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Fair Employment and the Handicapped: A Legal Perspective

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FAIR EMPLOYMENT AND THE HANDICAPPED: A LEGAL PERSPECTIVE

Amy Jo Gittler *

Approximately 27.6 million people suffer from physical or mental handicaps which affect their ability to work. Yet much of the problem in providing equal employment to this important segment of our society lies not in the fact that they are handicapped, but in the attitudes of others with respect to the ability of these people to serve as useful employees. In this Article, Ms. Gittler examines those factors which impede the realization of equal employment for the handicapped and argues that equal opportunity should be interpreted as reasonable accommodation to the job as well as on the job itself. The author also analyzes the controlling legal principles in the area of employment discrimination to determine how the unique characteristics of this protected class necessitates differences in both the existing theoretical concepts and the availability of certain litigation tools. The author also argues that not until stereotyped assumptions are re-examined with respect to the handicapped will they achieve gainful employment.

I. INTRODUCTION

> The handicapped live among us. They have the same hopes, the same fears, and the same ambitions as the rest of us. They are children and adults, black and white, men and women, rich and poor. They have problems as varied as their individual personalities. Yet, they are today a hidden population because their problems are different from most of ours. Only the bravest risk the dangers and suffer the discomforts and humiliations they encounter when they try to live what we consider to be normal, productive lives. In their quest to achieve the benefits of our society they ask no more than equality of opportunity.[1]

The mentally and physically handicapped are the burgeoning minority—emerging from isolation and demanding their rights. The variety of handicapping conditions and the varying degrees of disablement render them a fragmented minority, thus diffusing their collective power, however great their numbers.[2] In addition, dis-

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1. 118 CONG. REC. 3320 (1972) (remarks of Senator Williams).

2. It is perhaps symptomatic of society's attitude toward the handicapped that accurate statistics of their numbers cannot be obtained. Several reasons have been offered for the ab-

crimination against the handicapped, particularly in the area of employment, is pervasive and thoroughly entrenched in our society.[3] Therefore, like the minority groups who have preceded them, the handicapped must rely on the legal system to initiate and effectuate the necessary expansive changes.

The legal tool which handicapped persons initially relied upon for vindication of their rights in employment was constitutional litigation.[4] However, because of the inherent limitations in this approach,[5] state[6] and federal[7] statutes are now the major source

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sence of, or inconsistencies in, the statistics: "The difficulty in obtaining accurate and meaningful statistics is attributable to the inability of statisticians to measure the effect of a defined handicap on the capacity of the handicapped to function normally in society." Note, *Abroad in the Land: Legal Strategies to Effectuate The Rights of the Physically Disabled*, 61 GEO. L.J. 1501, 1501 n.2 (1973) [hereinafter cited as Note, *Abroad in the Land*].

In addition, the inaccuracy and unavailability of statistics has been attributed to the fact that:

> The data is collected for diverse purposes. Some figures include those with chronic diseases; some do not. Some figures only reflect those who are handicapped and are served by Federal Government programs. Some figures originate from an estimated number of handicapping conditions—not handicapped individuals, handicapping conditions.

118 CONG. REC. 3321 (1972) (remarks of Senator Williams).

Despite this uncertainty, there are a few statistics worth considering. First, one in every eleven Americans between the ages of sixteen to sixty-four suffers from disabilities lasting six months or more. President's Committee on Employment of the Handicapped, One in Eleven, Handicapped Adults in America 2 (1975). This figure translates into 11,265,000 persons, or 9% of the population. *Id.* However, there are an estimated 22 million adults in the United States suffering from a physical handicap sufficiently severe to limit in some way their ability to work. 118 CONG. REC. 3320 (1972). An additional 5.6 million persons of all ages are mentally retarded. *Id.*

3. Statistics on the percentage of handicapped persons who are or could be employed best demonstrate this point. For example, of the 22 million adults with physical handicaps of some severity, an estimated 800,000 are working, while an estimated 14 million could work if given the opportunity. Of the 5.6 million mentally retarded, 9 out of 10 *could* work if given the proper training and rehabilitation. An estimated 33% of the working age blind are employed. Finally, of the 400,000 persons with epilepsy, only 15-25% are working, although nearly 80% of them have their seizures under control. 118 CONG. REC. 3320, 3321 (1972); Epilepsy Foundation of America, Answers to the Most Frequent Questions People Ask About Epilepsy 6, 9 (1973); Epilepsy Foundation of America, Chicago Metropolitan Chapter.

4. *See, e.g.*, Gurmankin v. Costanzo, 556 F.2d 184 (3d Cir. 1977); King-Smith v. Aaron, 455 F.2d 378 (3d Cir. 1972); Bevan v. N.Y. State Teachers' Retirement Sys., 74 Misc. 2d 443, 345 N.Y.S.2d 921 (S. Ct. Special Term, Albany, 1973).

5. The two primary constitutional arguments are: (1) that the mentally and physically handicapped constitute a suspect class, thereby triggering a "strict scrutiny" analysis in any case in which they are excluded as a class, and (2) that the State's total exclusion of individuals with a specific handicap creates an irrebuttable presumption violative of the Due Process Clause.

The first approach derives from the Supreme Court's traditional application of a two-tiered analysis in equal protection cases. The more stringent of the two tests is the strict scrutiny test whereby courts scrupulously examine legislative or state-related classifications to determine the existence of a compelling governmental interest. This test is applied (1) where the classification is of a "suspect class," or (2) where the classification affects a fundamental right. In all other situations a less rigorous test is applied. A governmental classification which neither impinges

on a fundmental liberty or right, nor involves a suspect class will withstand a challenge under the equal protection clause if it is demonstrated to be rationally related to a legitimate governmental objective. Shapiro v. Thompson, 394 U.S. 618, 658-60 (1969) (Harlan, J., dissenting).

The Court has declined several recent invitations to expand the list of suspect classifications beyond the current list of three, including national origin (Korematsu v. United States, 323 U.S. 214, 216 (1944)); race (McLaughlin v. State of Florida, 379 U.S. 184, 191-92 (1964)); and alienage (Graham v. Richardson, 403 U.S. 365, 372 (1971)). *See* Frontiero v. Richardson, 411 U.S. 677, 688-92 (1973) (only a plurality of the Court regarded sex to be a suspect class); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (Court refused to include wealth in the suspect category).

Despite this reluctance to extend the list, commentators have urged courts to embrace the handicapped as a suspect class. *See, e.g.*, Burgdorf & Burgdorf, *A History of Unequal Treatment: The Qualifications of Handicapped Persons as a "Suspect Class" Under the Equal Protection Clause*, 15 SANTA CLARA LAW. 855, 905-08 (1975) [hereinafter cited as Burgdorf]; Krass, *The Right to Public Education for Handicapped Children: A Primer for the New Advocate*, 1976 U. ILL. L. R. 1016, 1033-42 [hereinafter cited as Krass]. The argument is grounded primarily in language contained in San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973). There the Supreme Court enunciated those factors which constitute a suspect class, while at the same time rejecting a challenge to the Texas school financing system based on local property taxation as violative of the Equal Protection Clause. The indicia of suspectness announced by Justice Powell include a class saddled with such disabilities, "[o]r subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Id.* at 28.

However, as the commentators are also quick to point out, there are obstacles which must be surmounted if courts are to adopt this thesis. In particular is certain language contained in Justice Brennan's opinion in Frontiero v. Richardson, 411 U.S. 677 (1973) which excluded disability as a suspect class: "And what differentiates sex from such non-suspect statuses as intelligence or *physical disability* and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society." *Id.* at 686 (emphasis added). As has been noted, this observation was not relevant to the issue of sex as a suspect classification and as *obiter dicta*, it is of no precedential value. Krass, *supra* at 1039.

Perhaps because of the problems and uncertainties in the area of equal protection, courts and litigators have relied more heavily upon the irrebuttable presumption in cases challenging the constitutionality of state classifications which exclude handicapped individuals. But plaintiffs have not always prevailed in these cases. *Compare* Gurmankin v. Costanzo, 556 F.2d 184 (3d Cir. 1977) (school district policy prohibiting employment of blind teachers creates irrebuttable presumption violative of due process), *with* Spencer v. Touissant, 408 F. Supp. 1067 (E.D. Mich. 1976) (refusal to consider applicants with prior history of mental illness for position as bus driver not unconstitutional).

Even cases which have held favorably for handicapped plaintiffs, whether based on the Equal Protection or Due Process Clause, are limited by the Constitution's inapplicability to private employment. Under either provision, a necessary element is state action. *See* The Civil Rights Cases, 109 U.S. 3, 11 (1833); Shelley v. Kraemer, 334 U.S. 1, 13 (1948).

As an alternative approach, one commentator has suggested that private discrimination against handicapped persons may be remediable under 42 U.S.C. § 1981 (1970). Note, *Abroad in the Land, supra* note 2, at 1512-18. Under § 1981 the right to make contracts and enjoy benefits equal to those enjoyed by white citizens has been read to prohibit all private and public discrimination in the sale and rental of property. Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968). This has been extended to prohibit private racial discrimination in employment, Johnson v. Railway Express Agency, Inc., 421 U.S. 455 (1975); and may include employment discrimination based on alienage. Guerra v. Manchester Terminal Corp., 498 F.2d 641, 643-54 (5th Cir. 1974). However, this statute is not applicable to sex discrimination. *Cf.* Runyon v. McCrary, 427 U.S. 160 (1976). Drawing from both the language itself and the judicial interpretations of

the statute, it is unlikely that any court will adopt the theory that § 1981 protects handicapped persons from private discrimination in employment.

6. Thirty-seven states, the District of Columbia, and New York City have some law proscribing discrimination against the handicapped. *See* ALASKA STAT. § 18.80.220(a)(1) (1969); CAL. LAB. CODE §§ 1411, 1413(h), 1432.5 (West 1973); CONN. GEN. STAT. §§ 1-1f, 31-126(a) (1973); D.C. CODE 6-2221 (1977); FLA. CONST. art. I, § 2 (1968) (amended 1974); FLA. STAT. ANN. § 413.08(3) (West 1974); HAW. REV. STAT. §§ 378-1(7), -2, -9 (1968); ILL. REV. STAT. ch. 48, § 851-867 (1975); IND. CODE §§ 22-9-1-3(q), (1), -13 (1975); IOWA CODE ANN. §§ 601A.2(11), .6(1) (West 1972); KAN. STAT. §§ 44-1002(j), -1009(a)(1) (1975); KY. REV. STAT. §§ 207.130(2), .150(1) (1976); ME. REV. STAT. ANN. tit. 5, §§ 4553.7-A, 4572 (1973); MD. ANN. CODE art. 49B, §§ 18(g), 19(a), 20 (1974); MASS. ANN. LAWS ch. 149, § 24K (Michie/Law Co-op 1972); MICH. STAT. ANN. §§ 3.550(103)(b), (202) (Callaghan Statutes Release No. 10 at 761, Oct. 4, 1976); MINN. STAT. §§ 363.01, 363.03(25), (1(2)) (1973); MISS. CODE ANN. § 43-6-15 (Supp. II 1977); MONT. REV. CODES ANN. §§ 64-305(10), (13), -306(1)(a), -307(1) (Cumm. Supp. 1977); NEB. REV. STAT. §§ 48-1102(8), -1104, -1108(1) (1974); NEV. REV. STAT. §§ 613.330, .350(1), (2) (1973); N.H. REV. STAT. ANN. §§ 354-A:3(13), -A:8, (Supp. 1977); N.J. STAT. ANN. §§ 10:5-4.1, 5(q) (West 1972); N.M. STAT. ANN. §§ 4-33-2(k), -7 (1974); N.Y. EXEC. LAW §§ 292(21), 296(1), (1-a) (McKinney 1976) CITY AD. CODE ch. 1 §§ B1-7.0 (3a)(c), B1-7.1 (1969); N.C. GEN. STAT. § 128-15.3 (Supp. 1977); OHIO REV. CODE ANN. §§ 4112-01(M), .02(A) (Page Supp. 1977); OKLA. STAT., tit. 74 ch. 27 § 818 (1972); OR. REV. STAT. §§ 659.400(a), .425 (Supp. 1977); PA. STAT. ANN. tit. 43, §§ 954(p), 955 (Purdon Supp. 1978); R.I. GEN. LAWS §§ 28-5-6(H), -7 (Supp. 1977); S.D. COMPILED LAWS ANN. § 3-6A-15 (1973); TENN. CODE ANN. § 8-4131 (Supp. 1977); TEX. REV. CIV. STAT. ANN. art. 4419e, §§ 2(a)(4), 3(f) (Vernon 1975); MT. STAT. ANN. tit. 21 § 498 (1974); VA. CODE § 40.1-28.7 (Repl. vol. 1975); WASH. REV. CODE § 49.60.180 (Supp. 1976); WEST VA. CODE §§ 5-11-3(s), 9 (Supp. 1976); WIS. STAT. ANN. §§ 111-.32(5)(a), (f) (West 1974).

7. At present the Rehabilitation Act of 1973 remains the major federal tool upon which handicapped persons may rely for statutory actions alleging employment discrimination. 29 U.S.C. § 701 (1973 & Supp. V 1975). Contained within the statute are three major provisions which affect the employment rights of handicapped persons where the requisite link between the employer and the federal government is present.

Section 503 of the Act mandates that any persons contracting or subcontracting with the federal government for services or materials in excess of $2,500 take affirmative action to employ and advance in employment qualified handicapped individuals. 29 U.S.C. § 793(a) (1973 & Supp. V 1975). Contractors must also include an affirmative action clause in the contract. *Id.* Additionally, those with 50 or more employees who hold contracts of $50,000 or more have a further obligation to maintain an affirmative action program. 41 C.F.R. § 60-741.5(A) (1977). Among other sanctions, a contractor's failure to comply with the requirements of this provision may result in termination of the contract in whole or in part. 41 C.F.R. § 60-741.28(d) (1977).

Section 504 provides that no otherwise qualified handicapped individual "shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794 (1973 & Supp. V 1975). This provision is particularly applicable to schools and universities, and is generally enforced by the Department of Health, Education and Welfare. Section 503, on the other hand, as it pertains to federal contracts, is administered by the Office of Contract Compliance of the Department of Labor.

The one other provision of the Rehabilitation Act which affects handicapped persons in the employment setting is Section 501. 29 U.S.C. § 791 (1973 & Supp. V 1975). This section establishes, *inter alia*, an Interagency Committee on Handicapped Employees to serve as a watchdog committee and advise the Civil Service Commission on the general status of employment of handicapped persons. 29 U.S.C. § 791(a) (1973 & Supp. V 1975). It further requires all executive agencies to draft affirmative action plans for "hiring, placement, and advancement of handicapped individuals." 29 U.S.C. § 791(b) (1973 & Supp. V 1975).

The definition of handicapped individual for purposes of Section 501, Section 503 and Section 504 is any person who:

upon which discrimination claims are based. This Article will focus on certain concepts which inhere in these laws and discuss their implications, emphasizing the more difficult conceptual problems and principles which underlie any statutes protecting handicapped persons from discrimination in employment.[8]

First, the rationale for expanding fair employment laws to include the handicapped and the means of accomplishing the intended goals will be examined. Because certain obstacles unique to the handicapped must be eliminated before parity in employment opportunities can be achieved, it will be argued that the concept of reasonable accommodation[9] is implicit in a prohibition against discrimination based on handicap. Second, employment discrimination against the handicapped will be compared with discrimination against other protected classes, demonstrating that although useful theories can be derived from the existing case law and applied to the handicapped,

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(A) has a physical or mental impairment which substantially limits one or more of such person's major life activities,

(B) has a record of such an impairment, or

(C) is regarded as having such an impairment.

29 U.S.C. § 706(6) (1973) as amended by Rehabilitation Act Amendments of 1973, Pub. L. No. 93-112, tit. I, 88 Stat. 1619. Both the Department of Labor and the Department of Health, Education, and Welfare supplement this broad statutory definition through the departmental regulations. *See* 41 C.F.R. § 60-741 (Appendix A) (1977); 45 C.F.R. § 84.3(j) (1977).

The Rehabilitation Act is a recognition by the federal government of the problems facing handicapped persons in employment and represents a constructive means of solving those problems. There exist, however, the inherent limitations that only federal agencies, private employers with contracts in excess of $2,500, and institutions or programs receiving federal funds fall within the ambit of the Act. Thus, handicapped individuals subjected to discriminatory practices or policies by employers lacking the requisite affiliation with the federal government are excluded.

The most important federal legislation currently available to victims of discrimination in employment is Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e (1970 & Supp. V 1975). The protected classes are limited to race, color, religion, sex and national origin. Amendments to the Act which would add handicapped persons to that list have been proposed but not enacted. *See, e.g.*, H.R. 3504, 95th Cong., 1st Sess., 123 CONG. REC. H115 (1977), H.R. 448, 95th Cong., 1st Sess., 123 CONG. REC. H193 (1977) (would prohibit only discrimination based on *physical* disability). In light of the limitations of the Rehabilitation Act as set out above, the widespread coverage provided under Title VII with its uniform applicability to all states is necessary if discrimination against handicapped persons is to be effectively and systematically eliminated. The fact that Title VII extends to virtually all private employers with 15 or more employees is of particular significance, 42 U.S.C. § 2000e(b) (Supp. II 1972). This contrasts sharply with the federal nexus requirement under the Rehabilitation Act. Finally, the addition of handicapped persons to Title VII has the advantage of providing a federal court remedy.

8. Several commentators have already analyzed the alternative remedies. *See, e.g.*, Note, *Abroad in the Land, supra* note 2; Note, *Equal Employment and the Disabled: A Proposal*, 10 COLUM. J.L. SOC. PROB. 457 (1974) (hereinafter cited as Note, *A Proposal*); Lang, *Employment Rights of the Handicapped*, 11 CLEARINGHOUSE REVIEW 703 (1977).

9. *See* note 21 *infra*.

there are substantial differences which preclude direct application of the established legal theories to cases involving handicapped persons. Finally, this Article discusses the class of persons protected under the statutes who may be properly considered handicapped.[10] Recurring issues and questions will be raised, and appropriate resolutions suggested. The intent is to provide a framework for a legislative response[11] that reconciles the rights of the handicapped with the competing interests of employers.

II. DISCRIMINATION: DEFINING THE PROBLEM AND DEVISING A CURE

A. An Overview of the Objectives

A large number of physically and mentally handicapped persons capable of working are unemployed.[12] Fair employment laws, seeking to reduce unemployment, assume that people of a designated class could be employed but for certain external factors. The theory underlying the responsive legislation is that all persons should have the opportunity to partake in the existing jobs, that employment should be based on ability and merit, and that artificial barriers should not be erected or maintained which give one group of persons a distinct advantage over another.[13] Conditions which bear on whether a handicapped person does work include the prejudices and attitudes of employers,[14] the inaccessibility of information networks,[15] the absence of adequate transportation facilities,[16] and architectural barriers.[17] Recognizing that these factors cause the underemployment of capable handicapped persons, the question remaining

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10. For purposes of this Article, "handicapped" will be defined in accordance with the federal definition under the Rehabilitation Act of 1973, 29 U.S.C. § 706(6). *See* note 7 *supra*.

11. This Article will discuss without distinguishing between the state and federal statutes proscribing discrimination in employment against handicapped persons. The concepts and principles are equally applicable to both.

12. *See* note 3 *supra*.

13. Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971).

14. *See* notes 46-48 and accompanying text *infra*.

15. Jobs advertised through the more traditional media may be inadequate for some handicapped persons. For instance, deaf persons may not learn about jobs which are advertised on the radio, while blind persons may not have access to braille copies of daily newspapers which contain large job advertisement sections.

16. A number of suits have been brought challenging inaccessible transportation systems. *See, e.g.*, Lloyd v. Regional Transp. Auth., 548 F.2d 1277 (7th Cir. 1977); Snowden v. Birmingham-Jefferson County Transit Auth., 407 F. Supp. 394 (N.D. Ala. 1975), *aff'd mem.*, 551 F.2d 862 (5th Cir. 1977).

17. *See* text preceding and accompanying notes 23-25 *infra*.

is what can reasonably be asked of employers to realize the goal of making equal employment opportunities for the handicapped.

It has been suggested, particularly in regard to race discrimination, that the goal of equality exists in two separate senses—equal treatment and equal opportunity to achieve.[18] This distinction is also useful in the area of handicapped discrimination where equal treatment will not always guarantee equal achievement. To make a job available in a building which is inaccessible to mobility-disabled persons, and to reject applicants because they cannot enter the building may appear to be equal treatment. The person hired may be one who, despite his or her lesser qualifications, is able to enter the building. While in some broad sense each is given an equal opportunity to compete for the job, in this situation equal treatment of the applicants will never ensure an equal opportunity to achieve.

Accepting the premise that all persons of equal skill should compete equally for jobs, this overall goal can only be effectuated by providing for the handicapped the opportunity for both equal achievement and equal treatment. The problem with this solution is twofold. First, to accept the additional goal of equal achievement opportunities for handicapped persons requires not only an additional commitment by society, but necessitates a leap in the minds of many as to what constitutes discrimination. Furthermore, the goal of equal employment opportunities is often considered to be the same for all classes. Recognizing the need for separate protection for different classes requires the additional realization that each class carries its own legacy,[19] its own unique characteristics and its own problems. Once this is acknowledged, it becomes clear that even where the ultimate goal is the same for each, the means of effectuating that goal will differ with the class and must be tailored to the individual needs. Attempting to devise a single definition for discrimination and prescribe a single cure only ignores these important differences.[20]

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18. *See generally* Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235, 235-45 (1971) [hereinafter cited as Fiss].

19. *Id.* at 239.

20. This position is reflected in the comments preceding the recently adopted Section 504 regulations where Secretary Califano stated:

> There is overwhelming evidence that in the past many handicapped persons have been excluded from programs entirely or denied equal treatment, simply because they are handicapped. But eliminating such gross exclusions and denials of equal treatment is not sufficient to assure genuine equal opportunity. In drafting a regulation to prohibit exclusion and discrimination, it became clear that different or special treatment of handicapped persons, because of their handicaps, may be necessary in a number of contexts in order to ensure equal opportunity. *Thus, for example, it is meaningless to "admit" a handicapped person in a wheelchair to a program*

B. *Accommodation*

The requirement that employers make a "reasonable accommodation" to handicapped employees or applicants[21] is a highly controversial aspect of laws which prohibit employment discrimination against handicapped persons.[22] But the necessity of this requirement becomes clear upon examination of what remains if it is omitted. Without requiring an accommodation, the laws would simply prescribe equal treatment. Prohibiting discrimination against mobility-disabled persons without requiring an employer to install a ramp at the building entrance would do nothing to further the opportunities for this

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if the program is offered only on the third floor of a walk-up building. Nor is one providing equal educational opportunity to a deaf child by admitting him or her to a classroom but providing no means for the child to understand the teacher or receive instruction.

42 Fed. Reg. 22,676 (1977) (emphasis added).

21. Reasonable accommodation to the handicapped, as discussed throughout this article, involves both alterations to physical structures and modifications to jobs. It may include the installation of ramps, the assignment of peripheral duties to other employees, the installation of special equipment, or the rearrangement of furniture. The word "reasonable" implies that not all accommodations will be required of an employer. The federal regulations, as well as some state guidelines, import into this requirement two additional concepts.

First, it is assumed here that the accommodation is one which, if made, would permit the individual to perform "the essential functions of the job." *See* 45 C.F.R. § 84.3 (k), (1) (1977). This insures that handicapped persons will not be denied employment in instances where the basic job can be performed, but other duties have been added which need not necessarily be performed by that person and which he or she cannot do. For example, a mobility-disabled person may be fully qualified to perform a clerical job. Traditionally, the person holding that position may have been the one to deliver the mail to a portion of the building which is inaccessible to persons confined to a wheelchair. In that instance, there are three possible accommodations.

The individual may be hired, and because the daily mail delivery is a nonessential function of the job, the task may simply be reassigned to another person. In turn, the handicapped individual may be assigned an additional task in place of the mail delivery. Alternatively, the place where the mail was formerly delivered can be changed to a location which is accessible to a wheelchair. Finally, the inaccessible portion of the building can simply be made accessible.

The second limitation which must be read into the requirement of reasonable accommodation is that of "undue hardship." *See* 45 C.F.R. § 84.12(a) (1977). In any event, an accommodation which imposes an undue hardship on the employer should not be considered to be reasonable and hence should not be required. What constitutes an undue hardship will, of course, vary on a case-by-case basis. For example, what may be required as reasonable for General Motors will differ from the local grocery store. The federal regulations suggest that among the factors to be considered for determining whether an accommodation would impose an undue hardship include the type of facilities, the size of the budget, the type of operation and the cost of the accommodation. 45 C.F.R. § 84.12(c) (1977).

22. The federal regulations for both Section 503 and Section 504 of the Rehabilitation Act of 1973 have read into the corresponding statutory provisions a requirement of reasonable accommodation. In addition, a number of states and the District of Columbia include in the statute or interpretive regulations a requirement of reasonable accommodation. *See, e.g.*, Ill. Guidelines on Discrimination in Employment, § 3.2(c); WASH. AD. CODE § 162-22-080; D.C. CODE § 6-2202(w). *But see* CAL. LAB. CODE § 1432.5.

class. A requirement of reasonable accomodation addresses the problems unique to handicapped persons and insures for them the desired equality in employment and opportunity to achieve.

Two important but independent kinds of accommodations can be made for handicapped persons. The first, access accommodation, includes the installation of a ramp or elevator and is wholly unrelated to actual performance of the job. This form of accommodation is necessary to make a job physically available to a handicapped person. The other form of accommodation involves adjustments or modifications to the job itself to permit actual performance of the job duties. To an applicant or employee, these may be indistinguishable where the absence of either form of accommodation operates to disqualify him or her from employment. Nevertheless, it is useful to consider the question of accessibility separately from accommodation in the employment setting because their independent relationship to employment discrimination may not be obvious.

1. *Access*

(a) *Equal Treatment*

If the singular goal of equal treatment is adopted, access as a discrimination issue may be unclear because it is assumed that each person starting at the bottom of the stairs is being treated similarly. The fallacy in this reasoning is that there is an additional operative assumption that all persons at the bottom of the stairs are capable of climbing stairs and entering narrow doorways.[23] These false assumptions have resulted in structures flanked with stairs which now proliferate our cities, and which have the additional effect of perpetuating these assumptions. However, with nearly half a million people in wheelchairs,[24] and an additional three million who use crutches, canes, braces, or walkers,[25] these premises are clearly unsupportable.

Legally, equal treatment cannot exist even in the narrowest sense of "present" equal treatment, without the concomitant requirement of

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23. One could argue that by historically providing blacks with inferior educations, to deny them jobs now because they lack the requisite knowledge is a direct result of the past discrimination in schools. However, the only response which can be made is to change the present educational system; the damage resulting from the past educational system has been done. Similarly, the analogous response for the situation facing handicapped persons is to change the *present* buildings. Society need not compensate for the previous exclusions of handicapped persons, it need only insure that they are no longer excluded.

24. N.Y. Times, Feb. 13, 1977, § 4 (The Week in Review) at 8, col. 1.

25. *Id.*

access accommodation. Drawing by analogy from certain Title VII[26] concepts, the reasons are twofold. First, treating handicapped persons equally with nonhandicapped persons is a facially neutral policy. It appears to be the very thing required by the fair employment laws. However, when this policy is applied by employers in inaccessible buildings, it obviously has a disparate impact upon mobility-disabled persons. Since the seminal case of *Griggs v. Duke Power Co.*,[27] facially neutral policies which have the effect of screening out a disproportionate number of persons of a protected class have been held illegal under Title VII. *Griggs* challenged an employer's policy which conditioned initial employment or transfer on a high school education or passing of a standardized intelligence test.[28] The Court held the tests and job requirements to be violative of Title VII. In so holding, the Court concluded that Title VII did not require discriminatory intent. Rather, it was sufficient, as in *Griggs*, that the policies had a discriminatory and hence illegal impact by excluding proportionately more persons of a protected class.[29] Under the *Griggs* analysis, either equal treatment of the handicapped without access accommodation is itself a policy illegal under the laws or, as suggested here, equal treatment must be defined to include a requirement of access accommodation which thereby eliminates the discriminatory impact.

The analysis can be taken one step farther. Equal treatment without architectural alterations has the discriminatory effect of perpetuating prior discrimination, including the assumptions about people's ability to climb stairs. In the recent case of *United Airlines*

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26. Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e (1970 & Supp. V 1975). *See* note 7 *supra*.

27. 401 U.S. 424 (1971). This was the first case in which the Supreme Court interpreted Title VII and must serve as the springboard for any analysis of employment policies.

28. The evidence showed that (a) neither standard was significant in predicting job performance; (b) both requirements disqualified a disproportionate number of black applicants relative to white applicants; and (c) the jobs in question had traditionally been held by whites pursuant to a preferential employment policy which the company discontinued when Title VII became effective. 401 U.S. at 426-27.

29. The only circumstance under which such policies can be maintained is where, despite discriminatory impact, the policies can be shown to be both necessary for the business and related to the specific job in question. 401 U.S. at 431.

More recently, the cases of General Electric Co. v. Gilbert, 429 U.S. 125 (1976) (exclusion of pregnancy-related disability benefits under company health plan held not discrimination based on sex) and Washington v. Davis, 426 U.S. 229 (1976) (requiring "intent" to discriminate under the 14th and 5th Amendments) suggested a retreat by the Court and the possible demise of *Griggs* and its progeny. But, in the more current case of Dothard v. Rawlinson, 433 U.S. 321 (1977) (statutory minimum weight and height requirements with a demonstrable disparate impact on women held discrimination under Title VII) the Supreme Court reaffirmed the vitality of *Griggs*.

v. Evans,[30] the Supreme Court rejected a challenge to a seniority system which had the effect of perpetuating prior discrimination. Subsequent cases[31] have established that the decision in *United Airlines* was predicated upon the saving clause in Title VII which protects "bona fide seniority systems."[32] Absent this clause and the existence of a valid seniority system pursuant to which the discriminatory perpetuating practices are maintained, these practices do constitute unlawful employment discrimination. Under this analysis, the perpetuation of the prior discrimination reflected in the present structures is unlawful present discrimination against handicapped persons. By freezing prior discriminatory practices, the current neutral policies have the discriminatory effect of perpetuating prior discrimination. The net result is again one of disparate impact on a protected class. Thus, whether the analysis is one of neutral policies or perpetuating practices, the conclusion is that access accommodation must be incorporated into the threshold goal of equal treatment.

Finally, the decision has been made that all newly erected or remodeled buildings are to be accessible and effectuating statutes have been enacted.[33] While such legislation can prescribe certain requirements for future architecture, the problem of inaccessibility of buildings already constructed is left wholly unsolved by these laws. Thus, the only way to rectify the existing problems of inaccessibility to jobs is by imposing on employers the obligation to alter structures which prohibit entry.[34]

(b) *Equal Achievement*

An analysis of access accommodation under the established goal of equal achievement, and not just equal treatment, makes the argu-

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30. 431 U.S. 553 (1977).

31. *See* International Bhd. of Teamsters v. United States, 431 U.S. 324, 353-54 (1977); Parson v. Kaiser Aluminum & Chemical Corp., 575 F.2d 1374 (5th Cir. 1978); Myers v. Gilman Paper Corp., 556 F.2d 758 (5th Cir. 1977).

32. 42 U.S.C. § 2000e-2(h) (1970). That Section reads as follows:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges or employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin. . . .

33. By 1974, all 50 states, Washington, D.C., and the federal government had laws requiring that new and remodeled buildings be made accessible to the mobility-disabled. Department of Health, Education and Welfare, White House Conference on Handicapped Individuals, Social Concerns 68 (1976). *See, e.g.*, The Architectural Barriers Act of 1968, 42 U.S.C. § 4151 (1970).

34. The Tax Reform Act of 1976 provides a special deduction for employers for the cost of removing architectural and transportation barriers. 26 U.S.C. § 190 (1976).

ment for accessibility alterations even more compelling. Persons of comparable abilities will never be able to achieve equally if they are not afforded the same initial opportunities. The starting point of competition must be the job itself and not getting to the job.

Obviously, society cannot and need not compensate for all existing inequities through remedial legislation. However, the fair employment laws reflect a policy decision and embody a philosophy that "the vessel in which the milk is proferred be one all seekers can use."[35] No such equality will exist unless the structures which house the jobs permit access to *all* persons.

2. *Accommodation in the Employment Setting*

(a) *Equal Treatment*

Reassigning peripheral duties, modifying equipment, or making flexible work schedules all relate directly to the job and are closely linked to an employer's own responsibilities and functions. While the building in which an employer is located may be purely fortuitous, the job structures or patterns are designed and established largely by the employer. The problem is that unlike buildings, jobs and machines must be based much more on an overall norm. Workbenches must be installed at a single, average height, based on the assumption that most people will be able to work at that height. The difference between access accommodation and accommodation in the employment setting is not only one of numbers but also the ease with which such adjustments can be made and the appropriate time to make them.

With 11.7 million mobility-disabled persons in the country,[36] there exists a high probability that over time a large number of such persons will want to enter a building, and are entitled to do so. Installing a ramp, placing buttons in an elevator to permit accessibility from a wheelchair, or putting in braille numbers as well, are relatively easy adjustments[37] which, while facilitating the movement of handicapped persons, in no way impair the mobility of nonhandicapped people. It is, however, unrealistic to expect or require that jobs be designed to account for the wide variety of handicaps, or with the expectation that a person with a given handicap may be hired at some future date.

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35. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (referring to an old fable).

36. N.Y. Times, Feb. 13, 1977, § 4 (The Week in Review) at 8, col. 1.

37. The cost of installing braille numbers on every selection button in an average elevator is $3.00; the cost for revamping a 27-story building in Oakland, California, was less than $8,000. 64 Nation's Business 51 (June, 1976).

Jobs are more properly designed for the average worker who will undoubtedly constitute most of an employer's work force. On the other hand, when a handicapped person applies for a job which he or she could perform if a workbench was lowered or a special tool provided, applying a standard of equal treatment without accommodation results in denying employment to that person. The effect is that the applicant is treated like all others and denied employment if unable to perform the job "as is".

Unlike the access situation, applying a standard of equal treatment in the job setting does not of necessity compel the additional requirement of reasonable accommodation. Therefore, the overall purpose of fair employment laws for the handicapped must be reevaluated to determine whether those purposes necessitate the additional goal of equal achievement and, accordingly, reasonable job modification.

(b) *Equal Achievement*

Merit and skill are the bases upon which handicapped and nonhandicapped people must ultimately be judged for employment. But performance of the job duties or execution of the tasks may be hampered by the handicap itself, and it is those cases in which the additional requirement of reasonable accommodation is relevant. This situation is to be distinguished from the case where the handicap prohibits the possibility of satisfactory performance altogether.

By focusing on the goal of equal opportunity to achieve and attempting to provide handicapped persons with the chance to compete equally with nonhandicapped persons, the need for accommodation to the job becomes compelling. The accommodation will be required where the individual possesses the ability but is simply hampered to a limited extent by a handicap. Requiring an accommodation ensures that the individual will be able to compete effectively with other applicants which, in turn, permits equal opportunities for the handicapped. Stated otherwise, the absence of an accommodation will preclude handicapped persons from equal achievement. Once the initial determination is made that handicapped persons, like nonhandicapped persons, should be afforded comparable chances for employment and should be permitted to achieve equally, the requirement of reasonable job modification is a natural correlate.

It is appropriate that fair employment laws generally be construed in light of their purpose of extending to all protected persons the opportunity to engage in gainful employment. An interpretation of

the statutes must evolve which best accomplishes that purpose.[38] Only by incorporating the concept of reasonable accommodation into fair employment for the handicapped will the objective of equal employment opportunity guarantee the possibility of employment to the greatest number of handicapped persons.[39]

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38. Numerous state statutes prohibit discrimination based on handicap "unrelated to ability." *See, e.g.*, Illinois, Indiana, Iowa, Kansas, Kentucky, Michigan, Nebraska, New Hampshire, New Jersey, New Mexico, New York, Oregon, Pennsylvania and Viriginia, *supra* note 6. This may be interpreted as ability to perform a given job, or overall capability. It is probably the former interpretation which is intended. However, if the requirement of reasonable accommodation is included, then the statutory wording is improper. Accommodations are necessary only in those cases where the handicap affects ability but does not prohibit performance altogether. In such situations the handicap is never "unrelated to ability" *unless* this is read as "unrelated to ability to perform a job with reasonable accommodation."

39. The Supreme Court's decision in Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977) does not dictate a different conclusion or lesser requirements. There, the Supreme Court set down the standards for reasonable accommodation to religion under Title VII. The case dealt primarily with the extent of an accommodation necessary for a collective bargaining agreement then in effect. Essentially, the court held that where (1) there is no additional cost to the employer for an accommodation, or the cost of a possible accommodation is *de minimis*; or, (2) an accommodation can be fashioned without displacing other employees or affecting their preferences, the employer must make the accommodation.

To the extent that this article suggests more of an accommodation than what was required there, that case is not controlling. First, accommodation to religion involves certain First Amendment rights which have long been held by the Court to be sacrosanct. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398 (1963) (striking down on First Amendment grounds a state law which was interpreted to preclude a Seventh Day Adventist from receiving unemployment benefits because her religion prohibited her from working on Saturdays). *See also* Engel v. Vitale, 370 U.S. 421 (1962) (striking down prayers in school as violative of the Establishment Clause). Although not specifically discussed in *Hardison*, the Establishment Clause clearly prohibits Congress from requiring employers to accommodate one employee to the extent of encroaching upon the religious practices of another employee. These First Amendment concerns are totally absent in cases involving handicapped individuals.

Second, unlike religion, and with a few exceptions noted elsewhere (*see* text accompanying and following notes 119-21 *infra*), handicaps are not voluntarily acquired and cannot be controlled. A person may choose a religion and voluntarily subscribe to its teachings and practices. Even in the case of temporary disabilities, to the extent these are included under the protection of these laws, the healing process cannot be accelerated and the conditions are still involitional and unalterable. This suggests much more compelling reasons for requiring an accommodation to a handicapped person than to a person practicing a particular religion.

Finally, of the kinds of accommodations that are suggested here, many of them would not affect other employees. The installation of ramps or equipment, or modification of equipment to accommodate an individual are all accommodations which would not displace other employees. The only type of accommodation which might affect other employees would be the delegation of peripheral duties to other employees in order to permit the handicapped individual to perform the "essential functions" of the job. But available statistics indicate that the number of instances in which this form of accommodation will be required is slight. 41 Fed. Reg. 20,325 (1976). (Studies reported there indicate that of 397 severely disabled persons who were placed in jobs, 317 persons required no restructuring of assigned tasks and 62 persons required only incidental modifications.)

III. Fair Employment: A Comparative Analysis

A. Race, Sex, and Handicap

1. Overall Comparison

Any reference to blacks or women embraces a uniform class of individuals—all persons with black skin, all persons of the female sex. But to speak of the handicapped as a class does little to further an analysis. The term "handicapped" includes many people with different disabilities of varying degrees of severity. For instance, included among epileptics are the fifty percent who are seizure free with the prescribed medication,[40] and the thirty percent who can control their seizures with medication.[41] Similarly, persons with a history of mental illness may include those who have had nervous breakdowns, those who are diagnosed schizophrenics, and those with intellectual disabilities.

But the most significant difference between the handicapped and other protected classes is the fact that the condition which initially gives rise to the protective status may also affect an individual's job performance. A handicap may limit ability altogether. As a result, blind people can be lawfully denied employment as bus drivers; persons confined to wheelchairs can be lawfully refused consideration as dancers. On the other hand, a blanket exclusion cannot be applied with the same certainty to any other protected class. Some women might be able to lift a specified weight and some might not.[42] And while we may permit an employer to refuse to hire a man for a female role in a play, this is not because the male is unable to perform the part, or cannot be dressed in women's clothing. Rather, it is because we will allow the employer to demand that degree of authenticity as a qualification for the job.[43]

Other handicaps touch on performance without excluding individuals altogether. For example, blindness may affect a teacher's ability to perform every facet of a job. But this does not mean that a blind

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40. Epilepsy Foundation of America, Answers to the Most Frequent Questions People Ask About Epilepsy 8 (1975).

41. *Id.* at 9.

42. *See, e.g.*, Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 235 (5th Cir. 1969) (company failed to establish that all or substantially all women could not lift weight in excess of 30 pounds).

43. The Guidelines on Sex Discrimination, 29 C.F.R. § 1604.2(d)(2) (1977), state the following: "Where it is necessary for the purpose of authenticity or genuineness, the Commission will consider sex to be a bona fide occupational qualification . . . ."

person cannot teach.[44] Similarly, a deaf person may be able to competently perform a clerical job, but be unable to answer the telephone unless a specially designed phone is installed.[45] Absent from the other protected classes is this correlation between the distinguishing trait and the ability to work.

An employer's refusal to hire or promote a handicapped person is premised on a variety of factors including fears of increased costs,[46] safety,[47] and stereotyped assumptions which frequently underestimate the capabilities of a handicapped person.[48] Race discrimina-

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44. The court's opinion in Gurmankin v. Costanzo, 411 F. Supp. 982 (E.D. Pa. 1976), *aff'd.*, 556 F.2d 184 (3d Cir. 1977), best illustrates this point:

> Some of the potential problem areas studied by Dr. Huntington were lunchroom and study hall supervision, teacher safety, administering tests, use of visual aids and chalk board, keeping written records, maintaining discipline and pupils' attention, and teaching various subjects. In schools where blind teachers were employed these problems either did not arise or were overcome through special arrangements. For example, Dr. Huntington found that the great majority of blind teachers maintained average or better than average classroom discipline. Blind teachers frequently were not assigned to lunchroom or playground supervision. Most blind teachers had no trouble operating audio-visual equipment and the majority were able to use the chalk board. However, blind teachers frequently used students to write on the blackboard or distribute mimeographed materials. For administering tests, either no special arrangements were made or the blind teachers used teachers who had study halls or students as proctors. A blind teacher could keep written records through use of braille or a typewriter. School administrators reported that English was the second most feasible subject (after social studies) for a blind teacher. Finally, school administrators who supervised blind teachers reported that the great majority were average or above average teachers.

411 F. Supp. at 986.

45. Teletypewriters (TTY's) permit the deaf to communicate by phone through systems similar to telegraphs.

46. Specifically, employers fear the expenses involved in accommodations, increases in insurance and workmen's compensation premiums, and greater liability resulting from subsequent injuries. Additionally, employers fear that handicapped workers will produce less, thereby increasing production costs. *See* Nagi, McBroom & Collette, *Work, Employment, and the Disabled*, 31 Am. J. Econ. & Soc. 21, 27 (1972) [hereinafter cited as Nagi & Collette]. This Article represents the most comprehensive collection of individual studies on employer prejudices.

47. Employers' fears in regard to safety are particularly strong in the employment of persons with a history of mental illness. *Id. See also* Olshansky, Grob & Malamud, *Employers' Attitudes and Practices in the Hiring of Ex-Mental Patients*, 42 MENTAL HYGIENE 391, 394-95 (1958). However, studies regarding safety of both mentally and physically handicapped persons in the employment setting indicate that the fears harbored by employers are largely unfounded. *See* Wolfe, *Disability Is No Handicap for DuPont*, THE ALLIANCE REV. 13 (Winter 73-74); Kalenik, *Myths About Hiring the Physically Handicapped*. 2 JOB SAFETY AND HEALTH 9, 11 (Sept. 1974). These findings have been confirmed in other reported studies. *See, e.g.*, Nagi & Collette, *supra* note 46 at 23 *citing* Ling, *An Investigation into the Readjustment to Work of Psychiatric Cases*, 1 INT'L J. OF SOC. PSYCH. 18 (Autumn, 1955).

48. One study indicated that handicapped persons must generally be more qualified or competent than nonhandicapped persons in order to compensate for the existing attitudes and

tion, on the other hand, may be based upon prejudices and general hostility toward persons of another race,[49] as well as assumptions regarding their abilities. Sex discrimination may be based largely upon assumptions regarding the capabilities of women. A direct correlation between a handicap and ability may be real or presumed; a direct correlation between race or sex and an individual's ability may be perceived by an employer. These perceptions may operate in the same fashion to exclude a handicapped person, a black or a woman from employment.

Other prejudices are operative in the employment decisions regarding handicapped persons. The images of our society portray only those persons who are able-bodied. In addition, because of persisting paternalism and discrimination, the mentally[50] and physically handicapped have been effectively excluded from participation in the mainstream of society.[51] Because of their limited visibility until recently, and the limited experience which the general population has had in living and working with handicapped persons, prejudices based upon ignorance have gone unchallenged. Generally, nonhandicapped persons feel uncomfortable around handicapped persons, particularly those with visible handicaps.[52] These attitudes, whether

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assumptions. Rickard, Triandis & Patterson. *Indices of Employer Prejudice Toward Disabled Applicants*, 45 J. APPLIED PSYCH. 52 (1953).

49. *See* Note, *The Age Discrimination in Employment Act of 1967*, 90 HARV. L. REV. 380, 383-84 (1976) [hereinafter cited as Note, *Age Discrimination*].

50. Historically, society has either institutionalized the mentally ill or driven them away. Burgdorf, *supra* note 5, at 883-91. *See also* N.N. KITTRIE, THE RIGHT TO BE DIFFERENT 56-65 (1971). Additionally, they are denied certain fundamental rights touching upon all aspects of their lives—voting, marriage, and the right to bear children. *See generally* S. BRAKEL & R. ROCK, THE MENTALLY DISABLED AND THE LAW (1971); Burgdorf, *supra* note 5, at 861-63, 887.

The problem of employment for persons with a history of mental illness is particularly acute. Studies show extremely low rates of employment for former mental patients. Miller & Dawson, *Effects of Stigma on Re-employment of Ex-mental Patients*, 49 MENTAL HYGIENE 281, 282-83 (1965).

51. The exclusion of mentally and physically handicapped persons from our society commences at an early stage. The process begins in school where children may be assigned to special programs designed for the handicapped, or misclassified and unnecessarily placed in special education programs. Krass, *supra* note 5, at 1017-23. Thereafter they may be excluded from participation in society because of the stigma which attaches with the special education programs, the physical inaccessibility of buildings, or the institutionalization noted *supra* note 50.

52. *See* Kriegel, *Uncle Tom and Tiny Tim: Some Reflections on the Cripple as Negro*, 38 AM. SCHOLAR 412 (1969). There the author, himself handicapped, writes: "The cripple, then, is a social fugitive, a prisoner of expectations molded by a society that he makes uncomfortable by his very presence." *Id.* at 416.

Another writer, paralyzed from the shoulders down, observed: "I have been served meals in separate dining areas of restaurants since, as the owners were quick to point out, I might upset the other customers and lessen their enjoyment of the meal." NEWSWEEK, November 1, 1976, at 13.

conscious or unconscious, operate in the employment setting to deny handicapped persons jobs which they can capably perform. While legally the preferences of clients or customers cannot be the basis for refusing to hire or discharging a member of a protected class,[53] the prejudices may operate on one level where the employer ostensibly denies employment to a handicapped person for other reasons.

Potentially, the same arbitrary, irrational employment decisions which were made *vis-à-vis* blacks are also made against handicapped persons. And in all but a few possible instances, handicapped persons, like blacks and women, lack individual control over their handicap status.[54] This factor distinguishes the handicapped from persons protected on the basis of religious preferences and practices which, while premised on strong fundamental beliefs, are nonetheless volitional. With a few possible exceptions,[55] handicap, like race or sex, is an immutable characteristic.[56] However, unlike blacks or women, the handicapped are plagued by the additional factor that their condition can render them incapable of specified work.

Like blacks and women, the handicapped have historically been subjected to unequal treatment.[57] For this reason, the mandates imposed by fair employment laws are the same for all protected classes. The fact that a handicap may bear on ability does not compel an outcome different from other protected classes. Rather, the basic principles and prohibitions which have evolved since *Griggs v. Duke Power Co.*[58] are generally controlling for mentally and physically handicapped persons. This general applicability is then modified by a few specific aspects of the law which, as they unfold, will result in the evolution of concepts unique to the law of handicap discrimination.

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53. Diaz v. Pan American World Airways, Inc., 442 F.2d 385 (5th Cir. 1971), *cert. denied*, 404 U.S. 950 (1971).

54. Fiss, *supra* note 18, at 241-43.

55. Some handicaps arguably protected under the fair employment statutes are not involuntary. Most notably these conditions include alcoholism and obesity. *See* text accompanying notes 118-121 *infra*.

56. *See* Willingham v. Macon Tel. Publishing Co., 507 F.2d 1084 (5th Cir. 1975) (protection of Title VII in sex discrimination case restricted to immutable characteristics).

57. *See* Burgdorf, *supra* note 5, at 861-99. (There the author discusses the unequal treatment to which handicapped persons have been subjected and the specific inequities existing in education and institutions).

58. 401 U.S. 424 (1971). *See* notes 27-29 and accompanying text *supra*.

2. *Evidentiary Considerations: Statistical Data and Burden of Proof*

a. Generating Statistical Data

Statistical data is often used to prove both individual instances of discrimination and systemic discrimination as well.[59] These statistics come in a variety of forms. For instance, in employment cases alleging discrimination on the basis of race or sex, statistics may be introduced to show the number of minorities or women currently employed by the defendant employer. Statistics may also be introduced to show the number of minorities or women available in the relevant applicant pool. Finally, statistics may be introduced to show a disparity between the overall number of minorities or women in the employer's total work force, and the number of minorities or women in higher level positions. In any case, statistics are often used to bolster a *prima facie* showing of discrimination.[60]

Recently, the Supreme Court has addressed the issue of statistics and their relevance in Title VII cases.[61] In *International Brotherhood of Teamsters v. United States*,[62] the Supreme Court observed that statistical analyses do serve a vital role in establishing the existence of discrimination, but their usefulness "depends on all of the surrounding facts and circumstances."[63] Thus a comparative analysis between the percentage of minorities in the employer's work force and the percentage in the general areawide population may be highly probative where the necessary job skill is slight.[64] On the other hand, when the challenged discrimination involves a job requiring specialized training or skill, the relevant labor market becomes the percentage of persons of a designated class in the areawide population who possess that training or skill.[65]

For several reasons, the handicapped will not have the additional tool of statistics in proving either individual or systemic discrimination. First, meaningful statistics cannot be obtained for the handicapped because of the virtual absence of handicapped persons in the labor market relative to the number of persons employed.[66] The

59. G. COOPER, H. RABB, & H. RUBIN, FAIR EMPLOYMENT LITIGATION TEXT AND MATERIALS FOR STUDENT AND PRACTIONER 83, 114 (1975) [hereinafter cited as COOPER & RABB].

60. *See* Lindsey v. Southwestern Bell Tel. Co., 546 F.2d 1123 (5th Cir. 1977) and cases cited therein.

61. Hazelwood Sch. Dist. v. United States, 433 U.S. 299 (1977). *See also* International Bhd. of Teamsters v. United States, 431 U.S. 324, 331-42 (1977).

62. 431 U.S. 324 (1977).

63. *Id.* at 340 & n.20.

64. *See* Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 308 n.13 (1977).

65. *Id.*

66. *See* notes 2 & 3 *supra*.

data will always show that few if any handicapped are currently employed by the defendant employer compared to the number of handicapped persons in the overall population. The obvious effect is that any statistics introduced in support of a handicapped individual's charge would not be significantly probative of the issue of discrimination. Otherwise, if the statistics were given the same weight for handicapped persons as they are for blacks or women, the handicapped plaintiff would always prevail.

Second, there is no definable class or relevant labor pool which can even be ascertained. The variety of handicaps and gradations in severity of these conditions contribute in part. While women may be regarded as a class without further distinction, the handicapped may be studied either as a general class or as a subclass divided according to the particular handicap or severity of the impairment. Though it may be argued that subclasses are irrelevant when comparing overall statistical data, the fact that an employer employs fifteen epileptics is not necessarily probative of whether he or she has discriminated against a blind person. This then leads to the next consideration.

There are a number of ways of dividing up the general class of handicapped individuals. The most obvious breakdown is between physical and mental handicaps. There is also a breakdown between visible and nonvisible handicaps. This latter distinction mitigates against grouping all handicapped persons together. The employment of one group does not imply employment of the other group. For example, an employer may attempt to create the appearance of compliance with the law by employing several epileptics, or cured cancer patients, while at the same time refusing to hire the more visibly and severely handicapped. Or, an employer may simply discriminate against persons with one handicap, whether visible or not, without necessarily discriminating against handicapped persons as a class.

Furthermore, it may be extremely difficult to produce any useful comparative data regarding the potential applicant pool either within the local area or the Standard Metropolitan Statistical Area (SMSA).[67] Proof of population percentages is currently derived from the United States Census data,[68] but statistics and numbers of handicapped persons were not even included in the census until 1970.[69]

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67. The SMSA is the area which includes a city and its outlying suburbs. The total area is commonly used to ascertain the existing applicant pool in an urban center.

68. COOPER & RABB, *supra* note 59, at 84.

69. President's Committee on Employment of the Handicapped, One in Eleven, Handicapped Adults in America 1 (1975).

Even now, these statistics exist only for the physically handicapped. Given the vague definition of handicap which is used,[70] the fact that such statistics will depend in many instances on individuals disclosing their handicaps and the reluctance of some to do so,[71] such information is simply not helpful in establishing an areawide labor pool.

The only plausible pool which could be probative of discrimination against an individual with a given handicap would be one containing statistics which relate to persons with that handicap in the areawide labor pool and who possess the requisite skill or training, to the extent this is required. But even if disparities could be shown between the employment statistics of the employer and the relevant labor pool, such statistical analyses would be so small as to have little legal significance,[72] or predictive value. The fact that statistics cannot be generated, and if generated cannot be used for proving employment discrimination against handicapped persons, becomes relevant because of the extent to which it affects the problem of proof in an individual case.

b. Legal Analysis

As it has developed, the law on employment discrimination deals primarily with two situations. The first is the situation where an employer maintains a policy which, although neutral on its face, has the unlawful effect of screening out a disproportionate number of persons of a protected class.[73] Proof of discrimination in this kind of case does not depend upon statistical data, except to the extent that statistics are needed to prove the disparate impact.[74] But in most cases involving the handicapped, this will be unnecessary. For example, a validated written test may be challenged by a blind person who is precluded from taking the test, but who is otherwise qualified for

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70. The definition is actually stated in terms of a question: "Does this person have a health or physical condition which limits the kind or amount of work he can do at a job? Does his health or physical condition keep him from holding any job at all?" *Id.*

71. This reluctance may stem from the fact that these people are aware of the existing prejudices against handicapped persons and are self-conscious about disclosing their condition to others.

72. *See* Morita v. Southern California Permamente Medical Group, 541 F.2d 217, 220 (9th Cir. 1976), *cert. denied*, 429 U.S. 1050 (1977); Robinson v. City of Dallas, 514 F.2d 1271, 1273 (5th Cir. 1975). Both courts found the meager statistics submitted by the plaintiffs to be too few to support or establish a finding of discrimination.

73. *See* notes 27-29 and accompanying text *supra*.

74. *See* Dothard v. Rawlinson, 433 U.S. 321, 330 (1977).

the job. Here the discriminatory effect can be easily demonstrated without statistics.[75]

The other common employment discrimination case, represented by *McDonnell Douglas Corp. v. Green*,[76] is one involving individual allegations of discrimination. In *McDonnell Douglas* the Supreme Court set down four showings which the plaintiff must make to establish a *prima facie* case of discrimination. The plaintiff must show (1) membership in the protected class; (2) application and qualification for the job; (3) rejection despite qualifications; and (4) that, after the rejection, the position remained open and applications were sought.[77] Once this showing is made, the burden shifts to the employer to come forth with a nondiscriminatory reason for rejecting or failing to promote the plaintiff.[78] If the employer meets this burden, the plaintiff must then prove the purported reason to be pretextual.[79] This is the typical case in which statistics are used, and the situation in which the absence of statistics will work to the detriment of an individual.

The key issue is what effect the absence of statistics will have on the burden of proof for handicapped individuals. In the case where an applicant is rejected pursuant to an overt policy which excludes persons with an identifiable handicap,[80] the statistical evidence is unimportant. However, because it is the initial burden of the plaintiff to establish a *prima facie* case,[81] and because it is so well accepted that negative statistics may raise an inference of discrimination,[82] handicapped persons may encounter difficulty in making out the initial *prima facie* case necessary to shift the burden to the employer in the *McDonnell Douglas* situation.

The alternatives facing handicapped plaintiffs are to either retain the *McDonnell Douglas* standard of proof or to replace that standard with a different burden of proof and mode of analysis. This second

75. The test itself may be an otherwise valid test. However, the fact that the test is only available in printed form converts the administration of the test from a policy neutral on its face to one which has a discriminatory impact upon a protected class (blind persons).

76. 411 U.S. 792 (1973).

77. *Id.* at 802.

78. *Id.*

79. *Id.* at 804.

80. Some of the more common instances of such discrimination include company policies prohibiting employment of persons with a history of heart disease; policies prohibiting the employment of persons who may be considered poor insurance risks; and refusal to hire cured cancer patients until five years after treatment. Wall Street Journal, July 20, 1976, at 1, col. 1; Wall Street Journal, Jan. 27, 1976, at 1, col. 1. In addition, a number of school systems have refused to hire blind teachers. *See, e.g.*, Gurmankin v. Costanzo, 556 F.2d 184 (3d Cir. 1977); King-Smith v. Aaron, 455 F.2d 378 (3d Cir. 1972).

81. 411 U.S. at 802.

82. *See* Lindsey v. Southwestern Bell Tel. Co., 546 F.2d 1123 (5th Cir. 1977).

alternative poses the additional problem of developing an appropriate means of measuring qualifications other than that set down in *McDonnell Douglas*. A thorough reading of the case, and thoughtful consideration of the question, indicates that the burden of proof established there by the Supreme Court is most appropriate for all protected classes, including the handicapped. However, in applying this standard, courts will have to remain cognizant of the fact that statistics simply will not be available to the extent they have been in other areas of discrimination. This factor, coupled with the additional evidence necessary to prove "ability," does not mean that handicapped individuals should necessarily have to produce less evidence to prove their cases than other protected persons. But at the outset, more creative approaches may have to be used in order to establish a case of discrimination than with, for example, blacks or women.

The absence of statistical data is exacerbated by an additional factor. If a court accepts the premise of this article, the term qualified must be interpreted to include qualified with a reasonable accommodation. But to make even a showing of qualification, a handicapped person may be forced to come forth with medical proof and vocational experts. Judges have not been immune from the stereotypes and assumptions about handicapped persons. Thus, before proving his or her qualifications for a given job, a handicapped individual may initially have to disprove some of the assumptions in our society regarding the extent to which a given handicap impairs an individual's ability to perform a job. The initial hurdle in the courtroom may be as much a problem of education as of proof.

In conclusion, the shifting burden of proof and initial requirements necessary for a *prima facie* case of discrimination can remain basically the same in individual cases regarding the handicapped. However, the kind of proof which will be submitted to make the requisite showing will be substantially different from other kinds of discrimination cases. In place of statistics, medical evidence will be relevant and vocational experts may be called upon. What must be avoided is the assumption that in applying the *McDonnell Douglas* analysis to cases involving the handicapped, the kind of evidence will also be the same.

B. Age

1. Overall Comparison

Because a person's physical capabilities are often impaired by the aging process,[83] age is perhaps most like a handicap. Discrimination

83. Kovarsky & Kovarsky, *Economic, Medical and Legal Aspects of the Age Discrimination Laws in Employment*, 27 VAND. L. REV. 839, 848-65 (1974) [hereinafter cited as Kovarsky].

based on age may be attributed to an employer's perceptions and estimates of the abilities of an applicant or employee and the correlative assumptions regarding diminished levels of productivity and diminished work capacity.[84] But older workers may be less the victims of disdain or prejudice[85] than handicapped workers who are subjected more to generalized assumptions which operate to exclude them from jobs in the work force. Age discrimination has been distinguished from race discrimination on the basis that the latter is premised largely upon general hostility and bigotry and which is less likely to correspond with ability.[86] Handicap discrimination, rooted in both prejudices and the perceived or actual impairment of ability, falls somewhere between the two.[87]

Aging is an evolving process which results in the deterioration of body cells,[88] and increasing risks of diseases and medical conditions. Handicaps, on the other hand, are frequently impairments or disabilities which are either congenital or the result of accidents. They are usually stable conditions which, until the onset of aging and the resultant deterioration, may be objectively measured. As a result, an accurate assessment of a handicapped person's *present* ability means that future ability can be reasonably predicted without the fear of diminished capacity resulting from the handicap. In contrast, the aging employee may have no single physical problem, but may manifest such symptoms as loss of memory, loss of manual dexterity, or overall slowing down of the bodily processes. These are progressive conditions which may not be easily isolated and assessed for purposes of determining present work ability.

Depending upon who is included in the class of handicapped persons,[89] there may be handicaps which are degenerative or rehabilitative, and thus do not differ substantially from aging. The distinction

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84. *See* Note, *Age Discrimination*, *supra* note 49, at 384.

85. *See* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313-14 (1976).

86. *See* Note, *Age Discrimination*, *supra* note 49, at 384.

87. It may be useful for purposes of analysis to imagine a continuum with race at one end where there exists virtually no relationship between ability and the distinguishing trait (except, for example, where it results from inferior education); then sex, which sometimes, though rarely, may pertain to ability; religion which, while the practices themselves may interfere with the performance of tasks, such interference is nonetheless due to the voluntary decision to adhere to one religion or another; to handicaps which may or may not affect ability; to age which will predictably affect ability at some point. Along this continuum there exists a progressive correlation between the extent to which ability relates to the class factor (race, sex, handicap), and the existence or absence of prejudices and ill-feelings which may have resulted in a history against the given class. With blacks the animosity is most prevalent, while with older workers it is virtually absent.

88. Kovarsky, *supra* note 83, at 851.

89. *See* Section IV of text at 981.

between age and handicap is further blurred by the fact that the aging process may precipitate a handicap; an elderly person may become mobility-disabled. However, the limited experience with discrimination based on handicap indicates that a large percentage of the conditions which constitute the basis of discrimination are those which are permanent or stable over a period of time.[90]

Because of the observed differences, the case law regarding age, particularly where physical ability is at issue, cannot be engrafted onto the handicapped without further analysis. The cases must be examined closely to discern what disabilities are involved and whether the prior case of age discrimination is analogous to the instant case involving handicapped persons. The following discussion illustrates that one of the most significant differences between age and handicap is that the blanket exclusion which is permissible for all persons of a certain age, can never exist for persons with a certain handicap.

2. *Bona Fide Occupational Qualification*

A bona fide occupational qualification (BFOQ) permits an employer an exception from the general prohibition against policies which discriminate against a designated class and allows a policy which absolutely excludes all members of a protected class from a particular job regardless of any individual's qualifications or abilities. The exemption is contained in the Age Discrimination in Employment Act of 1967,[91] and Title VII.[92] The BFOQ has been narrowly interpreted in cases of sex discrimination,[93] and more liberally construed in cases of age dis-

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90. For example, between September 1, 1974, and December 31, 1975, 591 complaints were filed in New York alleging employment discrimination based on handicap. A partial listing of the complaints includes 26 involving cardiac problems, 36 cases involving motor disabilities, 44 eye problems, 54 cases involving hearing problems (of which 32 persons were totally deaf), 15 cases involving diabetes, 5 cases involving speech problems, 19 cases involving stomach problems, 5 cases involving allergies, and 29 cases involving epilepsy. Of the 591 complaints, there were also 92 "miscellaneous" disabilities. New York State Division of Human Rights, Fact Sheet on Disability Complaints filed September 1, 1974—December 31, 1975.

91. 29 U.S C. § 623(f)(1) (1970).

92. 42 U.S.C. § 2000e-2(1) (1970). Under this subsection there exists a BFOQ for all categories except race.

93. *See, e.g.*, Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969). *But see* Dothard v. Rawlinson, 433 U.S. 321 (1977). There the Supreme Court upheld a state regulation which excluded women as prison guards in all-male penetentiaries. The Court sustained the exclusive policy as a valid bona fide occupational qualification. A detailed review of the case reveals no standard which can be derived from the case and applied in other situations. On the contrary, the case appears to be based solely upon the facts, and limited to that extent. The absence of any clear discernible standard renders this case an aberration and should be treated as such.

crimination.[94] The cases reflect the overall principle that the characteristic which gives rise to the exemption should be one which directly relates to the business, and which, if not permitted, would in some way undermine the operations.[95] It necessitates a showing by the employer that the particular characteristics which the excluded class lacks are necessary for performance of the job and that the aspects of the job for which the BFOQ is claimed embody the essence or purpose of the business.[96] Beyond these common principles, courts have applied different tests for different classes.[97]

The problems peculiar to the handicapped which bear upon the possibility of a BFOQ are similar to those pertaining to statistical data.[98] Because the BFOQ permits the blanket disqualification of a class without regard to individual abilities, this necessitates a definable class constituency. In *Weeks v. Southern Bell Telephone & Telegraph Co.*,[99] a case alleging sex discrimination, the Fifth Circuit required a "factual basis" from which the court could conclude that

> ". . . all or substantially all [members of a protected class] would be unable to perform safely and efficiently the duties of the job involved."[100]

If a court applied the above test to the handicapped, any class or subclass of persons would suffer from overbreadth. The variations in degree of impairment among persons with a specific handicap simply make it impossible to generalize about the abilities of all persons with that condition.[101] The alternative is to focus on a small identifiable group of handicapped persons. When this is done, a lawful refusal to hire because of a highly particularized handicap amounts to a just refusal to hire because of actual inability to perform. Once the excludable class becomes sufficiently specific so as not to suffer from

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94. *See, e.g.*, Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224 (5th Cir. 1976). Hodgson v. Greyhound Lines, Inc., 499 F.2d 859 (7th Cir. 1974), *cert. denied*, 419 U.S. 1122 (1975).

95. Diaz v. Pan American World Airways, Inc., 442 F.2d 385 (5th Cir. 1971), *cert. denied*, 404 U.S. 950 (1971).

96. *Id.* at 388.

97. *Compare, e.g., Weeks supra* note 93 *with Greyhound supra* note 94 which flatly rejected the *Weeks* test.

98. *See* text accompanying and following note 66 *supra*.

99. 408 F.2d 228 (5th Cir. 1969).

100. *Id.* at 235.

101. For example, deaf persons may include the partially deaf and the totally deaf, those who can speak and those who cannot, those who can "sign" and those who cannot. Similarly, the mobility-disabled as a class include those confined to wheelchairs and persons who are mobile with crutches and other aids. There are also varying degrees of visual impairments, ranging from minor problems correctable with glasses to total blindness.

overbreadth, it is then composed of persons who, by virtue of their handicap, are not qualified to perform the job.[102] The rejection is not, therefore, discrimination on the basis of handicap to which a BFOQ defense may be raised, but instead is a lawful refusal to hire those unable to do the job.

In contrast, the cases governing BFOQ for age can be distinguished not necessarily because the tests are inappropriate, but because the factual bases from which the courts derived the tests render the situations distinguishable from cases involving the handicapped. Two leading age discrimination cases challenged blanket policies which excluded persons above a certain age from consideration for jobs as bus drivers.[103] In sustaining the employer's policies, both courts were persuaded that the particular stresses involved in the jobs, coupled with the presence of subtle bodily changes, constituted too great a risk to customers to deny the BFOQ.[104] This distinguishes the protected class of persons over forty[105] from the substantial number of handicapped persons who have fixed, identifiable and stable conditions.[106]

A BFOQ because of safety considers both safety to customers and to the individual applicant or employee. Again, the variations in the conditions and their severity preclude a class-based generalization about the risk factors involved in hiring handicapped persons generally. For the handicapped, only an individualized approach to safety is possible. But once safety is considered on an individual case-by-

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102. For example, to specify that applications of deaf persons who cannot sign, speak, or read lips will not be considered is to describe the very individuals who cannot perform the job.

103. Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224 (5th Cir. 1976). Hodgson v. Greyhound Lines, Inc., 499 F.2d 859 (7th Cir. 1974), *cert. denied*, 419 U.S. 1122 (1975).

104. In *Greyhound*, the Seventh Circuit rejected the *Weeks* standard for BFOQ and instead formulated a new standard applicable in cases involving public safety. The new standard adopted the *Diaz* requirement of business essence (*see* text accompanying notes 95 & 96 *supra*), coupled with special considerations noted by another court in a non-BFOQ case, which also involved the transportation of passengers. Spurlock v. United Airlines, Inc., 475 F.2d 216 (10th Cir. 1972). What emerged in *Greyhound* was a test which required the defendant to demonstrate a "rational basis in fact" to believe that public safety would be endangered by elimination of the rule. 499 F.2d at 863. Applying the rule to the facts addressed at trial, the court determined that Greyhound met this burden and therefore permitted the 40-year maximum age requirement to stand. Contrary to the *Greyhound* courts, the *Tamiami* court was satisfied with the *Weeks-Diaz* standards combined to form a flexible text which sufficiently accounted for the safety factor.

For an excellent analysis of these two cases, *see* Note, *Age Discrimination*, note 49 *supra*, at 400-10.

105. The protected age group under the ADEA is forty to seventy years of age. Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, § 12, 92 Stat. 189 (amending 29 U.S.C. 633 (1967)).

106. *See* note 90 *supra*.

case basis, it loses the quality of a BFOQ which warrants the exclusion of an entire class.[107] Instead, it necessitates a broadened definition of "ability" to perform a job which accounts for safety to the individual. Safety can and must remain a factor in the employment decision, but its proper place for handicapped persons will always be at the initial employment stage when an individual's abilities are assessed.[108]

Finally, the notion of reasonable accommodation to the job contemplates an adjustment or modification tailored to the specific needs of a handicapped individual. This adjustment to the individual precludes the possibility of an exemption for a class of individuals. Compounded by the difficulty in defining a class of handicapped persons—either because of overbreadth or specificity so narrow as to bear on actual ability—a BFOQ for the handicapped becomes wholly implausible. If an individual accommodation is required, class-based exclusions cannot co-exist.

The standard which evolves requires that a handicapped individual be able to perform safely and efficiently the essential functions of the job with reasonable accommodation.[109] If any element is missing, he or she can be denied employment. Where a refusal to hire is challenged, the employer can be required to come forth with evidence to justify the refusal by showing a *"factual basis* to believe that the indi-

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107. *See, e.g.*, Fraser Shipyards, Inc. v. Dep't of Indus., Labor and Human Relations, 13 Fair Empl. Prac. Cas. 1809 (Wis. Cir. Ct. 1976). There the court held that an employer's discharge and refusal to hire two diabetics for jobs as welders constituted unlawful discrimination based on handicap under the state statute. The employer's actions were taken pursuant to a blanket policy which excluded all diabetics from employment, and which the employer sought to justify on the ground that some diabetics could be a substantial hazard to themselves or other employees. Although never articulated as such, the employer's justification that "some" is sufficient to disqualify all, was an attempt to establish a BFOQ. The problem with this argument is reflected in the court's opinion:

> While the petitioner did demonstrate that *individual diabetics may be unqualified* to fill the position of welder in a shipyard because those persons may have history of blackouts or may be so severely disabled by the disease as to require precise regularity of schedule, *the petitioner made no such showing with respect to these claimants.*
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> In fact, the record contains ample evidence that claimants . . . are capable of performing the tasks required by the petitioner. Each claimant has approximately one-half to one hour advance notice that he either needs to ingest sugar or to consume liquid and exercise. Neither . . . has ever blacked out from the disease. Both have done and continue to do strenuous work.

13 Fair Empl. Prac. Cas. at 1810 (Wis. Cir. Ct. 1976) (emphasis added).

108. *See* Montgomery Ward & Co. v. Bureau of Labor, 28 Or. App. 747, 561 P.2d 637 (1977). There the court properly considered safety of the individual applicant to be part of the criteria upon which an initial employment decision may be based.

109. *See* note 21 *supra.*

vidual could not perform the essential functions of the job safely and efficiently with reasonable accommodation." This proposed standard retains the required factual showing of *Weeks*,[110] thereby removing the speculative problem often present in employment decisions about the handicapped. Unlike *Weeks*, it applies on an individual and not a class basis, and for this reason, the proposal is not a BFOQ. It is, however, a balance between the employer's need and obligation to run a safe business[111] and the handicapped's need to be assured of consideration for employment, except in those cases where there is a demonstrable basis for the refusal.[112]

IV. Statutory Scope: Defining The Protected Class

A. *Background*

This Article ends where it began by focusing on the principles of fair employment laws; merit and capabilities are to be the controlling factors, assumptions and prejudices cannot and should not dictate employment decisions. The overall goal of equal employment opportunities is to allow all handicapped persons to compete equally with each other and with nonhandicapped persons for the available jobs. The specific goals of equal treatment and equal achievement necessitate the removal of both attitudinal and physical barriers. With these goals as a backdrop, this section will consider the question of who is appropriately included in the class of handicapped individuals. The discussion will assume that laws proscribing employment discrimination against the handicapped should include the mentally and physi-

110. *See* text preceding and accompanying note 100 *supra*.

111. Under the Occupational Health and Safety Act (OSHA), an employer is obligated to: [f]urnish . . . a place of employment . . . free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees. . . . 29 U.S.C. § 654(a)(1) (1970).

112. This means, of course, that in some situations the employer will have to solicit information from the applicant regarding his or her medical history and treatment. To the extent that this is prohibited by the Department of Health, Education and Welfare regulations interpreting Section 504 of the Rehabilitation Act of 1973, they are simply unworkable. 45 C.F.R. § 84.14 (1977). (Provision governing pre-employment inquiries.) The requirements made of employers in this area cannot be underestimated. By refusing to allow an employer to inquire about medical histories or handicaps, he or she is forced into the untenable position of basing employment decisions on insufficient information regarding an individual's handicap. The employer must then hope that if a decision not to hire the handicapped individual is challenged, the facts adduced during discovery regarding the individual's condition will be sufficient to justify the original decision.

This provision presents an additional problem. It is axiomatic that if an employer is to attempt a reasonable accommodation to determine initially whether an individual can perform the essential functions of a job, he or she must be apprised of the handicapping condition. It appears, however, that HEW has simply not thought through the application of these regulations and ironed out the internal inconsistencies.

cally handicapped. It will also be assumed that, at the very least, these laws should protect persons with permanent disabilities or impairments.

B. Temporary and Perceived Handicaps

The assumptions and stereotypes which have operated to exclude handicapped persons from employment are not limited to permanent handicaps. In fact, it is more likely that an employer will make assumptions about the extent of a temporary impairment for the very reason that it is temporary. While an employer can at least grasp with some certainty and measure to some extent a permanent handicap, this certainty may be frequently absent in the case involving a temporary disability. Consequently, he or she may be even more prone to dismiss from consideration a person with a temporary handicap because of its elusive quality.[113]

Furthermore, employers often engage in assumptions about the extent to which a condition impairs ability. But these assumptions are no less likely to occur in the case of a temporary condition than in the case of a permanent condition. In either instance, the employer may assume ability is impaired. If an employer is permitted to make assumptions about temporary conditions, it is highly probable that he or she will transfer those same assumptions to permanently handicapped persons. It is simply not possible to contain stereotyping strictly to one group, when both suffer from the same condition that gives rise to the stereotype. To the extent an employer is permitted to indulge in assumptions about temporary disabilities, these will color his or her view of permanent handicaps, irrespective of whether it is legal or not.[114]

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113. The number of persons suffering from temporary disabilities is not insignificant. There are a reported 12.5 million temporarily injured people in this country. N.Y. Times, Feb. 13, 1977, § 4 (The Week in Review) at 8, col. 1.

114. *See* Providence Journal Co. v. Mason, 116 R.I. 614, 359 A.2d 682 (1976). The court there held that whiplash was a temporary condition which was not within the meaning of the Rhode Island Fair Employment Practices Act. This decision was based on the court's reading of the following definition:

> 'Physical handicap' means any physical disability, infirmity, malformation or disfigurement which is caused by bodily injury, birth defect or illness, including epilepsy, and *which shall include, but not be limited to,* any degree of paralysis, amputation, lack of physical coordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment or physical reliance on a seeing eye dog, wheelchair, or other remedial appliance or device.

R.I. GEN. LAWS § 28-5-6(h) (emphasis added).

The court read the list of handicaps contained in the statute to be exclusive, despite the clear language to the contrary. But more importantly, the court's decision supports the position set

The overriding concern is, therefore, one of stereotypes, and anything which fosters or maintains these attitudes should, to the extent possible, fall within the broad proscription. It is unlikely that stereotypes against permanently handicapped persons will be broken down if they are permitted in the case of temporary disabilities. Prejudices, attitudes and stereotypes are not so neatly compartmentalized, packaged up and pulled out depending on the length of time the particular condition will last. An employer who is permitted to deny employment to a lawyer with a broken leg because it is assumed that a lawyer needs the full use of two legs to be effective as a litigator, cannot be expected to hire a person whose left leg is paralyzed. However desirable it may appear to distinguish between the two in terms of what the law requires, such a distinction is not made in the day-to-day employment practices. It is a highly formalistic distinction which, if permitted to survive, would render the laws a virtual nullity. It is more reflective of the way lawyers and legislators think than the way employers run businesses.[115]

For the same reasons, a distinction cannot be maintained between real and perceived handicaps. When an employer regards an individual as handicapped and denies him or her employment for that reason, such a rejection must be considered illegal discrimination. If an employer may deny employment to a person whom he or she

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forth here. The evidence established that prior to her termination, the employee had satisfactorily performed her job for three weeks. She was discharged on the basis of her condition (whiplash) only after it was discovered during the course of her employment physical. Obviously, the employer viewed it as a handicap irrespective of whether it was permanent or not. In addition, the fact that she had worked successfully for three weeks clearly substantiated a finding that she was able to perform the job. Under the court's view, if the neck condition had been permanent and not temporary, the individual would have been protected by the Act. Nevertheless, the same assumption would still have operated to exclude this capable employee from continued employment. This points up the anomalous situation which is created by omitting temporary conditions from coverage and exemplifies the hurdles which handicapped persons must overcome to prove their capabilities.

115. Arguably, the inclusion of temporary disabilities could have the effect of diluting the protection for the severely handicapped. This could occur by making employers resentful of the broad coverage under such statutes, thereby increasing the hostility toward handicapped persons generally. However, studies which have been conducted regarding employment of the handicapped refute such an outcome. These studies indicate that favorable past experiences with disabled individuals contribute to the development of positive attitudes on the part of employers and to the actual rehiring of the workers. Nagi & Collette, *supra* note 46, at 25. Thus, the effect upon employers is more properly focused on how the employees ultimately perform rather than whether the disability is of a permanent or temporary nature.

Beyond this, the question is purely one of balancing the interests of the handicapped, to determine whether they are best served by including or excluding temporary disabilities. For the reasons discussed throughout this article, it is the position here that the handicapped will be best served by including temporary disabilities.

erroneously believes to be asthmatic, *a fortiori*, the employer will never hire someone who is in fact asthmatic. Whether the individual is actually handicapped or perceived to be handicapped, the same stereotypes are operative. To condone one situation but not the other creates an inherent contradiction. Again it is a formal legal distinction which, once placed in the employment setting quickly disappears. An employer simply will not, and cannot be expected to differentiate attitudes in such a manner.

C. Present Ability

There is the additional issue of whether present ability should be assessed in the employment setting or whether ability should include predictions about future abilities. The position here is that as with all other protected classes, the proper consideration is whether a handicapped individual is *presently* capable of performing the job. For the handicapped, the present ability is further measured by performance of the essential functions of the job with reasonable accommodation. This discussion does not deal with the instance of an applicant who, with certainty, will be unable to work in two or three months subsequent. Rather, most cases of this nature involve speculation about an individual who, although presently able to perform the job, is nonetheless denied employment because at some future date he or she "might" be rendered unable to work because of a particular condition.[116] Back injuries are among the most recurring conditions.[117] In these cases, handicapped persons are evaluated on the basis of

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116. *See* Chrysler Outboard Co. v. Wisconsin Dep't of Indus., Labor and Human Relations, 14 Fair Empl. Prac. Cas. 344 (Wis. Cir. Ct. 1976). There the court rejected the employer's refusal to hire a person with leukemia. The company sought to justify its refusal on the basis of (1) risk of future absences, and (2) insurance costs. In rejecting both rationales, the court observed that the statute was written in the present tense, and precluded employment decisions based on speculation that the individual might, at some future date, be unable to perform the job. *See also* Chicago, M., St. P. & Pac. R.R. Co. v. Wisconsin Dep't of Indus., Labor and Human Relations, 8 Fair Empl. Prac. Cas. 938, 215 N.W.2d 443 (Wis. 1974).

117. *See, e.g.*, Hoadley v. Olin Corp., No. 7400142 (Wis. DILHR 1976). In an unreported decision, the State Department held the discharge of an employee who had previously sustained a back injury, to be discrimination based on handicap in violation of the state statute. The hearing examiner's decision, sustained on appeal, indicates that there was no evidence in the record that the discharged employee was unable to perform the assigned duties. In her Accompanying Memorandum, the hearing examiner stated:

> "Nonetheless, *the law does not permit physicians or others to restrict persons with disabilities from performing jobs that they are capable of performing because of speculation that the employee may injure himself*. . . . In this case, the Complainant was able to perform his handyman's duties at the standards set by the Respondent . . . ." *Id.* at 5 (emphasis added).

assumptions about their abilities, both future and present, instead of what they are actually able to do.

Certain safeguards for the employer are built into the recommendation that present ability should control. The definition of "ability" as set forth earlier in the article,[118] includes factors of safety to the individual and customers, as well as business efficiency. This broad definition of ability coupled with the requirement that *present* ability be determinative, protects the employer's interests while at the same time removing speculation regarding future ability from the employment decision.

D. Voluntary and Involuntary Conditions

The final question is whether voluntary and involuntary conditions should be included within the scope of a protected class for the handicapped. Such conditions as obesity and alcoholism[119] are two prime examples. As in the case of temporary disabilities, to permit discrimination where the condition is voluntary, but prohibit it when it is medically based, is to make a distinction which does little to dispel stereotyped assumptions. For example, from the employer's viewpoint, all obese persons are perceived similarly. In order to discourage any assumptions about obese people, coverage should be extended to all or to none.

Whether the particular conditions are voluntary or not, all persons suffering from the handicap are susceptible to the same assumptions and the same discrimination. In addition, at some point a voluntary condition becomes involuntary, blurring the distinction that much more.[120] To protect only the involuntary conditions sets up the anomalous situation of protecting persons suffering from the same condition on the basis of origin.[121] While the society may initially

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118. *See* text following note 109 *supra*.

119. *See, e.g.*, Connecticut Gen. Life Ins. Co. v. Wisconsin Dep't of Indus., Labor and Human Relations, 13 Fair Empl. Prac. Cas. 1811 (Wis. Cir. Ct. 1975). There the court upheld the Department's finding of unlawful discrimination based on the handicap of alcoholism. The court reasoned that as with other conditions, employer's fears regarding alcoholism may constitute discrimination unrelated to ability. *See also* Davis v. Bucher, 17 Fair Empl. Prac. Cas. 918 (E.D. Pa. 1978); 45 C.F.R. § 84.1 (1977) [Appendix A (A)(4)].

120. A person may initially drink voluntarily. But an alcoholic no longer has control of his drinking and is instead considered to suffer from a disease. This view of alcoholism as a disease has gained some recognition in the courts. *See, e.g.*, Salzman v. United States, 405 F.2d 358 (D.C. Cir. 1968); Easter v. District of Columbia, 361 F.2d 50 (D.C. Cir. 1966).

121. Obesity can result from overeating or from a medically diagnosable problem. Arguably, a statute could extend protection in the case of overweight due to physiological causes but not when it results from overeating. As noted earlier, the employer's perceptions in either instance will be identical. Furthermore, overeating may in itself be attributed to emotional or psychological problems, placing the condition back under the statutory scope. This circuity is

feel greater sympathy for the involutarily handicapped, the source of the problem, once it is recognized to be a problem, has little relevance. These fine distinctions simply do not take account of the practical effects in the work setting.

What emerges is no doubt a far broader protection than many people initially sought or contemplated. But it is essential if all handicapped people are to be upgraded to the level of equal opportunity to achieve. Both the prejudices and erroneous assumptions which have operated to exclude the mentally and physically handicapped must be shattered. Fine distinctions between permanent and temporary, actual and perceived, cannot be maintained if the net effect is to perpetuate the attitudes sought to be destroyed. The protection must be extended to include the less than permanently handicapped, not only because they, too, are victimized by the discrimination, but also because anything less than that will detract from the protection of the severely handicapped.

V. CONCLUSION

There are two tasks which confront this society once the decision is made to protect the mentally and physically handicapped from discrimination in employment. First, the discriminatory practices must be made illegal. This requires a sensitivity to the special needs of this class and a recognition that equal opportunities are achieved differently for different classes. There is no single panacea which will suit all protected persons. Accordingly, a BFOQ based on race is impermissible. For the handicapped, a reasonable accomodation may be required. It is not favored treatment, but the mature realization that each class comes with its own unique characteristics.

Second, through legislation and education, existing prejudices must be eroded. If a solution is properly fashioned and handicapped persons are integrated into the mainstream of the work force, experience indicates a correlation between the development of positive attitudes by employers toward the handicapped and their experience with handicapped workers.[122] As with other minorities,[123] it may

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inevitable if the distinction is maintained between the voluntary and involuntary condition. *Accord,* Johnson v. City of New York, No. (S) GCD-36562-75 (N.Y. Div. H.R. 1976) (holding a refusal to hire because of obesity to constitute unlawful discrimination based on handicap).

122. Nagi & Collette, *supra* note 46, at 25.

123. A ten-year study by the Institute for Social Research at the University of Michigan reported that increased contact of whites with blacks caused a shift in attitudes by whites from negative to positive. The researchers concluded that with this increase in contact between the races, whites accordingly grew more accepting of blacks. While the research is by no means

be deduced that the full integration of handicapped persons into a wide range of employment situations will succeed in breaking down the prejudices and stereotypes regarding mentally and physically handicapped persons. And from that, fair employment practices will flow.

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conclusive, particularly because the improvement in attitudes generally was not as marked in employment as in other areas, it still suggests that overall increased contact and exposure between people helps to break down negative attitudes and prejudices. N.Y. Times, Aug. 18, 1975, at 1, col. 2.