DEFINING INDEPENDENT CONTRACTOR PROTECTION UNDER THE REHABILITATION ACT

Richard Bales
Lindsay Mongenas[*]

I. INTRODUCTION

Section 504 of the Rehabilitation Act provides a private right of action for individuals subjected to disability discrimination (including employment discrimination) by any program or activity receiving federal financial assistance.[1] Section 504(d) states that "[t]he standards used to

* Richard Bales is a Professor of Law and Director of the Center for Excellence in Advocacy at Northern Kentucky University, Salmon P. Chase College of Law. Lindsay Mongenas received her J.D. from Northern Kentucky University, Salmon P. Chase College of Law.

1 Rehabilitation Act of 1973, tit. V, § 504, 29 U.S.C. § 794 (2006).

determine whether this section has been violated . . . shall be the standards applied under title I of the Americans with Disabilities Act . . . ."[2] Title I of the Americans with Disabilities Act (ADA),[3] however, covers employees but not independent contractors.[4]

The federal circuits currently are split over whether the Rehabilitation Act protects independent contractors from discrimination.[5] Two federal circuits—the Ninth and the Tenth—have interpreted section 504(d) of the Rehabilitation Act as covering independent contractors.[6] These circuits reason that section 504(d) incorporates the substantive standards of the ADA, such that the Rehabilitation Act is not limited to the narrow statutory definition of "employee" and may include independent contractors.[7] In contrast, the Sixth and Eighth Circuits maintain that an employer-employee relationship is the focal point of the Rehabilitation Act; an individual must be an employee to be covered by the Act.[8] These circuits have adhered to a "jot-for-jot" incorporation, reading Title I of the ADA directly into section 504(d), with the view that inclusion of independent contractors would be an impermissible extension of the Rehabilitation Act.[9]

This Article analyzes the competing approaches taken by the federal circuit courts with respect to the Rehabilitation Act's coverage of independent contractors. Part II introduces the Rehabilitation Act, the legislative history of section 504(d), and the only United States Supreme Court opinions that hint at the competing methods of incorporation.[10] Part III

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2 29 U.S.C. § 794(d).

3 Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (2006).

4 *See, e.g.*, Flannery v. Recording Indus. Ass'n of Am., 354 F.3d 632, 642 (7th Cir. 2004); Aberman v. J. Abouchar & Sons, Inc., 160 F.3d 1148, 1150 (7th Cir. 1998); Birchem v. Knights of Columbus, 116 F.3d 310, 312 (8th Cir. 1997); Cortes-Rivera v. Dep't of Corr. & Rehab. of P.R., 617 F. Supp. 2d 7, 23–24 (D.P.R. 2009); Edwards v. Creoks Mental Health Servs., Inc. 505 F. Supp. 2d 1080, 1089 (N.D. Okla. 2007); Wojewski v. Rapid City Reg'l Hosp., Inc., 394 F. Supp. 2d 1134, 1141 (D.S.D. 2005), *aff'd in part, vacated in part*, 450 F.3d 338 (8th Cir. 2006); Anyan v. N.Y. Life Ins. Co, 192 F. Supp. 2d 228, 238 (S.D.N.Y. 2002), *aff'd sub nom.* Anyan v. Nelson, 68 F. App'x. 260 (2d Cir. 2003); Metro. Pilots Ass'n, LLC v. Schlosberg, 151 F. Supp. 2d 511 (D.N.J. 2001); Case v. ADT Auto. Inc., 17 F. Supp. 2d 1077, 1079 (W.D. Mo. 1997), *aff'd per curiam* 163 F.3d 601 (8th Cir. 1998) (unpublished table decision); Vakharia v. Swedish Covenant Hosp., 987 F. Supp. 633, 636 (N.D. Ill. 1997), *aff'd* 190 F.3d 799 (7th Cir. 1999).

5 *See Current Circuit Splits: Civil Matters: Employment Law*, 6 SETON HALL CIR. REV. 343, 345–46 (2010); Bill Barnhart, *Circuit Split Over Independent Contractors Deepen*, INSIDE COUNS. (Feb. 1, 2010), *available at* http://www.insidecounsel.com/Issues/2010/February-2010/Pages/Circuit-Split-Over-Independent-Contractors-Deepens.aspx?k=circuit+split+over+independent+contractors; *see also* Fleming v. Yuma Reg'l Med. Ctr., 587 F.3d 938, 939 (9th Cir. 2009), *cert. denied*, 130 S. Ct. 3468 (2010); *Wojewski*, 450 F.3d at 345; Schrader v. Fred A. Ray, M.D., P.C., 296 F.3d 968, 975 (10th Cir. 2002); Hiler v. Brown, 177 F.3d 542, 547 (6th Cir. 1999).

6 *See Fleming*, 587 F.3d at 939; *cf. Schrader*, 296 F.3d at 975.

7 *See Fleming*, 587 F.3d at 941; *Schrader*, 296 F.3d at 972.

8 *Fleming*, 587 F.3d at 941.

9 *Id.*

10 *See infra* Part II.

summarizes the "selective incorporation approach," followed by the Ninth and Tenth Circuits, and the "jot-for-jot incorporation approach," taken by the Sixth and Eighth Circuits.[11] Part IV argues first that the selective incorporation approach more closely resembles the statutory spirit of the Rehabilitation Act, and, second, that the jot-for-jot incorporation approach (a) fails to address the inconsistent statutory language that results from simply reading Title I of the ADA into section 504(d) and (b) digresses from the broad coverage intended by the Rehabilitation Act.[12] This Article proposes the universal adoption of the selective incorporation approach because it correctly recognizes the absence of limiting language in section 504, such that Title I is meant to be used only for substantive guidance, as opposed to being incorporated *in toto*.[13] The selective incorporation approach also acknowledges the deliberate extension of disability discrimination protection afforded to workers through the Americans with Disabilities Act Amendments Act of 2008 (ADAAA)[14] and mirrors this trend by covering independent contractors.[15]

II. BACKGROUND

A. Relevant Statutory Provisions

Among the primary purposes of the Rehabilitation Act of 1973 was the promotion and expansion of employment opportunities for handicapped individuals.[16] The original language of section 504 of the Rehabilitation Act prohibited discrimination against a qualified handicapped individual under any federally funded program or activity solely by reason of his or her handicap.[17] A "handicapped individual" was one who had a physical or mental handicap which presented a substantial handicap to employment and who could reasonably expect to benefit from the Titles I and III of the Act in terms of employability.[18]

One year later, in 1974, the definition of "handicapped individual" was substantially amended, abandoning any references to employment.[19] The expanded definition included "[a]ny person who (A) has a physical or mental

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[11] *See infra* Part III.

[12] *See infra* Part IV.A.

[13] *Fleming*, 587 F.3d at 939.

[14] ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified in scattered sections of 29 and 42 U.S.C.).

[15] *See infra* Part IV. B.

[16] Rehabilitation Act of 1973, Pub. L. No. 93-112, § 2(8), 87 Stat. 355, 357 (codified at 29 U.S.C. § 791).

[17] *Id.* § 504, 87 Stat. at 394.

[18] *Id.* § 7(6), 87 Stat. at 361.

[19] *See* S. REP. NO. 93-1297, at 6388–89 (1974); *see also* Sch. Bd. of Nassau Cnty. v. Arline, 480 U.S. 273, 278–79 (1987) (explaining the development of the definition of "handicapped individual").

impairment which substantially limits such person's functioning or one or more of such person's major life activities, (B) has a record of such impairment, or (C) is regarded as having such an impairment."[20] The elimination of any mention of employment allowed for disability discrimination protection by all federally funded programs and services under section 504, not just the programs or services providing employment.[21] As a result, section 504, patterned from the anti-discrimination language of the Civil Rights Act of 1964[22] and Education Amendments of 1972,[23] created a broad policy against disability discrimination by federally assisted services and programs in the areas of housing, health care, and education, in addition to employment.[24]

The next major development in disability discrimination protection came in 1990 with the passage of the Americans with Disabilities Act (ADA).[25] The ADA dramatically altered the definition of disability and the scope of protection for qualified individuals with disabilities.[26] Relying heavily on the Rehabilitation Act, the ADA fashioned its statutory language after section 504.[27] The ADA borrowed the Rehabilitation Act's definition of "handicap" (changing the original nomenclature of "handicap" to "disability") to prohibit discrimination against a qualified individual with a disability by reason of such disability in the areas of employment, public services, and public accommodations.

The ADA and the Rehabilitation Act became further codependent in 1992, when section 504(d) was added to the Rehabilitation Act. Section 504(d) provides: "The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 . . . as such sections relate to employment."[28] By applying the standards of Title I of the ADA, section 504(d) was able to implement the compliance scheme contemplated by the 1973 amendments.[29]

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[20] S. REP. NO. 93-1297, at 6389

[21] *Id.*

[22] Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified at 42 U.S.C. §§ 2000a to 2000h).

[23] Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 235 (codified at 20 U.S.C. § 1001).

[24] *See* S. REP. NO. 93-1297, at 6390; *see also Arline*, 480 U.S. at 279 nn. 2–3 (describing the broadening of the anti-discrimination language).

[25] *See* S. REP. NO. 102-357, at 220–21 (1992) (providing examples of the application of the ADA to the Rehabilitation Act).

[26] Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified at 42 U.S.C. §§ 12101–12213).

[27] Ruth Colker, *The Death of Section 504*, *in* BACKLASH AGAINST THE ADA 323, 335 n.8 (Linda Hamilton Krieger ed., 2003) (comparing the language of the ADA at 42 U.S.C § 12132 with the Rehabilitation Act at 29 U.S.C. § 794(a)).

[28] S. REP. NO. 102-357, at 221.

[29] *See* S. REP. NO. 93-1297, at 6390 (describing the compliance scheme contemplated by the 1983 amendments).

However, in order to receive protection under Title I of the ADA, a worker must meet the definition of a qualified individual with a disability.[30] Only a person meeting this definition may bring a claim for disability discrimination under either Act.[31]

In the eighteen years following the enactment of the ADA, the definition of "qualified individual with a disability" was whittled away by pro-defendant U.S. Supreme Court opinions, thus narrowing the protection available for disabled workers.[32] This impacted ADA litigants, as well as plaintiffs bringing section 504 claims.[33] Congress recognized the shortcomings of the ADA and passed the Americans with Disabilities Amendment Act of 2008 (ADAAA)[34] with the intention of providing consistency and clarity to the scope of disabled individuals qualified under the ADA.[35] The ADAAA's findings and purposes specifically note that the courts' interpretation of disability under the ADA had not been consistent with the Rehabilitation Act's interpretation of handicap, frustrating Congress's expectations of the ADA.[36]

Congress's passage of the ADAAA substantially revised Title I of the ADA, primarily by expanding the meaning of "major life activity" and "substantially limits."[37] The ADAAA now categorizes the phrase "major life activities" into two lists: activities and major bodily functions.[38] New to the list of activities are reading, bending, and communicating; new to the list of major bodily functions are functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory,

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[30] 42 U.S.C. §§ 12102, 12111(8) (defining "disability" and "qualified individual").

[31] *Id.*

[32] *See* Sutton v. United Air Lines, Inc., 527 U.S. 471, 490–92 (1999) (holding that employers may decide whether "physical characteristics or medical conditions that do not rise to the level of an impairment . . . are preferable to others" and that an individual needs to show an inability to work in a broad range of jobs, not just one specific job); *see also* Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184 (2002) (affirming the Court's holding in *Sutton* and holding that the "central inquiry must be whether the claimant is unable to perform the variety of tasks central to most people's daily lives, not whether the claimant is unable to perform the tasks associated with her specific job" in determining whether an employee qualifies as "disabled" under the ADA).

[33] Colker, *supra* note 27, at 326–28 (finding that, prior to 1994, the percentage of section 504 pro-defendant outcomes was 64.9%, compared with 87.5% from 1994 to 1999).

[34] ADA Amendments Act (ADAAA) of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified as amended at 42 U.S.C. § 12101 (Supp. III 2009)).

[35] 42 U.S.C. § 12101(a)–(b) (stating the congressional findings and purposes of the ADAAA of 2008).

[36] *See id.* § 12101(a)(1), (3).

[37] *See id.* § 12102(2), (4); *see also* U.S. Equal Emp't Opportunity Comm'n, *Titles I and V of the Americans with Disabilities Act of 1990 (ADA)*, http://www.eeoc.gov/laws/statutes/ada.cfm (last visited May 23, 2011) (bolding the language of Title I that was altered by the ADAAA).

[38] U.S. Equal Emp't Opportunity Comm'n, *Notice Concerning the Americans with Disabilities Act (ADA) Amendments Act of 2008*, http://www.eeoc.gov/laws/statutes/adaaa_notice.cfm (last visited May 23, 2011).

circulatory, endocrine, and reproductive functions.[39] The definition of disability is also expanded to impairments that are episodic in nature or in remission, if the impairment would substantially limit a major life activity "when active."[40] Mitigating measures, except "ordinary eyeglasses or contact lenses," are no longer considered when determining whether an impairment substantially limits a major life activity.[41]

Despite sweeping changes to the ADA, the prerequisite that an individual be an employee to be covered by Title I remains unchanged.[42] Further, because section 504(d) continues to rely on Title I, the federal circuit courts are split as to whether this reliance absorbs both Title I's definition of disability and the requirement that a qualified individual with a disability be an employee.[43]

B. Section 504(d) Legislative History

Because section 504(d) is the vehicle for incorporation, it is important to understand the impetus for amending section 504 of the Rehabilitation Act to refer to Title I of the ADA. When considering the 1992 Amendments to the Rehabilitation Act, Nell Carney, Commissioner of the Rehabilitation Services Administration, testified that "[w]ith the advent of the Americans with Disabilities Act, it is essential that the Rehabilitation Act continue to complement the ADA in opening doors for individuals with disabilities at the workplace and in the community."[44] One way this was achieved was through complementary statutory language as implemented by section 504(d).[45] Section 504(d) provides that "[t]he standards used to determine whether this section has been violated . . . shall be the standards applied under title I of the Americans with Disabilities Act . . . ."[46]

Senator Tom Harkin, sponsor of the Senate bill proposing to amend the Rehabilitation Act,[47] explained how the bill's language would incorporate the Title I standards into section 504.[48] Referring to the terms used in Title I of the ADA, Senator Harkin said, "Now those who are covered by title V of the Rehabilitation Act will know that these are the definitions of reasonable accommodation and discrimination that apply. They will also know that the

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39 *Id.*

40 42 U.S.C. § 12101.

41 *Id.*; *see also* Sutton v. United Air Lines, Inc., 527 U.S. 471, 494 (1999).

42 42 U.S.C. § 12111(4). The ADA defines "employee" as "an individual employed by an employer." *Id.*

43 *See supra* note 5 and accompanying text (stating that there is a federal circuit split over whether Title I of the ADA covers employees but not independent contractors).

44 S. REP. NO. 102-357, at 5 (1992).

45 *See* Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified at 29 U.S.C. § 791).

46 29 U.S.C. § 794(d).

47 S. 3065, 102nd Cong., 2d Sess. (1992).

48 138 CONG. REC. 16,608–11 (1992).

standards governing preeemployment [sic] inquiries and examinations, and inquiries of current employees apply."[49] Senator Harkin did not provide any other specific examples of definitions or standards that the Rehabilitation Act must follow.[50]

Instead, Senator Harkin's explanation of section 504(d)'s incorporation of Title I concludes with the statement that the new section 504(d) will allow for consistent, equitable treatment under the laws.[51] Because only a few concrete ADA definitions were mentioned, 504(d) may be construed according to the maxim *expressio unius est exclusio alterius*.[52] This maxim would interpret the inclusion of the specific definitions of reasonable accommodation and discrimination and the standard of pre-employment inquiries in the Senate Conference Report, as signifying that all unmentioned Title I definitions and standards are excluded from incorporation. Though the use of the maxim does not authoritatively illuminate the meaning of section 504(d), it does demonstrate that Senator Harkin only presented a few examples and the deliberateness of his speech should be contemplated.

Though the meaning of section 504(d) is in dispute, the legislative history serves as a reminder of the harmonious relationship Congress intended to maintain between the ADA and the Rehabilitation Act. Speaking to the relationship between the two acts prior to the 1992 amendments to the Rehabilitation Act, Justin Dart, Chair of the President's Committee on the Employment of People with Disabilities, wrote:

> July 26, 1990 marked the beginning of a new era of independence and civil rights achievement for 43 million Americans with disabilities. These goals cannot be realized without resources to help citizens with disabilities prepare for the workplace of the future . . . . As the period for reauthorization of the Rehabilitation Act draws near, we need our most creative thinking to forge a comprehensive Act that will enable us to respond to the work preparation needs of *any individual who wants to work*, regardless of the severity of his or her disability.[53]

The need to prepare qualified individuals with disabilities for the workforce and ensure their fair treatment once employed (or contracted) is central to both the ADA and Rehabilitation Act.[54] The addition of section

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[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] 82 C.J.S. *Statutes* § 421 (2011).

[53] S. REP. NO. 102-357, at 5 (emphasis added). *See generally* Schrader v. Fred. A. Ray, M.D., P.C., 296 F.3d 968 (10th Cir. 2002).

[54] *See* S. REP. NO. 102-357, at 6–7.

504(d) represents Congress's intention to renew its commitment to addressing disability discrimination and share in the spirit of the ADA.[55]

C. Cases Reflecting Methods of Incorporation

Though the federal circuit courts are devoted to protecting qualified individuals with disabilities, they have diverged on the issue of section 504(d)'s incorporation of the standards and definitions used in Title I of the ADA.[56] There is no U.S. Supreme Court decision on this point, leaving open to what extent section 504 incorporates Title I.[57] Without more guidance, it is unclear whether independent contractors are protected under section 504.[58]

The Supreme Court's opinion in *PGA Tour, Inc. v. Martin*,[59] though not directly on point, may offer some guidance on the issue. Casey Martin suffered from a degenerative circulatory disorder that made it impossible for him to walk; this condition made him a qualified individual with a disability under the ADA.[60] Martin made a reasonable accommodation request to use a golf cart during PGA rounds.[61] The PGA denied the request, concluding that the tour rules required golfers to walk at all times.[62] Martin sued the PGA Tour, alleging violations of Titles I and III of the ADA.[63] The United States District Court for the District of Oregon held that Martin was an independent contractor and therefore not protected by Title I.[64] The court decided the case instead on the basis of Title III, finding that the PGA was covered by Title III's general rule prohibiting public accommodations from discriminating against individuals because of their disabilities.[65] The Ninth Circuit and the U.S. Supreme Court affirmed the finding of a Title III violation and required the defendant to accommodate Martin.[66] According to the Court, the use of a golf cart was a reasonable accommodation because it would not fundamentally alter the nature of the game of golf.[67] The majority opinion did not address the district court's finding that Martin was an independent contractor.[68]

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55 *See id.*

56 *See infra* Part III.

57 *Cf. Current Circuit Splits*, *supra* note 5.

58 *See generally id.*

59 532 U.S. 661 (2001).

60 *Id.* at 668.

61 *Id.* at 669.

62 *See id.* at 667.

63 *Id.* at 669–73.

64 *Id.* at 678.

65 *PGA*, 532 U.S. at 681–82.

66 *Id.* at 672–73, 690–91.

67 *Id.* at 690.

68 *Id.*; *see* Robert L. Burgdorf, Jr., *Restoring the ADA and Beyond: Disability in the 21st Century*, 13 TEX. J. C.L. & C.R. 241, 271 (2008) (explaining that *PGA* did not resolve the independent contractor issue).

Justice Scalia, in dissent, did reach the independent contractor issue, concluding that Title I "does not protect independent contractors."[69] Justice Scalia's dissent can be used to argue for exclusion of independent contractors from section 504, which literally incorporates Title I's standards.[70] This jot-for-jot incorporation method provides a shortcut in determining the scope of coverage of section 504 because it simply transplants Title I's definitions. Because Title I does not cover independent contractors,[71] neither should section 504. However, Justice Scalia's characterization of the limits of Title I is not necessarily determinative of the scope of section 504 because that section focuses on programs or activities receiving federal financial assistance, as opposed to only employers.

Unlike *PGA*'s jot-for-jot incorporation approach, section 504 may alternatively be viewed to incorporate other statutes, like the ADA, selectively. This is demonstrated in the U.S. Supreme Court's decision in *Consolidated Rail Corp. v. Darrone*.[72] Section 505 of the Rehabilitation Act states that the remedies available for violations under section 504 are the same as those available under Title VI of the Civil Rights Act of 1964.[73] In *Darrone*, the Court considered whether 504 must follow Title VI's condition that only employers who sought federal financial aid for the primary purpose of providing employment may be liable for employment discrimination.[74] The employer-defendant was attempting to escape liability by showing its primary use of federal aid was not to create jobs.[75] The Court decided that section 504 does not include such a condition when assessing liability to an employer for violating the Rehabilitation Act.[76] In reaching this conclusion, the Court relied on the legislative history, executive interpretation, and purpose of the Act to find an absence of statutory intent to limit liability.[77] Therefore, *Darrone* stands for the proposition that when section 504 incorporates a title of another employment discrimination act, it does not absorb all of the conditions and limitations of the other act unless expressly instructed to do so. This selective incorporation method requires a more in-depth statutory analysis of the specific terms and standards used.

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69 *PGA*, 532 U.S. at 692 (Scalia, J., dissenting).

70 *See* Fleming v. Yuma Reg'l Med. Ctr., 587 F.3d 938, 941 (9th Cir. 2009), *cert. denied*, 130 S. Ct. 3468 (2010).

71 Burgdorf, *supra* note 68, at 271–72 (noting that courts have denied ADA protection to independent contractors in a variety of arenas because they are not employees).

72 Consol. Rail Corp. v. Darrone, 465 U.S. 624, 629 (1984).

73 29 U.S.C. § 794a(a)(2) (2006).

74 *Darrone*, 465 U.S. at 628.

75 *Id.*

76 *Id.* at 632.

77 *Id.* at 633–34.

III. TWO APPROACHES TO THE INDEPENDENT-CONTRACTOR ISSUE

Courts are divided as to the appropriate method of incorporating the standards of Title I of the ADA into section 504 of the Rehabilitation Act.[78] While the courts agree to the use of a plain-language approach, the plain-reading applications are inconsistent.[79] The inclusion or exclusion of independent contractors under section 504 illustrates this conflict among the federal courts.[80]

With no guidance from the U.S. Supreme Court, the federal circuits have taken two approaches: the "jot-for-jot incorporation approach" and the "selective incorporation approach." The jot-for-jot incorporation approach holds that section 504(d) requires an employment relationship and applies the statutory definitions of the ADA *in toto* to section 504.[81] Because an independent contractor does not fit the ADA's definition of an employee, section 504 does not protect independent contractors. In contrast, the selective incorporation approach finds no employment requirement within section 504(d) and extracts from Title I the standards for determining whether a violation has occurred, not whether the complainant is covered.[82] Therefore, courts following the selective incorporation approach find that independent contractors are protected by the Rehabilitation Act.[83]

A. The Jot-for-Jot Incorporation Approach

The Sixth and Eighth Circuits adhere to the jot-for-jot incorporation approach, which is characterized by a literal adoption (adoption *in toto*) of the definitions and standards of Title I of the ADA as applied to the Rehabilitation Act.[84] The Eighth Circuit addressed the incorporation of the definition of "employee" from Title I in *Wojewski v. Rapid City Regional Hospital, Inc.*, and found that independent contractors, as non-employees, may not be covered by section 504.[85] Similarly, in *Hiler v. Brown*, the Sixth Circuit determined that the Rehabilitation Act will not impose liability on

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[78] Fleming v. Yuma Reg'l Med. Ctr., 587 F.3d 938, 945 (9th Cir. 2009), *cert. denied*, 130 S. Ct. 3468 (2010).

[79] *See* Schrader v. Fred A. Ray, M.D., P.C., 296 F.3d 968, 975 (10th Cir. 2002) (using the plain language of section 504 to support its holding not to incorporate the ADA's fifteen-employee requirement to hold employers liable for violations); Hiler v. Brown, 177 F.3d 542, 545 (6th Cir. 1999) (suggesting plain language plus the consideration of the remedial scheme of the Rehabilitation Act is the proper method of interpreting section 504(d)).

[80] *See Fleming*, 587 F.3d at 946; Wojewski v. Rapid City Reg'l Hosp., Inc., 450 F.3d 338, 345 (8th Cir. 2006).

[81] *Fleming*, 587 F.3d at 939.

[82] *Id.*

[83] *Id.*

[84] *Id.*

[85] 450 F.3d 338, 345 (8th Cir. 2006).

supervisors, because supervisors are not within the statutory definition of "employer" from Title I.[86] The Circuits have focused on two main aspects to support this approach: (1) the plain language of the statue with reference to the statutory scheme and remedial purpose of the Rehabilitation Act and (2) case law. [87] According to the jot-for-jot incorporation approach, there is no authorization for the inclusion of independent contractors in the statutory language of the Act or in case law. Therefore, independent contractors may not be protected from disability discrimination under the Rehabilitation Act;[88] to do otherwise would be an unprecedented and unwarranted extension of the Act to non-employees.[89]

The jot-for-jot incorporation approach first appeared in this context in *Hiler v. Brown*, a Sixth Circuit case.[90] Plaintiff Wayne Hiler worked as a pipefitter for the Veterans Administration from 1994 until 1997.[91] Hiler was a veteran of the armed services and had been severely injured while serving in the Vietnam War.[92] Hiler suffered from aphasia, a language disorder that made it difficult for him to write in his own handwriting quickly.[93] Because of this impairment, Hiler was repeatedly passed over for promotions to supervisory positions because he could not score well on timed written examinations.[94]

In 1997, Hiler sued the Veteran's Administration, alleging, *inter alia*, employment discrimination and retaliation by his immediate supervisors and the Secretary of Veterans Affairs in violation of the Rehabilitation Act.[95] Hiler argued that his supervisors were personally liable pursuant to section 501(g) of the Rehabilitation Act, the "anti-retaliation" provision, [96] which uses the standards of the ADA to determine liability: "'[n]o person shall discriminate against an individual because such individual has opposed any act or practice made unlawful by this Act.'"[97]

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[86] 177 F.3d 542, 547 (6th Cir. 1999).

[87] *See id.* at 545, 547; *see also Wojewski*, 450 F.3d at 345.

[88] *Wojewski*, 450 F.3d at 345.

[89] *Id.* at 345.

[90] *Hiler*, 177 F.3d at 545 (describing the incorporation of portions of the ADA into the Rehabilitation Act).

[91] *Id.* at 543–44.

[92] *Id.* at 543.

[93] *Id.*

[94] *Id.* Hiler applied for promotions nine times for seven vacant positions, each requiring a ten minute written examination. *Id.* The employer refused to modify the testing procedure for Hiler or allow him to use a typewriter or computer to complete the examinations. *Hiler*, 177 F.3d at 543.

[95] *Id.*

[96] *See id.* at 544–45; *see also* Rehabilitation Act of 1973 § 501(g), 29 U.S.C. § 791(g) (2006).

[97] *Hiler*, 177 F.3d at 545 (quoting the Rehabilitation Act of 1973 and explaining that "the anti-retaliation provision of the Rehabilitation Act . . . incorporates by reference § 12203(a) of the ADA").

The United States District Court for the Eastern District of Kentucky accepted the plain-language interpretation of the Rehabilitation Act.[98] The court found that Hiler's supervisors fit the definition of "person," meaning one or more individuals, and imposed personal liability for their retaliatory acts.[99] In reaching this result, the court assigned the same meaning to "person" under the Rehabilitation Act as existed under Title VII of the Civil Rights Act of 1964.[100]

On appeal, the Sixth Circuit disagreed with the district court's finding that supervisors were "person[s]" and therefore personally liable for retaliation under the Rehabilitation Act.[101] According to the Sixth Circuit, the better approach for determining the meaning of "person" was to consider the remedies available to plaintiffs under the Rehabilitation Act.[102] Enforcement of the Rehabilitation Act has the same limitations as Title VII,[103] permitting claims only against "an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs."[104] And because a supervisor is not an employer as defined by Title VII,[105] a supervisor cannot be personally liable for retaliation under the Rehabilitation Act.[106]

The Sixth Circuit's statutory analysis of the relationship between Title VII and the Rehabilitation Act relied heavily on *Wathen v. General Electric Co.*, a case in which the Sixth Circuit declined to accept that a supervisor was an agent of an employer.[107] The Sixth Circuit explained, "We concede that 'a narrow, literal reading of the agent clause in § 2000e(b) does imply that an employer's agent is a statutory employer for purposes of liability.'"[108] However, to reach its desired outcome of precluding individual

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98 *Id.*

99 *Id.*

100 *Id.* (citing the Civil Rights Act of 1964, 42 U.S.C. § 2000e(a) (1994)) "The term 'person' includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under title 11, or receivers." 42 U.S.C. § 2000e(a).

101 *Hiler*, 177 F.3d at 545.

102 *Id.*

103 *See* Rehabilitation Act of 1973 § 505, 29 U.S.C. § 794(a) (2006) (awarding the same remedies, rights, and procedures as section 717, including sections 706(f)–(k), of the Civil Rights Act of 1964).

104 42 U.S.C. § 2000e-5(b).

105 *Id.* § 2000e(b). "The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person . . . ." *Id.*

106 *Hiler*, 177 F.3d at 546 (rejecting the argument that a supervisor could be an employer or agent of an employer).

107 115 F.3d 400, 405 (6th Cir. 1997).

108 *Id.* (quoting Tomka v. Seiler Corp., 66 F.3d 1295, 1314 (2d Cir. 1995)).

liability of supervisors,[109] the court used the tenet "'in expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.'"[110] In *Wathen*, the Sixth Circuit decided the agent clause could not include individual supervisors because it was contrary to congressional intent.[111] An individual supervisor does not fit into agency clause,[112] so there can be no supervisory liability.[113]

The Sixth Circuit in *Hiler* similarly focused on who could be liable for a violation of the Rehabilitation Act.[114] An individual supervisor is not liable under the Rehabilitation Act because this designation does not fall within the definitions of Title I, which draws from Title VII of the Civil Rights Act.[115] And aside from the meaning of employer or agent, if Congress limited employer liability under the ADA to only those employers with fifteen or more employees,[116] it does not follow from a policy perspective that individual supervisors could be liable when the statutory scheme insulates small employers from liability.[117]

While the anti-retaliation portions of the Rehabilitation Act are not located in section 504, the Sixth Circuit's focus on the remedial scheme in *Hiler* and *Wathen* illustrates the jot-for-jot incorporation approach. Multiple layers of statutory language analysis led to the Sixth Circuit's determination that the definitions alone did not support a finding of personal liability of supervisors; the court explicitly rejected a broader, more protective approach.[118]

The Eighth Circuit reached the same conclusion in *Wojewski v. Rapid City Regional Hospital, Inc.*[119] Dr. Paul Wojewski became a member of Rapid City Regional Hospital (RCRH) in 1988.[120] After working as a cardiothoracic surgeon for eight years, Dr. Wojewski took a leave of absence in 1996 to obtain treatment for bipolar disorder.[121] In 2003, RCRH reinstated Dr. Wojewski with certain limitations.[122] Shortly after reinstatement, Dr.

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109 *See id.* at 405–06.

110 *Id.* at 405 (quoting Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 51 (1987)).

111 *Id.* at 405–06.

112 *Id.*

113 *See* 42 U.S.C. § 2000e-5(b) (2006).

114 Hiler v. Brown, 177 F.3d 542, 546 (6th Cir. 1999).

115 *See id.*

116 *See* § 2000e(b). "The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person . . . ." *Id.*

117 *Wathen*, 115 F.3d at 406 (citing Tomka v. Seiler Corp., 66 F.3d 1295, 1314 (2d Cir. 1995)).

118 *See Hiler*, 177 F.3d at 546–47.

119 450 F.3d 338 (8th Cir. 2006).

120 *Id.* at 340–41.

121 *Id.* at 341.

122 *Id.* The court outlined Dr. Wojewski's limitations:

Wojewski suffered a manic episode during heart surgery and was terminated.[123] Dr. Wojewski sued RCRH for violations of the ADA and Rehabilitation Act with respect to his termination, but the United States District Court for the District of South Dakota granted RCRH's motion for summary judgment on both claims on the ground that Dr. Wojewski was an independent contractor.[124]

On appeal, the Eighth Circuit Court of Appeals held that the ADA protects employees, not independent contractors.[125] The appellate court agreed with the district court's determination that Dr. Wojewski was an independent contractor, applying factors from the Restatement (Second) of Agency section 220(2)[126] and the control test.[127] Under these analyses, Dr. Wojewski did not meet the criteria of an employee, and therefore was not covered by the ADA.[128] With respect to Dr. Wojewski's claim of a violation of section 504 of the Rehabilitation Act, he argued that even if he was classified as an independent contractor, the Act does not require employee status.[129] The court disagreed.[130]

The Eighth Circuit's treatment of independent contractors under the Rehabilitation Act in *Wojewski* primarily cites the absence of contrary case

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> 'meet periodically with a monitoring physician; meet with [certain medical officers] upon demand.' In addition, the agreement required that Dr. Wojewski 'take mandatory vacations'; limit the time he was on call; participate in therapy; take prescribed medications and refrain from taking unprescribed medications; 'consume no more than three glasses of wine per week'; submit to 'random biological fluid collection'; 'submit to . . . mental, physical or medical competency examinations' demanded of him; limit traveling; release all medical or other personal information relevant to his impairment; 'submit to review of 100% of his surgical cases for a period of six months from the date of reinstatement'; and 'submit a formal proctorship of his clinic and hospital practice.'

Id.

[123] *Id.*

[124] *Wojewski*, 450 F.3d at 341–42.

[125] *Id.* at 342.

[126] RESTATEMENT (SECOND) OF AGENCY § 220(2) (1958) ("In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered: (a) the extent of control which, by the agreement, the master may exercise over the details of the work; (b) whether or not the one employed is engaged in a distinct occupation or business; (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (d) the skill required in the particular occupation; (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (f) the length of time for which the person is employed; (g) the method of payment, whether by the time or by the job; (h) whether or not the work is a part of the regular business of the employer; (i) whether or not the parties believe they are creating the relation of master and servant; and (j) whether the principal is or is not in business.").

[127] *Wojewski*, 450 F.3d at 342–44.

[128] *Id.*

[129] *Id.* at 344.

[130] *Id.* at 345 (holding that the Rehabilitation Act applies only to employees and not to independent contractors).

law to support a finding that protection extends to independent contractors.[131] Dr. Wojewski was not a qualified individual with a disability because he was not an employee under the ADA.[132] The Eighth Circuit adhered to the principle that the ADA and Rehabilitation Act are so similar that "cases interpreting either are applicable and interchangeable."[133] Therefore, section 504 requires the existence of an employment relationship.[134] Only a person employed by an employer is protected under the Rehabilitation Act.[135] Because Dr. Wojewski was unable to present any case law finding a non-employee to be covered by section 504, the Eighth Circuit refrained from "extend[ing] coverage of the Rehabilitation Act to independent contractors."[136]

The Sixth and Eighth Circuit Courts' analyses of the interplay between the ADA and Rehabilitation Act in *Hiler* and *Wojewski* share the view that the Rehabilitation Act must rely exclusively on the literal statutory language of Title I.[137] By following the jot-for-jot incorporation approach, courts must deny protection to independent contractors under the Rehabilitation Act because they are not statutory employees under the ADA.[138] To do otherwise would be an impermissible extension of the Rehabilitation Act. In disagreement with this interpretation are the Ninth and Tenth Circuit Courts of Appeal, which adhere to the selective incorporation approach.

B. The Selective Incorporation Approach

Distinguishable from the jot-for-jot incorporation approach is the selective incorporation approach, which includes independent contractors within the ambit of Rehabilitation Act protection. The selective incorporation approach incorporates the standards of the ADA to reach a broader reading of the Act.[139] This broader reading of the Act does not "extend" coverage to

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[131] *Id.* at 344–45.

[132] *Id.* at 344.

[133] *Wojewski*, 450 F.3d at 345 (quoting Gorman v. Bartch, 152 F.3d 907, 912 (8th Cir. 1998)).

[134] *Id.* at 345 (holding that, as an issue of first impression, the Rehabilitation Act applies only to employees and not to independent contractors).

[135] *See* Americans with Disabilities Act of 1990, 42 U.S.C. § 12111(4) (2006) (defining an "employee" as "an individual employed by an employer").

[136] *Wojewski*, 450 F.3d at 345.

[137] *See id.* (citing the similarity between the Rehabilitation Act and Title I as a reason for limiting applicability of the Rehabilitation Act to employees); Hiler v. Brown, 177 F.3d 542, 546–47 (6th Cir. 1999) (referencing the statutory definition of "employer" in Title I in holding that supervisors are not subject to liability for retaliation under the Rehabilitation Act).

[138] *See Wojewski*, 450 F.3d at 344–45 (holding that the Rehabilitation Act applies only to employees and not to independent contractors).

[139] *See* Fleming v. Yuma Reg'l Med. Ctr., 587 F.3d 938, 946 (9th Cir. 2009), *cert. denied*, 130 S. Ct. 3468 (2010).

independent contractors, but rather finds that they may be covered intrinsically by the language of the Act.[140] The Ninth Circuit in *Fleming v. Yuma Regional Medical Center* did not incorporate Title I's definition of "employee" because that definition does not relate to the standards for evaluating whether section 504 has been violated.[141] Likewise, in *Schrader v. Fred. A. Ray, M.D., P.C.*, the Tenth Circuit declined to incorporate Title I's definition of "employer" and held an employer with fewer than fifteen employees liable under section 504.[142] The "Selective Incorporation Approach" followed by the Ninth and Tenth Circuit Courts of Appeal represents (1) an emphasis on legislative history in support of the Rehabilitation Act's broad coverage and (2) a severance of the Act's reliance on the ADA with respect to whom may be protected by the Act.[143]

Just as the Sixth Circuit determined whether the statutory definitions of the ADA apply to the Rehabilitation Act, so too did the Tenth Circuit in *Schrader v. Fred A. Ray, M.D., P.C.*, but with opposite results.[144] Alexis Kim Schrader worked for Fred A. Ray, M.D., P.C. as a receptionist and records clerk until she was terminated in 1998.[145] Schrader had a history of liver cancer and a non-cancerous brain tumor, which caused her to take medical leaves of absence from employment with Ray.[146] In her complaint, Schrader alleged that Ray terminated her solely because of her disability, violating section 504 the Rehabilitation Act.[147] Accepting Ray's argument that the Rehabilitation Act did not apply to employers with fewer than fifteen employees, and because Ray had fewer than fifteen employees, the United States District Court for the Northern District of Oklahoma entered an order of summary judgment for Ray.[148]

On appeal, the Tenth Circuit considered whether section 504(d)'s adoption of the standards of Title I of the ADA meant that the Rehabilitation Act must use the same definition of employer as the ADA.[149] The court emphasized that section 504(d) does not use the word "employer";[150] instead, it prohibits discrimination by any program or activity receiving federal financial assistance[151] without reference to the number of employees.[152] Title

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[140] *Id.* at 945–46 (stating that the language of the Rehabilitation Act "is broad enough to cover employees and independent contractors alike" without any need to judicially expand the Act).

[141] *See id.* at 941.

[142] 296 F.3d 968, 969 (10th Cir. 2002).

[143] *See id.* at 972–74.

[144] *See id.* at 972.

[145] *Id.* at 970.

[146] *Id.*

[147] *Id.*

[148] *Schrader*, 296 F.3d at 970.

[149] *See id.* at 971–72; *see also supra* note 103.

[150] *Schrader*, 296 F.3d at 972.

[151] *Id.* at 971.

[152] *Id.* at 972 (citing Johnson v. N.Y. Hosp., 897 F. Supp. 83, 86 (S.D.N.Y. 1995), *aff'd*, 96 F.3d 33 (2d Cir. 1996)).

I should not be used to determine if the Rehabilitation Act applies to an employer, because section 504(d) is silent on this issue.[153] In other words, "[section] 504(d) addresses only the substantive standards for determining *what* conduct violates the Rehabilitation Act, not the definition of *who* is covered under the Rehabilitation Act."[154] In reaching this conclusion, the Tenth Circuit relied on *Johnson v. New York Hospital*,[155] which explained the significance of the addition of 504(d) in 1992.[156]

The Tenth Circuit in *Schrader* looked to *Johnson* for its explanation of why the standards for deciding whether an employer is subject to the Rehabilitation Act are left open under section 504(d).[157] If the ADA was created to provide disability discrimination protection to all employees, not just employees of employers receiving federal funding, then it does not follow that the Rehabilitation Act must now restrict its protection to employees of employers receiving federal financial assistance with fifteen or more employees as the ADA suggests.[158] *Schrader* agreed with the suggestion in *Johnson* that it is counter-intuitive that the ADA would have a narrowing effect on the Rehabilitation Act.[159]

The Tenth Circuit found this rationale persuasive, particularly considering the existing language of other parts of section 504 and the congressional intent of the Act.[160] In *Schrader*, the court referred to section 504(c) which carves out an exception for small providers;[161] small providers, defined as providers with fifteen or fewer employees,[162] do not have to make "significant structural alterations to their existing facilities for the purpose of assuring program accessibility."[163] It is unnecessarily duplicative for section 504(c) to explicitly exclude small providers; if section 504(d) is read to have the same limiting effect as to all portions of 504, there is no need for a small-employer exception in 504(c) if all provisions of 504 impose a fifteen-employee minimum.[164]

Departing from *Hiler*, the Tenth Circuit in *Schrader* held that section 504(d) should be interpreted to adopt the standards of Title I of the ADA only as to substantive matters, such as whether a person is a qualified

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153 *Id.*

154 *Id.*

155 *Johnson*, 897 F. Supp. at 83.

156 *See id.* at 86.

157 *See id.*

158 *See id.*; *see also Schrader*, 296 F.3d at 972.

159 *See Johnson*, 897 F. Supp. at 86; *see also Schrader*, 296 F.3d at 972.

160 *See Schrader*, 296 F.3d at 973–74.

161 *See id.* at 972–73.

162 Nondiscrimination on the Basis of Handicap in Programs or Activities Receiving Federal Financial Assistance, 7 C.F.R. § 15.b.18(c) (2010); Nondiscrimination Based on Handicap in Federally Assisted Programs or Activities—Implementation of Section 504 of the Rehabilitation Act of 1973, 28 C.F.R. § 42.521(c) (2010); Discrimination Prohibited on the Basis of Handicap, 41 C.F.R. § 101-8.309(d) (2007).

163 Rehabilitation Act of 1973, 29 U.S.C. § 794(c) (2006).

164 *Schrader*, 296 F.3d at 973.

individual with a disability or the provision of a reasonable accommodation.[165] *Schrader* primarily rests on the legislative construction and history of 504(d) to find that the Act is not limited to employers with fifteen or more employees.[166] While small employers are shielded from ADA liability, the Rehabilitation Act offers no such exception with respect to workplace disability discrimination.[167] Employers or providers voluntarily accept federal funding under the Rehabilitation Act and, therefore, must adhere to its terms without exception.[168] Similarly, there is no exception to liability for schools or health care facilities with fewer than fifteen employees that are recipients of federal financial aid.[169] All employers, regardless of the number of employees, must comply with section 504.[170]

Further adhering to the premise that 504(d) is inappropriate for determining who the Rehabilitation Act covers, the Ninth Circuit looked beyond Title I of the ADA in *Fleming* to find that the Act includes independent contractors.[171] *Fleming* addresses nearly the same factual situation as *Wojewski*, the Rehabilitation Act's treatment of independent contractors, but with the opposite outcome.[172]

Dr. Lester Fleming worked for Yuma Regional Medical Center (Yuma) as an anesthesiologist.[173] Yuma declined to accommodate Dr. Fleming, who suffered from sickle cell anemia, and Dr. Fleming sued Yuma for breach of employment contract and violation of section 504(d) of the Rehabilitation Act.[174] Relying on *Wojewski* and Justice Scalia's dissenting opinion in *PGA Tour, Inc. v. Martin*,[175] the United States District Court for the District of Arizona determined that Dr. Fleming was an independent contractor and, therefore, was not covered by the Rehabilitation Act.[176] The Ninth Circuit Court of Appeals reversed this decision, finding four reasons to support the Act's coverage of independent contractors.[177]

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165 *Id.* at 975.

166 *See id.* at 973–75.

167 *See id.* at 972 (citing Johnson v. N.Y. Hosp., 897 F. Supp. 83, 86 (S.D.N.Y. 1995)).

168 *See id.* at 974.

169 *See id.* at 973.

170 *Schrader*, 296 F.3d at 975.

171 Fleming v. Yuma Reg'l Med. Ctr., 587 F.3d 938 (9th Cir. 2009), *cert. denied*, 130 S. Ct. 3468 (2010).

172 *Id.* at 939.

173 *Id.* at 940.

174 *Id.*

175 *See supra* Part II.C.

176 *See Fleming*, 587 F.3d at 941 (quoting the district court as stating that "[e]mployment actions under the Rehabilitation Act may only be brought by employees and cannot be brought by independent contractors" and summarizing the district court's determination that "Fleming was not an employee, but an independent contractor"); *see also* PGA Tour, Inc. v. Martin, 532 U.S. 661, 692 (2001) (Scalia, J., dissenting).

177 *Fleming*, 587 F.3d at 941–46.

The first reason the Ninth Circuit cited is the broader coverage of the Rehabilitation Act as compared to Title I of the ADA.[178] The Act covers all programs and activities benefiting from federal aid, not just employers, such that an employment relationship is not a prerequisite.[179] In contrast, Title I only handles employment issues, such as hiring, firing, and training.[180] Other relationships, such as public accommodations and educational institutions, are dealt with in other titles of the ADA.[181] Because section 504 and Title I vary in scope, a wholesale incorporation of Title I was deemed inappropriate by the Ninth Circuit.[182]

Second, section 504(d) incorporates the standards of Title I of the ADA, as opposed to using language of incorporation.[183] The Ninth Circuit used the Supreme Court decision in *Consolidated Rail Corp. v. Darrone*[184] to illustrate this point.[185] *Darrone* found that although section 504 is limited to the remedies, rights, and procedures afforded by section 604 of Title VI of the Civil Rights Act, section 504 is not confined to the other provisions of section 604, like coverage of employers whose primary use of the federal funding was to provide employment.[186] *Darrone* supports the conclusion that section 504(d) should not be restricted in scope to the procedural standards of Title I because there is no explicit instruction to do so within section 504(d).[187] Without explicit limiting language, as in 504(c), the Ninth Circuit refrained from restricting section 504 to employees only.[188]

The third reason for including independent contractors within the Rehabilitation Act, according to *Fleming*, is that a "jot-for-jot" incorporation would unduly narrow the Act.[189] Adopting verbatim definitions of employer and employee, as used in Title I of the ADA, would have the undesirable effect of narrowing the Rehabilitation Act.[190] The Ninth Circuit explained,

> [I]f we adopted the district court's and Yuma's position, we would have to conclude that Congress narrowed the Rehabilitation Act by adopting the ADA. That conclusion contradicts the plain import of those acts, and we decline to go down that road without a clearer indication that Congress wanted us to.[191]

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178 *Id.* at 941–42.

179 *See id.* at 942; *see also* Rehabilitation Act of 1973, 29 U.S.C. § 794(a) (2006).

180 *Fleming*, 587 F.3d at 942 (citing 42 U.S.C. § 12112).

181 *Id.* (citing Zimmerman v. Or. Dep't of Justice, 170 F.3d 1169, 1172, 1177–78 (9th Cir. 1999)).

182 *See id.*

183 *Id.*

184 465 U.S. 624 (1984); *see supra* Part II.C.

185 *Fleming*, 587 F.3d at 942.

186 *Darrone*, 465 U.S. at 632.

187 *Fleming*, 587 F.3d at 943.

188 *Id.* at 946.

189 *Id.* at 943.

190 *Id.* at 943–44.

191 *Id.*

Instead, section 504 should adhere only to the substantive portions of Title I, as applied in *Schrader*.[192]

Following this thread, Yuma claimed that the definition of employee or employer is substantive, relying on *Arbaugh v. Y & H Corp.*, a U.S. Supreme Court decision that labeled Title VII of the Civil Rights Act's definition of employer[193] as substantive.[194] However, the Ninth Circuit suggested Yuma's argument is misguided; the definition of employee is substantive as opposed to jurisdictional, not as opposed to procedural.[195] Merely labeling the definitions of employer and employee as substantive does not explain whether the ADA's definitions are part of the substantive standards for evaluating an alleged violation.[196]

The fourth argument against a literal reading of section 504(d) is the potential for inconsistent duplication of terms, such as "infectious and communicable diseases" and alcoholism.[197] Section 7 of the Rehabilitation Act specifically treats alcoholics and individuals with certain infectious diseases[198] much differently than the ADA.[199] The Rehabilitation Act maintains its own standards with respect to alcoholism and infectious and communicable diseases;[200] it does not adopt of the ADA definition of disability with respect to these conditions.[201] The Ninth Circuit in *Fleming* suggests Congress intentionally created "two parallel schemes."[202] To incorporate the Title I standards of the ADA jot-for-jot into section 504, unnecessary duplication and inconsistencies would occur.[203]

The court in *Fleming* ultimately concluded that the Rehabilitation Act is broad enough to include independent contractors, reversing summary judgment for Yuma.[204] Because section 504 does not refer to employment, no employer-employee relationship is necessary.[205] The Ninth Circuit acknowledges the jot-for-jot incorporation approach taken by the Sixth and Eighth Circuits, but declines to follow it, though admitting it may be simpler

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192 *Id.* at 944 (citing Schrader v. Fred A. Ray, M.D., P.C., 296 F.3d 968, 972 (10th Cir. 2002)).

193 Civil Rights Act of 1964, 42 U.S.C. § 2000e(b) (2006).

194 *Fleming*, 587 F.3d at 944–45 (citing Arbaugh v. Y & H Corp., 546 U.S. 500, 516 (2006)).

195 *Id.*

196 *Id.*

197 *Id.* at 945.

198 *See* Rehabilitation Act of 1973, 29 U.S.C. § 705(20)(C)–(D) (2006).

199 Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12113(e), 12114 (2006).

200 29 U.S.C. § 705(20)(C)(v), (D).

201 42 U.S.C. §§ 12113(e), 12114.

202 *Fleming*, 587 F.3d at 945.

203 *Id.*

204 *Id.*

205 *Id.* at 945–46.

to administer.[206] The Ninth Circuit suggests that the selective interpretation of Title I is the best reading of section 504 of the Rehabilitation Act.[207]

IV. ANALYSIS

The U.S. Supreme Court denied certiorari in *Fleming*,[208] so the split between courts following the jot-for-jot incorporation approach and the selective incorporation approach will widen as jurisdictions must choose which approach to follow. The circuit courts following the jot-for-jot incorporation approach focus on Scalia's statement in his *PGA* dissent stating that Title I of the ADA applies only to employees; independent contractors are not protected.[209] An application of standards of Title I of the ADA to section 504 would mean the Rehabilitation Act does not protect independent contractors.[210] However, the courts following the selective incorporation approach are instead persuaded by *Darrone*, as they have differentiated Title I's substantive standards of finding a violation from procedural standards as to who is covered.[211] Whether Title I includes independent contractors is irrelevant to section 504 according to courts following this approach.[212] After contrasting the two approaches, and particularly heeding the legislative history and Congressional intent of the Rehabilitation Act, the selective incorporation approach emerges as the preferable approach because of the absence of limiting language in section 504 and because broadened disability discrimination protection aligns with the ADAAA.

A. Critique of the Jot-for-Jot Incorporation Approach

The interrelatedness of the ADA and the Rehabilitation Act is widely accepted by the courts, but there is a split of authority regarding the extent to which Title I's standards are incorporated into section 504. Courts following the jot-for-jot incorporation approach incorporate Title I *in toto*. This approach creates statutory inconsistencies between the ADA and the Rehabilitation Act. It also fails to account for both the subtle and obvious differences between the scope and purpose of each.

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206 *Id.* at 946.
207 *See id.*
208 Yuma Reg'l Med. Ctr. v. Fleming, 130 S. Ct. 3468 (2010).
209 PGA Tour, Inc. v. Martin, 532 U.S. 661, 692 (2001) (Scalia, J., dissenting).
210 *See supra* Part III.A.
211 *See supra* Part III.B.
212 *See supra* Part III.B.

1. Literal Extraction of Title I Causes Inconsistency Among the Acts

Section 503(e) of the Rehabilitation Act states that procedures should be developed such that complaints filed under both the Act and ADA are "dealt with in a manner that avoids duplication of effort and prevents imposition of inconsistent or conflicting standards for the same requirements under this section [503] and the Americans with Disabilities Act of 1990."[213] In determining who is covered by section 504, a literal adoption of Title I would create at least four internal inconsistencies, which the Act is trying to avoid.

First, Title I's fifteen-employee requirement as applied to the Rehabilitation Act would effectively duplicate section 504(c)'s exemption for small providers.[214] If section 504(d)'s incorporation of Title I was meant to exclude small employers as the ADA does, then there would be no need for the language in 504(c). Furthermore, section 504's definition of "program or activity" is not limited to a certain number of employees; the statutory definition includes a sole proprietorship,[215] which obviously falls below fifteen employees.

Second, the jot-for-jot incorporation approach fails to account for the different procedural requirements when filing a claim of discrimination. Under Title I, a complainant must file a charge of employment discrimination with the Equal Employment Opportunity Commission (EEOC) before filing a lawsuit.[216] The EEOC will then investigate the charge of disability discrimination and possibly issue at "Notice of Right-to-Sue."[217] Administrative exhaustion is required under the ADA because Title I incorporates this provision from Title VII of the Civil Rights Act of 1964 (CRA).[218] Section 504, on the other hand, does not require administrative exhaustion because the section incorporates Title VI of the CRA.[219] Individuals "may file suit in federal district court against a private employer [or a public entity] receiving federal financial assistance, without filing a complaint with the administrative agency."[220] If section 504(d) incorporates Title I jot-for-jot, then section 504 claimants should not be able to forego

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213 Rehabilitation Act of 1973, 29 U.S.C. § 793(e) (2006).

214 *See supra* text accompanying notes 162–164.

215 29 U.S.C. § 794(b)(3).

216 *See* Americans with Disabilities Act of 1990, 42 U.S.C. §12117(a) (2006) (incorporating the administrative exhaustion standards of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5 (2006)).

217 U.S. Equal Emp't Opportunity Comm'n, *Filing a Lawsuit*, http://www.eeoc.gov/employees/lawsuit.cfm (last visited May 23, 2011).

218 *See* 42 U.S.C. § 12117(a); *see also* Katie Eyer, *Rehabilitation Act Redux*, 23 YALE L. & POL'Y REV. 271, 290 (2005).

219 *See* 42 U.S.C. § 12117(a); *see also* Eyer, *supra* note 218, at 290.

220 U.S. Dep't of Labor, Office of Disability Emp't Policy, *Employment Rights: Who Has Them and Who Enforces Them*, http://www.dol.gov/odep/pubs/fact/rights.htm (last visited May 23, 2011).

administrative vetting through the EEOC. However, the procedure for filing section 504 claims has never followed Title I in this respect.

Third, the ADA and the Rehabilitation Act treat individuals with alcoholism differently.[221] An incorporation jot-for-jot of Title I into section 504 results in conflicting provisions. Under the ADA, alcoholics are qualified individuals with disabilities only if they are participating in or have completed a rehabilitation program and are no longer abusing alcohol, or are regarded as disabled.[222] The Rehabilitation Act specifically excludes alcoholics as qualified individuals with a disability if their alcoholism prevents them from performing their job duties.[223] The Act would not appear to include alcoholics who have undergone rehabilitation and are no longer using alcohol, but are nonetheless physically or mentally disabled due to prolonged alcohol abuse. An allegation of disability discrimination under the Act by an alcoholic under these circumstances would likely be resolved according to the ADA standards as most sections of the Act include provisions for incorporation of the standards of the ADA, like that of 504(d);[224] however, a facial discrepancy is created between the two Acts that suggests Congress either did not intend or did not anticipate such redundancy.

Fourth, the ADA and Rehabilitation Act differ on their handling of individuals with infectious or communicable diseases. Under the ADA, where an individual has an identified infectious or communicable disease, a covered entity may "refuse to assign or continue to assign such individual to a job involving food handling" when reasonable accommodations inadequately minimize the risk to self and others.[225] The Rehabilitation Act does not mention food-handling in its provision on individuals with infectious and communicable disease, but it does exclude individuals with certain infections or diseases from coverage under the employment provisions of sections 503 and 504.[226] When facing a disability discrimination claim under section 504 by a person claiming to be a qualified individual with a disability based on such an infection or disease, the ADA standards would, therefore, displace the Act's standards for food-handling employment positions only. This incorporation leaves open the determination of how an individual with such an infection or disease would be treated if he or she was discriminated against by a non-employer program or activity that receives federal funding, like a school or hospital. These statutory provisional differences demonstrate that the Rehabilitation Act and the ADA

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[221] Fleming v. Yuma Reg'l Med. Ctr., 587 F.3d 938, 945 (9th Cir. 2009), *cert. denied*, 130 S. Ct. 3468 (2010).

[222] 42 U.S.C. § 12114(a)–(b).

[223] Rehabilitation Act of 1990, 29 U.S.C. § 705(20)(C)(v) (2006).

[224] *See* 29 U.S.C. § 791(g) (referring to the standards for finding of violation of section 501, "Employment of individuals with disabilities"); 29 U.S.C. § 793(d) (referring to the standards for finding a violation of Section 503, "Employment under federal contracts").

[225] 42 U.S.C. § 12113(d)(2).

[226] 29 U.S.C. § 705 (20)(D).

are two separate statutory schemes, and simply inserting Title I into section 504 is not seamless because the Acts have different foci.

2. Congress Intended the Rehabilitation Act to Provide Broad Protection

Congress intended section 504 of the Rehabilitation Act to be a "floor" and not a "ceiling" for the ADA.[227] However, the jot-for-jot incorporation approach, in preferring literal incorporation, loses sight of the differences between the two Acts and inappropriately narrows the coverage of the Rehabilitation Act. Ironically, the Sixth Circuit in *Wathen* acknowledged that expounding a statute cannot be done in a vacuum. The whole provision and purpose of the act must be considered.[228] Yet, courts adhering to the jot-for-jot incorporation approach do not sufficiently separate the purposes of the intertwined ADA and Rehabilitation Act when addressing violations of section 504. This becomes apparent when comparing (1) the elements of a prima facie case of disability discrimination and (2) the scope of coverage of each Act.

First, the ADA and Rehabilitation Act differ with respect to the burden-shifting schemes used to prove intentional discrimination. The original language of section 504 stated that "no otherwise qualified handicapped individual . . . 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."[229] The key phrases are "solely by reason of handicap" and "program or activity." Section 504(a), as codified, has been altered several times, including replacing "qualified handicapped individual" with "qualified individual with a disability"[230] and inserting gender-neutral pronouns,[231] but all other terms have remained unchanged.

The phrase "solely by reason of disability" is significant because it differentiates a prima facie claim of disability discrimination under section 504 from that of Title I of the ADA. To establish a claim of discrimination under section 504, a party must show that he or she: (1) is a qualified individual with a disability, (2) was denied benefits of a program or activity receiving federal financial assistance, and (3) was discriminated solely based on disability.[232] Essentially, a section 504 plaintiff has to prove "but-for"

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[227] Colker, *supra* note 27, at 32. 42 U.S.C. § 12201(a) states, "Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 . . . ."

[228] *See supra* text accompanying notes 109–110.

[229] Rehabilitation Act of 1973 § 504 (emphasis added).

[230] Rehabilitation Act Amendments fo 1992 § 102(p)(32), 29 U.S.C. § 794(a) (2006).

[231] Handicapped Programs Technical Amendments Act of 1988 § 206(d)(1), 29 U.S.C. § 794(a) (2006).

[232] Wojewski v. Rapid City Reg'l Hosp., Inc., 450 F.3d 338, 344 (8th Cir. 2006) (citing Gorman v. Bartch, 152 F.3d 907, 911 (8th Cir. 1998)).

causation.[233] The defendant then has an opportunity to show that accommodating the individual is an undue burden, such that no liability should be imposed.[234] A mixed-motive instruction would not be available under section 504.[235]

Compare this with the elements needed to prove a prima facie case of ADA Title I discrimination: (1) complainant belongs to a protected class (meets the definition of qualified individual with a disability); (2) complainant applied and was qualified for a job for which the employer was seeking applicants; (3) despite his or her qualifications, he or she was rejected; and (4) after rejection, the position remained open and the employer continued to seek applicants from persons with complainant's qualifications.[236] The burden then shifts to the defendant to present a legitimate, non-discriminatory reason for the adverse action.[237] However, even if the defendant is able to present such a reason, the burden shifts back to the plaintiff to show pretext—a false motive used to disguise the true discriminatory motive.[238] Going one step further, if the plaintiff has demonstrated a prima facie case of ADA discrimination, and the fact-finder believes the plaintiff's argument of pretext, it may justify a finding of discrimination.[239]

Despite different statutory requirements for proving discrimination under Title I and section 504, some courts have spliced the causes of action, leading to further confusion. For example, the Sixth Circuit in *Jones v. City of Monroe*[240] imported the Rehabilitation Act's "solely" requirement into Title II of the ADA, noting that the there are no relevant differences between the two provisions.[241] In a similar Sixth Circuit case, *Everson v. Leis*,[242] the majority followed *Jones*, but not without criticism from one judge.[243] Judge Karen Nelson Moore addressed this hybrid language in her dissenting opinion, in which she noted the absence of the word "solely" in Title II.[244] Judge Moore argued that the Sixth Circuit had taken the minority approach by inserting "solely," diverging from at least eight other federal circuit courts of appeal.[245] Other than the Sixth Circuit, only the Fourth Circuit inserts

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233 *See* Eyer, *supra* note 218, at 283–84.

234 *Gorman*, 152 F.3d at 911.

235 *See* Eyer, *supra* note 218, at 293.

236 *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

237 *See id.*; *see also* Raytheon Co. v. Hernandez, 540 U.S. 44, 50 (2003) (acknowledging that the *McDonnell Douglas* framework is appropriate for ADA claims).

238 Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 143 (2000).

239 *Id.* at 148.

240 341 F.3d 474 (6th Cir. 2003).

241 *Id.* at 477 n.3.

242 Everson v. Leis, No. 09-4355, 2011 WL 463231 (6th Cir. Feb. 10, 2011).

243 *Id.* at *11–12 (Moore, J., dissenting).

244 *Id.*

245 *Id.* The following are the eight federal circuit court of appeals opinions Judge Moore referred to: *Bowers v. National Collegiate Athletic Ass'n*, 475 F.3d 524, 553 n. 32 (3d Cir. 2007); *Bircoll v. Miami-Dade County*, 480 F.3d 1072, 1083 (11th Cir. 2007); *Buchanan v.*

"solely" into the ADA standards of finding discrimination based on disability.[246] Of the Sixth Circuit's approach toward ADA and Rehabilitation Act claims, Judge Moore wrote, "Prior to *Jones*, this court recognized that, although we frequently apply the same analysis to claims under both statutes, this textual difference may be an instance in which the analyses diverge."[247]

Using the Sixth Circuit as a cautionary tale demonstrates that courts are conflicted between treating the Rehabilitation Act and the ADA as containing universally-shared provisions or containing completely separate standards. The Sixth Circuit is inclined to mesh a section 504 claim with the burden shifting that accompanies a Title I claim largely due to the statutory resemblance and codependence of the two Acts.[248] Courts following the jot-for-jot incorporation approach attempt to create harmonious standards for the same requirements under the Acts in order to avoid duplication of effort, but have caused further confusion because the Rehabilitation Act and ADA are not interchangeable.

Plaintiffs bringing ADA claims have an additional opportunity for proving discrimination by a showing of pretext because they must only show that discrimination was on the basis of disability.[249] Rehabilitation Act claimants may not assert pretext because discrimination must be solely based on disability.[250] The stricter "solely" standard of section 504(a) remains intact regardless of whether Congress deliberately or inadvertently retained it after adding section 504(d).[251] Section 504 cannot require both the use of Title I's "on the basis of disability" pursuant to section 504(d) and section 504(a)'s "solely" by reason of disability.[252] Instead, section 504 should retain its own distinct prima facie elements, relying on Title I only for the enumerated prohibited types of discrimination. As a result, ADA plaintiffs will have a potentially greater ability to bring successful claims of disability discrimination in the workplace than section 504 plaintiffs. This is logical because the ADA is an extension of the already broad Rehabilitation Act.

The phrase "program or activity" highlights the second difference in scope between section 504 and Title I. The Rehabilitation Act does not use

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Maine, 469 F.3d 158, 170–71 (1st Cir. 2006); *Rodde v. Bonta*, 357 F.3d 988, 995 (9th Cir. 2004); *Henrietta D. v. Bloomberg*, 331 F.3d 261, 272 (2d Cir. 2003); *Gohier v. Enright*, 186 F.3d 1216, 1219 (10th Cir.1999); *Randolph v. Rodgers*, 170 F.3d 850, 858 (8th Cir. 1999); *Lightbourn v. County of El Paso*, 118 F.3d 421, 428 (5th Cir. 1997), *cert. denied*, 522 U.S. 1052 (1998).

[246] *See* Doe v. Univ. of Md. Med. Sys. Corp., 50 F.3d 1261, 1265 (4th Cir. 1995).

[247] *Everson*, 2011 WL 463231, at *12 (Moore, J., dissenting) (citing McPherson v. Mich. High Sch. Athletic Ass'n, 119 F.3d 453, 460 (6th Cir. 1997) (en banc)).

[248] *See* Jeanette Cox, *Crossroads and Signposts: The ADA Amendments Act of 2008*, 85 IND. L.J. 187, 187 (2010) (explaining that the application of the ADA is contingent upon the courts' understanding of the ADA's relationship with other civil rights statutes).

[249] *See* Americans with Disabilities Act of 1990, 42 U.S.C. § 12112(a) (2006).

[250] Wojewski v. Rapid City Reg'l Hosp., Inc., 450 F.3d 338, 344 (8th Cir. 2006) (citing Gorman v. Bartch, 152 F.3d 907, 911 (8th Cir. 1998)).

[251] *See* Rehabilitation Act of 1973, 29 U.S.C. § 794(a) (2006).

[252] *See id.* § 794(a), (d).

the term "employer."[253] This is noteworthy because it illustrates the scope of coverage of section 504: all organizations that receive federal financial aid from any federal agency or department.[254] Section 504 does more than protect against employment discrimination because it covers more than just employers.[255] It also extends to entities like colleges, universities, hospitals, nursing homes,[256] and state agencies.[257] Section 504 covers the operations of all programs and activities receiving federal aid[258] and ensures that programs, activities, benefits, and opportunities are not withheld from qualified individuals with disabilities because of disability.[259]

In contrast, Title I of the ADA specifically deals with disability discrimination surrounding an employer-employee relationship.[260] The ADA covers all employers, regardless of their sources of funding.[261] Therefore, the ADA has the additional task of balancing competing interests of employers and employees, whereas the Rehabilitation Act does not.[262] When employers voluntarily accept federal funding, they accept, as a condition of that funding, the applicability of section 504.[263] The Rehabilitation Act is less concerned with the burdens placed on employers because receipt of the funding—and subjection to section 504—is optional.[264] Arguably the ADA must be more protective of employers than the Rehabilitation Act, which does not need to observe the tension between rights of employers and employees.

In summary, courts following the jot-for-jot incorporation approach have noted the difference in scope, and to some extent the difference in the elements of a prima facie case of discrimination between the two acts,[265] but still proceed to find the case law interchangeable.[266] Just as under the ADA, an individual hired by an employer cannot bring a claim under section 504 without a showing of an employment relationship under the jot-for-jot incorporation approach. Courts following the jot-for-jot incorporation approach demonstrate an unwillingness to relinquish the requirement of an

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253 *See* Fleming v. Yuma Reg'l Med. Ctr., 587 F.3d 938, 942 (referencing the language of 29 U.S.C. § 794(a)).

254 U.S. Dep't of Health and Human Servs. Office for Civil Rights, *Your Rights Under Section 504 of the Rehabilitation Act*, http://www.hhs.gov/ocr/civilrights/resources/factsheets/504.pdf (last visited May 23, 2011) [hereinafter *Your Rights*].

255 *Id.*

256 *Id.*

257 *See* Eyer, *supra* note 218, at 283–84.

258 Rehabilitation Act of 1973, 29 U.S.C. § 794(b) (2006).

259 *See Your Rights*, *supra* note 254.

260 Americans with Disabilities Act, 42 U.S.C. § 12112 (2006).

261 *See id.* § 12111(5)(A)–(B) (defining employer and exceptions).

262 *See* Schrader v. Fred A. Ray, M.D., P.C., 296 F.3d 968, 974 (10th Cir. 2002) (citing Consol. Rail Corp. v. Darrone, 465 U.S. 624, 633 n.13 (1984)).

263 *Id.*

264 *Id.*

265 *See supra* text accompanying notes 246–248.

266 Wojewski v. Rapid City Reg'l Hosp., Inc., 450 F.3d 338, 344 (8th Cir. 2002).

employment relationship within section 504, which casts independent contractors outside the realm of coverage.[267]

However, the exclusion of independent contractors is understandable by courts taking the jot-for-jot incorporation approach. If the ADA is meant to be broader than the Rehabilitation Act "floor," and the ADA excludes independent contractors, then the Rehabilitation Act could not include them. The distinction that the selective incorporation approach observes is that the two Acts are not so interrelated that they must share identical definitions, standards, and elements. This approach is preferable because, unlike the jot-for-jot incorporation approach, the selective incorporation approach appreciates that section 504 of the Rehabilitation Act can cover independent contractors where Title I of the ADA does not. Ultimately, it is inappropriate to treat the Acts as mirror images of one another because they have different standards, cover different entities, and observe different interests.

B. Proposal: Adopt Selective Incorporation Approach

The selective incorporation approach is superior because it respects that the Acts were both intended to provide broad protection to qualified individuals with disabilities in the workplace without interpreting an extension of one Act to trigger a contraction of the other. The Rehabilitation Act and ADA are separate and distinct statutory schemes, and any importation of Title I provisions into section 504 should be selective. The Acts have been able to maintain separate procedural frameworks and remedial schemes, so not all aspects of Title I need to be imported into section 504.[268] An exercise of that selective approach is the reluctance to insert the ADA's employment relationship requirement into section 504, such that independent contractors do not have to be excluded. Courts following the selective incorporation approach include independent contractors under section 504 on the grounds that there is an absence of statutory language that limits section 504 to employees and that anti-discrimination policy reasons necessitate coverage.

1. Text of Section 504(d) Limits Incorporation to Substantive Standards Only

Section 504(d) incorporates only "[t]he standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section . . . ."[269] The use of words of limitation

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[267] *See id.* at 345; *see also* Beauford v. Father Flanagan's Boys' Home, 831 F.2d 768, 771 (8th Cir. 1987).

[268] *See* Eyer, *supra* note 218, at 290–91 (explaining that section 504 does not require administrative exhaustion and does not cap compensatory damages awards, unlike Title I).

[269] Rehabilitation Act of 1973, 29 U.S.C. § 794(d) (2006).

signifies that Congress did not intend a jot-for-jot incorporation. The selective incorporation approach's perspective that Congress intended the Rehabilitation Act to selectively incorporate the ADA provisions is supported by the U.S. Supreme Court's decision in *Consolidated Rail Corp v. Darrone*.[270] As mentioned previously, that opinion explained that although section 504 borrows the remedial scheme of section 604 of the Civil Rights Act of 1964, it does not assume the same coverage limitations as section 604; section 504's statutory coverage of employers remains intact as written.[271] Because section 504 does not explicitly refer to language of section 604 of the Civil Rights Act nor use limiting language, section 504 does not follow the standards of section 604.[272]

The holding of *Darrone* can easily be analogized to section 504's incorporation of Title I of the ADA. Though section 504(d) does refer to the standards of Title I, it does not use any explicit language of Title I.[273] Likewise section 504(d) does not mention that Title I should in any way limit the scope of section 504.[274] Applying this reasoning, the Ninth Circuit in *Fleming* wrote:

> When Congress said that the Rehabilitation Act should use the "standards" applicable to employment discrimination claims brought under title I, we think Congress meant for us to refer to title I for guidance in determining whether the Rehabilitation Act was violated, but we do not think that Congress meant to restrict the coverage of the Rehabilitation Act.[275]

The Senate Conference Report on the 1992 amendments to the Rehabilitation Act demonstrates Congress's intent for a selective incorporation only.[276] Sponsoring Senator Harkin remarked that those covered by section 504 of Rehabilitation Act would now be able to use the ADA's definitions of reasonable accommodation and discrimination, as well as the standards of pre-employment inquiries.[277] The identification of "those covered by section 504" indicates that any coverage analysis is ancillary to an application of ADA definitions.[278] Also, Senator Harkin's statement was limited to these three specific examples of section 504(d)'s incorporation, suggesting these are the only standards section 504 incorporates.[279] Other

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[270] 465 U.S. 624 (1984).

[271] *See id.* at 632; *see also* Fleming v. Yuma Reg'l Med. Ctr., 587 F.3d 938, 943 (9th Cir. 2009), *cert. denied*, 130 S. Ct. 3468 (2010); *supra* Part II.C.

[272] *See Darrone*, 465 U.S. at 631–33.

[273] *See* 29 U.S.C. § 794(d).

[274] *See id.*

[275] *Fleming*, 587 F.3d at 943.

[276] *See supra* Part II.B; *see also* 138 CONG. REC. 16,608–11 (1992).

[277] 138 CONG. REC. 16,608–11.

[278] *See id.*; *see also* Schrader v. Fred. A. Ray, M.D., P.C., 296 F.3d 968, 974 (10th Cir. 2002).

[279] *Schrader*, 296 F.3d at 974.

ADA definitions, such as "employer" and "employee," arguably would not be incorporated by section 504.

Because the language of section 504(d) is not clear as to the extent of its incorporation of Title I, it must be conservative with incorporation. As compared to the jot-for-jot incorporation approach, the selective incorporation approach causes fewer internal inconsistencies in section 504 and adheres to Congress's intent to prevent inconsistencies and conflicting standards.[280] Also, the selective incorporation approach is desirable because it uses Title I only to decide if a violation of section 504 has occurred, leaving procedural coverage issues to be resolved separately by the Act. The ADA definitions of employer and employee should not be transplanted into section 504, and independent contractors should be automatically covered by the Rehabilitation Act.

2. Inclusion of Independent Contractors Aligns with the ADAAA

Additionally, the selective incorporation approach best recognizes the public policy considerations surrounding workers' rights. The policy of the Rehabilitation Act is to provide broad protection for qualified individuals with disabilities. Because the ADA was substantially amended recently to correct an unintended narrowing of disability discrimination protection,[281] interpretations of the Rehabilitation Act should respect Congress's decision to provide broad coverage. Section 504(d) limits the rest of the section to the substantive standards of Title I of the ADA, so any margin for change lies in procedural standards, such as who is covered. Courts can expand statutory protection to a greater number of qualified individuals with disabilities by including independent contractors under section 504. The selective incorporation approach appropriately allows for inclusion of independent contractors based on public policy considerations surrounding (1) increased prevalence of independent contractors in the workforce and (2) expanded rights of qualified individuals with disabilities.

First, the use and classification of workers as independent contractors has become increasingly widespread in the United States in light of the recent economic downturn. Companies have found the hiring and reclassifying of workers as independent contractors to be a strategic financial decision, allowing them to forego paying employment tax, providing employment benefits, and complying with other federal and state employment laws.[282] Independent contractors are thought to be economically independent from the hiring company, such that they do not need statutory

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[280] *See supra* Part IV.A.1; *see also* 29 U.S.C. § 793(e).

[281] *See* Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 (2006).

[282] *See* Robert C. Bird & John D. Knopf, *Do Disability Laws Impair Firm Performance?*, 47 AM. BUS. L.J. 145, 173–74 (2010) (suggesting disability laws may cause employers to hire more contingent or temporary employees); *see also* Barnhart, *supra* note 5.

protection because they are self-supervised.[283] However, such classification does not always match an individual's true employment status.[284] Further complicating the classification issue is the variety of standards for whether a worker is an employee or independent contractor.[285] A worker can be an employee in one instance and an independent contractor in the next.[286]

This trend toward non-employment has not gone unnoticed by federal enforcement agencies. The Internal Revenue Service (IRS) launched a three-year program in early 2010 that set out to randomly audit 6,000 companies for employee misclassification.[287] The primary aim is to collect employment taxes from companies that have failed to comply with independent contractor classification guidelines.[288] The U.S. Department of Labor (DOL), Wage and Hour Division, created a similar employee misclassification initiative with a ten-year goal of capturing seven million dollars from employer misclassifications.[289]

The extensive monitoring by the IRS and DOL signifies the economic repercussions employers may face by intentionally or mistakenly misclassifying independent contractors.[290] However, the magnitude of these government programs should not overshadow the grave consequences to workers who are dubbed independent contractors. Workers designated as independent contractors lose access to minimum wage, overtime, unemployment insurance, workers' compensation, workplace safety, discrimination protection,[291] unionization rights,[292] and more.[293]

It has already been noted that independent contractors are not employees under the ADA. Therefore, independent contractors who are

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[283] *See* Andrew E. Tanick, *Independent Contractor or Employee?* 67 BENCH & B. MINN., Sept. 2010, at 16–17.

[284] *Id.*

[285] *See* Jeffrey M. Hirsch, *The Law of Termination: Doing More with Less*, 68 MD. L. REV. 89, 118–19 (2008).

[286] *Id.*

[287] Nancy Mann Jackson, *Auditors Crack Down on Independent Contractors*, CNN MONEY.COM (Mar. 29, 2010), http://money.cnn.com/2010/03/29/pf/taxes/employee_audit_crackdown.smb/index.htm.

[288] *Id.*

[289] *See* Joy L. Grasse & Larry L. Turner, *Independent Contractor Relationships and the Perils of Misclassification: What All Employers Should Know*, BNA, 24 LRW 1179, July 15, 2010, at 1; *see also* Seth D. Harris, Deputy Sec'y U.S. Dep't of Labor, Statement Before the Senate Comm. on Health, Educ., Labor, and Pensions (June 17, 2010), http://www.dol.gov/_sec/media/congress/20100617_Harris.htm. [hereinafter *Harris Statement*].

[290] *Harris Statement*, *supra* note 289.

[291] *See id.*

[292] *See* Todd D. Saveland, *Fedex's New "Employees": Their Disgruntled Independent Contractors*, 36 TRANSP. L.J. 95, 96. (2009).

[293] RICHARD A. BALES ET AL., UNDERSTANDING EMPLOYMENT LAW 12 (2007) (explaining that companies do not need to worry about "employment discrimination laws, wage and hour laws, [or] retirement and benefit laws" with respect to independent contractors).

qualified individuals with disabilities have no ADA discrimination protection at the workplace. Section 504 of the Rehabilitation Act helps to bridge this gap by providing coverage to independent contractors who work for employers receiving federal financial assistance. DOL statistics reveal that in 2005, approximately 10.3 million workers were labeled independent contractors, comprising about 7.4% of the total number of individuals in the American workforce.[294] Independent contractor relationships are most likely to appear in the fields of construction, financial activities, and professional and business services.[295] Because of the increasing prevalence of independent contractors in the workplace, federal anti-disability discrimination laws should protect these workers.

Second, section 504 should be interpreted consistently with the ADAAA. The ADAAA was signed into law in September 2008 in response to the U.S. Supreme Court and lower courts' pro-defendant trend toward disability discrimination. Disability rights advocates had been criticizing the case law for years because it effectively put plaintiffs out of court.[296] The ADAAA's "Findings and Purposes" acknowledge that the ADA had fallen short of what Congress had envisioned, and several U.S. Supreme Court decisions were explicitly overruled.[297] In an effort to bring the ADA's goals to fruition where it had once failed, the ADAAA drastically expanded coverage to qualified individuals with disabilities.[298]

Now that the ADAAA has taken a step toward broader disability discrimination protection, the Rehabilitation Act should follow. One natural application of this is the inclusion of independent contractors within the coverage of section 504. As the ADA has recently expanded coverage with the ADAAA, the Rehabilitation Act should now allow independent contractors to be covered by section 504. An application of the canon that "civil rights legislation should be liberally construed" to the independent contractor coverage timely follows the passage of the ADAAA.[299] Courts adopting the selective incorporation approach stay true to the broad purposes and goals of the Rehabilitation Act by ensuring that any qualified individual with a disability who wants to work may work. The inclusion of the class of independent contractors is both appropriate given the public policy

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[294] U.S. Dep't of Labor, *Independent Contractors in 2005*, BUREAU OF LABOR STATISTICS (July 29, 2005), http://www.bls.gov/opub/ted/2005/jul/wk4/art05.htm.

[295] *Id.*

[296] *Cf.* Helen Gunnarsson, *Plaintiff-Friendly ADA Amendments Take Effect Jan. 1*, 96 ILL. B.J. 548, 548 (2008).

[297] *See* ADA Amendments Act (ADAAA) of 2008, Pub. L. No. 110-325, 122 Stat. 3553, 3553–54 (codified as amended at 42 U.S.C. § 12101 (a)–(b) (Supp. III 2009)). *See generally* James P. Drohan, *The Americans with Disabilities Act and Section 504 Update*, 26 TOURO L.REV. 1173, 1173–82 (2011); *supra* Part II.A.

[298] *See* sources cited *supra* note 297

[299] *See* Ruth Colker, *The Mythic 43 Million Americans with Disabilities*, 49 WM. & MARY L. REV. 1, 21 (2007) (citing Chisom v. Roemer, 501 U.S. 380, 430 (1991)) (noting that the canon was last used in 1991, immediately following the passage of the ADA).

considerations for broad disability discrimination protection and necessary due the rising number of workers designated as independent contractors.

V. CONCLUSION

Federal circuit courts are divided as to whether section 504 of the Rehabilitation Act covers independent contractors,[300] and the U.S. Supreme Court thus far has declined to settle this issue.[301] The Sixth and Eighth Circuits have found that section 504(d)'s literal incorporation of the standards of Title I of the ADA precludes extending coverage to independent contractors because they are not employees.[302] On the other hand, the Ninth and Tenth Circuits interpret 504(d) as incorporating from Title I only the standards defining what conduct violates the Act, not who is covered; independent contractors may be covered regardless of the absence of an employer-employee relationship.[303] In consideration of the distinct statutory language, congressional intent, and scope of coverage of the Rehabilitation Act, along with public policy concerning disability discrimination, the inclusion of independent contractors emerges as the better outcome.

Independent contractors represent a growing class of workers and their need for protection has not gone unnoticed.[304] When applying federal anti-discrimination statutes to programs and entities accepting federal financial aid, it is understandable why independent contractors should be included in the statutes' coverage. Section 504 can cover independent contractors without running afoul of 504(d)'s incorporation of Title I of the ADA, because only substantive standards for determining if a violation has occurred are inserted into section 504. More importantly, for public policy reasons, section 504 should cover independent contractors to be consistent with the extended protection afforded to qualified individuals with disabilities through the ADAAA.

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300 *See supra* Part III.

301 Yuma Reg'l Med. Ctr. v. Fleming, 587 F.3d 938 (9th Cir. 2009), *cert. denied*, 130 S. Ct. 3468 (2010).

302 *See supra* Part III.A.

303 *See supra* Part III.B.

304 *See supra* Part IV.B.