NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of	)	Appeal No. 00-0010
	)	
JONATHAN SCHUMACHER,	)	DECISION
Appellant.	)	
______________________________	)	September 16, 2002

STATEMENT OF THE CASE

Jonathan Schumacher appeals an Initial Administrative Determination [IAD] by the Restricted Access Management Program [RAM], which denied his application for a groundfish and a crab license under the North Pacific Groundfish and Crab License Limitation Program [LLP].[1] Mr. Schumacher applied for a groundfish license with a Central Gulf endorsement and a crab license with an *opilio* and *bairdi* endorsement. Mr. Schumacher can appeal the IAD because it directly and adversely affects his interests. [50 C.F.R. § 679.43(b)]

The IAD determined that Mr. Schumacher was not eligible for an LLP license because he did not own a vessel that made the harvests necessary for an LLP license and did not own the fishing history of such a vessel. The IAD determined that Mr. Schumacher was not eligible for an LLP license based on Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a), because he had presented no evidence to support that claim.[2] The IAD also stated that Mr. Schumacher had presented no evidence that unavoidable circumstances, as defined by federal regulation 50 C.F.R. § 679.4(k)(8)(iv), had thwarted his intent to participate in an LLP fishery.

On appeal, Mr. Schumacher argues that he suffered a serious back injury while running the F/V HALCYON which thwarted his intent to continue fishing and purchase a vessel. The F/V HALCYON is a vessel that, according to the official LLP record, made the harvests necessary for an LLP groundfish license with a Central Gulf endorsement. I issued an Order to Produce Evidence, which allowed Mr. Schumacher to submit argument or evidence in support of his claims. Mr. Schumacher, who is incarcerated, did not respond in any way.

After a status conference with Mr. Schumacher by telephone, I determined that the record did not contain sufficient information for me to reach a decision on Mr. Schumacher's appeal, as required by 50 C.F.R. § 679.43(g)(2). I held a hearing on June 28, 2002. Mr. Schumacher and two witnesses, Barbara Anderson and Gary Cobban, Jr., testified by telephone.

I conclude that the record does now have sufficient information on which I can reach a decision. I therefore close the record and issue this decision on the merits of Mr. Schumacher's appeal.

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[1] The LLP is located in federal regulation 50 C.F.R. § 679, primarily 50 C.F.R. § 679.2 (definitions), 50 C.F.R. § 679.4(k)(requirements for licenses) and 50 C.F.R. § 679.43 (appeals).

[2] When I refer to the Rehabilitation Act, I mean the Rehabilitation Act at 29 U.S.C. § 794(a) or Section 504.

SUMMARY

The issue in this Appeal is whether Mr. Schumacher has shown that he is an eligible applicant for an LLP license pursuant to Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a). Mr. Schumacher is not eligible for an LLP license pursuant to the Rehabilitation Act.

Mr. Schumacher proposes that he should receive an LLP license, under the Rehabilitation Act, because he was injured while fishing the F/V HALCYON, a vessel which qualifies for an LLP license. This is not a reasonable modification of the LLP because it would change the LLP into a program that awards LLP licenses as compensation for commercial fishing injuries.

Mr. Schumacher proposes that a disabled person should receive an LLP license, under the Rehabilitation Act, if the disabled person can prove that, but for his or her disability, the person would have owned a qualifying vessel on June 17, 1995. This is not a reasonable modification of the LLP because the criteria of vessel ownership does not discriminate against disabled persons, it waives an essential requirement of the LLP and it results in the same catch history being used to issue two LLP licenses.

Assuming that Mr. Schumacher could receive an LLP license if he proved that he would have owned a qualifying vessel but for his disability, Mr. Schumacher has not proved that he would have owned either the F/V HALCYON or any other qualifying vessel but for his disability.

Mr. Schumacher cannot receive an LLP license based on the unavoidable circumstances regulation, 50 C.F.R. § 679.4(k)(8)(iv), because he did not own a vessel on June 17, 1995 which made the harvests as specified in the regulation.

ISSUES

1. Has Mr. Schumacher shown he is an eligible applicant for an LLP license pursuant to the Rehabilitation Act of 1973, 29 U.S.C. § 794(a)?

2. Does the Rehabilitation Act require, as a reasonable accommodation, that NMFS grant a disabled person an LLP license, if the disabled person suffered his or her disability as a result of commercial fishing on a vessel which qualifies for an LLP license?

3. Does the Rehabilitation Act require, as a reasonable accommodation, that NMFS grant a disabled person an LLP license if a disabled person proves that he or she would have owned a qualifying vessel but for his or her disability?

4. Assuming that, under the Rehabilitation Act, Mr. Schumacher was entitled to an LLP license if he proved that he would have owned a qualifying vessel but for his disability, has Mr. Schumacher proved that he would have owned a qualifying vessel but for his disability?

5. Is Mr. Schumacher eligible for an LLP license based on the unavoidable circumstances regulation, 50 C.F.R. § 679.4(k)(8)(iv)?

ANALYSIS

To receive an LLP license, an applicant must be an "eligible applicant."[3] Federal regulation 50 C.F.R. § 679.2 defines "eligible applicant" as follows:

> Eligible applicant means (for purposes of the LLP program) a qualified person [[4]] who submitted an application during the application period announced by NMFS and:
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> (1) **For a groundfish license or crab species license, who owned a vessel on June 17, 1995**, from which the minimum number of harvests of license limitation groundfish or crab species were made in the relevant areas during the qualifying periods specified in § 679.4(k)(4) and (k)(5), unless the fishing history of that vessel was transferred in conformance with the provisions in paragraph (2) of this definition; or
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> (2) For a groundfish license or crab species license, to whom the fishing history of a vessel from which the minimum number of documented harvests of license limitation groundfish or crab species were made in the relevant areas during the qualifying periods specified in § 679.4(k)(4) and (k)(5) has been transferred or retained by the express terms of a written contract that clearly and unambiguously provides that the qualifications for a license under the LLP have been transferred or retained; or
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> (3) For a crab species license, who was an individual who held a State of Alaska permit for the Norton Sound king crab summery fishery in 1993 or 1994, and who made at least one harvest of red or blue king crab in the relevant area during the period specified in § 679.4(k)(5)(ii)(G) or a corporation that owned or leased a vessel on June 17, 1995 that made at least one harvest of red or blue king crab in the relevant area during the period in § 679.4(k)(5)(ii)(G), and that was operated by an individual who was an employee or temporary contractor; or
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> (4) For a scallop license, who qualified for a scallop license as specified at § 679.4(g)(2) of this part; or
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> (5) **Who is an individual that can demonstrate eligibility pursuant to the provisions of the Rehabilitation Act of 1973 at 29 U.S.C. 794(a)**.[emphasis added]

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[3] 50 C.F.R. § 679.4(k)(4); 50 C.F.R. § 679.4(k)(5).

[4] A qualified person for the LLP means "a person who was eligible on June 17, 1995, to document a fishing vessel under chapter 121, Title 46, USC." 50 C.F.R. § 679.2.

In his application, Mr. Schumacher listed the F/V HALYCON as the qualifying vessel.[5] He stated that he did not own the F/V HALCYON on June 17, 1995 but claimed to be an eligible applicant pursuant to the Rehabilitation Act of 1973 at 29 U.S.C. § 794(a), which is known as Section 504 of the Rehabilitation Act.

1. Has Mr. Schumacher shown he is an eligible applicant for an LLP license pursuant to the Section 504 of the Rehabilitation Act?

Section 504 of the Rehabilitation Act provides in relevant part:

> **No otherwise qualified** individual with a disability in the United States, as defined in section 705(20) of this title, shall, **solely by reason of her or his disability**, 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 or under any program or activity conducted by any Executive agency or by the United States Postal Service. [emphasis added] [29 U.S.C. § 794(a)]

Mr. Schumacher is the first LLP applicant to pursue a Rehabilitation Act claim on appeal. The regulatory history of the LLP sheds no light on how to evaluate a Rehabilitation Act claim by an LLP applicant. The definition of "eligible applicant" that incorporates Section 504 was not in the LLP regulations as originally proposed.[6] It was added in the final regulations.[7] The commentary to the final rule simply notes the addition of the provision but says nothing about its purpose or contours.[8] In evaluating Mr. Schumacher's claim, I therefore relied on court decisions interpreting the Rehabilitation Act and the Department of Commerce regulations implementing it.[9] I also looked at court decisions interpreting Title II of the Americans with Disabilities Act, which "incorporates the non-discrimination principles of Section 504 and

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[5] The NMFS website at <<http://www.fakr.noaa.gov/ram/llp.htm>> lists the F/V HALCYON as qualifying for an LLP groundfish license with a Central Gulf endorsement. Ala-Ore, Inc., the owner of the vessel on June 17, 1995, has received that license. The website does not show the F/V HALCYON as qualifying for an LLP crab license. I do not resolve whether the fishing history of the F/V HALCYON supports a crab license because I have decided that Mr. Schumacher is not eligible for any licenses based on the fishing history of the F/V HALYCON.

[6] Proposed Rule, 62 Fed. Reg. 43,866, 43,866 - 43,872, 43,882 - 43,889 (Aug. 15, 1997).

[7] Final Rule, 63 Fed. Reg. 52,642, 52,646, 52,653 (Oct. l, 1998).

[8] *Id.* at 52,646.

[9] Final Rule, 53 Fed. Reg. 19,270 (May 27, 1988), *codified at* 15 C.F.R. Part 8c.

extends them to State and local governments."[10]

To demonstrate eligibility for an LLP license based on Section 504, Mr. Schumacher must show four things: first, he is an individual with a disability within the meaning of the Act;[11] second, apart from his disability, he is otherwise qualified for an LLP license; third, he is being denied an LLP license solely by reason of his disability; fourth, the LLP is a program conducted by a federal Executive agency.

To meet the first requirement, Mr. Schumacher asserts the following.[12] He suffered a serious back injury while fishing for Pacific cod from the F/V HALCYON. He hurt his back while dislodging a crab pot on the boat's deck and stopped fishing because of this injury. He had back surgery and expects further surgery – a spinal fusion – to correct the injury. Due to his back injury, Mr. Schumacher received disability payments, until he was incarcerated. I accept, for purposes of this Appeal, that Mr. Schumacher is an individual with a disability.

Mr. Schumacher meets the fourth requirement for a Rehabilitation Act claim. The LLP is a program conducted by an Executive agency, namely the National Marine Fisheries Services within the National Oceanic Atmospheric Administration, which is part of the Department of Commerce.

What must Mr. Schumacher prove to meet the second and third requirements of Section 504: that he is "otherwise qualified" for an LLP license and is being denied "solely by reason of her or his disability?" The Supreme Court began "the difficult task of figuring out the meaning of 'otherwise qualified'"[13] in *Southeastern Community College v. Davis.*[14] The Court in *Davis* held that a nursing school could exclude a person with a hearing impairment because the school had shown that the impairment made the applicant unable to participate fully in the nursing program and to perform all the customary duties of a nurse:

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[10] *Helen L. v. DiDario,* 46 F.3d 325, 331 (3d Cir. 1995(citation omitted)), *cert. denied sub nom Pennsylvania Secretary of Public Welfare v. Idell*, 516 U.S. 813 (1995). Title II is similarly worded to Section 504. *See* 42 U.S.C. § 12,132. Any differences between the two Acts are not relevant to this Appeal. *Helen L.* has a nice discussion of the history of the Rehabilitation Act and Title II of the ADA. 46 F.3d at 329 - 332.

[11] The definition of "individual with a disability" in the Rehabilitation Act is at 29 U.S.C. § 705(20). A "disability" is a physical or mental impairment that "constitutes or results in a substantial impediment to employment" or that "substantially limits one or more major life activities." 29 U.S.C. § 705(9)(A)(B).

[12] Appeal at ¶¶ 4 - 9, ¶15 d, Oct. 3, 2000.

[13] *Brennan v. Stewart*, 834 F.2d 1248, 1260 (5th Cir. 1988)

[14] 442 U.S. 397 (1979).

> It is undisputed that respondent could not participate in southeastern's nursing program unless the standards were substantially lowered. Section 504 imposes no requirement upon an educational institution to lower or to effect substantial modifications of standards to accommodate a handicapped person.[15]

Davis and its progeny have resulted in the test of **reasonable accommodation** or **reasonable modification** for a violation of the Rehabilitation Act.[16] The government violates the Rehabilitation Act when a person can show that he or she would receive a government benefit if the government made **reasonable accommodations** for the person's disability. If an applicant could participate in a government program only if the government made substantial modifications or fundamental alterations in the program, the applicant is ***not*** "otherwise qualified" for the program and is ***not*** being denied solely based on a disability. The fundamental nature of the program, not the individual's disability, is causing the individual to be denied.

The Court stated in *Alexander v. Choate*, its next major Rehabilitation Act decision after *Davis*:

> *Davis* addressed that portion of 504 which requires that a handicapped individual be "otherwise qualified" before **the nondiscrimination principle of 504** becomes relevant. However, the question of who is "otherwise qualified" and what actions constitute "discrimination" under the section would seem to be two sides of a single coin; **the ultimate question is the extent to which a grantee is required to make reasonable modifications in its programs for the needs of the handicapped.**[17]

The Department of Commerce regulations implementing the Rehabilitation Act adopt the *Davis* standard. The regulations define an otherwise qualified individual as one who meets "the essential eligibility requirements for participation in, or receipt of benefits from, that program or activity."[18] Under these regulations, a measure cannot be a reasonable accommodation if it changes a fundamental requirement of a program.[19]

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[15] *Id.* at 413.

[16] Courts appear to use the two terms interchangeably.

[17] 469 U.S. 287, 299 n.19 (1985). *Accord Brennan v. Stewart*, 835 F.2d at 1262)("The question after *Alexander* is the rather mushy one of whether some 'reasonable accommodation' is available to satisfy the legitimate interests of both the grantee and the handicapped person.)

[18] 15 C.F.R. § 8c.3, definition of "qualified individuals with handicaps", subsection (2). This term means the same as an "otherwise qualified" individual. The regulation differentiates between programs "under which a person is required to perform services or to achieve a level of accomplishment" and "any other program or activity." Whatever the type of program, the disabled person must meet the "essential eligibility requirements" of the program to be "otherwise qualified."

[19] Final Rule, 53 Fed. Reg. at 19,272 (commentary to regulations).

The reasonable accommodation or reasonable modification test must be interpreted, keeping the "nondiscrimination principle" of Section 504 firmly in mind. The Rehabilitation Act seeks to eliminate discrimination. The basic purpose of Section 504 is "to ensure that handicapped individuals are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others."[20] Section 504 seeks to assure "evenhanded treatment of qualified handicapped persons" in government programs, not "affirmative efforts to overcome the disabilities caused by handicaps."[21] If a proposed change goes beyond what is necessary to eliminate discrimination, or the effects of discrimination, it is not a reasonable accommodation under the Rehabilitation Act.[22]

Mr. Schumacher made two arguments as to why he qualifies for an LLP license based on the Rehabilitation Act. First, he argued that since he was injured while fishing the F/V HALCYON, he should receive the LLP license that results from the fishing history of the F/V HALCYON. Second, he argued that, but for the accident and his subsequent disability, he would have owned the F/V HALYCON or some other qualifying vessel.

2. Does the Rehabilitation Act require, as a reasonable accommodation, that NMFS grant a disabled person an LLP license, if the disabled person suffered his or her disability as a result of commercial fishing on a vessel which qualifies for an LLP license?

Mr. Schumacher stated in his appeal that he was injured while running, or skippering, the F/V HALCYON. He stated: "Since I was injured the catch history should belong to me, as I was leaseing [sic] the boat [the F/V HALCYON]."[23] Mr. Schumacher testified at the hearing that he should receive an LLP license "by my fishing history" and "by my deliveries, [the deliveries] that were made in my name."[24]

It is unclear whether the crucial point, from Mr. Schumacher's perspective, is that he was injured as captain of the F/V HALCYON, as lessee of the F/V HALCYON or as the permitholder who recorded deliveries from the F/V HALCYON. Whichever Mr. Schumacher is proposing, he is asking that NMFS be required to award him an LLP license *because* he was injured while fishing on the F/V HALCYON. He is seeking an LLP license as a type of *compensation* for his injury.

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[20] *School Bd. of Nassau County v. Arline,* 408 U.S. 273, 282 (1987)(a teacher with tuberculosis is an individual with a disability under the Rehabilitation Act and is entitled to an individualized inquiry as to whether she was qualified to be in the classroom). *Arline* is the third major Supreme Court decision on the Rehabilitation act, after *Davis* and *Alexander*.

[21] *Southeastern Community College v. Davis,* 442 U.S. at 410.

[22] *Id.*

[23] Appeal at ¶ 15 b, Oct. 3, 2002.

[24] Tape 1, Side B, Hearing Log 110, June 28, 2002. All Hearing citations will be to this Hearing.

This is not a reasonable modification in the LLP. It would change the LLP into a program that compensates a group of people – whether it be boat captains, boat lessees or State of Alaska permit holders – for injuries sustained while commercial fishing. The LLP is not a program designed to compensate any group of persons for injuries relating to commercial fishing.[25]

The LLP is designed to restrict access to the North Pacific crab and groundfish fisheries according to the criteria and procedures of the Magnuson-Stevens Act.[26] It is "the first stage in fulfilling the [North Pacific Fisheries Management] Council's commitment to develop a comprehensive and rational management program for the fisheries in and off Alaska."[27] The LLP responds to the Council's concern that the crab and groundfish fisheries were suffering from overcapitalization: "that the domestic harvesting fleet had expanded beyond the size necessary to harvest efficiently the optimum yield (OY) of the fisheries . . . off Alaska."[28]

The LLP is not a response or solution to the problem of commercial fishing injuries. As the commentary to the Department of Commerce regulations on the Rehabilitation Act state:

> The agency is required to make modifications in order to enable an applicant with handicaps to participate [in a program offered by the agency], but is not required to offer a program of a fundamentally different nature. The test is whether, with appropriate modifications, the applicant can achieve the purpose of the program offered; not whether the applicant could benefit or obtain results from some other program that the agency does not offer.[29]

To require that NMFS award an LLP license based on whether an applicant suffered a commercial fishing injury on an LLP-qualified vessel would require that NMFS offer a program fundamentally different from the LLP. This proposed change is therefore not a reasonable modification under the Rehabilitation Act.

3. Does the Rehabilitation Act require, as a reasonable accommodation, that NMFS grant a disabled person an LLP license if a disabled person proves that he or she would have owned a qualifying vessel but for his or her disability?

Mr. Schumacher acknowledges that he did not own a qualifying vessel on June 14, 1995 but states that he should be excused from that requirement because he would have owned one but for

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[25] For the history of the LLP, see Final Rule, 63 Fed. Reg. 52,642, 52,642 - 52,643 (Oct. l, 1998).

[26] 16 U.S.C. §§ 1801 - 53.

[27] Final Rule, 63 Fed. Reg. at 52,642.

[28] *Id.*

[29] Final Rule, 53 Fed. Reg. at 19272.

the onset of his disability. Assuming Mr. Schumacher could prove that assertion, the question is whether he has stated a claim for an LLP license under the Rehabilitation Act.

NMFS awards LLP licenses without regard to whether an applicant has now, or ever has had a disability. NMFS does not ask anything about the applicant's physical or mental condition and does not award or deny a permit based on anything to do with the applicant's past, present or future physical or mental condition. NMFS awards LLP licenses based on whether an applicant owned a qualified vessel on June 17, 1995 or a qualified fishing history, separate from the vessel.

The proposed reasonable accommodation, implicit in Mr. Schumacher's argument, is this: instead of *not* asking about an applicant's disability, the Rehabilitation Act requires NMFS to [1] inquire into the applicant's disabilities, [2] determine whether a disabled person did not own a vessel due to his or her disabilities, [3] award an LLP license to a disabled person who proves that he or she would have owned a qualifying vessel but for his or her disabilities, and [4] endorse the LLP license based on either the vessel's catch history or the applicant's deliveries on a State of Alaska permit. For three reasons, I conclude this is not a reasonable accommodation.

First, the criteria of vessel ownership for award of an LLP license does not discriminate against disabled persons. It does not result from outdated or archaic assumptions about what disabled persons can and cannot do. It does not require that an applicant prove that he or she can perform any of the physical activities in operating a boat. A disabled person can own a vessel. Even a corporation – a legal entity only – can own a vessel. The criteria of vessel ownership has no intrinsic relationship to an applicant's disability or lack of disability.

Many reasons exist why an applicant might not have owned a vessel on June 17, 1995: a financial setback, poor fishing season, personal problems such as divorce or death in the family, boat breakdown, a natural disaster, a withdrawal of promised financial support from a partner or bank or, as Mr. Schumacher as argued, onset of a disability. NMFS does not examine why any applicant did not own a vessel on June 17, 1995 and does not award an LLP license based on *any* reason why an applicant did *not* own a vessel on June 17, 1995.

In essence, Mr. Schumacher asks NMFS to conduct such an inquiry for disabled persons only. This does not redress discrimination or the effects of discrimination. This would result in disabled persons receiving special treatment because of their disabilities, rather than equal or even-handed treatment which takes into account their disabilities. The change is therefore not a reasonable modification under section 504 of the Rehabilitation Act.

I should note that courts have sometimes required, as a reasonable accommodation, that the government make an exception for disabled persons to a regulation which is neutral on its face. The Ninth Circuit Court of Appeals in *Crowder v. Kitagawa* held that Hawaii's quarantine requirement for all animals discriminated against blind persons because they relied on guide

dogs.[30] In that case, the criteria – that an animal had spent 120 days in quarantine – had a particular exclusionary effect on disabled persons, which was directly related to their disability. The criteria in the LLP – vessel ownership – does not have a particular exclusionary effect on disabled persons which is related to their disabilities.

Or some courts have held that a blanket prohibition against 19-year-old high school students participating in sports – a rule which applies to all students – discriminates against a disabled student who is in high school at age 19 because of his disability.[31] The students use an argument similar to Mr. Schumacher's: "but for" the student's disability, the student would not be in high school, just as Mr. Schumacher argues that "but for" his disability, he would own a vessel.

The critical difference is that the policy in the student athlete cases results in *discrimination* against a disabled student vis-a-vis a non-disabled student. Because of a student's disability, the student will only be able to play high school sports for three years, whereas a non-disabled student who began high school at the regular age can play for four years. In the LLP, the disabled and the non-disabled applicant have access to the same benefit: an LLP license if they owned a vessel with a qualifying history on June 17, 1995. That is what the Rehabilitation Act requires.[32]

Second, the proposed change seeks a waiver of an essential feature of the LLP.program. Mr. Schumacher seeks a waiver of the requirement for *ownership* of a qualifying vessel on June 17, 1995. The award of LLP licenses to *vessel owners* was a fundamental policy choice in the LLP.

The definition of "eligible applicant" for the LLP in federal regulation 50 C.F.R. § 679.2 requires *ownership* – of a qualifying vessel or the qualifying fishing history – except in the narrowly circumscribed exception applicable to the Norton Sound red and blue king fishery in

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[30] 81 F.3d 1480 (9th Cir. 1996). The court remanded to determine if the plaintiff's proposed alternatives to the quarantine were reasonable accommodations

[31] *See, e.g., Dennin v. The Connecticut Interscholastic Conference*, 913 F. Supp. 663 (D. Conn. 1996), *judgment vacated as moot,* 94 F.3d 96 (2d Cir. 1996); *Booth v. University Interscholastic League*, 1990 W.L. 484414 (W.D. Tex. 1990). *But see, e.g., Sandison v. Michigan High School Ass'n,* 64 F.3d 1026 (6th Cir. 1995)(denying Rehabilitation Act claim, students excluded due to age not disability).

[32] *Patton v. TIC United Corporation,* 77 P. 3d 1235, 1246 (10th Cir. 1996), *cert. denied,* 518 U.S. 1005 (1996)(Rehabilitation Act "requires only that Patton have the same access to a jury determination of damages as everyone else"); *Castellano v. The City of New York,* 142 F.3d 58, 70 (2d Cir. 1998), *cert denied sub nom Velardi v. New York City Fire Dept. Pension Fund,* 530 U.S. 1205 (2000)("Because VSF [retirement] payments are available equally to persons with and without disabilities who retire after twenty years of service, Class I retirees have failed to state a claim of discrimination on the basis of disability under the ADA or the Rehabilitation Act.").

1993 or 1994.[33] Apart from the Norton Sound exception, the LLP regulations award licenses to vessel owners, not lessees, not skippers, not permitholders.

The regulatory history shows that award of LLP licenses to vessel owners was a deliberate policy choice. The Council, when it approved the LLP, unanimously adopted motions for both crab and groundfish licenses that licenses would be issued to "current owners (as of 6/17/95) of qualified vessels."[34] In making the motion to adopt the crab provision, Council member Dave Benton noted: "Through the discussion [of LLP], both groundfish and crab, the Council has heard again extensive testimony regarding the need to award licenses to current owners and I think this is consistent with public testimony and with the Council's discussions on this matter at numerous Council meetings."[35]

Since Mr. Schumacher seeks a waiver of an essential eligibility requirement, he has not proposed a reasonable accommodation under the Rehabilitation Act.

Third, Mr. Schumacher's proposal violates another essential feature of the LLP: that one catch history should not be used to generate more than one license. Mr. Schumacher seeks a permit based on harvests he made from the F/V HALCYON that were recorded on his State of Alaska permit. But the owner of the F/V HALCYON has already received the permit based on the fishing history of the F/V HALYCON. If Mr. Schumacher received a permit based on that same fish history, one fish history would yield two licenses.

NMFS has allowed the same fishing history to yield two licenses, or duplicate quota shares, only in very unusual situations where, due to an agency mistake, an innocent third-party purchaser for value would be harmed unless double licenses or quota shares were left to stand.[36] A proposal which allows two LLP licenses based on the same fish history as a matter of course – any time a person showed he or she would have owned a boat but for a disability – would be a drastic departure from agency regulations, practice and precedent.

Overall, Mr. Schumacher's claim in this case is similar to the claim rejected by the Supreme Court in Alexander v. Choate. The Court stated:

> The 14-day rule [that Medicaid pays for only 14 days of hospital stays per year]

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[33] 50 C.F.R. § 679.2, quoted on page 3 *supra.*

[34] North Pacific Fishery Management Council [NPFMC] Newsletter, June 1995, Attachment 1 to Newsletter at pages 9, 13, available at <<http://www.fakr.noaa.gov/npfmc/newsletters/695news.htm>>, Exhibit 3 in Appeal file; Partial Transcript of NPFMC Meeting, June 15, 1995, Exhibit 2 in Appeal file at pages 3 & 9.

[35] *Id.* at 89.

[36] *R.J. Fierce Packer*, Appeal 00-0004 at 20-21 (March 18, 2000).

> challenged in this case is neutral on its face, is not alleged to rest on a discriminatory motive, and does not deny the handicapped access to or exclude them from the particular package of medical services Tennessee has chosen to provide. The State has made the same benefit – 14 days of coverage – equally accessible to both handicapped and nonhandicapped persons, and the State is not required to assure the handicapped 'adequate health care' by providing them with more coverage than the nonhanidcapped.[37]

In this case, the requirement of vessel ownership is neutral on its face, is not alleged to rest on a discriminatory motive and does not deny the handicapped the ability to receive an LLP license. Just as the States had discretion to determine the particular mix of services covered by state Medicaid, the Magnuson-Stevens Act grants the Secretary of Commerce, working in conjunction with the regional councils established by the Act, the authority to develop and adopt programs that restrict access to a fishery.[38] The Secretary of Commerce, after the extensive review process established by the Magnuson-Stevens Act, adopted the LLP program, a restricted access program which awards licenses to owners of vessels and awards one license based on one fishing history. The Rehabilitation Act does not require NMFS to make an exception for disabled persons.

4. Assuming that, under the Rehabilitation Act, Mr. Schumacher was entitled to an LLP license if he proved that he would have owned a qualifying vessel but for his disability, did Mr. Schumacher prove that he would have owned a qualifying vessel but for his disability?

Since I held a hearing, I will address whether, assuming that Mr. Schumacher stated a claim under the Rehabilitation Act, he proved that he would have owned a qualifying vessel but for his disability. Mr. Schumacher did not ever assert that he would have purchased the fishing history of a qualified vessel, but for his disability.[39] But he did assert that he would have owned a qualified vessel but for his disability. I conclude that Mr. Schumacher did not prove that he would have owned an LLP-qualified vessel but for his disability.

A. The F/V HALCYON

Mr. Schumacher asserted in his written appeal that, because of his injuries, he was unable to purchase the F/V HALCYON.[40] Mr. Schumacher noticed that the Middlesworth family, who owned the vessel, sometimes left it in dry dock for long periods of time. Mr. Schumacher asked Todd Middlesworth what they would sell the F/V HALCYON for. Mr. Schumacher couldn't

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[37] 469 U.S. at 309.

[38] 16 U.S.C. §§ 1852 - 1854.

[39] Mr. Schumacher testified: "I never heard of that. I was unaware you could even do that." Tape 1, Side B, Hearing Log 120.

[40] Appeal at ¶ 15 b, Oct. 3, 2002.

remember the exact asking price but thought it was over $250,000, which he felt was much too high. Mr. Schumacher never got back to Todd Middlesworth on buying the F/V HALCYON. [41]

When asked whether he would have purchased the F/V HALCYON, Mr. Schumacher testified: "I am not saying it would have been the Halycon but I definitely would have bought a boat." He also stated: "I didn't say I would have bought that one specifically. I am saying that, except for my injury, I would have owned a boat."[42]

I conclude that Mr. Schumacher did not prove that he would have owned the F/V HALCYON but for his injury. Mr. Schumacher made only one inquiry to the owner. He essentially abandoned this claim at the hearing and made the argument that he would have purchased some other boat besides the F/V HALCYON.

B. A qualifying vessel other than the F/V HALCYON

Mr. Schumacher testified: "If it wasn't for my back being broken, I would have owned a boat. I would have owned one."[43] Mr. Schumacher has never owned a boat. When asked why he would have owned one then, when he hadn't owned one before, he stated, "That's easy. I'd been running boats for years. And I was in line to own my boat. I knew enough about fisheries and I could have made a go of it. There's nothing . . . that's my next logical step is to own my own boat." He stated: "I had enough experience out there on the ocean to make a go of it that I wouldn't go belly up."[44]

Barbara Anderson, a long-time friend of Mr. Schumacher's, testified:

> Q [by Mr. Schumacher]: Barbara, if I hadn't have broke my back, do you think I would have a boat right now?
>
> A: I don't think anything would have stopped you. You wouldn't have been on deck, but you probably would have had your own boat. [Tape 1, Side B, Hearing Log 360]

Ms. Anderson testified: "Yes, I definitely do believe that he would have owned his own boat, had things, you know, gone his way. He would have. It was a dream, he was a fisherman, and that's the ultimate dream of a fisherman. And he worked at it every step of the way. So he

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[41] Tape 1, Side A, Hearing Log 495 - 600.

[42] Tape 1, Side B, Hearing Log 25.

[43] Tape 1, Side A, Hearing Log 600.

[44] Tape 1, Side B, Hearing Log 55 - 70.

would have, he wouldn't have crewed."[45]

Gary Cobban, Jr., another lifelong friend of Mr. Schumacher's, testified.[46] Mr. Schumacher crewed for Mr. Cobban and Mr. Cobban credits Mr. Schumacher with saving the crew of the F/V GERRY D by quick action during a storm in the early 1980s. Mr. Cobban did not own a boat but had discussed partnership with Mr. Schumacher before and since Mr. Schumacher went to jail. They wish to get a boat about 70 feet long that could fish halibut, black cod and crab. Mr. Cobban would operate the boat while it was crabbing, Mr. Schumacher while it was fishing black cod and halibut. When asked whether he thought Mr. Schumacher would have owned a boat but for his injury, Mr. Cobban replied:

> Don't know what boat that would have been, but he was an adept, intuitive, very good fisherman. There is no doubt in my mind he would have owned his own boat. [Tape 2, Side A, Hearing Log 270]

While I believe that Mr. Schumacher and his two witnesses believed that Mr. Schumacher would have owned a vessel with a qualifying history but for his back injury, I conclude that Mr. Schumacher has not shown that he would have owned a qualifying vessel, other than the F/V HALCYON, but for his back injury, because of three critical deficiencies in the evidence.

First, Mr. Schumacher never owned a boat and was not engaged in negotiations with any boat owner for a specific boat at the time of his injury. Mr. Schumacher described his efforts at the hearing: "I started looking at the prices of boats. You can't buy a boat unless you look them over." [Tape l, Side A, Hearing Log 140] Later in the hearing, Mr. Schumacher testified:

> Q [by Appeals Officer]: If not the Halcyon, what boat would it have been? What are your thoughts on that?
>
> A: When you go to get something like a boat, you have to check it over really thoroughly.
>
> Q: Had you checked over any boats real thoroughly?
>
> A: I ran the Lady Angeline, Samantha Marie, King & Winge. A bunch of other boats. And there is always something that is wrong with all of them. You've got to weigh the pros and cons when you are thinking about that. it takes a while to decide. Because your whole life is going to be centered around what you can make with that boat. [Tape 1, Side B, Hearing Log 32 - 52]

These are very preliminary efforts. Mr. Schumacher had not narrowed down his search to any

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[45] Ms. Anderson's testimony is at Tape l, Side B, Hearing Log 306 - 395.

[46] Mr. Cobban's testimony is at Side A, Tape 2, Hearing Log 162 - 285.

single boat and therefore had not engaged in any serious negotiations for specific terms – purchase price, financing, period of repayment, collateral – for the purchase of any specific vessel. The process of arriving at the purchase of any major item – a house, a boat, property – requires agreement on many details. Even after a buyer's efforts narrow down to a single vessel, deals can fall through at any time because the buyer and seller cannot agree on the specific details of the purchase.

Second, the basis for the testimony that Mr. Schumacher would have owned a vessel is an unproven assumption. Mr. Schumacher testified that he would have owned a boat because he was "in line to own my own boat" and because it was the "next logical step." The progression from a crew member to a skipper to a boat owner is not inevitable. Many talented, resourceful skippers do not become boat owners. Many continue to skipper and lease vessels. The assumption that Mr. Schumacher would own his own boat, simply based on his increasing responsibility on other persons' boats, is especially questionable because Mr. Schumacher had no definite method of financing, which I discuss next.

Third, Mr. Schumacher did not have any financing to purchase a vessel. Mr. Schumacher testified that he had not contacted any banks or gotten preapproved for any loans. He testified that if he had bought a boat, the seller would have to finance it.[47] Under this arrangement, rather than the seller getting cashed out immediately, the seller agrees to be paid by letting the purchaser take the boat, fish the boat and pay the seller based on the boat's catch. It is risky for the seller, particularly if the seller transfers title to the purchaser before the seller is paid.

Mr. Schumacher did not identify a specific vessel that was available and that he could have purchased this way. Mr. Schumacher testified that he would have tried to get Terri Middlesworth to do that for the F/V HALCYON but "I never approached him on it because I still hadn't made up my mind on it."[48] Mr. Schumacher asserted that the owner of the F/V KING & WINGE had approached him about buying that boat, but he, Mr. Schumacher said no and the owner then sold it to someone else. Mr. Schumacher's evidence is inadequate to establish that he had a way to finance purchase of a substantial boat, such as the F/V HALCYON with an asking price in excess of $250,000, or a seventy-foot boat capable of catching halibut, cod and crab.

The cumulative effect of the deficiencies in Mr. Schumacher's evidence is that he has not proven that he would have owned a vessel, other than the F/V HALCYON, with an LLP qualifying history but for his injury. Mr. Schumacher, based on the testimony in this record, is a talented, resourceful and brave fisherman. He wished to own a boat. It was his goal. It was his dream. But he has not proven that, but for his back injury, he would have realized that dream and owned a boat with an LLP-qualifying history by June 17, 1995.

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[47] Tape l, Side B, Hearing Log 580 - 600.

[48] Tape l, Side A, Hearing Log 585.

5. Is Mr. Schumacher eligible for an LLP license based on the unavoidable circumstances regulation, 50 C.F.R. § 679.4(k)(8)(iv)?

On appeal, Mr. Schumacher claims that his back injury constituted an unavoidable circumstance. The unavoidable circumstances regulation, 50 C.F.R.§ 679.4(k)(8)(iv), requires that the applicant have owned a vessel on June 17, 1995 that made at least two harvests: one between January l, 1988 and February 9, 1992 and a second after the lifting of the unavoidable circumstances but before June 17, 1995. This regulation does not help Mr. Schumacher. It can substitute for missing *harvests* by a vessel, not missing *ownership* of a vessel by the applicant.

I do not decide whether the Rehabilitation Act could ever require, as a reasonable accommodation, that NMFS grant credit for missing harvests to a disabled applicant who owned a vessel on June 17, 1995 with a partial qualifying history and who did not meet the requirements of the unavoidable circumstances regulation.

FINDINGS OF FACT

1. Mr. Schumacher did not own the F/V HALCYON, or any vessel with an LLP qualifying fishing history, on June 17, 1995.

2. Mr. Schumacher does not own the fishing history of the F/V HALYCON or any vessel with an LLP qualifying fishing history.

3. Mr. Schumacher would not have owned the F/V HALCYON on June 17, 1995 but for his back injury.

4. Mr. Schumacher would not have owned any other vessel with a qualifying fishing history on June 17, 1995 but for his back injury.

CONCLUSIONS OF LAW

1. Mr. Schumacher is not an eligible applicant for an LLP license pursuant to Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a).

2. The Rehabilitation Act requires the government to modify non-essential features of a program that are neutral on their face but discriminate against disabled persons, if the government can accommodate the legitimate needs of the disabled applicant and the government.

3. The Rehabilitation Act does not require, as a reasonable accommodation, that NMFS grant a disabled person an LLP license, if the disabled person suffered his or her disability as a result of commercial fishing on a vessel which qualifies for an LLP license.

4. To require NMFS to award LLP licenses as compensation for commercial fishing injuries would require NMFS to offer a program of a fundamentally different nature from the LLP.

5. The Rehabilitation Act does not require, as a reasonable accommodation, that NMFS grant a disabled person an LLP license if the disabled person proves that he or she would have owned a qualifying vessel but for his or her disability.

6 If a proposed change modifies an essential feature of a program, it is not a reasonable modification.

7. If a proposed change goes beyond what is necessary to eliminate discrimination, it is not a reasonable accommodation.

8. The unavoidable circumstances regulation, 50 C.F.R. § 679.4(k)(8)(iv), is only available to an applicant that owned a vessel on June 17, 1995 that made specified harvests.

DISPOSITION

The IAD that is the subject of this appeal is AFFIRMED. This Decision takes effect October 16, 2002, unless by that date the Regional Administrator orders review of the Decision.

Any party or RAM may submit a Motion for Reconsideration, but it must be received by this Office not later than 4:30 p.m., Alaska time, on the tenth day after this Decision, September 26, 2002. A Motion for Reconsideration must be in writing, must specify one or more material matters of fact or law that were overlooked or misunderstood by the Appeals Officer, and must be accompanied by a written statement or points and authorities in support of the motion.

Mary Alice McKeen
Appeals Officer