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# Employment Discrimination--Analyzing Handicap Discrimination Claims: The Right Tools for the Job

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## COMMENT

### Employment Discrimination—Analyzing Handicap Discrimination Claims: The Right Tools for the Job

Handicapped persons<sup>1</sup> are relative newcomers to the protection offered by employment discrimination statutes.<sup>2</sup> Although they now have achieved wide recognition as a class requiring such protection,<sup>3</sup> their status as protected persons is not on a parity with that of persons claiming that they have been discriminated against on the basis of race, sex, national origin, religion, or age.<sup>4</sup> Moreover, analysis of handicap employment discrimination cases presents two unique considerations. First, while it is ordinarily easy to determine that a claimant is black, or female, or of foreign origin, or Jewish, or of a certain age, it is not always clear that a claimant is legally handicapped.<sup>5</sup> Second, in many cases a handicapped person can be employed successfully only if the employer is willing in some way to accommodate the person's handicap.<sup>6</sup> Although such accommodation is superficially analogous to other types of affirmative action,<sup>7</sup>

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1. "Handicapped persons" appears to be the accepted designation for the class under discussion. See *THE LEGAL RIGHTS OF HANDICAPPED PERSONS* 1-10 (R. Burgdorf, Jr. ed. 1980) [hereinafter cited as *LEGAL RIGHTS*] (an argument can be made that "disabled persons" is preferable). Handicapped persons have been referred to by a number of degrading terms. See *id.* at 4. The choice of words used to identify the class, therefore, is a matter of some importance, especially when treating antidiscrimination laws, which are designed in part to dispel prejudice. The temptation to shorten the designation merely to "the handicapped" should be resisted because handicapped persons frequently feel that their individuality is ignored, and that labeling them "the handicapped" is depersonalizing. See *id.* at 48.

2. By 1974, 10 years after the Civil Rights Act of 1964, Congress had prohibited both public- and private-sector employment discrimination based on race, sex, religion, and national origin, 42 U.S.C. §§ 2000e to -17 (1976 & Supp. IV 1980), and, seven years after the Age Discrimination in Employment Act of 1967 (ADEA), Congress had similarly prohibited such discrimination based on age, 29 U.S.C. §§ 621-634 (1976 & Supp. V 1981). Congress, however, had enacted only limited legislation protecting the rights of handicapped persons. See Rehabilitation Act of 1973, 29 U.S.C. §§ 701-794 (1976 & Supp. V 1981). Less than half of the states had "amended existing anti-discrimination laws to require equal employment opportunity for the disabled in both the public and private sectors." *LEGAL RIGHTS*, *supra* note 1, at 331-32.

Indeed, *Pennsylvania Assoc. for Retarded Children v. Commonwealth* (PARC), 343 F. Supp. 279 (E.D. Pa. 1972), is often seen as "[t]he start of [the] litigative movement" on behalf of handicapped persons, although it was not the first lawsuit brought by a handicapped person. *LEGAL RIGHTS*, *supra* note 1, at 52. The case was "a major, statewide class action supported by a state organization," and "placed in the public eye, for the first time, the notion that the courts could be used to secure constitutional and statutory rights for handicapped persons." *Id.*

3. See *infra* notes 25 & 34-35 and accompanying text.

4. See *supra* note 2 (protection afforded handicapped persons under federal law more limited). See also *infra* notes 25-26 (scope of federal law limited); *infra* notes 35-38 and accompanying text (state laws offer inadequate protection).

5. See *infra* text accompanying notes 39-125 (litigation may center on whether person with disability is legally handicapped).

6. A person in a wheelchair, for example, may be able to perform a clerical job but unable to use the company's restrooms unless they are modified. See *LEGAL RIGHTS*, *supra* note 1, at 317. For a discussion of what accommodation entails, see *infra* text accompanying notes 138-40.

7. All types of affirmative action require the employers to give protected classes preferential treatment. See generally Sowell, Weber and Bakke and *The Presuppositions of "Affirmative Action,"* 26 WAYNE L. REV. 1309 (1980).

it differs in critical respects. The underlying rationale of affirmative action plans aimed at racial and sexual job discrimination, for instance, is to eliminate longstanding and deep-seated prejudice through temporary remedial hiring. The theory is that integrating blacks and women into the work force will give them the opportunity to prove themselves and acquire skills that will eventually remove obstacles to their employment.<sup>8</sup> While some objections to hiring handicapped persons undoubtedly derive from prejudice,<sup>9</sup> some are based on the rational fear that handicapped persons will prove unable to perform their jobs adequately.<sup>10</sup> Accommodation plans must take into account the unique characteristics of individual handicaps, which present almost infinite variety.<sup>11</sup> Moreover, while affirmative action plans, whether based on race, gender, or handicap, may in the long run serve to dispel prejudice, and thus become obsolete, accommodation plans are designed to adapt a given job to a real disability that will persist even after prejudice is eliminated. Hence, because accommodation plans cannot eliminate the handicaps themselves, they cannot be viewed as a temporary remedial expedient.

The unique problems posed by handicap employment discrimination must be identified clearly if it is to be remedied. Recognition of these problems would provide guidance to Congress and state legislatures in drafting antidiscrimination statutes, and to courts in interpreting them. At present, despite a wide variety of statutory and case law aimed at handicap employment discrimination,<sup>12</sup> no uniform antidiscrimination policy has emerged. On the contrary, at both the federal and state level, circular analytic models are developing that short-circuit consideration of the crucial issues<sup>13</sup> and promote widespread confusion.<sup>14</sup> This comment explores the fallacies inherent in these developing models, and suggests instead a linear mode of analysis through which it can be rationally determined both whether handicap employment discrimination has occurred and whether an employer should be required to ac-

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8. See *id.* at 1310-11 (affirmative action requires consequences of past activity, such as word-of-mouth hiring practices, to be proscribed or mitigated, but is transitional policy).

9. See LEGAL RIGHTS, *supra* note 1, at 318 ("employers continue to discriminate against handicapped job applicants because of stereotypes, prejudices, and misconceptions").

10. See, e.g., *Southeastern Community College v. Davis*, 442 U.S. 397 (1979) (nursing-school applicant refused admission because handicap might threaten safety of patients); *Boynton Cab Co. v. Wisconsin Dep't of Indus., Labor & Human Relations*, 96 Wis. 2d 396, 291 N.W.2d 850 (1980) (one-handed taxicab driver refused employment because handicap might prevent safe operation of vehicle).

11. The problem of accommodating a mentally retarded person is obviously quite different from that of accommodating a person of normal intelligence who is confined to a wheelchair. Handicap, moreover, may be a matter of degree. A visual handicap, for example, may range from minor, such as vision impaired but correctable with glasses, see *Burgess v. Joseph Schlitz Brewing Co.*, 298 N.C. 520, 259 S.E.2d 248 (1979), to major, such as total blindness, see *Zorick v. Tynes*, 372 So. 2d 133 (Fla. 1979).

12. See, e.g., *infra* text accompanying notes 25-38.

13. See *infra* note 15.

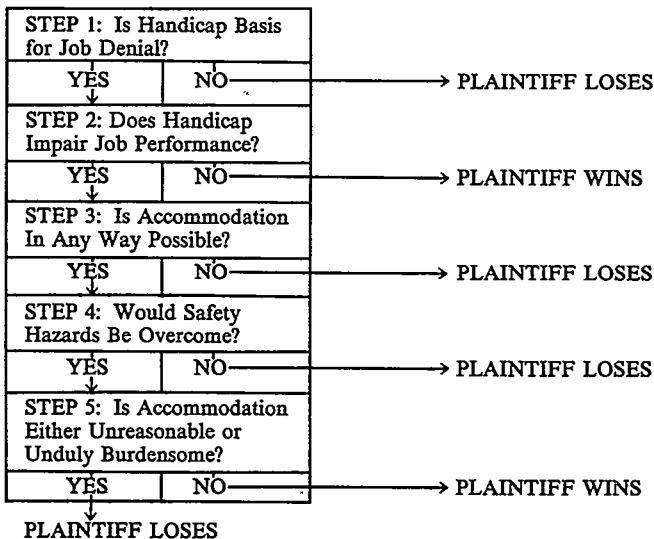
14. Because there is no widely accepted method of analyzing handicap employment discrimination cases, those presenting similar fact situations and arising under nearly identical statutes have been resolved in conflicting ways in different jurisdictions. See *infra* text accompanying notes 47-73.

commode a handicapped person's disability.<sup>15</sup>

Two issues that may be central to the enforcement of handicap legislation are beyond the scope of this comment, largely because they do not yet appear to have assumed real significance. First, this paper does not address methods of proving that handicap discrimination is the motive for job denial. Case law indicates that most employers freely admit they have refused employment because they consider the applicant handicapped.<sup>16</sup> As employers become more

15. The federal analytic model is based on the Supreme Court's reading of section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §§ 701-794 (1976 & Supp. V 1981), in *Southeastern Community College v. Davis*, 442 U.S. 397 (1979). Under this analysis, an "otherwise qualified" handicapped person may not be denied employment solely on the basis of handicap unless the handicap impairs job performance, in which case the person is not "an otherwise qualified handicap individual." *Id.* See *infra* text accompanying notes 144-70. The state analytic model derives from the North Carolina Supreme Court's reading of that state's handicap employment antidiscrimination statute, N.C. GEN. STAT. § 168-6 (1982), in *Burgess v. Joseph Schlitz Brewing Co.*, 298 N.C. 520, 259 S.E.2d 248 (1979). Using this analysis, a handicapped person may be denied employment on the basis of handicap only if the handicap impairs job performance, *unless* the handicap has been overcome or outlived, in which case the person is not legally handicapped. See *infra* text accompanying notes 64-97. Both analyses focus on whether plaintiff may claim the protection of the law, not on whether he has suffered unreasonable employment discrimination.

Contrast those lines of reasoning with the proposed analytic model diagrammed below. Under this analysis, the first question is whether a bias against a handicapping condition motivated the employer. The second question is whether that bias is reasonably based on evidence that the handicap would impair job performance. In jurisdictions that do not require accommodation, see *infra* note 131, the analysis would end with the second step. In jurisdictions that do require accommodation, see *infra* notes 132-33, the analytic model would compel an examination and balancing of the employer's and the handicapped person's interests. In either case, the model operates to require that a case be resolved on the merits, rather than on the issue of standing.



16. See, e.g., *Southeastern Community College v. Davis*, 442 U.S. 397 (1979) (hearing impairment reason for refusing nursing-school applicant); *Wisconsin Dairy Equip. Co. v. Wisconsin Dep't of Indus., Labor & Human Relations*, 95 Wis. 2d 319, 290 N.W.2d 330 (1980) (missing kidney reason for denying job to man functioning normally); *Burgess v. Joseph Schlitz Brewing Co.*, 298 N.C. 520, 259 S.E.2d 248 (1979) (glaucoma reason for refusing job to man with 20/20

aware that handicap employment discrimination is forbidden by law, they may develop more sophisticated rationales for denying jobs. At that point, the law may develop along lines suggested by cases arising under Title VII of the Civil Rights Act of 1964.<sup>17</sup> The Supreme Court has interpreted that statute to forbid not only intentional discrimination but also de facto discrimination (when it results in a disparate impact on a protected class),<sup>18</sup> and has developed methods of proving either.<sup>19</sup> Second, class-wide affirmative action plans have not become a significant issue in the field of handicap employment discrimination.<sup>20</sup> Although an employer's policies may discriminate equally against all persons with a given type of handicap,<sup>21</sup> they may have no impact at all on persons with different types of handicaps.<sup>22</sup> It would be extremely difficult, therefore, to fashion an enforceable affirmative action plan designed to eradicate discrimination against all handicapped persons as a class.

### I. DEFINING HANDICAP

For nearly two decades, federal law has prohibited both public- and private-sector employment discrimination based on race, sex, national origin, and religion.<sup>23</sup> For almost as long, employers have been forbidden to discriminate on the basis of age.<sup>24</sup> Not until 1973, however, did Congress prohibit employ-

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corrected vision); *Zorick v. Tynes*, 372 So. 2d 133 (Fla. 1979) (blindness reason for refusing job to man with good credentials).

17. 42 U.S.C. §§ 2000e to -17 (1976 & Supp. IV 1980).

18. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (disparate treatment prohibited); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (disparate impact also may be prohibited).

19. If plaintiff alleges intentional discrimination, but lacks overt evidence, he may establish a prima facie violation of Title VII by showing that: (1) he is a member of a protected group; (2) he was qualified for and applied for the job; (3) he was rejected; and (4) the employer continued seeking applicants with the same or similar qualifications. In defense, the employer may articulate a legitimate nondiscriminatory reason for denying employment, which the plaintiff may rebut with evidence of circumstances or statistics which indicate that the employer's articulated reason is a pretext for discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *But see Pushkin v. Regents of Univ. of Colo.*, 658 F.2d 1372 (10th Cir. 1981) (disparate treatment analysis held inapplicable to Rehabilitation Act because handicap discrimination is particularly invidious).

A plaintiff may also establish a prima facie violation of Title VII by showing, ordinarily through statistics, that the employer has engaged in a facially neutral employment practice that has a disparate impact on the protected class. The employer may justify the disparate impact by showing that the challenged practice is a business necessity. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Plaintiff may rebut this showing with evidence that other selection devices without disparate impact would serve the employer's interest in "efficient and trustworthy workmanship" equally well. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975).

20. Although federal law, in some circumstances, requires employers to take affirmative action to hire handicapped persons, see *infra* note 25, litigation has centered not on what steps employers must take, but on whether employees have a private right of action. See, e.g., *Davis v. United Air Lines, Inc.*, 662 F.2d 120 (2d Cir. 1981), *cert. denied*, 102 S. Ct. 2045 (1982); *Simon v. St. Louis County*, 656 F.2d 316 (8th Cir. 1981), *cert. denied*, 102 S. Ct. 1485 (1982); *Rogers v. Frito-Lay, Inc.*, 611 F.2d 1074 (5th Cir.), *cert. denied*, 449 U.S. 889 (1980).

21. See, e.g., *Burgess v. Joseph Schlitz Brewing Co.*, 298 N.C. 520, 259 S.E.2d 248 (1979) (employer denied jobs to all with glaucoma, without considering severity of disease).

22. Eliminating a policy of refusing employment to all persons with glaucoma, for example, would have no effect on discrimination against those with epilepsy or mental retardation.

23. See Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to -17 (1976 & Supp. IV 1980).

24. See Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1976 & Supp. V 1981) (employment discrimination prohibited against persons age 40-70).

ment discrimination based on handicap.<sup>25</sup> Even today, federal law leaves handicapped persons largely unprotected from private-sector employment discrimination.<sup>26</sup> Repeated efforts to bring handicapped persons within the ambit of the Civil Rights Act have failed.<sup>27</sup> Moreover, given the current popularity of the states' rights concept,<sup>28</sup> it appears unlikely that either Congress or the federal courts<sup>29</sup> will expand the protection offered handicapped persons in the near future. Their best hope for equal employment opportunity thus lies at present in working to clarify and strengthen state legislation.<sup>30</sup>

25. See Rehabilitation Act of 1973, 29 U.S.C. §§ 701-794 (1976 & Supp. V 1981). The Rehabilitation Act was intended primarily to help states develop and implement vocational rehabilitation services for handicapped persons. See *id.* § 701 (statement of purpose). The Act, however, does address employment in limited circumstances. Section 791 requires the federal government to take affirmative action to hire handicapped persons. See also *id.* § 794a (Supp. V 1981). Section 793 requires persons contracting with the federal government for more than \$2,500 to take affirmative action to employ and promote "qualified handicapped individuals." Under § 794, recipients of federal financial assistance may not discriminate against "otherwise qualified handicapped individuals." Affirmative action is not mentioned.

26. Federal law prohibiting employment discrimination against handicapped persons does not reach most private employers because it applies only to the federal government, federal contractors, and recipients of federal financial assistance. See *supra* note 25.

27. Erf, *Potluck Protection for Handicapped Discriminatees: The Need to Amend Title VII to Prohibit Discrimination on the Basis of Disability*, 8 LOY. U. CHI. L.J. 814, 835 (1977). The exclusion of handicap discrimination from Title VII has meant that the bulk of civil rights employment litigation is not directly applicable to handicap cases. Because classes protected under Title VII have not been forced to resort to state fair-employment legislation, the latter has been utilized only recently. *Id.* at 837.

28. "Today a new body of constitutional law is emerging based not on the Constitution of the United States but on the constitutions of several states. Indeed, a clear trend toward states' rights is bringing about a phoenix-like resurrection of federalism." Mosk, *Rediscovering the 10th Amendment*, 20 JUDGES J. 16 (Fall 1981).

29. To establish a violation of constitutional rights granted under the due process and equal protection clauses of the fourteenth amendment, or under § 1983 of the Civil Rights Act of 1866, 42 U.S.C. § 1983 (1976), passed pursuant to the enabling clause of the fourteenth amendment, a handicapped plaintiff must show that his injury flows from state action. U.S. CONST. amend. XIV, § 1 ("No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person . . . equal protection of the laws."). See *Trageser v. Libbie Rehabilitation Ctr.*, 590 F.2d 87, 90 (4th Cir. 1978) (handicapped person must show private employer's conduct "was in reality an act of either the state or federal government"). Thus, even if handicap were held to be a "suspect" basis for governmental classifications, as is race, see, e.g., *Loving v. Virginia*, 388 U.S. 1, 11 (1967), or if employment were held to be a "fundamental" right, as is the right to marry, *id.* at 12, laws affecting the employment rights of handicapped persons would be subjected to "rigid scrutiny," *id.* at 11, only in cases involving state action.

Nonetheless, the enabling clause of the thirteenth amendment empowers Congress "to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States." *Id.* at 11. Section 1981 of the Civil Rights Act of 1866, 42 U.S.C. § 1981 (1976), which was passed pursuant to that power, protects "the right to contract for employment," *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 441 n.78 (1968). The Court held that § 1981 extended to private acts of discrimination as well as state action in *Runyon v. McCrary*, 427 U.S. 160 (1976). Although § 1981 literally protects the same contractual rights "as [are] enjoyed by white citizens," 42 U.S.C. § 1981 (1976), it has been held that the statute's scope is not limited to racial discrimination. See *Scher v. Board of Educ.*, 424 F.2d 742, 743 (3d Cir. 1970). But see *Trehan v. IBM*, 24 Fair Empl. Prac. Cas. (BNA) 443 (S.D.N.Y. 1980) (cited in *McGarity & Schroeder, Risk-Oriented Employment Screening*, 59 TEX. L. REV. 999, 1023 n.104 (1981) (§ 1981 held not applicable to national origin). It has been suggested that § 1981 could be used to enforce handicapped persons' employment rights in the private sector. See Note, *Abroad in the Land: Legal Strategies to Effectuate the Rights of the Physically Disabled*, 61 GEO. L.J. 1501, 1514-19 (1973). This approach, however, remains untested. LEGAL RIGHTS, *supra* note 1, at 437.

30. For a detailed accounting of existing state fair employment practice laws, see 3 EMPL. PRAC. GUIDE (CCH) ¶¶ 20,000-29,335 (1981).

The primary concern of this comment, therefore, is state legislation and its attendant case law. The states, however, frequently look to federal statutes and case law for guidance in resolving handicap discrimination problems.<sup>31</sup> Proving particularly influential is the federal Rehabilitation Act definition of handicapped individual: "[a]ny person who (a) has a physical or mental impairment which substantially limits such person's functioning in one or more of such person's major life activities; (b) has a *record* of such an impairment; or (c) *is regarded* as having such an impairment."<sup>32</sup> Federal law also requires employers to make reasonable accommodation to an employee's handicap.<sup>33</sup> Hence it is important, in analyzing state statutes and decisions, to keep in mind the federal law backdrop.

At present, forty-five states and the District of Columbia have enacted provisions forbidding handicap discrimination in employment.<sup>34</sup> The state legislation, however, "is highly varied, often uncertain, and inadequately enforced,"<sup>35</sup> and the protection this legislation provides has aptly been described as "potluck."<sup>36</sup> Most of the difficulties with existing state legislation can be categorized in one of two ways: either the definition of handicap is so vague or so restrictive that many persons needing protection are denied it altogether;<sup>37</sup> or the law fails to address adequately (or at all) the issue of accommodation.<sup>38</sup>

Turning to the first of these difficulties, twelve states at present do not define handicap at all;<sup>39</sup> definitions in the remaining states vary and produce

31. See, e.g., *Barnes v. Washington Natural Gas Co.*, 22 Wash. App. 576, 591 P.2d 461 (1979) (state's administrative regulations tracked language of Rehabilitation Act; court judicially adopted federal definition of "handicapped individual"). Cf. *Zorick v. Tynes*, 372 So. 2d 133 (Fla. 1979) (court followed federal lead in refusing to hold for plaintiff under federal cause of action, but employed unique method of analysis to resolve state claim in plaintiff's favor).

32. Rehabilitation Act of 1973, 29 U.S.C. § 706(6) (1976 & Supp. V 1981) (emphasis added).

33. The duty to accommodate does not appear in § 503 or § 504 of the Rehabilitation Act, 29 U.S.C. §§ 793-794 (1976 & Supp. V 1981), but is imposed by OFCCP and HEW guidelines. See Affirmative Obligations of Contractors and Subcontractors for Handicapped Workers, 41 C.F.R. §§ 60-741.2, .6(d) (1983) (OFCCP); Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving or Benefiting from Federal Financial Assistance, 45 C.F.R. §§ 84.3(k)(1), .12 (1983) (HEW).

34. See PRESIDENT'S COMM. ON EMPLOYMENT OF THE HANDICAPPED, SELECTED STATE AND FED. LAWS AFFECTING EMPLOYMENT AND CERTAIN RIGHTS OF PEOPLE WITH DISABILITIES 68-80 (1980) (only North Dakota, Oklahoma, South Carolina, Utah, Wyoming and Puerto Rico provide no coverage) [hereinafter cited as SELECTED LAWS].

35. Erf, *supra* note 27, at 844. See SELECTED LAWS, *supra* note 34, at 35 (mentally handicapped persons protected in 22 states; cancer patients covered only in California; private employers must comply in 35 states and District of Columbia; 30 states, not including North Carolina, have enforcement agencies; private right of action expressly created in only 10 states and District of Columbia; remedies may be preliminary injunctions, cease-and-desist orders, monetary damages, reinstatement, hiring, back pay, criminal penalties; limited priority in government hiring only in New York; affirmative-action requirements vary widely).

36. Erf, *supra* note 27, at 814.

37. See *infra* text accompanying notes 64-125.

38. See *infra* text accompanying notes 126-301.

39. See Hartstein, *Employment of the Handicapped under State Law—An Employer's Perspective* (presentation at A.B.A. Labor Section Committee meeting in Sarasota, Fla., March 5-6, 1981), reprinted in 45 DAILY LAB. REP. E-4, E-5 n.9 (1981) ("[S]tates with no definition are Alabama, Arkansas, Florida, Idaho, Massachusetts, Mississippi, Nevada, Oklahoma, South Dakota, Tennessee, Vermont, and Virginia. Washington and Wisconsin also have no definition by statute but have developed definitions by regulation and case law, respectively.").

dramatically different degrees of protection.<sup>40</sup> A number of states use the federal standard,<sup>41</sup> which has the advantage of protecting against some of the most irrational forms of discrimination—discrimination against those who merely have a record of handicap or are perceived as having a handicap, but are not in fact handicapped.<sup>42</sup> Coverage for these categories is controversial,<sup>43</sup> but indefensible results may be reached in states that do not provide it.<sup>44</sup> Also controversial is a category of handicaps labeled “voluntary”;<sup>45</sup> exclusion from coverage of this category can likewise lead to indefensible results.<sup>46</sup>

Several courts have confronted the question whether “perceived” handicaps are protected by statutes that do not expressly mention them. In *Barnes v. Washington Natural Gas Co.*,<sup>47</sup> for example, an employee was discharged because the employer erroneously believed that he had epilepsy.<sup>48</sup> Defending against the ensuing charge of handicap discrimination, the employer maintained that the employee had no cause of action under the state handicap employment discrimination statute<sup>49</sup> because he did not in fact have epilepsy, and therefore had no standing to sue as a handicapped person.<sup>50</sup> Rejecting that argument, the Washington Court of Appeals observed:

It would be an anomalous situation if discrimination in employment would be prohibited against those who possess the handicap but would not include within the class a person “perceived” by the employer to have the handicap. . . . The essence of unlawful employment discrimination is the application of unreasonable generalizations about people to the hiring, promotion and discharge of workers.<sup>51</sup>

Recognizing that antidiscrimination legislation must mean, if it means anything at all, that it is unlawful to discriminate on purely irrational grounds, the *Barnes* court in effect judicially adopted<sup>52</sup> the federal Rehabilitation Act definition of “handicapped individual,” which forbids discrimination against those with “perceived” handicaps.<sup>53</sup> Although the Washington legislature had

40. *See id.* at E-5 & nn.5-8 (definitions range from the broad federal standard to “substantial impairment” standards).

41. *See id.* at E-5 n.5 (states with definition comparable to Rehabilitation Act standard include California, Colorado, Illinois, Iowa, Kansas, Louisiana, Maryland, Missouri, Oregon, Pennsylvania, and Washington).

42. Under the federal standard, persons who merely have a record of having a handicap, or are perceived to have a handicap, are considered legally handicapped. *See supra* text accompanying note 32.

43. *See Hartstein, supra* note 39, at E-5.

44. *See, e.g., Burgess v. Schlitz Brewery Co.*, 298 N.C. 520, 259 S.E.2d 248 (1979) (man with glaucoma denied job although vision corrected to 20/20 and job performance unimpaired).

45. *See Hartstein, supra* note 39, at E-6.

46. *See infra* text accompanying notes 106-13.

47. 22 Wash. App. 576, 591 P.2d 461 (1979).

48. *Id.* at 577, 591 P.2d at 462.

49. WASH. REV. CODE § 49.60 (1974).

50. *See Barnes*, 22 Wash. App. at 580, 591 P.2d at 463-64.

51. *Id.* at 582, 591 P.2d at 464.

52. *See id.* at 582-83, 591 P.2d at 465.

53. Rehabilitation Act of 1973, 29 U.S.C. § 706(6) (1976).



not included the federal definition in its antidiscrimination statute,<sup>54</sup> the *Barnes* court derived support for its position from administrative regulations that suggested the federal definition was appropriate.<sup>55</sup>

A similar result was reached in *Dairy Equipment Co. v. Wisconsin Department of Industry, Labor and Human Relations*.<sup>56</sup> Plaintiff's job application was denied because he had only one kidney.<sup>57</sup> The employer argued that because the man functioned normally, he could not be considered handicapped within the meaning of the state statute,<sup>58</sup> and was therefore not a proper plaintiff.<sup>59</sup> In holding that unlawful discrimination had occurred,<sup>60</sup> the court relied both on a finding by the state's enforcement agency that plaintiff should be considered handicapped,<sup>61</sup> and on a state case-law history that had traditionally afforded broad protection to handicapped workers.<sup>62</sup> The state statute, however, did not articulate the principle that those who are merely treated as if they were handicapped should be protected as fully as if they indeed were disabled.<sup>63</sup>

Taken together, these decisions seem to indicate that it is unnecessary to include the federal definition of "handicapped individual" within state statutes because a common sense approach to statutory construction achieves the same result. That is unfortunately not always the case. A North Carolina decision, *Burgess v. Joseph Schlitz Brewing Co.*,<sup>64</sup> illustrates the point. In *Burgess* the complainant had glaucoma.<sup>65</sup> "[C]ompetent medical authority"<sup>66</sup> informed Schlitz that "plaintiff's glaucoma would in no way interfere with plaintiff's job performance and that in fact plaintiff had 20/20 vision in both eyes with glasses."<sup>67</sup> Under the relevant state statute, a handicapped person could be denied employment on the basis of handicap only if that handicap would impair job performance.<sup>68</sup> Burgess's job application was nonetheless rejected because "it was against [company] policy to hire individuals who had glaucoma."<sup>69</sup> Despite a lower-court decision basically in accord with *Barnes* and *Dairy Equipment*,<sup>70</sup> the North Carolina Supreme Court held that although

54. See WASH. REV. CODE §§ 49.60.030, 49.60.180 (1974) (statute contains no definition of handicap).

55. See *Barnes*, 22 Wash. App. at 579, 591 P.2d at 463 (opinion sets out agency regulations).

56. 95 Wis. 2d 319, 290 N.W.2d 330 (1980).

57. See *id.* at 321, 290 N.W.2d at 331.

58. See WIS. STAT. §§ 111.31-111.37 (1975).

59. *Dairy Equipment*, 95 Wis. 2d at 325, 290 N.W.2d at 333.

60. See *id.* at 331-33, 290 N.W.2d at 336-37.

61. See *id.* at 323-25, 290 N.W.2d at 332.

62. See *id.* at 327-30, 290 N.W.2d at 334-35.

63. See WIS. STAT. § 111.32(5)(a) (1975) (statute includes no definition of handicap).

64. 298 N.C. 520, 259 S.E.2d 248 (1979).

65. *Id.* at 521, 259 S.E.2d at 250.

66. *Id.*

67. *Id.*

68. See N.C. GEN. STAT. § 168-6 (1982): "Handicapped persons shall be employed . . . on the same terms and conditions as the ablebodied, unless it is shown that the particular disability impairs the performance of the work involved."

69. *Burgess*, 298 N.C. at 521, 259 S.E.2d at 250.

70. See *Burgess v. Joseph Schlitz Brewing Co.*, 39 N.C. App. 481, 486, 250 S.E.2d 687, 690

glaucoma is a "visual disability" covered by the state's antidiscrimination legislation,<sup>71</sup> Burgess was not disabled by the disease and therefore not protected by the statute.<sup>72</sup> Indicating that a "corrected" handicap was unprotected, the court held: "Essentially plaintiff has indicated . . . that he has an eye disease but that his vision is functioning normally with glasses. Accordingly . . . plaintiff is not visually disabled within the meaning of the statute."<sup>73</sup>

In reaching this decision, the North Carolina Supreme Court ignored the lower court's implicit approval of the federal Rehabilitation Act definition of disabled persons.<sup>74</sup> Faced with construing for the first time the state's handicap employment discrimination statute,<sup>75</sup> the court announced it would honor two widely accepted principles of statutory construction. First, "[a] construction which operates to defeat or impair the object of the statute must be avoided if that can reasonably be done without violence to the legislative language";<sup>76</sup> and second, a remedial statute, such as the handicap employment discrimination law, "should be construed liberally, in a manner which assures fulfillment of the beneficial goals for which it is enacted and which brings within it all cases fairly falling within its intended scope."<sup>77</sup> To these principles, the court added that "the words and phrases of a statute must be interpreted contextually, in a manner which harmonizes with the other provisions of the statute and which gives effect to the reason and purpose of the statute."<sup>78</sup>

Embarking on this contextual study, however, the *Burgess* court failed to discern the purposes underlying the handicap employment provision, purposes revealed not only by the provision itself but also by the introductory language setting forth the general purpose of all of the state's handicap protection legislation.<sup>79</sup> These two provisions, taken together, identify three interests the law is designed to protect. As the following analysis will demonstrate, none of the three is advanced by the court's holding.

Two of the three interests are implicit in the employment discrimination statute, which provides that "[h]andicapped persons shall be employed . . . on the same terms and conditions as the ablebodied, unless it is shown that the particular disability impairs the performance of the work involved."<sup>80</sup> These words simultaneously protect and limit the interests of both handicapped

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(1979) (court of appeals found Schlitz violated antidiscrimination statute and observed that it was apparent that Schlitz viewed Burgess "as being under some type of disability").

71. See *Burgess*, 298 N.C. at 527, 259 S.E.2d at 253.

72. *Id.* at 528, 259 S.E.2d at 253.

73. *Id.*

74. See *Burgess*, 39 N.C. App. at 485-86, 250 S.E.2d at 690 (court of appeals quoted Rehabilitation Act definition of "handicapped individuals," apparently with approval).

75. See N.C. GEN. STAT. § 168-1 (1982) (handicapped persons are those with "physical, mental and visual disabilities").

76. *Burgess*, 298 N.C. at 524, 259 S.E.2d at 251.

77. *Id.*

78. *Id.*

79. See N.C. GEN. STAT. § 168-1 (1982).

80. N.C. GEN. STAT. § 168-6 (1982).

workers and employers. While the employer's interest in total hiring discretion ordinarily must yield to the handicapped person's autonomy interest, if the handicapped person cannot perform a job as well as the ablebodied, his interest must yield to the employer's interest. Thus the provision identifies the handicapped person's interest in being free from arbitrary employment discrimination and the employer's interest in being free to refuse employment to those unable to offer him unimpaired job performance. Moreover, the statute appears to weigh the handicapped person's interest slightly more heavily, placing on the employer the burden of proving as an affirmative defense that the handicap impairs job performance. The statute does not require the handicapped person to show that his handicap does not impair job performance.

The third interest is derived from the legislature's introductory recital of purpose: "The State shall encourage and enable handicapped persons to participate fully in the social and economic life of the State and to engage in remunerative employment."<sup>81</sup> To the interests of the handicapped person and of the employer, these words add an interest of the state itself. As a general proposition, the state has an interest in encouraging full citizenship for all persons because it promotes a healthy society. The reference in the statute to "remunerative employment," however, suggests a more specific interest. Clearly, chronic unemployment casts a burden on the state as well as on the unemployed. Some persons are so severely handicapped that the cost of caring for them will inevitably devolve upon the state, but the state has a strong self-interest in avoiding that result whenever possible.

A fourth interest should be added to this list, that of the judiciary, and hence, indirectly, of the state, in avoiding frivolous "nuisance" suits. This interest is not explicitly identified by the statutory language, but it can be inferred. Handicap legislation of course is not designed primarily to create a class of handicapped persons, but rather to create protections for those persons. It would little avail a person to be classified as legally handicapped if no protection flowed from that status. Presumably the *Burgess* court felt that the purpose of the statute could not be respected if persons whom the legislature did not intend to protect were able to claim relief under the law, and that extending protection to "perceived" handicaps would expose the court to a flood of meritless claims.<sup>82</sup>

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81. *Id.* § 168-1.

82. This presumption is an inference. The court's language throughout the opinion, until the final few paragraphs, suggests the court believed the legislature intended to grant rights to the handicapped "in the broadest possible terms." *Burgess*, 298 N.C. at 524, 259 S.E.2d at 251. Indeed, the logical momentum of the opinion seems to favor the plaintiff. The early pages are devoted to an expansion of the lower-court opinion, in which the court rejected defendant's argument that the state statute, N.C. GEN. STAT. § 168-6 (1982), was applicable only to those who were "totally blind or those whose vision with glasses is so defective as to prevent the performance of ordinary activity for which eyesight is essential." *Id.* § III-II (1978) (statute defining "visually handicapped"). See *Burgess*, 39 N.C. App. 481, 250 S.E.2d 687 (court of appeals held definition of "visually handicapped" should not be applied to limit meaning of "visual disability" in § 168-6); *Burgess*, 298 N.C. 520, 259 S.E. 2d 248 (supreme court agreed with court of appeals' construction). Unexpectedly, however, the supreme court held that while *Burgess* need not be "visually handicapped" to be protected by the employment statute, he must be "visually disabled," *id.* at 528, 259 S.E.2d at 253, by which the court meant that he must suffer from a "present, non-correctable loss

Taking in sequence the interests of the handicapped person, the employer, the state, and the judiciary, it is apparent at the outset that the handicapped person's interest in being free from arbitrary employment discrimination is not advanced by the *Burgess* decision. The *Burgess* court failed to recognize this because it focused on the meaning of "handicapped" rather than on the meaning of unlawful discrimination.<sup>83</sup> Concededly, the legislature's definition of handicapped persons—"those . . . with physical, mental and visual disabilities"<sup>84</sup>—was imprecise. Because "handicap" and "disability" are arguably interchangeable terms,<sup>85</sup> the statutory definition is circular and gave the court little guidance in identifying the protected class. Implicit in the statutory language, however, is an adequate definition of the kind of discrimination the legislature intended to outlaw. Such discrimination does not occur merely because an ablebodied person is preferred to a handicapped person; rather, it takes place when an employer bases job denial on an abnormality that has not been "shown"<sup>86</sup> to "impair"<sup>87</sup> the "performance of the work involved."<sup>88</sup> This is precisely the kind of discrimination that Schlitz engaged in when it rejected Burgess's job application. Because the statute is designed to prevent this kind of discrimination, the *Burgess* decision defeats, to a significant extent, the statutory purpose. Nor is the employer's legitimate interest in being able to reject applicants who cannot offer unimpaired job performance advanced by the decision. The employer's interest advanced is that of being able to deny employment on the basis of an infirmity *unrelated* to job performance—precisely what the statute says an employer must *not* do.

The state's interest in minimizing unnecessary unemployment is also defeated by the *Burgess* decision. *Burgess*, in effect, creates a class of persons who may be denied employment without cause and with legal impunity—those whose handicaps, real or imagined, do not impair their functioning in any significant way.<sup>89</sup> These are precisely the persons who do *not* belong on the state's unemployment or welfare rolls; their presence there shamefully wastes both their own productive capacities and the state's economic resources.

The *Burgess* court did not closely examine any of these three primary interests. Rather, it focused on the merely secondary and inferable interest of

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of function" that "substantially" impaired his ability "to function normally." *Id.* The court offered no authority to support this construction.

83. See *supra* note 82.

84. N.C. GEN. STAT. § 168-1 (1982).

85. See LEGAL RIGHTS, *supra* note 1, at 4-10 (dispute whether "handicapped" and "disabled" have different meanings and connotations).

86. N.C. GEN. STAT. § 168-6 (1982).

87. *Id.*

88. *Id.*

89. The *Burgess* holding was not limited to persons claiming visual handicaps. The court held that, as used in N.C. GEN. STAT. § 168-6 (1982), "disability" of any kind "refers to a present, non-correctable loss of function which substantially impairs a person's ability to function normally." *Burgess*, 298 N.C. at 528, 259 S.E.2d 253. Under this rationale, a person with a history of a handicapping condition, or a person who erroneously was believed to have a handicapping condition, would not be protected by the statute.

preventing meritless claims.<sup>90</sup> This focus was misplaced. A decision for the plaintiff would not have enhanced the possibility of nuisance suits. Such suits could materialize in cases in which claimants who were denied employment on the basis of lack of experience, for instance, claimed the real reason for job denial was some trivial infirmity. In *Burgess Schlitz* openly admitted that plaintiff was refused employment solely because he had glaucoma,<sup>91</sup> and further conceded that his glaucoma would not impair job performance.<sup>92</sup> The "real reason" for job denial was not in issue.<sup>93</sup>

The handicap employment statute construed by the *Burgess* court was enacted in 1973.<sup>94</sup> *Burgess* is the only case arising under it ever to reach the appellate level, and no case under the statute has proceeded to appellate judgment on the merits. Three conclusions are possible: either there is no handicap employment discrimination in North Carolina; all such discrimination is resolved either privately or by trial courts to the satisfaction of the parties; or handicapped persons are persuaded that the law, as it has been interpreted in *Burgess*, affords them no meaningful protection. The first two conclusions strain credulity. The third implies that *Burgess* made the antidiscrimination statute a nullity.<sup>95</sup>

As *Burgess* demonstrates, a mode of judicial analysis that focuses on the meaning of "handicap," and excludes from the protected class persons who

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90. The court quoted various statutory provisions pertaining to handicapped persons, at length and without comment, concluding that this "contextual" study revealed the scope of protection conferred by N.C. GEN. STAT. § 168-6 (1982), and that extending protection to *Burgess* "would exceed the intended scope." *Burgess*, 298 N.C. at 524-28, 259 S.E.2d at 252-53.

91. See *Burgess*, 298 N.C. at 521, 259 S.E.2d at 250.

92. See Appellants Brief at 2, *Burgess*, 298 N.C. 520, 259 S.E.2d 248 (defendant based motion to dismiss on plaintiff's claim that his glaucoma "would in no way interfere" with his job performance).

93. Indeed, it seems permissible to infer that Schlitz was resisting the concept of the handicap employment discrimination statute. The record does not suggest that Schlitz was attempting to comply in good faith with what it perceived to be the meaning and scope of the statute. On the contrary, defendant conceded that "unfortunately" the statute appeared to imply a private right of action. Appellant's Brief at 9, *Burgess*, 298 N.C. 520, 259 S.E.2d 248. The statute itself specifies neither civil remedies nor criminal penalties. See N.C. GEN. STAT. § 168-6 (1982). Moreover, North Carolina has no enforcement agency designated to bring or hear cases arising under the statute. See *supra* note 35. Unless handicapped persons were allowed to bring suit, there would be no mechanism to enforce the statute, and an unenforceable statute has little significance beyond a bare articulation of public policy. Defendant indicated, however, that it would prefer to argue that the statute was indeed unenforceable, but had been unable to discover legal support for that position. See Appellant's Brief at 9, *Burgess*, 298 N.C. 520, 259 S.E.2d 248 (all available authority indicated plaintiff must be allowed to bring suit). Defendant was not, in other words, concerned with avoiding a nuisance suit, but rather with prohibiting any suit at all. When this broadside attack on the statutory purpose appeared doomed, Schlitz settled for an end-run: denying plaintiff standing.

For a discussion of the problems handicapped plaintiffs have encountered in attempting to bring a private lawsuit in employment discrimination cases arising under federal law, see Wegner, *The Antidiscrimination Model Reconsidered: Ensuring Equal Opportunity Without Respect to Handicap Under Section 504 of the Rehabilitation Act of 1973*, (to be published in 69 CORNELL L. REV. (1984)).

94. See N.C. GEN. STAT. §§ 168-1 to -10 (1982).

95. A fourth possibility is that handicapped persons are simply unaware of the statute and the protection it offers. It stands to reason, however, that if on even one occasion the statute had furnished a handicapped person with effective protection, it would have received greater publicity and, as a result, would have been used more often.

are not substantially impaired, results in a circular line of reasoning<sup>96</sup> which both misses and defeats the point of antidiscrimination legislation. Under this ill-conceived analysis, a person denied employment on the basis of a handicap that does not impair job performance may sue for relief unless he has overcome or outlived his handicap, in which case he may be denied employment on the basis of a handicap that does not impair job performance, and may not sue for relief. This model could make it virtually impossible to maintain a charge of handicap employment discrimination. On the one hand, an employer can defeat such a charge by showing that the handicap impairs job performance; on the other hand, if the employee then successfully proves that his handicap has been overcome (with the aid of glasses, a prosthetic device, or medication) so that his work is unimpaired, the court can find that he is not handicapped, and therefore has no standing. Even viewed in the most favorable light (conceivably a claimant could be substantially impaired in some areas of life, but still manage to perform a job without impairment), the *Burgess* rationale creates an extremely narrow class of protected persons, widely missing the mark of construing a remedial statute "liberally, in a manner which assures fulfillment of the beneficial goals for which it is enacted and which brings within it all cases fairly falling within its intended scope."<sup>97</sup>

Widespread adoption of the federal definition of "handicapped individual"<sup>98</sup> would be, of course, an aid to hitting that mark. Perhaps more importantly, courts must come to recognize that if employment is denied on the basis of a condition that the employer regards as a handicap,<sup>99</sup> and if this condition does not impair job performance, then unlawful handicap employment discrimination has occurred and the claimant must prevail.<sup>100</sup> Outlawing discrimination against "perceived" handicaps advances two important concerns. First, it protects the person against whom there is no rational basis for discrimination. Second, it ultimately helps to dispel the prejudice that irrationally<sup>101</sup>

96. See *supra* note 15.

97. *Burgess*, 298 N.C. at 524, 259 S.E.2d at 251 (citations omitted). See also *supra* text accompanying notes 76-78.

98. See *supra* text accompanying note 32. At present, only twelve states use a definition comparable to the federal standard. See *supra* notes 39-41 and accompanying text.

99. If the employer expressly offers a physical, mental, or emotional condition as the reason for job denial, he should not be allowed to argue disingenuously that he does not regard the condition as a handicap. As the North Carolina Court of Appeals observed, Schlitz obviously viewed *Burgess* as "being under some type of disability," *Burgess*, 39 N.C. App. at 486, 250 S.E.2d at 690, when it refused him a job because he had glaucoma.

100. See *supra* note 15.

101. Alcoholism, for example, has traditionally been viewed as sinful behavior rather than as a disease, so the alcoholic has been seen as wicked rather than sick. See generally Note, *Alcohol Abuse and the Law*, 94 HARV. L. REV. 1660 (1981) [hereinafter cited as Note, *Alcohol*]. Obese persons have been viewed as gluttons (gluttony is one of the seven deadly spiritual sins), but recent research suggests that their condition may be involuntary. See generally Comment, *The Rehabilitation Act of 1973: Protection for Victims of Weight Discrimination?*, 29 U.C.L.A. L. REV. 947 (1982). Mentally retarded persons were once thought to be demoniacal. S. DAVIES, *THE MENTALLY RETARDED IN SOCIETY* 9-10 (1959). Epileptic persons have been classified, for purposes of sterilization by the state, with "idiots, imbeciles and morons . . . rapists, certain criminals and other defectives." *Smith v. Board of Examiners*, 85 N.J.L. 46, 48, 88 A. 963, 964 (1913).

Even among educated people, prejudice against handicapped persons has at times reached an absurd, almost hysterical, level:

attaches to certain conditions. Conversely, if an employer is allowed to discriminate against a person who merely is presumed to have a certain condition, or who once had such a condition, the prejudice against that condition inevitably will be reinforced.<sup>102</sup>

In addition to "perceived" handicaps, many states exclude from coverage an emerging category of handicaps labeled "voluntary." A 1980 Louisiana law, for example, essentially adopted the federal definition of handicap, but made exceptions for "chronic alcoholism or any other form of active drug addiction."<sup>103</sup> Similarly, California has enacted regulations excluding from protection those suffering from "alcoholism or narcotics addiction."<sup>104</sup> The trend, indeed, appears to be toward the exclusion of "voluntary" handicaps, with obesity and drug and alcohol addictions commonly among the handicaps so classified.<sup>105</sup>

Wisconsin, which has frequently championed the cause of equal employment opportunity for handicapped persons,<sup>106</sup> labels venereal disease "voluntary" and therefore undeserving of statutory protection.<sup>107</sup> Furthermore, without going as far as to declare alcoholism a voluntary handicap, the Wis-

Since time immemorial, the criminal and defective have been the "cancer of society." Strong, intelligent, useful families are becoming smaller and smaller; while irresponsible, diseased, defective families are becoming larger. The result can only be race degeneration. To prevent this race suicide we must prevent the socially inadequate persons from propagating their kind, i.e., the feeble-minded, epileptic, insane, criminal, diseased, and others.

Note, *A Sterilization Statute for Kentucky?*, 23 KY. L.J. 168, 168 (1934).

In a slightly more temperate vein, Oliver Wendell Holmes once wrote:

It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes.

*Buck v. Bell*, 274 U.S. 200, 207 (1927) (citations omitted). Today, it is becoming clear that the assumptions about the criminal tendencies of handicapped persons and the beliefs about the hereditary nature of handicapping conditions were incorrect, and that attempts to eliminate such conditions through sterilization were misguided. See Murdock, *Sterilization of the Retarded: A Problem or a Solution?*, 62 CALIF. L. REV. 917, 924-27 (1974).

102. A person denied a job because he suffers from some condition that renders him de facto unemployable has been labeled and stigmatized. Stigmatization can be compared to a "sentence of death." *Pennsylvania Assoc. for Retarded Citizens (PARC) v. Commonwealth*, 343 F. Supp. 279, 295 (E.D. Pa. 1972). "The imposition of an unfortunate label reinforces a person's feelings of insecurity and negative self-concepts, tends to cause behavior to conform to role expectations, and results in a situation in which the individual shortchanges his or her own potential as a result of being pigeonholed by others." LEGAL RIGHTS, *supra* note 1, at 50-51. In turn, if people negatively labeled view themselves in a negative light, it is to be expected that society will react in kind by accepting and perpetuating these persons' self-images.

103. LA. REV. STAT. ANN. §§ 2251-2256 (West 1982).

104. 2 CAL. ADM. CODE, Div. 4 §§ 2251-2256.

105. See Hartstein, *supra* note 39, at E-5 & E-6.

106. See Hartstein, *supra* note 39, at E-6 ("Wisconsin . . . has been in the forefront of making law in favor of the handicapped."). See *Chicago, M., St. P. & P. RR. v. Wisconsin Dep't of Indus., Labor & Human Relations*, 62 Wis. 2d 392, 398, 215 N.W.2d 443, 446 (1974) (court adopted broad interpretation of "handicapped"). See also *Wisconsin Tel. Co., v. Wisconsin Dep't of Indus., Labor and Human Relations*, 68 Wis. 2d 345, 368, 228 N.W.2d 649, 661 (1975) (court held fair employment statute designed to prevent discrimination causing poverty and other suffering).

107. See *Johnson v. Dutchland Dairy Foods*, ERD Case No. 7735019, slip op., (Wis. Comm'n, Oct. 11, 1979), cited in Hartstein, *supra* note 39, at E-6 n.15.

consin Supreme Court recently refused to equate a "drinking problem" with alcoholism, noting that the former might be voluntary even if the latter were not.<sup>108</sup> The court held that when an employee had been discharged because of a "drinking problem" (which did not prevent satisfactory job performance), the state's antidiscrimination statute had been violated only if the employee's drinking was "non-volitional."<sup>109</sup> The court said: "If his drinking was volitional it hardly can be classified as a handicap within the meaning of our anti-discrimination statute."<sup>110</sup> Thus, "medically definable alcoholism" is technically a handicap; a mere "drinking problem" is not.<sup>111</sup> This analysis misses the point and leads to a variation of the *Burgess* rationale.<sup>112</sup> The inquiry in both cases should have been addressed first to whether the condition was perceived or treated as a handicap, and second to whether it interfered with job performance. Here, as in *Burgess*, it seems that the less serious the problem, and the slighter the rational basis for discrimination, the more the courts are prepared to tolerate discrimination.

The exclusion of "voluntary" handicaps from antidiscrimination coverage could be devastating to the employment rights of handicapped persons. Arguably, none of the recognized exclusions is truly voluntary. A person suffering from venereal disease may have voluntarily engaged in sexual relations, but no more voluntarily contracted the disease than someone who drives an automobile voluntarily sustains injury in a crash. Less obviously, it is becoming increasingly well recognized that although obese persons, and those addicted to alcohol or drugs, do on occasion conquer their handicapping conditions, they may be suffering from compulsions, or even diseases, that require professional intervention to overcome.<sup>113</sup> It should not be presumed, in other words, that these people have voluntarily assumed their handicaps, nor that they could voluntarily banish them. Moreover, because the recognized exclusions are logically analogous to the car-crash hypothetical, if the trend toward excluding "voluntary" handicaps continues, coverage ultimately could be denied any handicap deriving from some voluntary action on the part of the affected persons, or carrying this logic to its extreme, perhaps only birth defects could be considered truly involuntary.

The effort to exclude voluntary handicaps may stem from a desire to avoid making handicap legislation a catch-all to cover every conceivable form of discrimination not already forbidden by more specific legislation. It may also derive from a sense that alcoholics, drug addicts, obese people, and persons with "social diseases" are sinners<sup>114</sup> and therefore do not deserve statu-

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108. See *Connecticut Gen. Life Ins. v. Wisconsin Dep't of Indus., Labor & Human Relations*, 86 Wis. 2d 393, 273 N.W.2d 206 (1979).

109. *Id.* at 408, 273 N.W.2d at 213.

110. *Id.*

111. *Id.*

112. See *supra* text accompanying notes 64-73.

113. See Comment, *supra* note 101, at 947 (obesity, properly understood, may be voluntary); Note, *Alcohol*, *supra* note 101, at 1661-62 (alcoholism now widely regarded as disease).

114. See *supra* note 101. A Pennsylvania court has held that a "morbidly obese" person is handicapped, but took no position concerning those who are merely "obese." *English v. Philadel-*



tory protection. Nonetheless, it is intellectually dishonest to pretend either that these persons are not handicapped or that they have willfully handicapped themselves. Moreover, because antidiscrimination employment statutes are designed both to dispel prejudice and enhance productivity,<sup>115</sup> a strong argument can be made for protecting these persons. Assuming, however, that states are unwilling to do so, certain handicaps can be excluded from coverage without resort to the label "voluntary." Legislatures simply could admit that they are making value judgments and policy decisions that they feel no compulsion to rationalize. Alternatively, courts could examine so-called "voluntary" handicaps in the context of accommodation<sup>116</sup> by holding that it is unreasonable to require employers to make allowances for an employee who is, for instance, drunk on the job.<sup>117</sup>

Indeed, if the concern is that it is difficult to weigh the policy that people must bear the consequences of their actions against society's need to employ as many people as possible, then the creation of specific "voluntary" handicaps does little to resolve the problem. It seems clear that epilepsy, for example, should be considered a handicap;<sup>118</sup> it is not clear that a person who refuses to take medication to control his epilepsy should be protected. If the employee could but will not control the disease, then perhaps in that limited instance epilepsy should be considered a "voluntary" handicap. This possibility does not justify, however, excluding all persons with epilepsy from coverage. More useful than an analysis that denies protection to "voluntary" handicaps is one which proceeds along previously suggested lines.<sup>119</sup> First, is the condition the basis for job denial? And second, does the condition impair job performance? If the answer to both questions is "yes," and the law does not require the employer to accommodate the employee's handicap,<sup>120</sup> then the employer has won his case.<sup>121</sup> If the law does require accommodation, the next question is whether it is reasonable to require an employer to accommodate an employee who refuses to take medication. In most instances, the answer to this question would be "no," and the employer would win at that stage.<sup>122</sup> Although labeling some handicaps "voluntary" results in clearly defined rules, easy to apply

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phia Elec. Co., No. 12163, slip op., (Pa. Comm'n, 1980), cited in Hartstein, *supra* note 39, at E-5 n.2. Cf. Connecticut Gen. Life Ins. v. Wisconsin Dep't of Indus., Labor & Human Relations, 86 Wis. 2d 393, 273 N.W.2d 206 (1979) (medically definable alcoholism a handicap, mere drinking problem is not). Even states that recognize the involuntary nature of certain handicaps continue to make distinctions based on the severity of the condition, which would seem to reflect a judgment that only radically overweight or alcoholic persons are truly out of control.

115. See *supra* text accompanying notes 80, 81 & 101-02.

116. For a discussion of what accommodation means and entails, see *infra* text accompanying notes 133-40.

117. See *Squires v. Labor & Indus. Review Comm'n*, 97 Wis. 2d 648, 294 N.W.2d 48 (1980) (alcoholic handicapped but could be discharged because drinking impaired job performance).

118. See, e.g., *Barnes v. Washington Natural Gas*, 22 Wash. App. 576, 591 P.2d 461 (1979) (court assumed, without discussion, that epilepsy is handicap).

119. See diagram, *supra* note 15.

120. Most states do appear to require accommodation, whether by statute, administrative regulation, or case law. See *infra* notes 131-33 and accompanying text.

121. See diagram, *supra* note 15.

122. See diagram, *supra* note 15.

and enforce, such rules are unsuited to antidiscrimination legislation, which is remedial<sup>123</sup> and addresses subtle, frequently irrational,<sup>124</sup> forms of prejudice. Strict categorical exclusion is particularly unsuited to handicap antidiscrimination legislation because handicaps, unlike race or sex, are so varied in type and degree.<sup>125</sup> Thus, if the purpose of such legislation is to be fulfilled, flexibility is essential.

## II. THE ACCOMMODATION ISSUE

Although much litigation has centered on the question whether the claimant can be considered legally handicapped, that issue is primarily an employers' stratagem representing resistance to the idea that the state may interfere with their hiring decisions. As in *Burgess*,<sup>126</sup> *Barnes*,<sup>127</sup> and *Dairy Equipment*,<sup>128</sup> an employer who concedes he has denied employment because he considers an applicant handicapped nonetheless may seek to avoid trial on the merits by contending that the person is in fact not handicapped. By contrast, accommodation is the truly difficult issue facing even those who wholeheartedly support equal employment opportunity for handicapped persons. A requirement of reasonable accommodation is, in practical effect, unique to the field of handicap law.<sup>129</sup> Because affirmative action is controversial in any context,<sup>130</sup> accommodation can be expected to generate heated dispute, particularly in employment cases. It is quite compelling to argue that handicapped persons must be given special treatment with regard to, for example, public education or access to public transportation, on the ground that these are incidents of full citizenship which the government should make available to all. Employers, however, especially in the private sector, are justifiably concerned

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123. See *Burgess v. Joseph Schlitz Brewing Co.*, 298 N.C. 520, 524, 259 S.E.2d 248, 251 (1979).

124. See *supra* note 101 and accompanying text.

125. Epilepsy, for example, may produce different types of seizures, classified as "grand mal," "petit mal," "psychomotor," and "Jacksonian," resulting in different degrees of disability. See LEGAL RIGHTS, *supra* note 1, at 36-37. Mental retardation, similarly, may be "mild," "moderate," "severe," or "profound," and result in markedly different levels of adaptive behavior. *Id.* at 38-40.

126. *Burgess v. Joseph Schlitz Brewing Co.*, 298 N.C. 520, 259 S.E.2d 248 (1979).

127. *Barnes v. Washington Natural Gas*, 22 Wash. App. 576, 591 P.2d 461 (1979).

128. *Wisconsin Dairy Equip. Co. v. Wisconsin Dep't of Indus., Labor & Human Relations*, 95 Wis. 2d 319, 290 N.W.2d 330 (1980).

129. Title VII requires reasonable accommodation in cases of religious discrimination. 42 U.S.C. § 2000e(j) (1976). This requirement, however, has been construed very narrowly. See *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977) (employer not required to sacrifice efficiency, make expenditures more than de minimus in aggregate, discriminate against other employees or violate collective bargaining agreement to accommodate employee's religious belief).

130. In the context of racial discrimination, the constitutionality of affirmative action plans has been seriously challenged. When segregation has been deliberate, however, the Supreme Court has held that federal district courts may fashion affirmative action remedies. See *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1972). Five justices have held that past discrimination and an interest in academic diversity permit a state university to take race or ethnicity into account in admissions programs. See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). The Court has also held that *private* affirmative action employment programs do not violate federal law. See *United Steelworkers v. Weber*, 443 U.S. 193 (1979). Nonetheless, whether state action that gives preference to racial minorities in order to remedy past "societal discrimination" is constitutional is an open question. See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

with efficiency, safety, and maximizing profits. In a free enterprise system, their reluctance to modify job requirements or invest capital to accommodate a handicapped person must be given some deference.

Some states have no accommodation requirement,<sup>131</sup> but most, following the federal lead,<sup>132</sup> appear to require "reasonable accommodation" of handicapped persons unless "undue hardship" to the employer would result.<sup>133</sup> Although the accommodation issue is an obvious battleground, to date it has been the site only of inconclusive skirmishes.<sup>134</sup> Indeed, even in jurisdictions requiring reasonable accommodation, analytic models are emerging that preclude consideration of the issue.<sup>135</sup>

Were the issue squarely faced, it would enter a handicap employment discrimination case at the third stage of analysis. First, it must be established that the plaintiff has been denied employment on the basis of a handicap.<sup>136</sup> Second, the employer must prove that the handicap impairs job performance<sup>137</sup> by showing that the handicapped person is unable to perform the job, or to do so safely, or to do so unless job requirements are modified. Third, the claim would reach the crucial, and complicated, issue of accommodation. Because standards of "reasonable accommodation" and "undue hardship" to the employer are obviously subjective and elastic, it is essential to examine the variables likely to be involved in order to formulate a step-by-step analysis leading to equitable application.

Accommodation can take many forms, including "improved accessibility, job restructuring, part-time or modified work schedules, acquisition and modification of equipment, the provision of readers or interpreters and other similar actions."<sup>138</sup> Whether such accommodation is in turn "reasonable" and poses no "undue hardship" will depend on a variety of factors, such as "the

131. North Carolina's handicap employment discrimination statute, for instance, does not mention accommodation. *See* N.C. GEN. STAT. § 168-6 (1982). Because the state has no enforcement agency, the accommodation requirement has not been imposed through administrative regulations. Moreover, because no case arising under the statute has reached judgment on the merits, North Carolina's courts have had no opportunity to inquire whether an accommodation requirement should be imposed through case law.

132. Although the accommodation requirement does not appear in § 503 or § 504 of the Rehabilitation Act of 1973, 29 U.S.C. §§ 793-794 (1976 & Supp. V 1981), the duty to accommodate is imposed by administrative regulation. *See supra* note 33.

133. Some states, such as Washington and Pennsylvania, have not attempted to set standards applying the accommodation requirement, and merely state the duty to accommodate in general terms. Regulations in California, Colorado, Iowa, Maryland, and Ohio give examples of reasonable accommodation and establish standards for hardship.

In Montana, the state's Human Rights Commission found an implied duty of reasonable accommodation. *See* Hartstein, *supra* note 39, at E-6 & E-7.

134. *See, e.g.,* Southeastern Community College v. Davis, 442 U.S. 397 (1979) (Court failed to reach accommodation issue in handicap discrimination case, but intimated accommodations requested would be unreasonable or unduly burdensome).

135. *See supra* note 15 (accommodation issue can be avoided by focusing on question of standing).

136. *See supra* note 15. This is established if the employer admits that he has refused employment because of the applicant's physical or mental condition. The focus is on the reason for job denial, not on whether the employee is legally handicapped.

137. *See supra* note 15.

138. *See* Hartstein, *supra* note 39, at E-6.

nature and cost of accommodation needed, the size and nature of the business, the number and type of facilities, and the structure and composition of the work force."<sup>139</sup> Only rarely is a person truly incapable of performing a job if accommodation possibilities are considered seriously. For instance, if a person is incapable of operating a piece of machinery because of a physical handicap, an imaginative redesign of that machine might overcome the difficulty.<sup>140</sup> Perhaps the employer could assert successfully that such an accommodation would be unreasonable or unduly burdensome. Replies of that sort, however, should be evaluated after the kind of accommodation contemplated has been identified.<sup>141</sup>

Most objections to accommodation probably would fall into one of two categories. The employer would assert that the person could under no circumstances perform safely, which seems to go to the "reasonableness" defense; or he would maintain that accommodation would be prohibitively expensive, which goes to the "undue hardship" defense.<sup>142</sup> Safety could be the sole consideration, but it would frequently be tied directly to considerations of expense (e.g., a handicapped person's ability to perform safely could be overcome only by providing extensively modified equipment or elaborate supervision). Occasionally, an extremely expensive accommodation, such as hiring a second person solely to provide the handicapped person with continuous supervision, could both eliminate safety hazards and impose no undue hardship on the employer because of his extensive resources; such accommodation nonetheless appears unreasonable from a common-sense point of view. Thus, a number of variables affect a determination whether accommodation is unreasonable or unduly burdensome. Unfortunately, the reported cases indicate that although these variables do indeed affect the outcome of handicap employment discrimination claims, they rarely are analyzed in terms of accommodation, and tend instead to sway courts' judgments before the issue is reached.<sup>143</sup>

The Supreme Court case of *Southeastern Community College v. Davis*,<sup>144</sup> illustrates the way in which safety and expense considerations can be determi-

139. *Id.*

140. A "grand mal" epileptic seizure, for example, could cause a worker to fall into dangerous machinery. McGarity & Schroeder, *Risk-Oriented Employment Screening*, 59 TEX. L. REV. 999, 1008 n.35 (1981). Nonetheless, "[r]elatively inexpensive protective devices . . . can substantially reduce" that risk. *Id.* at 1066.

141. See *supra* note 15 (consideration of accommodation possibilities precedes determination whether accommodation unreasonable or unduly burdensome).

142. Because the courts so rarely compel accommodation in the workplace, see McGarity & Schroeder, *supra* note 140, at 1065, it is difficult to tell whether there is a real distinction between an accommodation that is unreasonable and one that is unduly burdensome. In *Southeastern Community College v. Davis*, 442 U.S. 397 (1979), the Supreme Court suggested that it would be unreasonable to require a nursing school to modify its training program to accommodate a hearing-impaired student, because safety hazards would persist. *Id.* at 411-13. It has been suggested, however, that efficiency considerations were the real concern. McGarity & Schroeder, *supra* note 140, at 1042 ("it undoubtedly would cost more to tailor [the nursing-school program to plaintiff's] special needs"). Possibly, then, the Supreme Court felt that accommodating plaintiff would prove unduly burdensome.

143. See, e.g., *infra* text accompanying notes 144-66.

144. 442 U.S. 397 (1979).

native at a preliminary stage of analysis, rather than at the accommodation stage where they properly belong. The case involved education, not employment, but is highly analogous: a severely hearing-impaired nursing-school applicant was denied admission although she had the required academic credentials.<sup>145</sup> Her claim under section 504 of the Vocational Rehabilitation Act<sup>146</sup> failed because the Court agreed with the defendant school that the woman's handicap would prevent her from safely completing her clinical training and then safely serving the public.<sup>147</sup>

Section 504 extends protection to persons who are handicapped but "otherwise qualified";<sup>148</sup> the Court reasoned that *because* of her handicap, plaintiff was not "otherwise qualified."<sup>149</sup> By deciding that "otherwise qualified" meant "qualified in spite of the handicap,"<sup>150</sup> the Court terminated its analysis before reaching the accommodation issue, much as the *Burgess* court avoided the merits by deciding that plaintiff was not legally handicapped.<sup>151</sup> The Court also avoided a straightforward analysis of accommodation.<sup>152</sup> Had the issue been directly addressed, the outcome ultimately might have been the same, but at least the unique nature of handicap antidiscrimination legislation would have been emphasized.

For example, the Court could have held that plaintiff was indeed "otherwise qualified," because her credentials were in order, but because her handicap would pose a safety hazard, she had not been denied admission "solely" on the basis of her handicap.<sup>153</sup> The Court then would have been forced to examine the legitimacy of the school's "safety" defense; the opinion indicates that providing an interpreter and putting restrictions on plaintiff's license to practice probably could have eliminated safety hazards.<sup>154</sup> Thus, the next question would have been whether such accommodation was unreasonable or unduly burdensome.<sup>155</sup> Without squarely deciding what the law required and what accommodation could accomplish,<sup>156</sup> the Court indicated that the modifications in the nursing program requested by plaintiff were indeed unreasonable, because they would have caused the school to lower its standards and compromise the integrity of its training program.<sup>157</sup> This finding, however,

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145. *Id.* at 400-02.

146. 29 U.S.C. § 794 (1976) (recipients of federal financial assistance may not discriminate "solely" on the basis of handicap against "otherwise qualified . . . individuals").

147. *See Davis*, 442 U.S. at 401-09.

148. *See supra* note 146.

149. *See Davis*, 442 U.S. at 405-14.

150. *See id.* at 406-07.

151. *See Burgess v. Joseph Schlitz Brewing Co.*, 298 N.C. 520, 259 S.E.2d 248 (1979); *see also supra* text accompanying notes 64-97.

152. *See Davis*, 442 U.S. at 407-14 (noting § 504 did not mention affirmative action, Court did not decide whether such requirement could ever be imposed by regulation, and did not inquire in any detail whether proposed accommodation would overcome safety hazards).

153. *See supra* note 146.

154. *See Davis*, 442 U.S. at 407-09.

155. *See supra* note 15.

156. *See Davis*, 442 U.S. at 412-13 (Court conceded that refusal to accommodate might be unlawful in some circumstances).

157. *See id.* at 413.

ignored the nature of accommodation, which merely requires an employer to tailor a job to fit a given individual's handicap. Asking the school to accommodate plaintiff would have created an exception in only this isolated case and would have affected permanently neither the school's program nor its standards for nonhandicapped students.

In the *Davis* analysis, the Court may have been influenced by its previous decision pertaining to religious employment discrimination.<sup>158</sup> The Civil Rights Act of 1964<sup>159</sup> requires employers to make reasonable accommodation to employees' religious beliefs. The Court, however, has effectively interpreted this requirement out of the statute<sup>160</sup> because it was faced with a dilemma: a constitutional challenge to the provision, on the ground that it violates the first amendment's establishment of religion clause, could well be sustained.<sup>161</sup> As Justice Marshall has suggested, the Court may have chosen to interpret the provision restrictively rather than declare it unconstitutional.<sup>162</sup> In the area of handicap law, however, the Court would not be forced to employ strict scrutiny.<sup>163</sup> There is no express provision in the Constitution regarding handicap; employment has never been held to be a fundamental right,<sup>164</sup> nor is handicap a suspect classification.<sup>165</sup> To uphold accommodation of handicapped workers, the Court would have to find only a rational basis for giving them special treatment.<sup>166</sup> Viewed in this light, it becomes clear that the ultimate question in *Davis* should have been whether the expense involved in accommodating plaintiff was unduly burdensome. The answer would depend on the school's resources and on factors such as whether plaintiff was able to provide her own interpreter. Under the Court's analysis, however, the accommodation issue was never addressed squarely and the sub-issue of expense never emerged at all.

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158. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977).

159. 42 U.S.C. § 2000e(j) (1976).

160. *See Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977) (accommodation provision narrowly construed); *see also supra* note 129.

161. *See Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 89-91 (1977) (Marshall, J., dissenting).

162. *Id.*

163. Strict constitutional analysis is invoked when state action is predicated on a "suspect" classification, such as race, or impinges on a "fundamental right," such as the right to marry. *See supra* note 29.

164. *See Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312-13 (1976) (per curiam) (age not a suspect classification); *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 16 (1973) (education not fundamental right); *Dandridge v. Williams*, 397 U.S. 471 (1970) (poverty not a suspect classification).

165. *See, e.g., Upshur v. Love*, 474 F. Supp. 332 (N.D. Cal. 1979) (no strict scrutiny for exclusion of blind applicants). *Cf. Gurmankin v. Costanzo*, 556 F.2d 184 (3d Cir. 1977) (exclusion of handicapped persons unconstitutional under "irrebuttable presumption" due process analysis), *cert. denied*, 450 U.S. 923 (1981).

166. Moreover, even when a classification, such as race, is suspect, it may be constitutionally valid if "an important and articulated purpose" is shown. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 361 (1978) (Brennan, White, Marshall, and Blackmun, JJ., concurring in part and dissenting in part). *But see Bey v. Bolger*, 540 F. Supp. 910 (E.D. Pa. 1982) (exclusion of applicant with high blood pressure from postal service job upheld; court, in dictum, adhered to rationale of *Trans World Airlines, Inc. v. Hardison*, 412 U.S. 63 (1979), without citing case, although no constitutional issue presented).

The *Davis* analysis probably will distort future attempts to treat handicap discrimination claims.<sup>167</sup> The opinion gives an easy legitimacy to the bona fide occupational qualification (bfoq) defense,<sup>168</sup> in which an employer asserts that "specific physical and mental qualifications are absolutely needed"<sup>169</sup> to perform a job. It is all too easy, after *Davis*, to assert this defense whenever a handicapped person seeks employment.<sup>170</sup> If the defense should succeed, it should do so only after accommodation is considered.

When, as in *Davis*, expense is the only genuine obstacle to giving a handicapped plaintiff relief, the analysis is fairly simple; an accommodation that is too expensive is "unduly burdensome" and ipso facto not "reasonable."<sup>171</sup> Whether an employer can assert successfully expense as a defense should depend on two highly variable factors: the employer's own resources, and the availability of government offsets such as tax incentives.<sup>172</sup>

An employer's cash outlay for accommodation may well pay for itself in the long run because handicapped persons tend to remain in jobs longer, with less absenteeism, than nonhandicapped workers.<sup>173</sup> Moreover, even if a cash outlay represents a genuine loss, it easily could be absorbed by an employer with substantial resources. Nor would a wealthy employer be forced to make repeated accommodations for a never-ending line of handicapped job applicants until his entire plant was staffed by disabled persons; again, unlike religious employment discrimination, which invokes strict-scrutiny constitutional analysis, linedrawing can be achieved on a merely rational basis. Thus, a formula could be devised to determine what is unduly burdensome in terms of the employer's resources at any given time; however, to date, the effort has not been made.

Government offsets also bear on whether accommodation is unduly burdensome. They should bear in addition on whether accommodation is reasonable because, by encouraging the employment of handicapped persons, society escapes responsibility for disability payments and reaps the benefit of added

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167. Although *Davis* is an education case, it bears on employment because plaintiff was seeking job training and the clinical phase of the training entailed working directly with patients. See *Southeastern Community College v. Davis*, 442 U.S. 397, 407 (1979).

168. The bfoq defense is recognized under Title VII in cases involving discrimination based on sex, religion and national origin. 42 U.S.C. § 2000e-2(e)(1) (1976). It has been construed narrowly, however. See, e.g., *Weeks v. Southern Bell*, 408 F.2d 228 (5th Cir. 1969) (employer has burden of proving bfoq by showing he had reasonable cause, factual basis, for believing all or substantially all of protected class would be unable to perform safely and efficiently the job involved). The bfoq defense is not recognized under Title VII racial discrimination cases. See 42 U.S.C. § 2000e-2(e)(1) (1976) (race not mentioned in bfoq provision). Cf. *Age Discrimination in Employment Act of 1967 (ADEA)*, 29 U.S.C. §§ 621, 623(f)(2) (1976 & Supp. II 1978) (bfoq an affirmative defense); *Hodgson v. Greyhound Lines, Inc.*, 499 F.2d 859, 865 (7th Cir. 1974) (employer must have rational basis in fact for believing older workers would increase risk of harm).

169. *Burstein & Foster, Handicap Discrimination: The Available Defenses*, 7 EMPL. REL. L.J. 672, 678 (1982).

170. *But see Puskin v. Regents of Univ. of Colo.*, 658 F.2d 1372 (10th Cir. 1981) (court held severely handicapped doctor was "otherwise qualified" because he had proper credentials).

171. This may have been the unstated rationale for the *Davis* decision. See *supra* note 142.

172. See *infra* note 176 and accompanying text.

173. *Erf, supra* note 27, at 818.

productivity.<sup>174</sup> It is, therefore, arguably unreasonable to shift to employers the entire burden of making extra productivity possible. The experience of the Rehabilitation Institute of Chicago illustrates the point. By placing 176 physically disabled adults in diverse employment positions, the Institute discovered that in a single year \$1,056,000 in disability payments had been eliminated, while society had gained \$1,643,000 in productivity.<sup>175</sup> Government can defray the cost of accommodation by providing tax credits and deductions for barrier removal, special equipment in the work place and even added supervisory personnel.<sup>176</sup> Increased government involvement in accommodation efforts should help achieve two goals. First, employers' resentment toward statutory mandates is likely to diminish if they believe they will be rewarded economically for hiring handicapped workers. Second, more handicapped persons can be employed.

On occasion, an employer may mask his belief that hiring a handicapped person will prove expensive by asserting that he is really concerned for the job applicant's safety. "The courts are usually skeptical of an employer's argument that it refuses to hire qualified applicants for their own good, and they often require a higher level of justification in these cases than in cases in which public safety is at stake."<sup>177</sup> In *Wisconsin Dairy Equipment Co. v. Wisconsin Department of Industry, Labor and Human Relations*<sup>178</sup> an employee with only one kidney was dismissed from a truck-assembler's job when his condition became known.<sup>179</sup> The employer argued that the employee might fall from a truck tank and damage the remaining kidney.<sup>180</sup> Observing that plaintiff "was not more likely to fall because he had only one kidney,"<sup>181</sup> the court held that it was the employer's burden to establish to a "reasonable probability"<sup>182</sup> that the employee was unable to work safely and concluded that the burden had not been met.<sup>183</sup>

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174. See *supra* text accompanying note 81.

175. PRESIDENT'S COMMITTEE ON EMPLOYMENT OF THE HANDICAPPED, SPECIAL REPORT: DISABILITY AND EMPLOYMENT, FACTS ABOUT COSTS AND BENEFITS 7 (1980) [hereinafter cited as SPECIAL REPORT].

176. The federal government has in the past offered tax deductions of up to \$25,000 per year for "architectural and transportation barrier removal expenses" incurred to make facilities more accessible to handicapped persons. See 26 U.S.C. § 190 (1978 & Supp. V 1983). This provision expired, however, on Dec. 31, 1982, and has not been renewed. Several bills are pending, some of which would merely re-create § 190, and one of which would increase the deductible amount to \$100,000 and extend the provision's life beyond the previous two-year span.

North Carolina offers unlimited tax deductions for access renovations to existing buildings. See N.C. GEN. STAT. § 105-130.5(b)(10) (Supp. 1981). Nonetheless, a bill that would have provided an income tax credit for adaptive devices and equipment for handicapped persons failed in 1983. N.C.S. 435. The Senate Finance Committee reported favorably on a committee substitute that called for the Legislative Research Commission to study this idea. The committee substitute was referred to the appropriations committee, and apparently no such study was authorized by the General Assembly.

177. McGarity & Schroeder, *supra* note 140, at 1049.

178. 95 Wis. 2d 319, 290 N.W.2d 330 (1980).

179. *Id.* at 321, 290 N.W.2d at 331.

180. *Id.* at 322, 290 N.W.2d at 332.

181. *Id.* at 333, 290 N.W.2d at 337.

182. *Id.*

183. *Id.*



While the outcome seems correct, the court failed to consider that expense, rather than safety, was the employer's real concern. A more careful analysis would have addressed the employer's fear of excessive workers' compensation payments should the employee damage his remaining kidney,<sup>184</sup> and the employer's assertion that the job contained "inherent dangers" because of the "height at which a truck assembler must work."<sup>185</sup> The court brushed these concerns aside, when in fact both the operation of a state's workers' compensation statute and the inherent risk of a given job do come into play when an employer decides whether to hire a handicapped person. It follows that they should enter into an analysis of handicap employment discrimination cases as well.

Nearly all states' workers' compensation statutes provide second-injury funds<sup>186</sup> designed to "reduce the disincentive to employ the disabled"<sup>187</sup> by relieving the employer of liability for preexisting disabilities.<sup>188</sup> "The provisions generally have the effect of imposing liability on the employer or his insurer only for the degree of disability resulting from the injury arising out of employment with his company."<sup>189</sup> Moreover, "[s]tudies show that the accident experience of properly placed disabled workers is at least equal, if not superior, to that of non-disabled workers,"<sup>190</sup> and that "there is only a small probability that a subsequent injury will interact with a pre-existing condition to produce a permanent total disability."<sup>191</sup> Second-injury statutes have not, however, "completely eliminated the incentive for employers to screen out handicapped job applicants."<sup>192</sup> First, many employers are either altogether unaware of second-injury provisions or do not understand how they work.<sup>193</sup> Second, access to the fund may be limited to preclude coverage for a number of preexisting conditions,<sup>194</sup> or coverage may be conditioned on notice to the state by the employer that he has hired a disabled worker.<sup>195</sup> Third, the principal methods of financing the second-injury fund may discourage employers from hiring handicapped persons.<sup>196</sup>

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184. See *id.* at 322, 290 N.W.2d at 332. See also *infra* note 201.

185. *Dairy Equipment*, 95 Wis. 2d at 322, 290 N.W.2d at 332.

186. See generally 2 A. LARSON, LARSON'S WORKMEN'S COMPENSATION LAW § 59.31 (1983). See also 2 A. LARSON, LARSON'S WORKMEN'S COMPENSATION DESK EDITION § 50.30, at 1050 n.17 (Cum. Supp. Apr. 1981) (Georgia only state without second-injury fund).

187. McGarity & Schroeder, *supra* note 140, at 1012.

188. *Erf*, *supra* note 27, at 822.

189. *Id.*

190. *Id.* at 821.

191. *Id.*

192. McGarity & Schroeder, *supra* note 140, at 1013.

193. See *Erf*, *supra* note 27, at 820-25.

194. In about half the states, asthma, epilepsy, or a coronary ailment, for example, will not allow resort to the second-injury fund if the initial disability must be an "injury." See *id.* at 823.

195. SPECIAL REPORT, *supra* note 175, at 4.

196. Ordinarily, if an employee dies in a work-related accident or suffers some specified injury, such as loss of a hand or eye, the employer either contributes a fixed sum or is assessed a percentage of his total compensation payments over a set period. A third method of financing the second-injury fund is through the general tax revenues of the state. This approach is more conducive to the hiring of handicapped workers because the employer shoulders no additional burden in order to maintain the fund. It has been suggested, however, that this should not be the exclusive

Although the operation of a second-injury fund may be an extremely important factor in an employer's decision whether to hire a handicapped person, courts quite rightly do not give the fund much weight in analyzing discrimination claims. First, the possibility of a second injury, or one which exacerbates an underlying disease, is highly speculative,<sup>197</sup> and courts have been reluctant to "allow an employer to deny employment opportunities to those who may have problems in the future."<sup>198</sup> Second, courts are not in a position to reform workers' compensation—that is a job for the legislature. Courts can, however, bring the need for such reform to lawmakers' attention. Workers' compensation laws predate handicap employment discrimination statutes by many years,<sup>199</sup> and the potential interaction between the two types of statutes probably has not occurred to most legislators. If courts would make it clear that hiring and accommodating handicapped workers appears more reasonable and less burdensome in states with progressive second-injury fund provisions, perhaps the oversight could be remedied.

The court in *Dairy Equipment* made no reference to Wisconsin's second-injury provision.<sup>200</sup> It was actually highly relevant and would have served to refute the employer's argument that a second injury would have resulted in burdensome workers' compensation payments.<sup>201</sup> First, access to the fund was allowed not only for an earlier injury but also for any "permanent disability"<sup>202</sup> which, if it had resulted from the second injury, would have entitled the employee to certain scheduled disability payments.<sup>203</sup> The employee in *Dairy Equipment*, in other words, would have been covered by the second-injury provision. Second, the fund was financed by employer contributions required whenever an employee suffered "the loss or . . . the total impairment of a

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method of financing a second-injury fund because employers do reap economic benefits from hiring handicapped workers and therefore should be required to bear some of the cost. See Erf, *supra* note 27, at 824-25 nn.57-60.

197. See *id.* at 821 (probability small of second injury interacting with preexisting condition to cause permanent total disability, and accident experience of disabled workers as good as that of the nonhandicapped).

198. Burstein & Foster, *supra* note 169, at 677.

199. North Carolina's second-injury fund provision, for example, was enacted in 1953, 20 years before its handicap employment discrimination statute. See N.C. GEN. STAT. § 97-40.1 (1979); *id.* § 168-6 (1982).

200. WIS. STAT. ANN. § 102.59 (West 1973).

201. The employer "admitted that it was concerned with the costs to the company of care and treatment of the respondent, if injured, under its workmen's compensation policy," and contended that "it was too great a risk both from the humanistic standpoint of permanently injuring the man and from a cost standpoint to the company," to keep the man on the job. *Dairy Equipment*, 95 Wis. 2d at 322, 290 N.W.2d at 332.

202. WIS. STAT. ANN. § 102.59(1) (West 1973).

203. If an employee has at the time of injury permanent disability which if it had resulted from such injury would have entitled him to indemnity for 200 weeks less 2½% thereof for each year of age above 50 years with no reduction in excess of 50%, he shall be paid from the funds provided in this section additional compensation equivalent to the amount which would be payable for said previous disability if it had resulted from such injury or the amount which is payable for said further disability, whichever is the lesser. If said disabilities result in permanent total disability the additional compensation shall be in such amount as will complete the payments which would have been due had said permanent total disability resulted from such injury.

*Id.*

hand, arm, foot, leg or eye."<sup>204</sup> Hence, the *Dairy Equipment* employer would have been forced to contribute to the fund if an employee, for example, had lost an eye in a fall, but he would have contributed nothing if the employee injured his remaining kidney. An eye injury, therefore, could have cost the employer *more* than the anticipated kidney injury.

The *Dairy Equipment* employer also argued that a truck-assembler's job was inherently dangerous.<sup>205</sup> The court gave this argument short shrift, pointing out that "[t]he record fail[ed] to disclose any evidence" that an employee previously had been injured performing the job plaintiff was seeking.<sup>206</sup> This observation is relevant because workers' compensation insurance premiums are based in part on "the employer's actual accident experience."<sup>207</sup> Nonetheless, premiums also are based on "the relative hazard of the employer's industry."<sup>208</sup> Thus, if the job was inherently dangerous, the employer would pay higher premiums regardless of whether he hired a disabled worker. Moreover, if a job is equally dangerous to handicapped and nonhandicapped workers,<sup>209</sup> then the issue is not whether a handicapped worker must be accommodated<sup>210</sup> but whether the workplace is sufficiently safe.<sup>211</sup> When the workplace is inherently unsafe, an employer should not be permitted to use his reluctance to improve safety standards to discriminate against handicapped workers.

Safety questions become more complex, however, when an employer alleges that the general public, or an applicant's co-workers, will be endangered by the applicant's handicapping condition. As *Southeastern Community Col-*

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204. *Id.* at § 102.59(2).

205. Truck assemblers had to climb to a height of ten or twelve feet, and " 'pipe-like' objects protrud[ed] from the steel tanks." *Dairy Equipment*, 95 Wis. 2d at 322, 290 N.W.2d at 332. Should a worker fall, in other words, some part of his body could strike one of these protruding objects with considerable force, and he could be severely injured. The employer did not, however, point out that were a worker to fall he could injure his head, for instance, as easily as his kidneys.

206. *Id.* at 333, 290 N.W.2d at 337.

207. *Erf, supra* note 27, at 820.

208. *Id.*

209. The court observed that a person with only one kidney is no more likely to fall from heights than any other person. *Dairy Equipment*, 95 Wis. 2d at 333, 290 N.W.2d at 337.

210. Conceivably, the danger of a fall could have been eliminated through the use of a safety harness, such as those worn by telephone linemen. Apparently the company considered using harnesses but "found that idea to be impractical." *Id.* at 322 n.1, 290 N.W.2d at 331 n.1.

211. If all employees are endangered by working conditions, the issue is resolved properly, not by resort to handicap employment discrimination statutes, but to the Occupational Safety and Health Act of 1970 (OSHA), 29 U.S.C. §§ 651-678 (1976 & Supp. V 1981), which imposes on employers a duty to "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." *Id.* at § 654(a)(1). The express purpose and intent of OSHA is to assure "so far as possible" that all working men and women have "safe and healthful working conditions." *Id.* at § 651(b). Moreover, whereas burdensome expense provides a defense to the duty to accommodate handicapped employees, under OSHA the workers' health and safety are paramount. In promulgating OSHA rules, for instance, the Secretary of Labor is obligated to consider only the feasibility of safety modifications. He is not required to make a cost-benefit analysis. *American Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490 (1981). Penalties under OSHA may be harsh. For example, the Secretary of Labor can petition the district courts to require complete cessation of operations while safety modifications are made. 29 U.S.C. § 662(a) (1976). OSHA violations may result in fines of up to \$20,000 and imprisonment of up to one year. *Id.* § 666(e). Thus, an employer should hesitate to defend against a handicap employment discrimination claim by asserting that his workplace is inherently dangerous.

*lege v. Davis*<sup>212</sup> suggests, courts are particularly likely to defer to the safety defense when the safety of others, rather than that of only the employee, is involved.<sup>213</sup> Indeed, when others' safety allegedly is threatened, courts tend to demand merely a lax "rational basis" standard of proof.<sup>214</sup> When only the safety of the employee is at issue, however, courts generally require the more rigorous standard suggested by the sex discrimination case of *Weeks v. Southern Bell Telephone & Telegraph Co.*<sup>215</sup> the employer must have a "factual basis for believing that all or substantially all [of the excluded class] would be unable to perform safely and efficiently the duties of the job involved."<sup>216</sup>

Total deference to the safety-of-others defense is unwarranted; an employer may as easily and as disingenuously allege concern for the safety of others as for the handicapped employee. "When the applicant's *own* safety is threatened, self-interest will eliminate many frivolous cases,"<sup>217</sup> but one cannot assume that if a handicapped person suspects he may pose a risk to the safety of others he will refrain from bringing suit. Because "[j]ob applicants generally should not be allowed to set their autonomy interests above the safety interests of innocent third parties,"<sup>218</sup> a court suspecting that the employer's safety-of-others defense is not proffered entirely in good faith is nonetheless bound by conscience to examine carefully any claim that other people will be endangered. Therefore, if the employee's own safety is at issue, doubts about whether accommodation can eliminate safety hazards should be resolved in favor of the employee; when the safety of others is at stake, doubt should be resolved in favor of the employer.

In many cases, employers attempt to avoid altogether an individualized determination that it would be unsafe to hire a particular handicapped job applicant. Citing safety, employers may devise screening methods to deny jobs to all persons with real or perceived disabilities.<sup>219</sup> Whether the policy is formal or informal,<sup>220</sup> it may be extremely difficult to evaluate. The employer may claim that all persons with epilepsy, for example, endanger themselves or others in certain occupations, and therefore must be refused employment.<sup>221</sup> Although this assertion might be disproved by placing a given epileptic on the

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212. 442 U.S. 397 (1979).

213. *Id.* (hearing-impaired nursing-school applicant denied admission because of perceived risk to patients). See *supra* text accompanying notes 144-47.

214. See *New York City Transit Auth. v. Beazer*, 440 U.S. 568 (1979) (exclusion of all methadone users rational even if overbroad); *McCrea v. Cunningham*, 202 Neb. 638, 277 N.W.2d 52 (1979) (rational to set visual-acuity standards for firefighters); *Boynnton Cab Co. v. Wisconsin Dep't of Indus., Labor & Human Relations*, 96 Wis. 2d 396, 291 N.W.2d 850 (1980) (rational to exclude all one-handed drivers from taxicab jobs).

215. 408 F.2d 228 (5th Cir. 1969).

216. *Id.* at 235. See McGarity & Schroeder, *supra* note 140, at 1050.

217. McGarity & Schroeder, *supra* note 140, at 1068 (emphasis added).

218. *Id.* at 1061.

219. See generally *id.*

220. See *id.* at 1004 (may be formal methods of administering risk-oriented screens); *Wisconsin Dairy Equip. Co. v. Wisconsin Dep't of Indus., Labor & Human Relations*, 95 Wis. 2d 319, 321-22, 290 N.W.2d 330, 331-32 (1980) (employer had no formal policy, but denied employment based on perceived risk).

221. "The most common handicap screens are those used to bar epileptics, diabetics, and per-

job, the possibility remains that an on-the-job tryout could result in injury. A court-ordered invalidation of an employment screen, in other words, may involve genuine risk. In these as in other handicap employment discrimination cases, however, the feasibility of accommodation should be considered before the validity of a screen is upheld. At present, though, courts too readily reason from the general to the particular in deciding that because some persons with a given disability might create a safety hazard, so would the individual job applicant.<sup>222</sup>

In *Boynton Cab Co. v. Wisconsin Department of Industry, Labor and Human Relations*<sup>223</sup> a man who had lost one hand was refused employment as a cab driver<sup>224</sup> although he had a good safety record in the occupation<sup>225</sup> and provided his own vehicle safety-modification equipment.<sup>226</sup> Under the Wisconsin Fair Employment Practices Statute, an employee must be "physically or otherwise [able] to efficiently perform, at the standards set by the employer, the duties required in that job."<sup>227</sup> The standards the employer set were those used for Federal Motor Carrier Safety Regulations and Wisconsin school-bus regulations.<sup>228</sup>

In determining that no unlawful discrimination had occurred, the court reasoned that because of "the high degree of care required of common carriers,"<sup>229</sup> the cab company had to show only that its exclusion of one-handed drivers was "rational and reasonably tailored to advance safety considerations."<sup>230</sup> It would be incorrect, the court concluded, to impose on the employer "the rigorous 'reasonable probability' burden of proof,"<sup>231</sup> established by state precedent,<sup>232</sup> that the specific individual could not perform safely the job. The court failed completely to consider the possibility of accommodation and ignored evidence that plaintiff had accommodated his own handicap by providing special safety equipment. Further inquiry might have shown that this accommodation surmounted safety hazards. Instead of exploring the accommodation issue, however, the court focused on three arguably irrelevant factors.

First, the court accepted the argument that federal motor-carrier and school-bus regulations could be imposed appropriately on the taxicab industry, but failed to consider that although large, heavy vehicles such as tractor-

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sons with cardiovascular diseases from jobs in which constant vigilance is required to prevent accidents." McGarity & Schroeder, *supra* note 140, at 1008.

222. See *infra* text accompanying notes 223-35.

223. 96 Wis. 2d 396, 291 N.W.2d 850 (1980).

224. *Id.* at 398, 291 N.W.2d at 851.

225. See *id.* at 400, 291 N.W.2d at 852.

226. *Id.* at 399, 291 N.W.2d at 852.

227. WIS. STAT. ANN. § 111.32(5)(f) (West 1974), repealed and re-created by WIS. STAT. ANN. § 111.34 (West Supp. 1983-84).

228. *Boynton Cab*, 96 Wis. 2d at 402, 291 N.W.2d at 853.

229. *Id.* at 419, 291 N.W.2d at 861.

230. *Id.*

231. *Id.*

232. *Id.* See *id.* at 420, 291 N.W.2d at 861 (Abrahamson, J., dissenting) (majority opinion inconsistent with case law precedent).

trailers and buses might be unsuited to modifications accommodating a one-handed driver, modification of a taxicab might be entirely feasible. Second, the court appeared to give great weight to the opinion of a Milwaukee judge who testified that "if a personal injury action came before him involving a one-handed taxicab driver, he would instruct the jury that, as a matter of law, the cab company by hiring such driver had not exercised the requisite high degree of care imposed on a common carrier."<sup>233</sup> The court neglected to consider that the judge's thoughts on the matter failed to rise to even the level of dictum. Third, the court credited testimony from the cab company's vice president that some other one-handed driver had been "involved in two accidents which could have been avoided had the driver not been handicapped."<sup>234</sup> Based on these three highly equivocal pieces of evidence, the court concluded that all one-handed drivers should be considered a uniform class, possessing the characteristics of the least rather than the most capable members.<sup>235</sup> Neither the official vehicle regulations, the judge's view, nor the company official's testimony necessarily was related to the plaintiff's ability to drive a cab safely, yet they tipped the balance against him.

In *McCrea v. Cunningham*<sup>236</sup> a Nebraska court more nearly approached a reasonable evaluation of a safety screen, but still fell short of the ideal. Defendant City of Omaha rejected by regulation all applicants for the job of firefighter whose vision was less than 20/30, correctable to 20/20.<sup>237</sup> The court found the visual-acuity standard permissible because it "was directly related to the health and safety of firemen and the public."<sup>238</sup> Furthermore, the court was unimpressed by arguments that the plaintiff's vision could "possibly be corrected by the wearing of glasses for ordinary purposes."<sup>239</sup>

Unlike the court in *Boynton Cab*, this court attempted to evaluate the defendant's safety screen. The court examined evidence that numerous fire departments in other cities and states, as well as the National Firefighters Association, used similar vision screens.<sup>240</sup> The court also based its decision on testimony that glasses could be broken or lost and that, whereas many of Omaha's firefighters did wear glasses, they were able to remove them during fires.<sup>241</sup> Finally, the court considered the accommodation issue (without labeling it as such) by inquiring whether there was a face mask available for persons wearing glasses.<sup>242</sup>

The court did not, however, consider that vision problems probably

233. *Id.* at 401-02, 291 N.W.2d at 853.

234. *Id.* at 401, 291 N.W.2d at 853. The company official's testimony was, moreover, hearsay within hearsay. He told the court that he had been informed by a third party (at a convention) that the latter knew of a one-handed cabdriver who had been in accidents.

235. *See id.* at 417-19, 291 N.W.2d at 860-61 (decision not limited to plaintiff).

236. 202 Neb. 638, 277 N.W.2d 52 (1979).

237. *Id.* at 640, 277 N.W.2d at 54.

238. *Id.* at 649, 277 N.W.2d at 58.

239. *Id.* at 650, 277 N.W.2d at 59.

240. *See id.* at 643, 277 N.W.2d at 55.

241. *See id.* at 645-47, 277 N.W.2d at 56-57.

242. *See id.* at 645, 277 N.W.2d at 56.

would be most acute inside a burning building, where even those with the sharpest vision would suffer from stinging, watering eyes, and visibility would be, at best, marginal. In those circumstances, it seems logical to assume that all firefighters are forced to rely primarily on senses other than sight. More importantly, there was no evidence that a single firefighter had ever endangered himself or others because of poor vision. Widespread acceptance of visual-acuity screens proves only that the prejudice against poor vision is widespread, not that the standards are well grounded in fact.<sup>243</sup> Finally, because the technology pertaining to face masks is clearly an inappropriate subject for judicial notice, the court could not challenge seriously the city's claim that existing face masks were vulnerable to smoke seepage.

Suppose, however, that it were established to the court's satisfaction that even under conditions of poor visibility, firefighters with normal vision perform more safely than those with impaired vision. Suppose further that no adequate face mask existed, and that it would be impossible or unduly burdensome to require the employer to devise such a mask. The case then could have been resolved under a linear mode of analysis:<sup>244</sup> employment was denied on the basis of handicap; the handicap was shown to impair job performance; and accommodation was not feasible. The *McCrea* opinion indicates no such step-by-step analysis. Indeed, it is unclear whether plaintiff lost because his handicap impaired job performance, because accommodation was impossible, because accommodation could not overcome safety hazards, or because it would have been unreasonable to require the employer to accommodate him. The visual-acuity screen in *McCrea* may have been valid, but it should have been evaluated in light of accommodation possibilities. If accommodation could eliminate the need for the screen, then the screen should not be a bar to employment unless accommodation were shown to be unreasonable or unduly burdensome. Under the *McCrea* analysis, however, it appears that the need for the screen was accepted largely because its use was widespread,<sup>245</sup> and it is not even clear whether the court believed the employer had a duty of reasonable accommodation.<sup>246</sup>

Nevertheless, *McCrea* does suggest that courts, regardless of the mode of analysis they employ, are ill-equipped to evaluate safety screens because of "the difficulty of understanding the technology necessary to alter the workplace."<sup>247</sup> *McCrea* involved rather simple technology—an effective face

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243. Similarly, outmoded eugenics laws, based on the belief that certain handicaps were transmitted largely through heredity, were once widespread, and undoubtedly served to reinforce a feeling that they were necessary. Today, it is becoming understood that eugenic predictions are unreliable at best. See Ferster, *Eliminating the Unfit—Is Sterilization the Answer?*, 27 OHIO ST. L. J. 591, 603 (1966); Murdock, *supra* note 101, at 924-27; Note, *Human Sterilization*, 35 IOWA L. REV. 251, 254 (1950).

244. See diagram, *supra* note 15.

245. See *supra* text accompanying note 240.

246. Although the court did observe that no satisfactory face mask appeared to be available, it did not mention a duty to accommodate. See *McCrea*, 202 Neb. at 645, 277 N.W.2d at 56.

247. McGarity & Schroeder, *supra* note 140, at 1070.

mask<sup>248</sup>—but it is unlikely that the court had the expertise to evaluate that technology. Obviously, the court's lack of expertise becomes more of a problem in cases involving sophisticated industries. In addition, employers are in a better position than handicapped job applicants to evaluate whether technology permits reasonable accommodation, but have no incentive to prove that accommodation is feasible.<sup>249</sup> Therefore, if employers assert that the technology to permit reasonable accommodation is unavailable, courts may be forced to take their word.

It has been suggested that, because courts are not "the most efficient agents"<sup>250</sup> for evaluating employment screens, the best approach would be to create a federal agency exclusively devoted to the task.<sup>251</sup> Given the expense involved, however, "realistic efforts . . . may be best directed toward improvements in existing agencies,"<sup>252</sup> and toward the creation of new agencies on the state level. At present, thirty states have established enforcement agencies to scrutinize handicap employment discrimination claims.<sup>253</sup> These agencies could be given broad authority "to examine employment screens and debate the merits of screens in rulemaking proceedings,"<sup>254</sup> using the input of "all concerned parties"<sup>255</sup> in "informal hearings."<sup>256</sup> As the agencies acquire a "special familiarity"<sup>257</sup> with the issues, they would presumably become sensitive both to industry-wide problems and the technology available to combat them, thus rendering appropriate the setting of industry-wide standards. Meanwhile, in the absence of expert agency evaluation, courts are faced with a difficult task. Under no circumstances, however, should a screen be beyond scrutiny simply because the employer has asserted a safety defense. When the safety hazard is to the public or other employees, "efficiency considerations may support arguments for a somewhat reduced degree of scrutiny."<sup>258</sup> When the alleged danger is only to the employee, courts should scrutinize vigorously safety screens. And if a court lacks the expertise to evaluate a screen, it should complain to the legislature, for unless the problem is admitted, it cannot be resolved.

Although the *Boynton Cab* and *McCrea* courts appeared willing to accept the employers' proffered safety defenses, progressive courts, apparently eager

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248. *McCrea*, 202 Neb. at 645, 277 N.W.2d at 56.

249. A similar problem is posed under Title VII cases. An employee attempting to show that a hiring policy with disparate impact on a protected group is not a business necessity may offer evidence that other selection devices without a disparate impact would serve the employer's interests just as well. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975). Knowledge of alternative selection devices, however, is likely to be peculiarly within the employer's reach, and he has no reason to reveal this knowledge because it would, in effect, establish the plaintiff's case.

250. *McGarity & Schroeder*, *supra* note 140, at 1070.

251. *Id.* at 1071-72.

252. *Id.* at 1072.

253. *See supra* note 35.

254. *McGarity & Schroeder*, *supra* note 140, at 1071.

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.* at 1068.



to enforce antidiscrimination legislation, occasionally have failed to give the safety defense adequate consideration.<sup>259</sup> The short-term result has been attractive—handicapped persons have obtained employment rights—but the end result could be entirely unsatisfactory. If an improperly placed handicapped person injures others, antidiscrimination legislation inevitably will meet with increased resistance and resentment, retarding rather than advancing the cause of equal employment opportunity and causing unnecessary injury in the process.

*Ross v. Gama Shoes, Inc.*<sup>260</sup> is a case in point. There, an employee with epilepsy successfully challenged his dismissal from a position as a shoe store salesperson.<sup>261</sup> The employer was aware of and sympathetic to the employee's condition and had made no attempt to deny him employment on the basis of presumed safety problems.<sup>262</sup> The employee's seizures, however, were uncontrolled and sometimes occurred as often as three times a day.<sup>263</sup> Moreover, the seizures took atypical forms: on one occasion, the employee "attempted to pull a large mirror from the wall,"<sup>264</sup> permanently frightening away a customer;<sup>265</sup> on another he grabbed his employer, causing injuries requiring medical attention and resulting in lost work days;<sup>266</sup> on still another, he squeezed until breathless a co-worker who had just recovered from pneumonia.<sup>267</sup>

Despite these incidents, the court did not agree with the employer that the employee's dismissal "constituted a 'business necessity' within the meaning of the [District of Columbia] code."<sup>268</sup> The court reasoned that since the seizures were purely involuntary, they "[did] not arise out of nor [were] they in furtherance" of the employer's business.<sup>269</sup> Therefore, the employer could not be held liable under the theory of *respondeat superior*, and firing the employee was not a business necessity.<sup>270</sup> Without inquiring whether the employer nonetheless could be held to have been negligent in employing the plaintiff, the court observed that the shoe store business is not inherently dangerous, and that "the risk of injury to shoe store customers or employees by an epileptic salesman is not substantially greater than risk of injury to any other general

259. See *infra* text accompanying notes 260-301.

260. 28 Fair Empl. Prac. Cas. (BNA) 150 (D.C. Sup. Ct. 1980).

261. *Id.* at 150-52.

262. See *id.* at 150.

263. *Id.*

264. *Id.* at 150-51.

265. *Id.* at 151 (customer would not return to store while plaintiff employed there).

266. *Id.*

267. *Id.*

268. *Id.* (defendant alleged "business necessity"). *Id.* at 152 (court found no "business necessity").

269. *Id.* at 152.

270. *Id.* This finding appears to be beside the point, since the issue was not whether the employer was liable for the employee's acts, but whether the law required the employer to keep the employee on the job. The employer, however, had argued that he *would* be liable for the employee's acts, and that firing him was a business necessity to avoid damage claims in tort. See *id.* The court also observed, in apparent disregard of the evidence, that "plaintiff was an asset to the defendant and not a hindrance," *id.*, because although plaintiff's employment was becoming increasingly problematical, he was basically a good salesman. See *id.*

member of the public by epileptics in general."<sup>271</sup> Thus, the court inverted the usual, and frequently invidious, reasoning through which an employee with a handicap is excluded from employment simply because other persons with similar handicaps are perceived to pose a safety hazard. Instead, the court substituted a highly questionable analysis, suggesting that even though a given individual has been shown to pose a safety hazard, he must be granted employment because other persons with similar handicaps generally pose no special risk. Rather than speculating by reasoning from the general to the particular, this court ignored the uncontroverted evidence<sup>272</sup> by extending the particular to the general.

Had the court kept in mind the unique nature of handicap legislation, the outcome might have been different. After acknowledging that job performance was impaired, and that the handicap created safety hazards, the court could have asked whether accommodation was possible. The record suggests that safety hazards could not be overcome by assigning the employee to store-room duties, because other employees could be injured there.<sup>273</sup> The court failed completely, however, to determine whether medical treatment could control the employee's seizures. If it could, accommodation would have been possible.<sup>274</sup> If no treatment would alleviate the seizures, accommodation was not possible. If the employee simply refused to accept treatment, the court could have held that it would be unreasonable to require the employer to retain him. By failing to examine the accommodation issue, the court sanctioned a situation which posed hazards to innocent persons and seems certain to have engendered among the employer, the co-workers, and the store's customers prejudice toward persons with epilepsy. Although the decision was superficially favorable to the handicapped person, it frustrated the goals of antidiscrimination legislation.

Similarly, in *Zorick v. Tynes*<sup>275</sup> a court's failure to consider safety factors undermines the persuasiveness of a decision favorable to the handicapped plaintiff.<sup>276</sup> In *Zorick* a blind man was refused employment as a physical education instructor at an elementary school.<sup>277</sup> The court held he had no cause of action under federal law.<sup>278</sup> Turning to *Zorick's* state claim, however, the

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271. *Id.*

272. Although there was evidence that plaintiff in many instances was an asset to the business, *see supra* note 270, it was clear that plaintiff had endangered others. The court seemed to feel, however, that the risk of harm was balanced by plaintiff's generally good performance. This analysis suggests that personal safety is no more important than mere economic considerations.

273. *Ross*, 28 Fair Empl. Prac. Cas. (BNA) at 150-51.

274. Of course, a quite separate question is whether it would have been reasonable or unduly burdensome to require the employer to pay for the employee's treatment.

275. 372 So. 2d 133 (Fla. 1979).

276. *Id.* (plaintiff won period of trial employment).

277. *Id.* at 136.

278. *Id.* at 137-41. The court found Rehabilitation Act claim defective because "no federal court . . . [had] held that federal-aid recipients may not . . . enforce standards for physical capacities reasonably related to the work or program concerned," *id.* at 140, and a federal court "would not likely regard [the] decision concerning *Zorick* as arbitrary, capricious, or groundlessly discriminatory against the blind." *Id.* at 141.

court held Zorick was entitled to a period of trial employment. The Florida legislature required that a handicapped person be granted employment "unless it is shown"<sup>279</sup> that the handicap impairs job performance. "These words declare that . . . there shall be no presumption, whether rebuttable or irrebuttable, that the physically handicapped are unable to perform satisfactorily tasks previously reserved for the fully able-bodied."<sup>280</sup> Furthermore, the court said, the "incapacity must be 'shown' to be that of the applicant, and that may be shown by the employer's particularized knowledge of the work of the similarly handicapped, or, lacking such experience, by testing, interview, or trial employment of a particular applicant."<sup>281</sup> The court found that the decision "to withdraw the employment offer was based, not on any identifiable experience . . . , [nor] on a test or interview of Zorick or any trial of his abilities, but on ordinary preconceptions."<sup>282</sup> While Zorick had not shown "that he [was] qualified as a matter of law,"<sup>283</sup> he was entitled to "a trial employment of sufficient length to dispel the preconceptions which tainted the original decision, replacing them with personalized knowledge of all relevant facts pertaining to Zorick's capacity or lack of it."<sup>284</sup> Only the lone dissenting judge raised safety concerns, observing that the playground in question was "adjacent to a busy highway"<sup>285</sup> and warning that "tragedy [could] stalk the playground during the 'on-job tryout.'"<sup>286</sup>

The majority and the dissent thus focused on entirely different issues. The majority cared only whether Zorick successfully could teach physical education and admonished the school superintendent that "a public employer exercising discretion in employment decisions affecting the handicapped must take care that the operative incapacity is not his own dearth of knowledge, experience and ingenuity."<sup>287</sup> The court demanded a "particularly informed" decision.<sup>288</sup> The dissenting judge, by contrast, demonstrated an "operative incapacity" to imagine that blind persons may be able to compensate for their lack of sight by developing their other senses,<sup>289</sup> but he also realized that the children's safety as well as the teacher's competence was at issue.<sup>290</sup> In ignoring the dissenting judge's concern for the children, the majority was too sympathetic to Zorick's cause. The dissent read the record to establish "that

279. *Id.* at 141. See FLA. STAT. § 413.08(3) (1977).

280. *Zorick*, 372 So. 2d at 141.

281. *Id.*

282. *Id.* at 142.

283. *Id.*

284. *Id.*

285. *Id.* at 143 (Melvin, J., dissenting).

286. *Id.* The judge also complained that, following *Zorick*, blind persons could insist on the chance to prove themselves as firefighters or traffic-control officers. *Id.*

287. *Id.* at 141.

288. *Id.* at 141-42.

289. See LEGAL RIGHTS, *supra* note 1, at 2 n.q (list of "real life heroes" includes blind persons Homer, Helen Keller, Joseph Pulitzer, Ray Charles).

290. The judge's primary complaint was addressed to what he perceived to be Zorick's inability to teach. See *Zorick*, 372 So. 2d at 143 (Melvin, J., dissenting). He did, however, devote almost equal space to safety concerns. *Id.*

Zorick would be dependent upon other students or some other instructor to advise him if a student decided to dart away from the playground."<sup>291</sup> It is unclear whether such assistance was available to Zorick.<sup>292</sup> Nonetheless, the majority insisted that it must be "shown" that Zorick was "incapable, by reason of his blindness, to perform satisfactorily."<sup>293</sup> Presumably, if a child darted into traffic and were killed, Zorick would have been "shown" to be "incapable." Surely, however, the majority was unwilling to pay such a high price for its "experiment."<sup>294</sup>

On the other hand, *Zorick* stands for the proposition that state statutes may prevent handicap employment discrimination more effectively than federal law<sup>295</sup> and represents an innovative, progressive approach to evaluating discrimination claims. The logic of the opinion, however, is seriously flawed. First, the *Zorick* court was, in a sense, merely passing the buck. "The employer's decision is still his own,"<sup>296</sup> the court said, and need be only "rational,"<sup>297</sup> not "also correct and wise."<sup>298</sup> The school was required only to employ Zorick, not to assist him in any way. It seems safe to assume that a blind man, surrounded by hostile and uncooperative co-workers, could easily be "shown" to be "incapable." Thus Zorick's trial period of employment would be brief and unpleasant, his victory short-lived. Second, the court could have reached the same decision, without ignoring the safety issue, by centering its analysis on accommodation.<sup>299</sup> It is disingenuous to pretend that Zorick's blindness was no obstacle to job performance. The real issue was whether it would have been unreasonable or unduly burdensome to accommodate his handicap. Hence, both *Zorick* and *Ross* established faulty models for future decisions. Because they are among the few reported employment discrimination cases in which a seriously handicapped person prevailed,<sup>300</sup> it is

291. *Id.*

292. It is not even clear from the opinion whether the playground was fenced.

293. *Zorick*, 372 So. 2d at 142.

294. *Id.* at 143 (Melvin, J., dissenting).

295. Federal legislation . . . is more cautious in terms and effect [than Florida's statute], offering administrative and judicial remedies for systemic discrimination against qualified handicapped job applicants in federally-funded state employment programs, but deferring to local employment decisions that are not shown to be irrational.

*Id.* at 135-36.

296. *Id.* at 141.

297. *Id.* at 142. By "rational," the court meant that a decision must follow an "exploration" of "relevant facts, opposing views, and possible alternatives." *Id.* The court did not mean merely that a decision must have some arguably rational basis.

298. *Id.*

299. The court did not mention accommodation. Interestingly, however, the decision has been read to mean "that the requirement of reasonable accommodation [is] . . . strictly applied regarding individuals with visual handicaps." Hartstein, *supra* note 39, at E-7. A trial period of employment is, at best, a temporary accommodation. In fact, the *Zorick* court did not require the school to make any modifications in its program to accommodate Zorick.

300. Another is *Pushkin v. Regents of Univ. of Colo.*, 658 F.2d 1372 (10th Cir. 1981) (severely handicapped doctor protected under Rehabilitation Act because he had proper credentials). *Cf.* *Southeastern Community College v. Davis*, 442 U.S. 397 (1979) (hearing-impaired nursing-school applicant not protected, despite proper credentials, because handicap precluded finding she was "otherwise qualified").

unfortunate that both are analytically weak and vulnerable to attack.<sup>301</sup>

### III. CONCLUSION

The obstacle to equal employment opportunity for handicapped persons is nearly always expense. Employers reject the handicapped, fearing that insurance claims will be excessive,<sup>302</sup> that their presence will discomfit customers,<sup>303</sup> or that they will prove inefficient.<sup>304</sup> Protective legislation may be no more than a policy statement because the states refuse to commit resources to an enforcement agency.<sup>305</sup> Courts may be unwilling to order, or even to consider the possibility of, accommodation because it requires an investment of capital.<sup>306</sup> Hence, the courts are faced with a dilemma. They may tell an employer primarily concerned with profit that he must spend money to accommodate a handicapped applicant. Alternatively, they may tell a handicapped person that he cannot be employed because hiring him would be too expensive. This is not a pleasant choice. Not surprisingly, many courts beg the question by instead telling plaintiff that he is not legally handicapped,<sup>307</sup> not "otherwise qualified,"<sup>308</sup> or that he poses a safety hazard.<sup>309</sup> Frequently, the fear that hiring a handicapped person will prove expensive is illusory.<sup>310</sup> When it is, courts have a responsibility to expose the prejudices and misconceptions which operate to deny handicapped persons jobs.<sup>311</sup> When that fear has a basis in fact, however, the harsh reality must be faced: decisions *not* to hire handicapped persons hinge on dollars and cents. Perhaps society's current conviction "that an employer's private efficiency concerns must be tempered by larger considerations such as fairness, autonomy, and the necessity to

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301. They appear, however, to have set no precedents. Citations to *Ross* do not appear in the reported cases. *Zorick* has been cited several times, apparently with approval, but nowhere expressly followed. See *Hollis v. Florida School Bd.*, 384 So. 2d 661, 664 (Fla. 1980); *Hurley v. Allied Chem. Corp.*, 262 S.E.2d 757, 765 (W. Va. 1980).

302. See, e.g., *Wisconsin Dairy Equip. Co. v. Wisconsin Dep't of Indus., Labor & Human Relations*, 95 Wis. 2d 319, 322, 290 N.W.2d 330, 332 (1980) (worker with one kidney rejected because employer feared excessive workers' compensation payments).

303. See *Erf*, *supra* note 27, at 814 (customers do not like to see handicapped workers). See also *Pushkin v. Regents of Univ. of Colo.*, 658 F.2d 1372 (10th Cir. 1981) (employer feared handicapped doctor would make patients uncomfortable).

304. This fear has little basis in fact. See *supra* text accompanying note 173.

305. Only 30 states have enforcement agencies. See *supra* note 35.

306. See *McGarity & Schroeder*, *supra* note 140, at 1065. In addition, courts may have no clear statutory mandate authorizing them to require accommodation. *Id.*

307. See *Burgess v. Joseph Schlitz Brewing Co.*, 298 N.C. 520, 259 S.E.2d 248 (1979).

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

309. See, e.g., *Boynton Cab Co. v. Wisconsin Dep't of Indus., Labor & Human Relations*, 96 Wis. 2d 396, 291 N.W.2d 850 (1980).

310. In *Burgess v. Joseph Schlitz Brewing Co.*, 298 N.C. 520, 259 S.E.2d 248 (1979), for example, there appears to be no reason to suppose that plaintiff, who had glaucoma, would have cost the employer any more money than a nonhandicapped employee.

311. That responsibility is too often unfulfilled. In *Wisconsin Dairy Equip. Co. v. Wisconsin Dep't of Indus., Labor, & Human Relations*, 95 Wis. 2d 319, 290 N.W.2d 330 (1980), for instance, the court failed to point out that hiring a worker with one kidney would not cost the employer more money than hiring a nonhandicapped worker, even if the man suffered a second injury which resulted in total disability. Instead, the court merely pointed out that a second injury was unlikely, thus creating the impression that the employer must accept the risk of excessive expense.

expend all societal resources as efficiently as possible"<sup>312</sup> is half-hearted. If so, handicapped people have a right to straightforward answers on this score from the courts. Society seems to be saying, "We are willing to help you, but not if it costs too much." Possibly putting the policy judgment in precisely those terms will persuade us it is unpalatable. At a minimum, it should convince us that we must begin to decide how much is too much.

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312. McGarity & Schroeder, *supra* note 140, at 1075.

