strathie* court¹³³ could have used that as a benchmark and decided that the extra risk in driving a bus was more costly and so unreasonable.¹³⁴

A further benefit from adopting the cost-based approach would be an improved understanding of the difference between reasonable accommodation and affirmative action.¹³⁵ Perhaps what makes reasonable accommodation look like affirmative action is that the employer must expend dollars in the typical accommodation case. An expenditure of dollars is universally recognized as "a cost," and an imposition of "a cost" then may look like an affirmative action requirement. If, however, examples of imposing costs on employers can be found which are intuitively and clearly *not* affirmative action, then it is possible to start drawing a line between reasonable accommodation and affirmative action. For example, it can be argued, as did the court in *Bentivegna*, that it is imperative that employers take at least some risk when hiring handicapped individuals if Section 504 is to have any effect at all.¹³⁶ It also could be argued that even if no extra risk would be imposed on employers, employers at the very least should have to look beyond the mere classification (or stereotyping) of individuals, such as "hearing impaired," and determine if, in the words of the *Davis* decision, the individual is "one who is able to meet all of a program's requirements in spite of his [or her] handicap;"¹³⁷ a determination which is not cost-free. Once these sorts of situations are recognized as not being affirmative action, then a

132. 707 F.2d 473 (11th Cir. 1983).

133. 716 F.2d 227 (3d Cir. 1983).

134. For an extreme example where future risks are minimized by a court, see *Chrysler Outboard Corp. v. Dept. of Industry, Labor and Human Relations*, 14 FEP Cases 344 (Wisc. Cir. Ct. 1976). In ruling in favor of a worker with acute lymphocytic leukemia, the court stated that the "contention that the [worker] may at some future date be unable to perform the duties of the job is immaterial." *Id.* at 345 (emphasis added).

135. This is particularly important since § 504 contains no explicit affirmative action language as do § 501 and § 503. See, e.g., *Southeastern Community College v. Davis*, 442 U.S. 397, 410-13 (1979). The *Davis* Court first held that § 504 does not "impose an affirmative action obligation on all recipients of federal funds." *Id.* at 411-12. The Court then 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." *Id.* at 412. The Court in *Alexander v. Choate* later clarified the difference between reasonable accommodation and affirmative action by referring back to *Davis*:

Regardless of the aptness of our choice of words in *Davis*, it is clear from the context of *Davis* that the term affirmative action referred to those "changes," "adjustments," or "modifications" to existing programs that would be "substantial," 442 U.S. at 410, 411, n.10, 413, or that would constitute "fundamental alteration[s] in the nature of a program. . . ." *Id.* at 410, rather than to those changes that would be reasonable accommodations.

105 S. Ct. at 721, n.20. For further discussions on the distinction between affirmative action and accommodation (and by extension, therefore, the costs of risk and screening), see *Accommodating the Spectrum*, *supra* note 2, at 154-56; *Accommodating Under Section 504*, *supra* note 19, at 885-87; and *Accommodating After Southeastern*, *supra* note 3, at 185-86.

136. See *supra* notes 112-114 and accompanying text.

137. See *Southeastern Community College v. Davis*, 442 U.S. 397, 406 (1979).

court can engage in the type of comparisons just described above. That is, if a court can force an employer to take an extra risk or engage in further fact-finding, then a court can ask if it is any costlier to require the making of an accommodation. This type of analysis would provide a starting point for distinguishing between reasonable accommodation and affirmative action; and recognizes that expenditures by employers were anticipated by the drafters of Section 504, even though Congress did not employ affirmative action language in Section 504.¹³⁸

SUMMARY

Section 504 of the Rehabilitation Act of 1973¹³⁹ has broadened the protection from discrimination provided to individuals with handicaps. The results of cases often turn on determinations of whether or not a handicapped individual is otherwise qualified or accommodations provided to them are reasonable, standards which are interrelated though not always recognized as such. Employers may have many cost-based reasons for preferring not to hire handicapped individuals. These reasons include a perception of current inability to fully perform the tasks of a job, an increased risk that the handicapped individual may be unable to deal with unforeseen or unpredictable external events, a heightened risk that the individual's condition itself will cause future costs due to recurrence or deterioration, and increased costs needed to make individual determinations of ability. The approach proposed by this article would require a court first to determine what costs the employer would incur if it hired the handicapped individual. The potential economic burdens to employers include the costs of accommodation, risk, and screening. A court addressing an alleged cause of action under Section 504 could then look to a broadened pool of precedent to determine whether the level of these combined costs was too burdensome to impose on the employer. The application of this standard would avoid the ambiguities presented when attempting to make separate determinations of reasonable accommodation and otherwise qualified, and also would facilitate the development of a more consistent and predictable Section 504 case law.

138. *See supra* note 135.

139. 29 U.S.C. § 794 (1982).

APPENDIX

CASE ^a	HANDICAP	JOB	EMPLOYER MOTIVATION			JUDICIAL ANALYSIS		
			Current Inability	Risk of External Event	Risk of Internal Deterioration	Individual Determination	Employer Cost: S ^b or L ^c	Accommodation
Court Held for Applicant ^d								
RENTIVEGNA (25)	diabetes mellitus	building repairer		X	X	X	S	S
CRANE (78)	hearing impairment	information specialist	X				S	
DOE V. SYRACUSE (97)	history of mental disorders	teacher	X	X	X	X		S
DURAN ^e (26)	history of epilepsy	police officer			X	X		S
NELSON (41)	sightlessness	income maintenance worker	X				S	
STRATHIE (35)	hearing impairment	school bus driver	X	X			S	S
STUTTS (71)	dyslexia	heavy equipment operator	X			X		S

Court Held for Employer^d

REY ^f (27)	hyperten- sion	postal clerk		X	X	L	L	L
COSTNER ^g (50)	history of epilepsy	truck driver		X	X	L	L	L
DOE V. REGION 13 (39)	depression	caseworker	X	X		L	L	L
SIMON (28)	paraplegia	police officer	X	X		L	L	L
TREADWELL ^f (36)	heart condition	park technician	X	X		L	L	L

^a All §504 cases unless otherwise noted. Number in parentheses refers to footnote in text where case first cited.

^b Cost small, or employer failed to show otherwise.

^c Cost large, or applicant failed to show otherwise.

^d Court held for the party on the issue before it, whether on merits, preliminary motion, or reversing a prior adverse decision.

^e Also decided under due process.

^f Also decided under §501.

^g Decided under equal protection only.

CATEGORIZATION OF SELECTED FEDERAL EMPLOYMENT DISCRIMINATION CASES
ACCORDING TO COST-BASED APPROACH
TABLE 1

