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Employment of the Handicapped - The Rehabilitation Act of 1973, 29 § U.S.C. 793 - Section 503

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EMPLOYMENT OF THE HANDICAPPED—THE REHABILITATION ACT OF 1973, 29 U.S.C. § 793—SECTION 503—A federal district court in Texas has denied a plaintiff a private cause of action under section 503 of the Rehabilitation Act on the grounds that implying a private cause of action is contrary to both legislative intent and the purpose of section 503, and that it interferes with state regulations.

Rogers v. Frito-Lay, Inc., 433 F. Supp. 200 (N.D. Tex. 1977).

Mildred Lee Rogers, asserting that she was a qualified, handicapped individual, brought an action against her former employer, Frito-Lay, Inc., in the United States District Court for the Northern District of Texas, under sections 503 and 504 of the Rehabilitation Act of 1973,[1] challenging the termination of her employment.[2] Section 503 provides that any contract in excess of $2,500 to provide personal property or nonpersonal services to any federal department or agency must contain a clause requiring the contracting party to take affirmative action to employ and promote qualified, handicapped individuals.[3] Section 504 provides that no person, because of his handicap, will be denied either participation in, or the benefits of, any program or activity receiving federal financial assistance.[4]

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1. 29 U.S.C. §§ 793, 794 (Supp. IV 1974) [hereinafter referred to as sections 503, 504 respectively].

2. Rogers v. Frito-Lay, Inc., 433 F. Supp. 200 (N.D. Tex. 1977). Plaintiff also alleged pendent jurisdiction over a claim under the Texas Workmen's Compensation Act; however, since the court held plaintiff did not have a substantive federal claim, there could be no pendent jurisdiction over a state claim. *Id.* at 204.

3. The statute reads in pertinent part:

> Any contract in excess of $2,500 entered into by any Federal department or agency for the procurement of personal property and nonpersonal services (including construction) for the United States shall contain a provision requiring 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 as defined in section 706(6) of this title. The provisions of this section shall apply to any subcontract in excess of $2,500 entered into by a prime contractor in carrying out any contract for the procurement of personal property and nonpersonal services (including construction) for the United States.

29 U.S.C. § 793(a) (Supp. IV 1974).

4. The statute says: "No otherwise qualified handicapped individual in the United States, as defined in section 706(6) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794 (Supp. IV 1974).

Defendant moved to dismiss for lack of subject matter jurisdiction.[5] The court, however, treated defendant's motion as a motion for a summary judgment and dismissed the action with prejudice on the grounds (1) that there is no implied private cause of action under section 503, and (2) that section 504 was inapplicable since plaintiff's discovery revealed that defendant had not received any federal financial assistance since the effective date of section 504.[6]

To determine the appropriateness of an implied, private cause of action under section 503, the court applied the four factors which the Supreme Court, in *Cort v. Ash*,[7] considered relevant to the issue of implying a cause of action: (1) whether plaintiff is a member of the class for whose benefit the statute was enacted; (2) whether there is any express or implied indication of legislative intent to allow a private cause of action; (3) whether it is consistent with the purpose of the statute to imply a private cause of action; and (4) whether the matter is one traditionally relegated to state law.[8]

The court held that, even assuming plaintiff was a qualified, handicapped individual and thereby satisfied the first factor in *Cort* (being one of the class for whose benefit section 503 was enacted), to imply a private cause of action under section 503 would contradict the second, third, and fourth *Cort* factors. The provision in section 503(b) for a private administrative remedy,[9] when related to

5. If, as defendant asserted, plaintiff did not have a private cause of action under either § 793 or § 794, the court lacked subject matter jurisdiction because neither 28 U.S.C. § 1331(a) (1970)—granting jurisdiction for a federal question—nor 28 U.S.C. § 1343(4) (1970)—granting jurisdiction for infringement of a civil right—were applicable. Although 28 U.S.C. § 1337 (1970) grants jurisdiction for any civil action arising under an act of Congress, it does not create a cause of action. 433 F. Supp. at 204.

6. 433 F. Supp. at 204. Under § 794, federal financial assistance is limited to federal grants to support activities considered to be in the public interest or for the public welfare. *Id.*

7. 422 U.S. 66 (1975). The plaintiff, a corporate stockholder, sought an injunction and asserted a derivative claim for damages, maintaining that the court should imply a private cause of action in favor of stockholders against their respective corporations under 18 U.S.C. § 610 (1970), a federal criminal statute prohibiting corporate expenditures in campaigns for federal office. Thus, the federal statute in *Cort* was not concerned with any right of the plaintiff stockholder against defendant corporation but with prohibiting large corporations from using their wealth to exercise influence over candidates. This situation is distinguishable from *Rogers*, where the statute is concerned with the right of the handicapped employee in relation to the employer. *See* note 3 *supra*.

8. *See* 433 F. Supp. at 202-03.

9. Section 503(b) provides the following remedy:

> If any handicapped individual believes any contractor has failed or refuses to comply with the provisions of his contract with the United States, relating to employment of handicapped individuals, such individual may file a complaint with the Department

the second *Cort* factor, indicated to the court a legislative intent not to allow a private cause of action. As support for this interpretation of legislative intent, the court cited the various defeated attempts, from 1972 to 1977, to amend title VII of the Civil Rights Act of 1964 to give handicapped employees a cause of action.[10] Also, in view of the administrative remedy, to allow a private judicial remedy would delay and obstruct the enforcement process in this new area of law.[11] Next, the court determined that the purpose of section 503 is not to prohibit employers' discrimination against the handicapped, but to create improved employment opportunities for the handicapped by including the affirmative action clause in federal contracts; to imply a private cause of action, the court thought, would be inconsistent with the purpose of section 503.[12] The court's rationale in determining the purpose of section 503 was that the handicapped do not constitute an identifiable, homogenous group, so it is impossible to compare the treatment received by the handicapped in employment with that received by the nonhandicapped. Thus the legal term "discrimination" does not appear in the statute because it is inapplicable to the handicapped. Whatever different treatment the handicapped receive from employers stems from sympathetic, rather than discriminatory, motives. Finally, since the fourth *Cort* test cautions interference with state regulation, and a Texas statute prohibits employers' discrimination against handicapped individu-

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of Labor. The Department shall promptly investigate such complaint and shall take such action thereon as the facts and circumstances warrant, consistent with the terms of such contract and the laws and regulations applicable thereto.

29 U.S.C. § 793(b) (Supp. IV 1974).

10. 433 F. Supp. at 202.

11. *Id.*

12. *Id.* at 203.

13. The Texas statute specifies:

An employer who conducts business in this state may not discriminate in his employment practices against a handicapped person on the basis of the handicap if the person's ability to perform the task required by a job is not impaired by the handicap and the person is otherwise qualified for the job.

TEX. REV. CIV. STAT. ANN. art. 4419e (Vernon 1975).

The scope of the Pennsylvania statute includes not only employment but also housing and public accommodation opportunities. Although this statute, the Pennsylvania Human Relations Act, is concerned with various types of discrimination, the 1974 amendment includes the employment of the handicapped among the goals to be fostered:

(b) It is hereby declared to be the public policy of this Commonwealth to foster the employment of all individuals in accordance with their fullest capacities regardless of their race, color, religious creed, ancestry, handicap or disability, use of guide dogs because of blindness of the user, age, sex, or national origin, and to safeguard their

als,[13] the court considered that such discrimination was a matter to be left to state regulation.[14]

The *Rogers* court, construing these *Cort* factors to be absolute rules,[15] structured its opinion upon these criteria in a somewhat mechanical way and often overlooked their substance.

In applying the second *Cort* factor, the *Rogers* court viewed the legislative failure to amend the Civil Rights Act to include a cause of action for the handicapped as an expression of legislative intent not to provide a private cause of action under section 503 of the Rehabilitation Act, thus limiting aggrieved parties to administrative remedies.[16] The court apparently based its decision on the statutory interpretation principle of *expressio unius est exclusio alterius*—the expression of one thing is the exclusion of another. Although not explicitly referring to *expressio unius,* the court quoted from the enunciation of this principle in *National Railroad Passenger Corp. v. National Association of Railroad Passengers* (the *Amtrak Case),*[17] and thereby summarily dismissed any consideration of legislative intent to provide a private cause of action under section 503. The *Rogers* court, however, may have been too quick to employ this ready-made principle without considering the context in which it was originally applied.

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right to obtain and hold employment without such discrimination, to assure equal opportunities to all individuals and to safeguard their rights at places of public accommodation and to secure commercial housing regardless of race, color, religious creed, ancestry, sex, handicap or disability, use of guide dogs because of blindness of the user or national origin.

PA. STAT. ANN. tit. 43, § 952(b) (Purdon Supp. 1977-1978).

14. 433 F. Supp. at 203. Thus, the court stated that a federal private cause of action would duplicate state remedies. *Id.*

15. *Id.* at 202 (court refers to "the standards laid down" in *Cort).* In Cort v. Ash, 422 U.S. 66, 78 (1975), the Court proposed that these four factors were "relevant"—not totally determinative rules or standards as the *Rogers* court appears to regard them.

16. The court listed the bills proposed to amend the Civil Rights Act of 1964 to include handicapped employees, but which failed. 433 F. Supp. at 202. In light of these defeated proposals to amend the Civil Rights Act of 1964, and assuming, as did the *Rogers* court, that rights of the handicapped constitute an area of law in which traditional concepts of discrimination are not applicable, the Rehabilitation Act may represent a congressional response to create an alternative to the Civil Rights Act in this special area of law. If the Rehabilitation Act is viewed in this context, a private cause of action under this act should be implied since the act was created to accommodate the problems that the *Rogers* court considered to be unique to this area of rights, such as qualification for a particular job. According to this rationale, since Congress was reluctant to apply title VII to handicapped individuals, it created the Rehabilitation Act to grant analogous rights in accordance with the special problems of the handicapped.

17. 414 U.S. 453, 458 (1974).

In the *Amtrak Case,* associations of railroad passengers sought an injunction to prevent the discontinuance of certain passenger trains on the grounds that the Rail Passenger Service Act of 1970 prohibited this.[18] The major issue was whether the court could imply a private cause of action under section 307(a). This section conferred jurisdiction on federal courts to grant equitable relief in suits brought by the Attorney General for violation of the Act, but, in contrast, granted jurisdiction to hear complaints of individuals only in labor disputes.[19] The Supreme Court held that a private cause of action, allowing a suit against the railroads by any aggrieved party, was not to be implied under section 307(a).[20] This decision was based upon an interpretation of the language of the statute and a consideration of its legislative history. In construing the language of section 307(a), the Court noted the specificity used in designating to whom a cause of action was to be granted: a private cause of action was explicitly allowed by this section in the case of labor disputes, while a public cause of action was granted for other claims.[21] The Court considered that such a specific grant of a private cause of action only in the case of labor disputes was indicative of legislative intent to preclude a private cause of action for nonlabor claims. The Court's interpretation was supported by the legislative history of section 307(a), which revealed that the Secretary of Transportation, who was to be the primary administrative officer responsible for the implementation of the Act, opposed the congres-

18. The Rail Passenger Service Act of 1970, 45 U.S.C. §§ 501-645 (1970), is popularly known as the Amtrak Act.

19. As revealed by a reading of § 307(a), the only section of the Amtrak Act that authorizes any suits, this section purports only to confer jurisdiction rather than to create a cause of action:

> If the Corporation or any railroad engages in or adheres to any action, practice, or policy inconsistent with the policies and purposes of this chapter, obstructs or interferes with any activities authorized by this chapter, refuses, fails, or neglects to discharge its duties and responsibilities under this chapter, or threatens any such violation, obstruction, interference, refusal, failure, or neglect, the district court of the United States for any district in which the Corporation or other person resides or may be found shall have jurisdiction, except as otherwise prohibited by law, upon petition of the Attorney General of the United States or, in a case involving a labor agreement, upon petition of any employee affected thereby, including duly authorized employee representatives, to grant such equitable relief as may be necessary or appropriate to prevent or terminate any violation, conduct, or threat.

45 U.S.C. § 547(a) (1970).

20. 414 U.S. at 463.

21. *Id.* at 459.

sional proposal to permit any aggrieved person to seek enforcement of section 307(a).[22] Thus, in this very limited context, the Court applied the principle of *expressio unius* quoted by the *Rogers* court as an absolute principle of law.

The fact that *expressio unius* was to have limited application in cases involving the implication of a private cause of action was indicated by Justice Brennan[23] who wrote the opinion in *Cort v. Ash,* which appeared the following year. Brennan, who concurred in the result and reasoning of the *Amtrak Case,* pointed to the factors of specificity of language and legislative history as distinguishing the application of *expressio unius* in the *Amtrak Case* from the circumstances in *Cort v. Ash.* Rather than presume that an existing remedy indicated that no further remedies should be implied (as the *Rogers* court did), Brennan's position was that, when a statute has granted certain rights to certain persons, it is not necessary to prove the intent to create a private cause of action, although an explicit denial of a private cause of action would be controlling.[24] If Brennan's rationale were applied to the *Rogers* case, the holding in *Rogers* would be reversed. The existence of the administrative remedy specified in section 503(b) would not be sufficient to indicate a legislative intent not to allow a private cause of action. Since there is no explicit denial of a private cause of action under § 503, the plaintiff in *Rogers* should not have had to prove an intent to create one. Accordingly, the *Rogers* court should have implied a private cause of action under section 503.

In *Drennon v. Philadelphia General Hospital,*[25] the Federal District Court for the Eastern District of Pennsylvania reached a conclusion contrary to that of the *Rogers* court. Although the legislative history of section 503 does not refer to a private cause of action, the *Drennon* court cited the Report of the Committee on Labor and Public Welfare, which approved a private cause of action under a related provision of the Rehabilitation Act, section 504.[26] The *Drennon* court applied Brennan's reasoning in *Cort v. Ash,* that it is not necessary to prove the intention to create a private cause of action. Since nothing in the legislative history of section 503 negated

22. *Id.* at 459-60.
23. 422 U.S. at 83.
24. *Id.*
25. 428 F. Supp. 809 (E.D. Pa. 1977).
26. *Id.* at 815. Neither the *Rogers* opinion nor plaintiff's brief cites *Drennon.*

the intent to create a private cause of action, and since a private cause of action was appropriate under section 504, the *Drennon* court granted a private cause of action under section 503.

In its application of the third *Cort* factor, the *Rogers* court can be criticized, on both legal and policy grounds, for its interpretation of the purpose of section 503. The court's statement that the handicapped do not constitute an identifiable and homogenous class of persons contradicts both the language and the purpose of the Rehabilitation Act,[27] as well as the Texas statute prohibiting discrimination in employment of the handicapped.[28] Section 706(6) of the Rehabilitation Act[29] defines the term "handicapped individual" as anyone with a physical or mental disability which limits his or her employment opportunities or other major activities of life. The designated purpose of the Act is to expand employment opportunities for these individuals.[30] Thus the language of the Rehabilitation Act defines a group of individuals who, because of their disability, are barred from the employment opportunities to which the nonhandicapped have access. When the *Rogers* court acknowledged that the purpose of section 503 is to improve employment opportunities for the handicapped,[31] yet maintained that the handicapped do not constitute an identifiable, homogenous group to which the term "discrimination" is applicable,[32] the court seemed to contradict itself. If section 503 is to create employment opportunities for the "handicapped," then the Rehabilitation Act recognizes that the handicapped constitute an identifiable group. The fact that individuals, because of a disability, experience limited opportunities for employment for which they are qualified certainly constitutes discrimination as real as that based on skin color, religion, national

27. *See* note 3 *supra*.

28. *See* note 13 *supra*.

29. The section defines the term as follows:

> The term "handicapped individual" means any individual who (A) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and (B) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services provided pursuant to subchapters I and III of this chapter. For the purposes of subchapters IV and V of this chapter, such term means any person who (A) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (B) has a record of such an impairment, or (C) is regarded as having such an impairment.

29 U.S.C. § 706(6) (Supp. IV 1974).

30. *See id.* § 701.

31. 433 F. Supp. at 202.

32. *Id. See also* note 12 and accompanying text *supra*.

origin, or sex, whether or not the word "discrimination" appears in section 503.[33]

The court's argument fails not only on the basis of language but also on policy grounds. The purpose of section 503 is to provide employment opportunities for the handicapped by means of an affirmative action clause in some federal contracts. It is somewhat ironic that the court's comment, that the different treatment accorded the handicapped stems from sympathy rather than discrimination or intolerance, reflects a paternalistic attitude toward the handicapped which the Rehabilitation Act strives to eliminate.[34] The handicapped are not seeking sympathy but equality.[35] To as-

33. Section 503, 29 U.S.C. § 793 (Supp. IV 1974) requires the employer to take "affirmative action" to employ qualified handicapped individuals. The obligation not to discriminate would seem to be such a basic premise underlying affirmative action that "discrimination" need not be mentioned. "The obligation to take affirmative action imports more than the negative obligation not to discriminate." Southern Ill. Builders Ass'n v. Ogilvie, 471 F.2d 680, 684 (7th Cir. 1972) (affirmed lower court's ruling that the Ogilvie Plan for recruitment, placement, and training of minorities in certain Illinois counties did not violate the Civil Rights Act or the fifth or fourteenth amendments).

34. The declared purpose of the Act includes providing vocational rehabilitation so the handicapped may "prepare for and engage in gainful employment," 29 U.S.C. § 701(1) (Supp. IV 1974); improving their ability "to live with greater independence and self-sufficiency," *id.* § 701(3); and promoting and expanding employment opportunities for the handicapped, *id.* § 701(8). The White House Conference on Handicapped Individuals Act also impliedly strived to eliminate such paternalistic attitudes toward the handicapped as the *Rogers* court manifests: "[I]t is essential that recommendations be made to assure that all individuals with handicaps are able to live their lives independently and with dignity, and that the complete integration of all individuals with handicaps into normal community living, working, and service patterns be held as the final objective." Pub. L. No. 93-651, § 301(6), 89 Stat. 2-16 (1974).

35. *See* C. BRIDGES, JOB PLACEMENT OF THE PHYSICALLY HANDICAPPED 31 (1946) ("Pitfalls to be avoided are excessive sympathy, 'making a job' for the injured man, and any appearance of charity. The disabled need sympathetic understanding, not sympathy or special handling.") [hereinafter cited as BRIDGES]. The attitude which would accord a special, and seemingly benevolent, treatment to the handicapped constitutes a veiled discrimination. *See* Siller, *Attitudes Toward Disability*, CONTEMPORARY VOCATIONAL REHABILITATION 72 (1976). Treatment of the handicapped as a special or separate group constitutes a discrimination analogous to the "separate and equal" theory attacked in Brown v. Board of Educ., 347 U.S. 483 (1954). Separate or special is not equal either in regard to skin color and its relation to educational opportunity or to a handicap and its relation to employment opportunity. The doctrine attacked in *Brown* has been analogized to the attitudes exhibited toward the handicapped:

> Thus far we have focused upon the custodializing features of public welfare programs for the disabled—features which treat them as a minority group permanently apart and permanently dependent: in other words, as "separate and unequal." To the extent that these prejudicial premises remain embedded in welfare law and administration, the legal and constitutional status of the physically handicapped individual resembles

sume a protective attitude toward a handicapped person and not hire or promote him to a job for which he is qualified, because he may hurt himself, constitutes gross discrimination and inequality.[36] The handicapped have consistently taught employers, when given the opportunity, that they can take care of themselves and perform their jobs as well as anyone. Although the handicapped person may lack a particular quality, such as sight, a limb, or physical coordination, he or she often has other assets, abilities, and ways of doing a job that compensate for the particular disability.[37]

The court's objection that a private cause of action would delay and obstruct the enforcement process in this new area of law overlooks the doctrine of primary jurisdiction,[38] which is utilized in cases involving an administrative remedy. If an administrative agency has primary jurisdiction, the court will not grant injunctive relief prior to the agency's decision but will stay the proceedings until the agency investigates the matter to determine any questions of fact.[39]

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that of the American Negro prior to the equalitarian civil rights movement activated by Brown v. Board of Education in 1954.

tenBroek & Matson, *The Disabled and the Law of Welfare*, 54 CAL. L. REV. 809, 833 (1966). *But see* Wright, *Equal Treatment of the Handicapped by Federal Contractors*, 26 Emory L.J. 65 (1977). Wright, who represented the defendant in the *Rogers* case, shares the view of the *Rogers* court: (1) the handicapped do not constitute an identifiable group, so "discrimination" is not an applicable term; and (2) the special sympathetic attitudes toward the handicapped are not discriminatory. *Id.* at 67, 93, 100-03.

36. This attitude is analogous to the type of sex discrimination condemned in Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969). Plaintiff's application for a switchman's position was rejected because under a company policy women would not be considered for this job which required handling of a 34-lb. fire extinguisher and included occasional late-hour call-outs. The court, stating that women should be considered according to their individual qualifications, rejected this attitude of "romantic paternalism" and said that the individual woman should have the power to decide whether or not to take on "unromantic tasks." *Id.* at 236. Likewise, the handicapped individual should be considered according to his individual qualifications for the particular job and, if qualified, should have the freedom to assume the risks involved in that job. For further consideration of the concept that equality is established only if an individual has an opportunity to be considered according to his particular talents and capacity, see Rosenfeld v. Southern Pac. Co., 444 F.2d 1219 (9th Cir. 1971) (plaintiff was denied the position of agent-telegrapher because the company considered the work involved too strenuous for a woman to perform).

37. *See* BRIDGES, *supra* note 35, at 30.

38. The doctrine of primary jurisdiction involves the issue of whether the court should withhold exercising its jurisdiction until the administrative agency has determined a particular question in the proceeding before the court. *See* K. DAVIS, ADMINISTRATIVE LAW TEXT § 19.01 (3d ed. 1972).

39. United States v. Fritz Properties, Inc., 89 F. Supp. 772 (N.D. Cal. 1950), an action involving a violation of the Housing and Rent Act of 1947, defines the doctrine of "primary" or "preliminary jurisdiction" as the presupposition of a complete absence of judicial power

If the court would utilize the doctrine of primary jurisdiction, a private cause of action under section 503 would not interfere with the administration of justice in this area of law. Thus, the *Drennon* court, applying the doctrine of primary jurisdiction, stayed the proceedings until plaintiff had exhausted the administrative remedies specified in section 503(b).[40] This approach allows a private cause of action to be implied; at the same time, it facilitates the efficient administration of justice by allowing the administrative agency to perform its investigative work before the claim proceeds through the courts, thereby relieving the court of this investigative work which the administrative agency may be better equipped to perform.[41]

By failing to consider the rationale behind the fourth *Cort* factor, which involves interference with state regulations, the *Rogers* court misinterpreted the factor. The issue in *Cort v. Ash* concerned the implication of a private cause of action under a criminal statute relating to corporations, a branch of law traditionally governed by state, as opposed to federal, regulations. In this context, the Court considered a relevant factor to be whether the private cause of action was in an area traditionally relegated to state law[42]—not, as the *Rogers* court interpreted this factor, whether there existed a state statute concerning the matter.[43] Although Texas has a statute pro-

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to deal with an issue because of the legislative grant of exclusive jurisdiction to an administrative body. The basis for the rule, according to this case, is "the desire and need for expert administrative judgment on a technical question"; the purpose is "to prevent a party from bringing a controversy into court prior to the securing of this administrative judgment on a question usually involving complex evidentiary material." *Id.* at 777. Oil Shale Corp. v. Udall, 235 F. Supp. 606 (D. Colo. 1964), an action against the Secretary of the Interior to set aside decisions rendered by the Department of the Interior, said that the purpose of the doctrine of primary jurisdiction is to assure that an agency will not be bypassed on what is essentially committed to it. *Id.* at 606-07. In *Oil Shale*, the court held that the doctrine of primary jurisdiction was not applicable because the issue involved a question of law rather than a question of fact which the administrative agency could decide. *Id.* at 607.

40. 428 F. Supp. 809, 816 (E.D. Pa. 1977).

41. *See* note 39 *supra*. In Catholic Medical Center v. Rockefeller, 305 F. Supp. 1256 (E.D.N.Y. 1969), an action was brought by the hospitals against the Governor, Commissioner of Health, Commissioner of Social Services, and Director of Budget of New York for a declaration that a New York statute temporarily freezing rates for in-patient Medicaid recipients, regardless of the actual cost of the services, was unconstitutional. The court employed the doctrine of primary jurisdiction to allow the Department of Health, Education and Welfare to determine the factual question of whether the state plan so departed from the regulations that it constituted a violation, resulting in the forfeiture of millions of dollars in federal aid to the state of New York. *Id.* at 1267. The court cited several other cases involving the doctrine of primary jurisdiction. *See id.* at 1266.

42. 422 U.S. at 84.

43. 433 F. Supp. at 203.

hibiting discrimination in employment of the handicapped, the problem of rights of the handicapped is not one traditionally relegated to state law but has been, like other laws relating to equal opportunities, an area primarily governed by federal statutes.[44]

Drennon and *Rogers* present contrary answers to the question of whether a private cause of action should be implied under section 503.[45] Both courts utilized the *Cort* factors to reach contrary conclusions. However, an understanding of the rationale underlying the *Cort* factors, rather than a merely mechanical application of these factors such as the *Rogers* court displayed, would have resulted in an affirmance of a private cause of action under section 503 in *Rogers v. Frito-Lay, Inc.*

Despite the *Rogers* court's statement to the contrary,[46] discrimination by employers against the handicapped can, and does, exist. The problem is not, as the *Rogers* court states, that a person's handicap may affect his productivity and ability to perform a job.[47] As section 503 specifies,[48] employers are to to take affirmative action to hire only those handicapped individuals who are qualified to perform a particular job. Discrimination occurs when the handicapped individual is denied employment merely on the basis of his handicap without being given the opportunity to demonstrate that

44. In regard to the fourth *Cort* factor, the *Drennon* court said: "Courts have previously recognized the federal government's interest in preventing discrimination, on the basis of race, color or national origin, in employment in federally assisted activities and programs and, consequently, have implied a right of action under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d." 428 F. Supp. at 815.

45. Since this note was written, two additional cases have addressed the issue of whether to imply a private cause of action under § 503. Wood v. Diamond State Tel. Co., 440 F. Supp. 1003 (D. Del. 1977), held that the implication of a private cause of action would not be consistent with the third *Cort* factor of purpose because § 503 does not make discrimination against the handicapped illegal in the private sector but requires affirmative action in government contracts which exceed $2,500. Contractors should not be exposed to burdens of de novo litigation but should have their liability limited to the terms of the contract and the applicable laws and regulations. *Id.* at 1009. Moon v. Roadway Express, Inc., 439 F. Supp. 1308 (N.D. Ga. 1977), cited *Rogers* on the application of the second and third *Cort* factors to § 503: this section stresses affirmative action, it does not forbid discrimination. The Act and the regulations enumerate when a judicial remedy is appropriate as well as who may seek judicial enforcement. Referring to this designated remedy, the *Moon* court, citing the *Amtrak Case*, applied *expressio unius* to hold that a private cause of action should not be implied under § 503. See the discussion on affirmative action and discrimination at note 33 *supra* for a contrary view.

46. 433 F. Supp. at 202.

47. *Id.* at 202-03.

48. For the text of the statute, see note 3 *supra*.

he is qualified to perform the job.[49] Statutes prohibiting racial and sexual discrimination do not mandate that an employer must hire any member of the minority race or sex but only that qualified members of these minority groups be given an equal opportunity to compete with qualified nonminority members for a job. The purpose of section 503 is to grant qualified handicapped persons an equal opportunity to be hired by employers who enter into certain types of contracts with the federal government.[50] To imply a private cause of action under section 503 would promote this purpose of improving employment opportunities for qualified handicapped individuals[51] without subjecting contractors, who are aware of the affirmative action clause in their contracts, to any unexpected burdens of litigation.[52]

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49. In Gurmankin v. Costanzo, 411 F. Supp. 982 (E.D. Pa. 1976), the court held that the Philadelphia public school system's policy of excluding blind instructors from teaching sighted students violated due process. Although the case was decided on due process grounds since many of the plaintiff's claims were based on actions prior to December, 1973, the effective date of the Rehabilitation Act, the court stated that the plaintiff's situation was "the kind of discrimination which that section [§ 504] was meant to prohibit." *Id.* at 989. *See also* note 36 *supra.*

50. *See* note 3 *supra.*

51. As support for the proposition that allowing a private cause of action promotes employment opportunities for the class to be benefitted by a particular statute, see the reference to the recommendation of the United States Commission on Civil Rights, that the 1975 Age Discrimination Act be amended to permit aggrieved persons to file suit. [1978] 97 LAB. REL. REP. (BNA) 47. The purpose of this Act was to prevent age discrimination in programs or activities receiving federal financial assistance. 42 U.S.C. § 6101 (Supp. V 1975). The Act is, therefore, analogous to § 504 of the Rehabilitation Act, which prohibits discrimination toward the handicapped in these programs.

52. The *Rogers* decision was appealed, and the case is currently pending before the Court of Appeals for the Fifth Circuit (consolidated with Moon v. Roadway Express, Inc., 439 F. Supp. 200 (N.D. Ga. 1977). Rogers v. Frito-Lay, Inc., 433 F. Supp. 200 (N.D. Tex. 1977), appeal docketed, No. 77-2443 (5th Cir.).