OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 82-862

TITLE CONSOLIDATED RAIL CORPORATION, Petitioner v. LEE ANN LeSTRANGE, AS ADMINISTRATIX OF THE ESTATE OF THOMAS LESTRANGE

PLACE Washington, D. C.

DATE November 29, 1983

PAGES 1 thru 48



(202) 628-9300 440 FIRST STREET, N.W. WASHINGTON, D.C. 20001

1	IN THE SUPREME COURT OF THE UNITED STATES
2	x
3	CONSOLIDATED RAIL CORPORATION, :
4	Petitioner, :
5	v. : No. 82-862
6	LEE ANN LeSTRANGE DARRONE, AS
7	ADMINISTRATRIX OF ESTATE OF :
8	THOMAS LeSTRANGE :
9	x
10	Washington, D.C.
11	Tuesday, November 29, 1983
12	The above-entitled matter came on for oral
13	argument before the Supreme Court of the United States
14	at 11:08 a.m.
15	APPEAR ANCES:
16	HARRY A. RISSETTO, ESQ., Washington, D.C.; on behalf of
17	the Petitioner.
18	JOSEPH P. LENAHAN, ESQ., Scranton, Pennsylvania; on
19	behalf of the Respondent.
20	WILLIAM BRADFORD REYNOLDS, ESQ., Assistant Attorney
21	General of the United States, Civil Rights Division,
22	Department of Justice, Washington, D.C.; on behalf
23	of the United States as amicus curiae.
24	
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- 2 CHIEF JUSTICE BURGER: We will hear arguments
- 3 next in Consolidated Rail Corporation against Lee Ann
- 4 LeStrange Darrone, as Administrix of Estate of Thomas
- 5 LeStrange.
- 6 Mr. Rissetto, I think you may proceed when you
- 7 are ready.
- 8 ORAL ARGUMENT OF HARRY A. RISSETTO, ESQ.,
- 9 ON BEHALF OF THE PETITIONER
- MR. RISSETTO: Mr. Chief Justice, and may it
- 11 please the Court, this case involves the application of
- 12 the Rehabilitation Act of 1973 as it was amended to
- 13 claims of employment discrimination on the basis of
- 14 handicap. I think it would be useful to briefly outline
- 15 the essential facts that resulted in the petition for
- 16 cert being granted and being petitioned in this case.
- 17 Mr. LeStrange was employed originally by the
- 18 Erie Lackawanna Railroad in 1943 as an engine service
- 19 employee. He progressed from fireman to engineer, and
- 20 in 1972 -- I'm sorry, 1971, as a result of a non-jcb
- 21 related injury, Mr. LeStrange suffered the loss of his
- 22 left hand and part of his left forearm. He was
- 23 subsequently disqualified from active employment on the
- 24 Erie Lackawanna by the medical department of the Erie
- 25 Lackawanna.

- 1 Shortly afterwards, the Erie Lackawanna sought
- 2 the protection of the bankruptcy laws, and in 1976 the
- 3 properties, the rail properties of the Erie Lackawanna
- 4 were conveyed to ConRail. In 1978, Mr. LeStrange was
- 5 examined by a ConRail medical officer to determine
- 6 whether he was qualified to be reinstated as a yard
- 7 service engineer on ConRail, and he was rejected. A
- 8 complaint was filed under the Rehabilitation Act. The
- 9 district court granted ConRail's motion for summary
- 10 judgment on that aspect of the complaint, and the United
- 11 States Court of Appeals for the Third Circuit reversed.
- 12 The principal question in the case regards the
- 13 score of Section 504 of the Rehabilitation Act. It is
- 14 ConRail's position that Section 504 applies only When
- 15 the primary objective of the federal assistance is to
- 16 provide employment. That interpretation is based
- 17 primarily on the language of the statute, and it is --
- 18 and then that interpretation has also been adopted by
- 19 the United States Court of Appeals for the Second,
- 20 Fourth, Eighth, and Ninth Circuits.
- 21 Section 504 provides that no otherwise
- 22 qualified handicapped individual as defined in Section
- 23 7067 of this title shall solely by reason of his
- 24 handicap be excluded from the participation in and be
- 25 denied the benefits of, or be subjected to

- 1 discrimination under any program or activity receiving
- 2 federal assistance.
- 3 Section 504 as originally enacted had no
- 4 enforcement procedures. In 1978, the statute was
- 5 amended by the addition of Section 505, which provided,
- 6 and this is the critical language in the case, that the
- 7 remedies, procedures, and rights set forth in Title 6 of
- 8 the Civil Rights Act shall be available to any person
- 9 aggrieved by any act or failure to act by any recipient
- 10 of federal assistance or federal provider of such
- 11 assistance under Section 794, which is Section 504 of
- 12 this title.
- 13 Thus, the incorporation of the Title 6
- 14 remedies raises the principal issue in the case. In
- 15 incorporating Title 6, what rights, remedies, and
- 16 procedures were incorporated and made applicable to
- 17 actions under Section 504? It is ConRail's
- 18 interpretation of the statute that the rights, remedies,
- 19 and procedures contained in Title 6 include the
- 20 limitations and particular provisions set out in Section
- 21 604 of the statute.
- 22 Section 604 cf Title 6 provides that nothing
- 23 contained in this title shall be construed to authorize
- 24 action under this title by any department or agency with
- 25 respect to any employment practice of any employer,

- 1 employment agency, or labor organization except where a
- 2 primary objective of the federal financial assistance is
- 3 to provide the employment.
- 4 QUESTION: Your opponents say that that wasn't
- 5 discussed in Congress at any point. Are they correct?
- 6 MR. RISSETTO: That is correct, Your Honor.
- 7 Our interpretation is based on the plain language of the
- 8 statute. There is very little legislative history on
- 9 either side of the guestion, either with respect to the
- 10 initial enactment of Section 503 --
- 11 QUESTION: It is 3,000 pages.
- 12 MR. RISSETTO: There are 3,000 pages in the
- 13 Rehabilitation Act, and the Rehabilitation Act itself is
- 14 a lengthy statute dealing with a myriad of vocational
- 15 rehabilitation programs. Section 504 appears in the
- 16 miscellaneous section, and there is scarcely a snippet
- 17 of legislative history that focuses on it.
- 18 CUESTION: Do you have any explanation why it
- 19 wasn't even mentioned?
- 20 MR. RISSETTO: The only explanation that I can
- 21 offer, and it would be one by hypothesis rather than by
- 22 reference to the legislative history, is that Congress
- 23 understood what they meant in Title 6. They understood
- 24 the coverage of Title 6, and they were simply
- 25 incorporating Title 6 into Section 504. Both in the

- 1 initial passage of Section 504, there is almost an
- 2 identical similarity in the language between Section 504
- 3 and Section 601 of Title 6, and in addition, when they
- 4 amended the statute in 1978 and incorporated the rights,
- 5 remedies, and procedures of Title 6 to enforce Section
- 6 504.
- 7 We believe that the legislative history of
- 8 Sectionn 601 itself, without even looking at Section 604
- 9 of the Act, supports an inference that Congress did not
- 10 intend to regulate federal programs with respect to
- 11 employment practices, except where the federal program
- 12 had as its primary objective employment.
- 13 Whatever ambiguity may have existed in the
- 14 language of Section 601 as it was originally proposed
- 15 was rectified when Congress passed Section 604 of the
- 16 Act, which clearly prohibited or clearly limited the use
- 17 of Section 601 for employment discrimination, and with
- 18 respect to Section 604 and Section 601, there is some
- 19 legislative history, and the legislative history
- 20 supports a limiting interpretation of Section 601 and
- 21 604.
- Now, in the North Haven case, dealing with the
- 23 third statute, that has language similar to Section 504
- 24 and Section 601, this Court considered whether or not
- 25 Title 9 of the Education Act amendments apply broadly to

- 1 all programs receiving federal assistance with respect
- 2 to employment discrimination on the basis of handicap,
- 3 or conversely, whether it applied narrowly only when the
- 4 primary objective of the program for assistance was to
- 5 provide employment, and they opted for the latter
- 6 interpretation of the statute, and the North Haven
- 7 decision was important, if not instrumental in the
- 8 decision of the court of appeals in this case.
- 9 We believe that Title 9 and the North Haven
- 10 decision is inapposite for several reasons, the first of
- 11 which is that Title 9 has its cwn enforcement
- 12 procedures. It did not incorporate Title 6. The
- 13 enforcement procedures set cut in Title 9 do not include
- 14 an analogue to Section 604.
- 15 Secondly, during the legislative consideration
- 16 of Title 9 amendments, a provision identical or similar,
- 17 significantly identical to Section 604 was offered and
- 18 proposed in Congress and was rejected by Congress during
- 19 the conference on the legislation, so thus the court in
- 20 North Haven looked to the rejection of Section 604 as an
- 21 indication of a legislative intent to construe the Title
- 22 9 more broadly than Title 6 had been construed.
- 23 And finally, there was positive legislative
- 24 history identified in the Court's opinion in North Haven
- 25 evidencing an intention to construe that statute more

- 1 broadly than Title 9.
- In contrast, with respect to Section 504 of
- 3 the Rehabilitation Act, Title 6 does not -- is
- 4 specifically incorporated in Section 504. There is no
- 5 evidence that Congress intended or attempted to exclude
- 8 Section 604 from the rights, remedies, and procedures of
- 7 Title 6 that were incorporated into Section 504 as an
- 8 enforcement mechansim, and there is no legislative
- 9 history that suggests that Section 604 was not intended
- 10 to be applied to actions under Section 504.
- 11 We believe that Section 504 was intended to
- 12 focus on the intended beneficiaries of the federal
- 13 assistance, and in the context of allegations of work
- 14 place discrimination, the intended beneficiaries of
- 15 federal assistance exist only when the primary objective
- 16 of the federal assistance is to provide employment, and
- 17 this is even more so the case under Section 504 than
- 18 under Title 6 and Title 9.
- 19 The primary objectives of Title 6 and Title 9
- 20 are to require the employer to present from considering
- 21 an applicant or an employee's race, sex, national
- 22 origin, or color in making employment-related
- 23 decisions. If an employer acts on the basis of an
- 24 employee's or an applicant's race or sex, the employer
- 25 should know that he is either on shaky ground or he may

- 1 be violating the Act.
- 2 On the other hand, with respect to handicapped
- 3 discrimination, allegations of handicapped
- 4 discrimination, when an employer considers an
- 5 application or a personnel action relating to a
- 6 handicapped employee, he is almost always forced, or she
- 7 is almost always forced to focus on the handicap, the
- 8 nature of the handicap, because the statute itself
- 9 requires the protections of the Act to handicapped
- 10 persons who are otherwise qualified for employment.
- 11 Sc, in practice, when an employer considers,
- 12 as in the case of Mr. LeStrange, whether Mr. LeStrange
- 13 is qualified to be a yard service engineer on ConRail,
- 14 he is not being asked to consider whether Mr. LeStrange
- 15 is qualified other than the fact that he is missing a
- 16 portion of his left arm. Rather, he is being asked to
- 17 consider whether that handicap itself disqualifies Mr.
- 18 LeStrange from employment on ConRail.
- And I believe that that distinction between
- 20 the Acts buttresses an -- a narrowing interpretation of
- 21 Section 504 that would direct the statute to the program
- 22 that is being considered, and in the context of
- 23 employment discrimination, the program has to be related
- 24 to employment. Otherwise, Section 504 assumes a range
- 25 of remedial legislation, and it is our position that

- 1 Congress did not intend to enact remedial legislation
- 2 when it passed Section 504.
- If one examines the 1978 --
- 4 QUESTION: What is your definition of remedial
- 5 legislation?
- 6 MR. RISSETTO: Remedial legislation is when
- 7 the primary purpose of the legislation is to provide a
- 8 remedy for a wrong that is identified in the statute. I
- 9 think Title 7 is a model of remedial legislation. I
- 10 would distinguish remedial legislation from legislation
- 11 where the principal purpose of the statute is to obtain
- 12 compliance. Funding legislation that puts conditions on
- 13 the receipt of federal funds has as its primary purpose
- 14 compliance.
- 15 QUESTION: But certainly legislation such as
- 16 we were discussing in the preceding case provides for
- 17 remedies for failure to comply with the conditions on
- 18 which the funds are given.
- 19 MR. RISSETTO: Yes, it does, and Section 504
- 20 does. In Section 504, it provides the Title 6 remedies,
- 21 which are essentially debarment or actions otherwise
- 22 permitted by law, so that --
- 23 QUESTION: Would you agree that those are
- 24 remedial provisions?
- 25 MR. RISSETTO: Those are remedial provisions,

- 1 but the primary purpose of the provisions is to obtain
- 2 compliance. They are in essence prospective in nature.
- 3 They operate that a recipient of federal assistance can
- 4 come into compliance with the objectives of the Act by
- 5 agreeing to follow the requirements of Section 504.
- 6 They do not necessarily comprehend remedy victims of an
- 7 unlawful act in the past. That is the primary purpose
- 8 of Title 7.
- 9 QUESTION: Then your definition of remedial
- 10 really means something which grants a private cause cf
- 11 action to somebody.
- MR. RISSETTO: Well, I think the remedy could
- 13 be provided by someone else having -- a governmental
- 14 cause of action could also be remedial in character.
- 15 Normally, private causes of action where the purpose is
- 16 to not ensure compliance with the statute, but to
- 17 vindicate and remedy the effects of a prior unlawful act
- 18 would be a remedial statute, and whether that action was
- 19 initiated by an employee or a person aggrieved or by the
- 20 United States government on the employee's behalf, I
- 21 think, is less important than the purpose of the cause
- 22 of action, and in this particular case, in the context
- 23 of Section 504, the purpose of the legislation was to
- 24 ensure that federal funds were not expended in the
- 25 context of discrimination, that they weren't being used

- 1 by employers and by entities to discriminate on behalf
- 2 of handicapped individuals.
- 3 QUESTION: Isn't this legislation parallel in
- 4 many ways to Title 9, where the Court in the Cannon case
- 5 found there was a private right of action, that it was
- 6 in effect remedial; to use your terms, and how do you
- 7 distinguish the analysis that should be made here from
- 8 that?
- MR. RISSETTO: Well, we believe that in the
- 10 Cannon case, that they recognized the private cause of
- 11 action, and as a result of this Court's recent decision
- 12 in the Guardians case under Title 6, we have conceded in
- 13 our reply brief that there is a private cause of action
- 14 under Title 6 -- under Title 6 and under Section 504, in
- 15 the context of a handicap discrimination complaint.
- 16 However, we believe that the purposes of the private
- 17 cause of action that are created should be consistent
- 18 with the funding purpose of the statute, and should be
- 19 designed to bring the employer into compliance, and that
- 20 the purposes of the statute and the legislative intent
- 21 can be achieved without awarding compensatory damages
- 22 and retrospective relief to a person who is aggrieved
- 23 under the terms of the statute, and that really is the
- 24 third argument, and the one that must necessarily be
- 25 reached by the Court in this case, because if the

- 1 complainant is not entitled to compensatory damages or
- 2 monetary relief under this Act, then the case is moot,
- 3 because there is no basis for injunctive relief under
- 4 the -- because Mr. LeStrange has passed away.
- 5 So, we believe that a question that the Court
- 6 should consider is the propriety of monetary damages,
- 7 and that essentially is a guestion of legislative
- 8 intent. What did the Court intend when they enacted
- 9 Section 504? What did they intend when they adopted the
- 10 remedies --
- 11 QUESTION: Do you mean Congress?
- 12 MR. RISSETTO: I am sorry. Yes, Your Honor.
- 13 What did Congress intend when they applied or
- 14 incorporated the remedies contained in Title 6?
- 15 QUESTION: Well, now, the damages question
- 16 wasn't even argued below, was it?
- 17 MR. RISSETTO: No, Your Honor, it wasn't --
- 18 QUESTION: Why should we depart from our
- 19 normal practice and get into it here?
- 20 MR. RISSETTO: Well, Your Honor, if the damage
- 21 question is not resolved, then we will have to start all
- 22 over again with the district court, and determine --
- 23 QUESTION: Well, maybe you should have raised
- 24 it below, but the fact is that it wasn't, so Why should
- 25 we deal with it here?

- 1 MR. RISSETTO: Mr. LeStrange was alive below,
- 2 and he had a live claim for injunctive relief, and that
- 3 injunctive relief entitled him -- it kept the case
- 4 alive, notwithstanding the disposition of the damages
- 5 question. The case below was decided on a motion for
- 6 summary judgment based on an interpretation of the
- 7 statute, Section 504, relying on the Trageser line of
- 8 cases, but now, subsequent to the filing of the petition
- 9 in this case, we were informed that Mr. LeStrange has
- 10 died, so therefore the damage guestion is before the
- 11 Court.
- 12 If the Court simply remands the case back to
- 13 the district court, then we have to start from scratch
- 14 again on entitlement to damages under Section -- or
- 15 monetary relief under Section 504, and the prospect of
- 16 wending our way through again on that issue we think
- 17 presents considerations of judicial administration that
- 18 would prey on the Court to answer the question in the
- 19 context of this case. It is simply a question of law.
- 20 Is a complainant under Section 504 entitled to
- 21 compensatory damages or monetary damages?
- I think the third issue in the case is really
- 23 the program specific question that was presented earlier
- 24 this morning in the Grove City case, and that is, what
- 25 happens when a recipient of federal assistance does not

- 1 receive that assistance with respect to a particular
- 2 program or activity? In the normal case, federal
- 3 assistance is received to build a building, to perform,
- 4 to subsidize in the system some kind of specific
- 5 program, be it a public works project or otherwise.
- 6 However, in the case of ConRail, ConRail
- 7 received two kinds of federal money. It received Title 5
- 8 funds to assist in the payment of labor protective
- 9 provisions required by Title 5, and it received funds in
- 10 the form -- in return for stocks and debentures that
- 11 were given to the United States Railway Association.
- In essence, the scope of those forms of
- 13 assistance --
- 14 QUESTION: Well, what was the purpose of that
- 15 latter money?
- 16 MR. RISSETTO: That latter money was designed
- 17 to keep ConRail afloat, and hopefully enable it to
- 18 operate as a profitable railroad.
- 19 QUESTION: It could use the money for
- 20 anything?
- 21 MR. RISSETTO: Well, the financing agreement
- 22 is very broad. It ranged from track rehabilitation --
- QUESTION: So the answer is yes, it could use
- 24 it for anything.
- 25 MR. RISSETTO: Yes, they could use it for

- 1 anything.
- QUESTION: They could pay wages of employees.
- 3 MR. RISSETTO: Yes, they could have paid wages
- 4 of employees with it, and the question then is, in the
- 5 case of unrestricted money, does that require an
- 6 institutional application of Section 504? And that
- 7 again is also a question of legislative policy, what did
- 8 Congress intend? In the case of ConRail, we are dealing
- 9 with an entity that received a lot of money from the
- 10 government, \$3.2 billion in federal assistance. But the
- 11 same question applies to a smaller entity that receives
- 12 government federal impact aid in the amount of \$40,000
- .13 or \$50,000. If that federal impact aid is not directed
- 14 to a particular program, does the obligations and the
- 15 liabilities under Section 504 apply to every personnel
- 16 decision that was made by that institution? If monetary
- 17 damages or monetary liability is -- if monetary
- 18 liability is available as a remedy for employment
- 19 discrimination on the basis of handicap, then does that
- 20 apply to every employment decision being made by the
- 21 institution that receives a small amount of money?
- 22 QUESTION: Mr. Rissetto, may I interrupt you
- 23 just a minute? I am curious. Do the securities held by
- 24 the government have a market? Are they listed on
- 25 exchanges?

- 1 MR. RISSETTO: No, they aren't. That is one
- 2 of the issues that is presently under consideration in
- 3 the Northeast Rail Service Act.
- 4 QUESTION: Is it clear that the government
- 5 will not get its money back?
- 6 MR. RISSETTO: Well, the government has agreed
- 7 to subcrdinate the preferred stock in the event that
- 8 ConRail has successfully conveyed to another -- to
- 9 another entity. The preferred stock --
- 10 QUESTION: Subordinated stock is not always
- 11 worthless.
- MR. RISSETTO: It is only worthless -- well,
- 13 it may have value if ConRail in the form of a subsequent
- 14 entity subsequently goes into bankruptcy. In that
- 15 situation, the subordinated stock would have value and
- 16 the government would make a claim under it, but under
- 17 Nurser, other than that contingency, the subordinated
- 18 stock would not carry value to the government.
- 19 OUESTION: I was just wondering whether the
- 20 government renders financial assistance if it chooses to
- 21 buy securities that should have a fair market value that
- 22 approximated what the government paid for, but that is
- 23 not this case.
- MR. RISSETTO: That is not this case, Your
- 25 Honcr. The parties throughout the litigation have

- 1 acknowledged that ConRail has received federal
- 2 assistance from the government. When Congress intends
- 3 to apply monetary remedies and attach obligations to the
- 4 receipt of federal assistance, or when they intend to
- 5 establish a remedy that carries a monetary liability or
- 6 obligation to it, they ordinarily do it pretty clearly.
- 7 The Education of All Handicapped Children Act, Title 7,
- 8 the Age Discrimination Act all carry with them a
- 9 specific either monetary remedy or investment of
- 10 discretion in the district courts to determine whether a
- 11 monetary remedy is appropriate.
- In this particular case, in the case of
- 13 Section 504, the monetary remedy is not established in
- 14 the statute. In 1978, when Title 6 was incorporated as
- 15 part of the rights and remedies, Title 6 itself, to the
- 16 extent that it had been in force through governmental
- 17 actions or private causes of action, had not established
- 18 a remedy of monetary damages.
- We believe that there is no evidence of
- 20 Congressional intent, that they -- that Congress
- 21 intended to require more than an entity remained in
- 22 compliance with the Act.
- 23 I would like at this time to reserve the
- 24 remainder of my time for rebuttal.
- 25 CHIEF JUSTICE BURGER: Mr. Lehahan.

- 1 ORAL ARGUMENT OF JOSEPH P. LENAHAN, ESQ.,
- 2 ON BEHALF OF THE RESPONDENT
- 3 MR. LENAHAN: Mr. Chief Justice, and may it
- 4 please the Court, I must first correct a misstatement
- 5 made by Mr. Rissetto with reference to the facts in this
- 6 case. There is no question that Tom LeStrange was
- 7 qualified to be a yard engineer in this case. He was so
- 8 qualified under a medical examination set up by
- 9 ConRail. There is no issue in that regard, at least at
- 10 this point in the case. That is manifested in our
- 11 amended complaint. He was also subjected to a test by
- 12 ConRail, and met almost all of the requirements of that
- 13 test at that time, and the only reason he was unable to
- 14 complete the entire test is that he did not have his
- 15 prosthesis with him, and we had scheduled a second test
- 16 which ConRail had set up so it would be impossible to
- 17 pass, so there is no issue --
- 18 QUESTION: Well, granting all of that, dc I
- 19 understand you to mean that there is a one-armed
- 20 engineer?
- MR. LENAHAN: Yes, Your Honor.
- QUESTION: You have no problem with that?
- 23 MR. LENAHAN: Your Honor, I think that the
- 24 statute --
- 25 QUESTION: Would you put a sign up to tell all

- 1 the passengers they've got a one-armed engineer?
- MR. LENAHAN: Your Honor, I think that there
- 3 is an issue here -- first off, the record was not made
- 4 completely -- insofar as the otherwise qualified.
- 5 QUESTION: I agree with you it is beyond us,
- 6 but I mean I'd still like your comment on it.
- 7 MR. LENAHAN: Your Honor, Mr. LeStrange was
- 8 seeking employment as a yard engineer. He was not
- 9 seeking employment as an over the road engineer, so to
- 10 speak. In addition to that, Your Honor, there are at
- 11 least three or four other individuals in the cab with
- 12 him at the very same time when he is running the engine
- 13 in the yard, firemen and other types of individuals.
- 14 There is no question Mr. LeStrange could have performed
- 15 the functions. The only functions of running the
- 16 railroad train in the yard itself involved the use cf
- 17 one hand. There was no question on that in the case,
- 18 although the Court didn't even consider that, since they
- 19 did not reach the point in the case.
- 20 There are three statements that can be made
- 21 regarding the issues presented in this case. First,
- 22 Section 504 prohibits employment discrimination in all
- 23 federally assisted programs, regardless of the purpose
- 24 of the funding. Secondly, the discrimination against
- 25 Mr. LeStrange was in a program or activity receiving

- 1 federal financial assistance. And third, monetary
- 2 relief is available in a private right of action under
- 3 Section 504.
- 4 I will first address the major issue in the
- 5 case, which incidentally is the only issue which was
- 6 addressed by the court below, and that is, Section 504
- 7 prohibits employment discrimination in all federally
- 8 assisted programs. First we must look at the
- 9 Rehabilitation Act of 1973 as a whole. As a whole, it
- 10 had a broad-based application to employment
- 11 discrimination, or to -- I'm sorry, to vocational
- 12 rehabilitation and creating employment opportunities for
- 13 the handicapped. In dealing specifically now with
- 14 Section 504, and also applying the test as set forth by
- 15 this Court in North Haven, we first look to the express
- 16 language of Section 504.
- 17 This language of Section 504 does not support
- 18 a narrow or limited reading of the statute. Rather, it
- 19 specifically refers to any program or activity, not some
- 20 programs. Thus, the language of the statute, 504
- 21 itself, seems to indicate a broad employment coverage.
- 22 Next, we will look at the legislative
- 23 history. This history -- we will have to go back now
- 24 from 1972 through 1974 first, and this is in response
- 25 somewhat to a question asked by Justice Marhsall. There

- 1 is a great deal of legislative history regarding this
- 2 Act, both prior to and after the amendments, but if we
- 3 look to the legislative history from 1972 through 19784,
- 4 it shows the intent of Congress to prohibit employment
- 5 discrimination in all federally assisted programs,
- 6 regardless of the purpose of the funding.
- 7 For example, the remarks of the sponsors of
- 8 the bill, Senators Cranston, Williams, Javits, and Taft,
- 9 these all, all of them support a broad employment
- 10 coverage under Section 504. These are set forth at
- 11 length under Pages 65 through 72 of our brief. Also,
- 12 and this is kind of a bit of a convoluted reference, but
- 13 it was in response to Justice O'Connor's parallel
- 14 remark, in 1972, Congress was dealing with Title 9.
- 15 Congress specifically rejected with Title 9 a Title 6
- 16 type of limitation in Section 1004. That is mentioned,
- 17 I believe, in the North Haven decision.
- 18 Just four months later, Congress considered a
- 19 parallel, or a statute which was modeled after Section
- 20 901, and they did not even consider a similar limitation
- 21 for Section 504. In 1974, Congress clarified the scope
- 22 of Section 504 by redefining the term "handicapped
- 23 individual." Actually, in 1974, Congress set it up so
- 24 that Section 504 applied not only to employment
- 25 discrimination, but also to all other types of

- 1 discrimination as well, and if I may disgress here for a
- 2 moment, there was some discussion during Mr. Rissetto's
- 3 argument that this is not a remedial statute, but in
- 4 1974, when the amendments were passed, there is clear
- 5 legislative history which is indicated in our brief that
- 6 says that it was contemplated by Congress that there was
- 7 to be a judicial remedy through private action as part
- 8 of this statute.
- Thus, if we look at both the express language
- 10 and the legislative history of Section 504 before its
- 11 amendment, this supports broad employment coverage
- 12 within the meaning of that statute.
- Now, let's turn for a moment to the 1978
- 14 amendments. These amendments did not limit the scope of
- 15 Section 504, which, according to its legislative
- 16 history, was broad to begin with. If we lock now at the
- 17 express language of Section 505(a)(2) -- now, that is
- 18 the amendments section --
- 19 QUESTION: Where do we find that, Mr.
- 20 Lenahan? In your brief somewhere?
- 21 MR. LENAHAN: Yes, that is cited in the
- 22 appendix to our brief. Section 505(a)(2) is listed
- 23 there at Page 4 -- I am sorry, 2A. It is 505(b)(2).
- 24 The express language of that statute indicates that the
- 25 rights set forth in Title 6 of the Civil Rights Act

- 1 shall be available to any person aggrieved by any act or
- 2 failure to act by any recipient of federal assistance.
- 3 QUESTION: Well, if there was already a
- 4 private cause of action intended by Congress, as you
- 5 said, why did Congress add this?
- 6 MR. LENAHAN: What Congress intended, and
- 7 actually it is explicit in the legislative history, was
- 8 that they wanted to codify existing HEW procedural
- 9 regulations and make also that remedy available to
- 10 handicapped individuals. Actually, the legislative
- 11 history is very clear. The Congress in 1978 wanted to
- 12 enhance the remedies and rights of handicapped people,
- 13 and one of the ways they were going to enhance that was
- 14 to make available the rights, remedies, and procedures
- 15 of Title 6.
- 16 Title 6 -- excuse me, the amendments in 1978
- 17 codified existing HEW regulations. These were
- 18 procedural enforcement regulations, all of which do not
- 19 deal with Section 604 whatscever. They specifically do
- 20 not deal with that. Those procedural enforcement
- 21 regulations deal with Section 601, 602, and 603. None
- 22 of them mention Section 604.
- 23 So, it is clear from both the -- if we look at
- 24 the express -- the express language of Section
- 25 505(a)(2), it makes available rights, remedies, and

- 1 procedures. Section 604 is neither a right, remedy, or
- 2 procedure. It is a limitation.
- Also, we should note that Section 505(a)(2)
- 4 refers to any recipient of federal assistance.
- 5 Turning once again very briefly to the
- 6 legislative history of the amendments to Section
- 7 505(a)(2), we would note in passing that they added in
- 8 Section 505(b) a whole section dealing with counsel
- 9 fees. If this Act is not remedial in purpose, there
- 10 seems to be no reason to have a section dealing with
- 11 counsel feels. Clearly, the Congress was intending some
- 12 type of remedial portion of the statute by the 1978
- 13 amendments.
- 14 QUESTION: Well, Mr. Lenahan, the gist of your
- 15 argument, I take it, and of the position taken by the
- 16 Third Cicuit, is that private rights of action to
- 17 enforce this discrimination against handicapped law are
- 18 more extensive than the agency's or department's
- 19 authority.
- 20 MR. LENAHAN: No, the -- first off, let me
- 21 state that the petitioner even concedes that a private
- 22 right of action exists here. The expanse of the private
- 23 right of action is set, by this Court in Bell versus
- 24 Hood, as to what remedies would be available.
- 25 QUESTION: Well, you say that the agency and

- 1 department is just as free as -- perhaps you want to
- 2 talk to Cort v. Solage.
- 3 MR. LENAHAN: No, that's all right. No,
- 4 that's all right.
- 5 QUESTION: You say the agency and department
- 8 is just as free to enforce the Act regardless of Section
- 7 604 as a private individual is?
- 8 MR. LENAHAN: Your Honor, maybe I am
- 9 misunderstanding your question. It is our position that
- 10 604 is not even incorporated into Section 504. It is
- 11 merely made -- It is not even made any part of it. In
- 12 fact, there was no contemplation of that whatsoever.
- 13 QUESTION: What is the effect of Section 604
- 14 in your view?
- MR. LENAHAN: In this particular instance,
- 16 with 504, it has no effect whatsoever.
- 17 QUESTION: What effect did Congress intend
- 18 when it enacted Section 604?
- 19 MR. LENAHAN: Your Honor, you mean within the
- 20 context of 504, or within the pure context of 604 in and
- 21 of itself?
- 22 QUESTION: What was Section 604 designed to
- 23 do?
- 24 MR. LENAHAN: As I understand it, it was
- 25 dealing with termination of funds and limiting specific

- 1 types of agency action, but that deals with Title 6,
- 2 which is not necessarily completely controlling in this
- 3 case. It is one of the remedies which was made
- 4 available under Section 504.
- 5 QUESTION: Well, assume we thought that 604
- 6 was incorporated into the Rehabilitation Act and that it
- 7 does apply. What is your response then?
- 8 MR. LENAHAN: First, Your Honor, I think if
- 9 that assumption is made, in dealing with that
- 10 hypothetical we would have to say that it applies only
- 11 to an agency action, and that the private right of
- 12 action would exist anyway, which in our belief was
- 13 created back when 504 was originally enacted, and it is
- 14 only one of the remedies. Title 6 is only one of the
- 15 remedies available under Section 504, and there is no
- 16 legislative history to include Section 604 or
- 17 incorporate Section 604 into this particular statute.
- 18 We would also note --
- 19 QUESTION: Well, the remedies of Title 6 were
- 20 made available.
- 21 MR. LENAHAN: And I agree with you, Your
- 22 Honor. They were made available, but Section 604 is
- 23 neither a right remedy or a procedure. It is a
- 24 limitation on Title 6. And as a matter of fact, the
- 25 legislative history of Section 504 was to enhance the

- 1 rights of the handicapped, certainly not to limit them.
- 2 We would also direct the Court's attention to
- 3 the current regulations dealing with Section 504. None
- 4 of these limit Section 504's employment coverage. If
- 5 the Department of Transportation regulations are valid
- 6 and consistent with Section 504, these would prohibit or
- 7 prevent employment discrimination in all federal
- 8 programs within the purview of the Department of
- 9 Transportation.
- 10 Here it would be applicable to ConRail's
- 11 activities, even though these statutes, the Section -- I
- 12 am sorry, the Department of Transportation regulations,
- 13 were enacted after this lawsuit was initiated, because
- 14 it is the law in effect that applies, as this Court held
- 15 in Bradley versus the School Board of Richmond case.
- 16 So, our position is that the current
- 17 regulations dealing with ConRail -- these would be the
- 18 Department of Transportation regulations -- do not
- 19 include any type of 604 limitation. As a matter of
- 20 fact, they specifically exclude it. There are 28 other
- 21 agencies, federal agencies which have regulations which
- 22 are consistent with not only 504 but with the DCT
- 23 regulations that I have just mentioned, and they all
- 24 provide for broad employment coverage.
- 25 This view of Section 504 is also supported by

- 1 the Department of Justice and the Solicitor General.
- 2 Finally, and this is somewhat in response to
- 3 your question, Justice White, if Section 604 is
- 4 incorporated into Section 504, as the petitioner would
- 5 have, it would defeat the legislative scheme of Section
- 6 504. Nowhere in 3,000 pages of legislative history of
- 7 the 1978 amendments alone is Section 604 mentioned.
- 8 Section 604 contradicts the actions and regulations of
- 9 29 federal agencies. Section 604 in effect repeals
- 10 without any express language or intent the employment
- 11 coverage of Section 504.
- 12 QUESTION: It really isn't correct to speak of
- 13 Section 604 should be neglected because it is contrary
- 14 to the regulations of a group of agencies. I think
- 15 perhaps one would question the regulations of the
- 16 agencies rather than the statute.
- 17 MR. LENAHAN: Your Honor, am I to understand
- 18 that these regulations that you are speaking of are not
- 19 to be given deference in this instance?
- 20 OUESTION: Not if they are -- not if, as you
- 21 say, they are contrary to Section 604.
- MR. LENAHAN: No, Your Honor. We are saying
- 23 -- We are saying, Number One, 604 is not incorporated
- 24 here, and they all --
- 25 QUESTION: Assume Justice White's hypothesis,

- 1 that the Court were to feel it were incorporated.
- MR. LENAHAN: We don't feel, quite frankly,
- 3 that there is any basis to incorporate them, but if you
- 4 are saying that they are, obviously the regulations
- 5 which ignore them would have to be inconsistent with
- 6 them, but that is not -- the interpretation and the
- 7 repeated interpretation of Section 504 is that Section
- 8 604 is not incorporated into the statute.
- 9 QUESTION: We haven't decided that yet, and
- 10 that is one of the issues.
- 11 MR. LENAHAN: That is one of the issues in
- 12 this case. All I am saying is that the interpretation
- 13 given by -- if you look at the legislative history, the
- 14 express language, and the interpretation by the 29
- 15 agencies here. Finally, if Section 604 is incorporated
- 16 here, it would allow discrimination against millions of
- 17 handicapped people by recipients of federal funds.
- 18 Let me next move ahead to what --
- 19 QUESTION: How would it do that?
- 20 MR. LENAHAN: Because it limits the scope of
- 21 Section 504 to only those programs which were the
- 22 primary purpose is -- where the funding is -- primary
- 23 purposes deals with employment. That would certainly
- 24 limit the scope of Section 504, a situation that was
- 25 never contemplated by the people involved -- or the

- 1 Congress when they passed the Act. They wanted -- if
- 2 you will look at the remarks of Senator Cranston, they
- 3 wanted it to have broad employment coverage.
- 4 QUESTION: Unless what it means is, it is
- 5 limited only to enforcement by the government agency
- 6 itself, a fund termination, for instance, by that
- 7 agency.
- 8 MR. LENAHAN: If that --
- 9 QUESTION: If that is the limitation --
- MR. LENAHAN: Yes.
- 11 QUESTION: -- it wouldn't.
- MR. LENAHAN: No, it certainly wouldn't. That
- 13 would be a limitation on the elements of 604 itself.
- 14 In light of my limited time, let me just deal
- 15 with the issue of the monetary relief. It is the
- 16 petitioner's position here that no monetary relief
- 17 should be available to us for its intentional violation
- 18 of Section 504. We have alleged an intentional
- 19 violation of Section 504.
- The petitioner here concedes that a private
- 21 right of action exists under Section 504. If such a
- 22 right of action exists, the full panoply of remedies are
- 23 normally available for a violation of the statute,
- 24 unless there is a contrary Congressional intent. We
- 25 direct the Court's attention to Bell versus Hood, which

- 1 dealt with a violation of the Fourth Amendment, and also
- 2 Sullivan versus Litting Humming Park, which dealt with a
- 3 Section 1982 violation.
- 4 It becomes the petitioner's burden to show a
- 5 contrary intent of Congress to limit these remedies
- 6 normally available under the Bell versus Hood decision.
- 7 The express language of Section 504 amendment -- Section
- 8 504 as amendment has no such express limitation.
- 9 Actually, the 1978 amendments making counsel fees
- 10 available made it clear that the private right of action
- 11 existed, and traditional remedies were available.
- 12 Also, the legislative history, if we look at
- 13 that under Section 504 as amended, clearly shows no
- 14 intent to limit the monetary relief which may be
- 15 available. We ask the Court that this issue of monetary
- 16 relief be remanded. This is an issue which does not
- 17 have to be decided by this Court. It was not handled by
- 18 the Third Circuit in this particular case. We would ask
- 19 the Court to remand this case to the trial judge for a
- 20 determination of what the appropriate remedy would be
- 21 after a trial on the merits, and it would be up to the
- 22 trial court to fashion the appropriate remedy under the
- 23 circumstances.
- QUESTION: But if there is no monetary relief,
- 25 the case is moot, isn't it?

- 1 MR. LENAHAN: Your Honor, if there is no
- 2 monetary relief, the case is moot. There is no question
- 3 about that. But we would also recognize that Senator
- 4 Cranston in 1979 stated as part of the -- when they
- 5 tried to add -- amend Title 7 to include the
- 6 handicapped, that a back pay remedy is in fact available
- 7 under Section 504, and that certainly would not make the
- 8 case moot, since the action here was instituted in 1978,
- 9 and our claim may go back all the way to 1976, with a
- 10 back pay claim.
- 11 We also have a claim for medical coverage
- 12 which he would have been entitled to which would have
- 13 paid the bills of his last illness.
- In summary, we believe on the damage issue
- 15 that if there is no monetary relief available here, it
- 16 would permit ConRail to knowingly and intentionally
- 17 discriminate against handicapped individuals with
- 18 complete impunity. This is not the type of situation
- 19 that was contemplated by Congress when they passed
- 20 Section 504.
- 21 We believe that the opinion of the Third
- 22 Circuit Court should be affirmed in this case. Thank
- 23 you.
- 24 CHIEF JUSTICE BURGER: Mr. Reynolds?
- 26 ORAL ARGUMENT OF WILLIAM BRADFORD REYNOLDS, ESQ.,

- for united states as amicus curiae
- MR. REYNOLDS: Mr. Chief Justice, and may it
- 3 please the Court, I have but a few minutes, and I
- 4 believe they can best be utilized by underscoring some
- 5 of the points made by Mr. Lenahan.
- 6 The issue here is one of statutory
- 7 construction. Section 504 as enacted in 1973 prescribes
- 8 discrimination on account of handicapped in any program
- 9 or activity receiving federal financial assistance.
- 10 There is, as I understand it, no issue in this case
- 11 whether the provision covers employment. I suspect
- 12 after North Haven there really could not be. The issue
- 13 instead is how much employment activity is covered by
- 14 Section 504.
- 15 The United States' position is that the 1973
- 16 Congress intended Section 504 to be every bit as broad
- 17 in its employment coverage as this Court found Title 9
- 18 to be in North Haven. The entire structure and focus of
- 19 the Rehabilitation Act is aimed at enhancing employment
- 20 opportunities for physically and mentally handicapped
- 21 individuals. Indeed, the very word "handicapped" was
- 22 defined in the statute in terms of employability, and
- 23 specific provisions were included in the Act to
- 24 encourage employment of the handicapped by the federal
- 25 government and by those contracting with the federal

- 1 government.
- 2 There is nothing in the language or the
- 3 history of Section 504 to suggest that Congress had more
- 4 modest ambitions for federally assisted programs. To the
- 5 contrary, the 93rd Congress in 1973 proscribed
- 6 employment discrimination on account of handicap in
- 7 Section 504 as comprehensively and indeed in virtually
- 8 the same terms as did the 92nd Congress in 1972, only a
- 9 year earlier, with respect to Title 9 insofar as it
- 10 covered employment discrimination on account of sex in
- 11 educational programs.
- 12 QUESTION: So, Mr. Reynolds, the provision
- 13 then would reach employment in the programs, in the
- 14 appropriate program.
- MR. REYNOLDS: That's correct.
- 16 QUESTION: Have you taken a position in this
- 17 case, or are you going to, as to what the program would
- 18 be if there are federal funds given to an entity on an
- 19 unrestricted basis that it could use for anything it
- 20 wanted to?
- 21 MR. REYNOLDS: We have not in this case taken
- 22 a position. That question is one that we think would
- 23 appropriately be addressed by the district court --
- QUESTION: There are funds in this case of
- 25 that nature.

- 1 MR. REYNOLDS: I believe that there are funds
- 2 that -- there are indications in the record that there
- 3 are funds of that nature.
- 4 QUESTION: And if the only program that you
- 5 could identify in such an unrestricted grant is the
- 6 entire entity, the entity can use the money for anything
- 7 it wants to.
- 8 MR. REYNOLDS: Right.
- 9 QUESTION: And you say it would include and it
- 10 certainly would reach employment in whatever the program
- 11 is.
- MR. REYNOLDS: That's --
- 13 QUESTION: What would be the program?
- MR. REYNOLDS: In that case, the --
- 15 QUESTION: Is the government prepared to take
- 16 a position now, or not?
- 17 MR. REYNOLDS: I think in that case that the
- 18 program would be again defined by the funding grant, and
- 19 it could well be the whole entity. There is no -- if --
- QUESTION: The funding grant says, here's the
- 21 money, put it in any of the empty coffers that you want
- 22 to.
- MR. REYNOLDS: There is no resistance on the
- 24 part of the government with respect to the program
- 25 specific issue, to define the program indeed as the

- 1 whole entity in an appropriate circumstance.
- 2 QUESTION: Well, in which event the remand
- 3 would be sort of a -- I know you say that it ought to be
- 4 remanded to really define the program, but it would be a
- 5 rather hollow gesture if a good deal of this money is on
- 8 an unrestricted basis, and if it is, that means the
- 7 entire entity.
- 8 MR. REYNOLDS: Well, I think that in the event
- 9 that there is, as the record now sits, I think that
- 10 certainly there would be a presumption that it would be
- 11 the entire entity. I don't think, though, that that
- 12 presumption is irrebuttable, and certainly the entity
- 13 should have the opportunity --
- 14 QUESTION: How could it be rebutted with
- 15 respect to the money that goes to ConRail on an
- 16 unrestricted basis?
- 17 MR. REYNOLDS: I don't know how it would be
- 18 rebutted. If ConRail could demonstrate factually that
- 19 the alleged -- that the claimant in this case was indeed
- 20 employed in a non-funded program, then it should have
- 21 the opportunity to that. I am not suggesting --
- 22 QUESTION: How could the program be unfunded?
- 23 MR. REYNOLDS: I don't know where the funds
- 24 went or indeed how the security works in this case with
- 25 respect to the funding. I am just saying, I think that

- 1 certainly as the record now sits there is certainly the
- 2 likelihood that it would be the entire entity, and that
- 3 would be an appropriate definition.
- 4 QUESTION: Mr. Reynolds, I am confused by your
- 5 use of the word "program." Perhaps I don't understand
- 6 you. But as I read Section 504, it says that "No other
- 7 otherwise qualified handicapped person shall be subject
- 8 to discrimination under any program or activity
- 9 receiving federal financial assistance or any under
- 10 program or activity conducted by any executive agency."
- Now, do you take the word "program" to mean
- 12 the program which ConRail conducts as a result of
- 13 receiving money, or the program is one that Congress or
- 14 the executive branch is conducting to fund entities?
- 15 MR. REYNOIDS: I think the program has to be
- 16 defined by the funding statute, and therefore it would
- 17 be the program that the federal government is funding.
- 18 In the prior case, with respect to the EEOG, it would be
- 19 the program that that funding statute defines, and if we
- 20 are talking about, in this case, either Title 5 money
- 21 under the Three R Act or the securities funding, it
- 22 would be defined by however that program is set up in
- 23 the funding statute.
- 24 QUESTION: Is the program tied to the
- 25 government agency that is passing out the money, or to

- 1 the recipient?
- MR. REYNOLDS: It is tied to the funding
- 3 agency, to the government agency that is passing out the
- 4 money.
- 5 QUESTION: Sc this might be -- the program
- 6 would be bailing out railroads, perhaps.
- 7 MR. REYNOLDS: It could be, yes. I think
- 8 that's right. Let me, if I can --
- 9 QUESTION: Well, that is not the argument that
- 10 was made in the prior case, was it, Mr. Reynolds?
- 11 Wasn't the proposal taken by Mr. Bator something
- 12 different than that, in suggesting that the program was
- 13 one at the college, and was the administration of the
- 14 funds at the college? It sounds to me different.
- MR. REYNOLDS: I am sorry. I believe his
- 16 argument was that the program is defined by the federal
- 17 grant or the federal government's funding operation. In
- 18 that case, it was a -- the federal government is funding
- 19 scholarship aid, and the program that was defined by the
- 20 statute that we are dealing with in that case, and
- 21 therefore it was the federal -- it was the student aid
- 22 program. That is the one that is being funded by the
- 23 statute in question. So I think it is the same thing.
- 24 If I can make one point that I think was
- 25 raised by Mr. Justice Rehnquist, with respect to the

'	regulations, the rederal government has had regulations
2	in this area addressing this question which have
3	interpreted 504 as broadly covering employment. Those
4	regulations were in place
5	CHIEF JUSTICE BURGER: We will resume there at
6	1:00 o 'clock. ·
7	(Whereupon, at 12:00 o'clock p.m., the Ccurt
8	was recessed, to reconvene at 1:00 o'clock p.m. of the
9	same day.)
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1	AFTERNOON_SESSION
2	CHIEF JUSTICE BURGER: Mr. Reynolds, you may
3	resume.
4	ORAL ARGUNENT OF WILLIAM BRADFORD REYNOLDS, ESQ.,
5	FOR THE UNITED STATES, AS AMICUS CURIAE - RESUMED
6	MR. REYNOLDS: Thank you, Mr. Chief Justice,
7	and may it please the Court. I was about to answer a
8	question that Mr. Justice Rehnquist had asked early in
9	the argument about the regulations and the statute and
10	the which controlled, and the point I wanted to make
11	was that at the time that Congress amended the statute
12	in 1978, it had before it comprehensive HEW regulations
13	that indeed set forth the procedure and the enforcement
14	mechanism that Congress intended to incorporate into the
15	statute by the 1978 amendments. Those regulations
16	defined employment coverage in terms of the entire
17	funded program, and not in terms of the primary purpose
18	of the funding, and therefore when Congress amended the
19	statute to pick up and incorporate this regulatory
20	scheme, it did it with the regulations defining it as
21	QUESTION: Well, that wouldn't be
22	post-enactment history at all, would it?
23	MR. REYNOLDS: No.
24	QUESTION: That would be enactment history.
25	MR REYNOIDS: That is the point I was trying

- 1 to make, that that is enactment history, and it would
- 2 therefore be a reason to give some --
- 3 QUESTION: I know you weren't arguing -- you
- 4 aren't arguing the prior case, but would the same
- 5 argument apply to the prior case?
- 6 MR. REYNOLDS: With respect to which -- the
- 7 regulation -- I think that if Congress has in --
- 8 QUESTION: Well, the regulations that we were
- 9 -- the regulations that were extant when these grant
- 10 statutes were re-enacted, they were in place when
- 11 Congress re-enacted the grant statutes.
- MR. REYNOLDS: Well, I think that --
- 13 QUESTION: Well, I don't need to waste your
- 14 time arguing the other case. Go ahead.
- MR. REYNOLDS: I had an answer, but I --
- 16 QUESTION: I would be interested in your
- 17 answer.
- MR. REYNOLDS: Well, I think --
- 19 QUESTION: Go ahead. Go ahead.
- MR. REYNOLDS: In the other case, I think the
- 21 relevant legislative history relates to Title 9 and what
- 22 Congress intended by Title 9. With respect to the grant
- 23 statutes, I think that that is a different question, and
- 24 one that would not determine how you do decide --
- 25 QUESTION: Nevertheless, it wouldn't be

- 1 post-enactment history, would it? It would just be the
- 2 strength of what -- it's strength as far as enactment is
- 3 concerned.
- 4 MR. REYNOLDS: I think insofar as it might
- 5 inform the federal program -- the program that is being
- 6 subsidized by federal funds, it might be relevant, but
- 7 not in terms of what Congress intended with respect to
- 8 the coverage of Title 9 and the strength of that
- 9 coverage.
- 10 QUESTION: What is your view on the meaning of
- 11 Section 604 if that in fact is part and parcel of the
- 12 remedies? Is it limited to action by the covernment in
- 13 fund --
- MR. REYNOLDS: Well, I think that if 604 is
- 15 imported into the statute, and we are talking about an
- 16 implied right of action, that the implied right of
- 17 action would be defined by the parameters of the statute
- 18 as it is written, and therefore that that limitation
- 19 would also apply to the private right of action. That
- 20 would mean that a private litigant could indeed pursue
- 21 his or her rights under the statute with respect to
- 22 employment where the primary purpose of the funding was
- 23 employment, to the same extent, but I think that where
- 24 we imply a private right of action, it would be defined
- 25 by the parameters of the statute.

- 1 QUESTION: And what is your view of what
- 2 remedies are available to a private litigant, Mr.
- 3 Reynolds?
- 4 MR. REYNOLDS: I think that the private
- 5 litigant --
- 6 QUESTION: Back pay? Back pay?
- 7 MR. REYNOLDS: I think the private litigant
- 8 would, if you have a violation of the statute, that the
- 9 private litigant would be able to obtain equitable
- 10 relief with respect at least to back pay, and that is
- 11 the claim in this case.
- 12 QUESTION: An equitable relief, in your view,
- 13 includes back pay?
- MR. REYNOLDS: Yes, I would put that in the
- 15 category of back pay, and I think that at least would be
- 16 recoverable if you had a private right of action. I
- 17 believe my time has expired, if there are no other
- 18 questions. Thank you.
- 19 CHIEF JUSTICE BURGER: Anything further, Mr.
- 20 Rissetto?
- 21 ORAL ARGUMENT OF HARRY A. RISSETTO, ESC.,
- 22 ON BEHALF OF THE PETITIONER
- 23 MR. RISSETTO: Just two short points, Your
- 24 Honor.
- 25 CHIEF JUSTICE BURGER: Very well. You have

- 1 five minutes remaining.
- 2 MR. RISSETTO: It was recently mentioned that
- 3 the HEW regulations were in existence in 1978, and
- 4 constitute enactment history. The critical reference to
- 5 the HEW regulations in the legislative history of the
- 6 1978 amendments appear on Page A16 of our petition for
- 7 cert, and are quoted as part of the court of appeals
- 8 decision, and it is a very small paragraph, and I would
- 9 like to ask the Court if I could read it.
- "It is the Committee's understanding that the
- 11 regulations promulgated by the Department of Health,
- 12 Education, and Welfare with respect to the procedures,
- 13 remedies, and rights under Section 504 conform with
- 14 those promulgated under Title 6. Thus this amendment
- 15 codifies existing practice as a specific statutory
- 16 requirement."
- Now, that quoted portion could mean either one
- 18 or two things, that in fact there is no antagonism
- 19 between Title 6 and the HEW regulations, and I believe
- 20 there is -- the evidence or the legislative history of
- 21 Title 6 and its applicability to employment is very
- 22 clear, or alternatively that the regulations are not in
- 23 conformity with the language of Title 6, and therefore
- 24 the report and the representation made to Congress in
- 25 the legislative history regarding the HEW regulations

- 1 are erroneous.
- 2 We believe that the enactment legislative
- 3 history either supports ConRail's position that Title 6
- 4 does apply to Section 504 or that the references to the
- 5 HEW regulations that appear in the legislative history
- 6 are misleading and should not be given weight by the
- 7 Court.
- 8 The second point I would like to make is one
- 9 that at the conclusion of respondent's argument, he
- 10 argued that if respondent's interpretation of Section
- 11 504 is not adopted, ConRail would be able to
- 12 discriminate with impunity. I think there are two
- 13 responses to that. The first is that when Title 6 was
- 14 originally passed, it was passed and had a very narrow
- 15 scope as it applied to employment. I think that the
- 16 legislative history establishes that, both through the
- 17 legislative history relating to 601 and 604. That
- 18 narrow scope left a group of people, including public
- 19 employees and educational employees, without a remedy
- 20 for employment discrimination, because they were not
- 21 covered by Title 7 in 1964. They were not brought into
- 22 Title 7 until the 1972 amendments were passed.
- So, I don't think it is bizarre, I don't think
- 24 it's a mazing or irrational for Congress to pass a
- 25 legislation with a particular purpose, with a narrow

- 1 application in one of its phases, and thereby leave a
- 2 group of people without a remedy for discrimination. It
- 3 has been done.
- I think just as a last note, as we indicated
- 5 in our reply briefs, there is legislation in more than
- 6 40 states now, including every state in which ConRail
- 7 does business in except Delaware, prohibiting employment
- 8 discrimination on the basis of handicap. These state
- 9 statutes ordinarily provide remedies which are
- 10 ordinarily similar to those provided under Section 7,
- 11 although there has been some experimentation in some of
- 12 the states. We believe that plaintiffs who allege that
- 13 they are not covered by Section 504 do have a remedy,
- 14 and that ConRail does have a legally enforceable
- 15 obligation not to engage in discrimination on the basis
- 16 of handicap as well as, obviously, an ethical and moral
- 17 obligation not to do sc.
- 18 Thank you.
- 19 CHIEF JUSTICE BURGER: Thank you, gentlemen.
- 20 The case is submitted.
- 21 (Whereupon, at 1:07 o'clock p.m., the case in
- 22 the above-entitled matter was submitted.)

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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of elactronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:

#82-862 - CONSOLIDATED RAIL CORPORATION, Petitioner v. LEE ANN LeSTRANGE DARRONE. AS ADMINISTRATIX OF ESTATE OF THOMAS LeSTRANGE

and that these attached pages constitute the original transcript of the proceedings for the records of the court.

- VIPAL

(REPORTER)

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