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***E.E. BLACK, LTD. v. MARSHALL: A
PENETRATING INTERPRETATION OF
“HANDICAPPED INDIVIDUAL” FOR
SECTIONS 503 AND 504 OF THE
REHABILITATION ACT OF 1973 AND FOR
VARIOUS STATE EQUAL EMPLOYMENT
OPPORTUNITY STATUTES***

*by Andrew W. Haines**

The legal and constitutional status of the physically disabled—like their status in society and in the economy—is a reflection of underlying attitudes and assumptions concerning disability and of social policies based upon those attitudes. For the most part it is the *cultural definition* of disability, rather than the scientific or medical definition, which is instrumental in the ascription of capacities and incapacities, roles and rights, status and security. Thus a meaningful distinction may be made between “disability” and “handicap”—that is, between the *physical disability*, measured in objective scientific terms and the *social handicap* imposed upon the disabled by the cultural definition of their estate.¹

I. INTRODUCTION

The above quote implies a view about the term “disability” in the

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1. tenBroek and Matson, *The Disabled and the Law of Welfare*, 54 CALIF. L. REV. 809, 814 (1966) (emphasis in original). The authors continue their analysis of the culturally determined concept of “handicap” in the following:

Ideally these two concepts should be isomorphic; the “handicap” of being blind, for example, should correspond to the visual and physical limitations of blindness, without the superimposition of additional difficulties. In practice, however, the psychological and socio-economic handicap suffered by disabled persons far outweighs the actual physical restrictions resulting from their impairment. Their dependent and segregated status is not an index merely of their physical condition; to an extent only beginning to be recognized it is the product of cultural definition—an assumptive framework of myths, stereotypes, aversive responses, and outright prejudices, together with more rational and scientific evidence.

Id.

employment discrimination context that many persons are only now beginning to comprehend: the definition of "disability" in this setting is a complex matter, as society inextricably intertwines its cultural views of this term with its scientific views.² Indeed, the quotation implies that the statement "he or she is a handicapped individual" gains its meaning summarily from the cultural or employment context. Hence, we have great difficulty understanding the phrase "handicapped individual" in the abstract, or solely in scientific terms.

In light of the complexity of "disability," Congress has been un-

2. A disagreement exists among writers, legislators and courts about the proper denomination for the persons who are the subject of this article. For example, one view denominates these persons as "disabled"; it explains the interaction between the "disability" and the environment (the "handicap") as follows: "A disability is a condition of impairment, physical or mental, having an objective aspect that can usually be described by a physician A handicap is the cumulative result of the obstacles which disability interposes between the individual and his maximum functional level." B. HAMILTON, *COUNSELING THE HANDICAPPED IN THE REHABILITATION PROCESS* 17 (1950).

A second view denominates these persons as "disabled" with a different definition of "handicap." Here, the "handicap" does not equal the cumulative dysfunctions that some persons measure scientifically, with a traditional scale of incapacities and dysfunctions. Rather, this view determines "handicap" culturally. tenBroek and Matson make this point in the quote within the text.

A third view, relying on shared cultural attitudes, often merges the terms "disability" and "handicap," making them indistinguishable. For instance, the term "disability" means a "condition of being disabled: deprivation or lack especially of physical, intellectual, or emotional capacity or fitness" WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 642 (1976). Similarly, the term "handicap" means "a disadvantage that makes achievement unusually difficult; especially a physical disability that limits the capacity to work." *Id.* at 1027. This shared cultural view eschews the scientific precision of the above views in favor of a definition that brings together intuitions and actual cultural experiences and captures the idea of dysfunction. See generally Note, *Potluck Protections for Handicapped Discriminatees: The Need to Amend Title VII to Prohibit Discrimination on the Basis of Disability*, 8 LOY. U. CHI. L.J. 814 (1977).

A fourth view applies a "functional" definition, using only the terms "disabled" and "disability." See, e.g., DIVISION OF VOCATIONAL REHABILITATION, MINNESOTA DEPT. OF ECON. SECURITY, *THE ASSESSMENT OF DISABILITY IN MINNESOTA* (1978) [hereinafter cited as MINNESOTA ASSESSMENT].

For the purposes of this article, neither the lack of societal consensus nor the lack of consistency in the usage of a given denomination is important; rather, this article concentrates on the question of which persons deserve to be included in this statutorily protected group for equal employment opportunity purposes. This determination is not easily made, however; it involves an examination of a number of factors, including the complicated interaction of a given health condition, a particular occupation, and the perceptions of employers. Statutes must focus on the "true handicap" or the treatment that a handicapped person receives, that is, the imposition of cultural expectations on this individual, based primarily on stereotyped views about that individual's health condition. Because the focus is on the *social* handicap, this article will use the terms "handicap" (noun) and "handicapped" (adjective and occasionally a noun), as they more clearly refer to the social behavior than do the terms "disability" and "disabled." Where a statute demands the usage of the latter terms, however, an exception will be made.

able to adopt a precise definition for the pivotal phrase "handicapped individual" for any of the provisions of the Rehabilitation Act of 1973³ [hereinafter called the "Rehabilitation Act"]. This complexity forced Congress, through a trial and error method, to work continually to refine the definition so that the public had a "workable formula" for ascertaining who is a "handicapped individual" in the employment context of the Rehabilitation Act.⁴ Nonetheless, the administrative refinements of this statutory definition of "handicapped individual" for

3. Pub. L. No. 93-112, 87 Stat. 357 (1973) amended by the Rehabilitation Act Amendments of 1974, Pub. L. No. 93-516, 88 Stat. 1617 (1974), amended by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978, Pub. L. No. 95-602, 92 Stat. 2984 (1978) (current version at 29 U.S.C. §§ 701-796 (1976 & Supp. V 1981)) [collectively referred to as the "Rehabilitation Act," except where specifically discussed with the other statutes, at which point they will be referred to as the "Rehabilitation Act Amendments of 1974" and the "Rehabilitation Act Amendments of 1978"].

4. The importance of the Rehabilitation Act of 1973 within the employment context is more apparent when viewed in light of handicap discrimination in America. In early American society, individual human production and social contribution were significant measures of worth. Hence, society particularly denigrated those persons who were deemed incapable of human production or social contribution—either because society viewed them as dysfunctional, or because society viewed them as socially unsuitable for human interaction. Moreover, in the transition from an agrarian society to an industrial society, the importance of individual production doubled. Indeed, in our industrial society members now think in terms of individuals "transacting" their lives to maximize their human production. Thus, life is reduced to a commodity, with the importance of social contribution seriously diminished. In turn, a prejudice about the incapacity to produce deprives the stigmatized individuals of the "prized" commodity status, thus relegating them to the status of mendicants and aspiring welfare recipients. Essentially, these individuals are placed outside of a majority of the social, economic, and jurisprudential relations that the American industrial society creates (neither are they the center of critical Marxian analysis, however). In effect, the industrial society continues—in fact, it reinforces—the tradition of viewing these individuals who have undesirable health conditions as socially invisible persons; industrial society has therefore traditionally denied these persons employment access. Yet, Senator Birch Bayh once commented, "[t]he right to work is one of the most basic of all our cherished rights. Work gives an individual not only economic self-sufficiency, but also a sense of dignity, self worth, and the satisfaction of making a contribution to our society." Bayh, *Forward to the Symposium Issue on Employment Rights of the Handicapped*, 27 DE PAUL L. REV. 943 (1978). See also Cook, *Nondiscrimination in Employment Under the Rehabilitation Act of 1973*, 27 AM. U.L. REV. 31, 37 (1977).

Hence, the Rehabilitation Act compels a jettison of these societal biases about handicapped persons within federal employment settings that frequently deny equal job access. Nevertheless, owing to several important limitations in the Rehabilitation Act which prevent the statute from being a broad equal employment opportunity statute for the handicapped, several members of Congress proposed the Equal Employment Opportunity for the Handicapped Individuals Act of 1979. See S. 446, 96th Cong., 1st Sess. (1979), which proposed adding "handicapped individuals" to the "protected classes in section 703(a) of title VII. See generally Lehr, *Employer Duties to Accommodate Handicapped Employees: The Equal Employment Opportunity for Handicapped Individuals Act of 1980*, 41 THE ALA. LAW. 108 (1980); Lehr, *Employer Duties to Accommodate Handicapped Employees*, 31 LAB. L.J. 174 (1980) (discussing part of the proposed legislation).

the employment provisions in sections 503⁵ and 504⁶ of the Rehabilitation Act represent a concerted movement toward greater definitional precision than is observed in the statute's language. In fact, the administrative regulations do a commendable job of explaining the key components of the statutory definition, capturing the spirit of the above quotation.⁷ Yet, this complexity continues to create difficulties for any person—especially employers—using the statutory definition in various employment contexts. Important ambiguities in the statutory definition remain, however, and ambiguities are found also in the administrative refinements.

Moreover, the manifest ambiguities in the statutory definition of the Rehabilitation Act have a wider reach than this statute. Many state unfair discriminatory practices statutes⁸ prohibiting employment discrimination based on disability obtain direction from the statutory definition of "handicapped individual" in the Rehabilitation Act. The various legislators, administrators, and courts have relied upon the language and interpretations of this federal definition to define and interpret their respective state disability provision. Indeed, owing to the limited statutory coverage of the Rehabilitation Act, these state provisions become important adjuncts to the federal statute, thus creating a "national concept" of equal employment opportunity for the handicapped⁹ [hereinafter referred to as the "concept of EEO for the

5. Pub. L. No. 93-112, § 503, 87 Stat. 393 (1973) (codified as amended at 29 U.S.C. § 793 (Supp. V 1981)).

6. Pub. L. No. 93-112, § 508, 87 Stat. 393, 394 (1973), amended by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978, Pub. L. No. 95-602, §§ 119 and 122(d)(2), 92 Stat. 2982, 2987 (1978) (codified 29 U.S.C. § 794 (Supp. V 1981)).

7. See, e.g., 45 C.F.R. 84.1-99 (1982).

8. For a general discussion of these state statutes, see Bonfield, *The Substance of American Fair Employment Practices Legislation I: Employers*, 61 NW. U.L. REV. 907 (1967) and Bonfield, *The Substance of American Fair Employment Practices Legislation II—Employment Agencies, Labor Organizations, and Others*, 62 NW. U.L. REV. 19 (1967). For a general discussion of the theory underlying these statutes, see Fiss, *Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235 (1971).

Many of these state statutes represent efforts parallel to the Rehabilitation Act to translate the normative foundations of the concept of equal employment opportunity for the handicapped through various legislative schemes. At present, a majority of the states and the District of Columbia have legislation creating some degree of equal employment opportunity for the handicapped. For a discussion of this legislation, see Gittler, *Fair Employment and the Handicapped: A Legal Perspective*, 27 DE PAUL L. REV. 953 (1978), and Guy, *The Developing Law on Equal Opportunity for the Handicapped: An Overview and Analysis of Major Issues*, 7 BALF. L. REV. 183 (1978).

Interestingly, although some of the state statutes differ from the Rehabilitation Act in certain respects, insofar as the state statutes protect handicapped persons, they are influenced by interpretations of the provisions of the Rehabilitation Act.

9. For a discussion of the origins and outlines of the phrase "equal opportunity," which

handicapped"].

For the above reasons, the *E.E. Black, Ltd. v. Marshall*¹⁰ case represents a significant effort to advance our thinking about the Rehabilitation Act's definition of "handicapped individual." In fact, the court's opinion probably represents one of the most penetrating published analyses of this definition.¹¹ There now exists at least one court which

serves as the foundation for the concept of "equal employment opportunity" [hereinafter referred to as the "concept of EEO"], see Note, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969) [hereinafter "Developments"]. This note discusses the "classical formulation" or "equal opportunity" with its prominent laissez-faire orientation. Cf. J. RAWLS, *A THEORY OF JUSTICE* (1971), which argues that the "principle of fair equality of opportunity" mandates that society must not merely make careers open to all societal members, but should provide that all have "a fair chance to attain [careers]." *Id.* at 73. See also Frank & Munro, *The Original Understanding of "Equal Protection of the Laws,"* 1972 WASH. U.L.Q. 421, 442 n.61.

This article maintains that the meaning of the concept of equal opportunity in America has shifted over time. The present concept of equal opportunity comes closer to Rawls' conception than the view in "Developments," *supra*. See also, J. TENBROEK, *EQUAL UNDER LAW* 201-39 (First Collier Books ed. 1965); Frank & Munro, *supra* at 435-443; R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 150-83 (1977).

Hence, the concept of EEO is a "flexible social mechanism" for achieving a "fair equality of opportunity" in the workplace. Because society struggles to separate the socially constructive modes of employment behavior (which deny this "fair equality of opportunity,") from the socially destructive modes of employment behavior, our "relational concept" of EEO becomes a complicated social measurement for distinguishing between appropriate and inappropriate employment practices. In essence, this legal construct is a plexus of ideas that synergistically interact to determine the parameters and perimeters of equality in a given employment setting for a given protected class member, without losing its connection to the ethic of equality for the genus of persons and to a sense of reasonableness in weighing other societal interests. For this reason, experience teaches us that a varietal concept of EEO requires a sensitive and flexible social mechanism for weighing a *complex* of social interests: the constructive schemes used by employers differentiate between applicants and employees; the protection of the employment rights of traditional and potential victims of irrational and arbitrary employment decisions; a protection of the employment rights of other innocent individuals (co-workers or co-applicants); and the protection of a host of societal interests including the health and safety of numerous individuals, as well as the protection of the integrity of other valuable social policies. Nevertheless we should not forget that the doctrines of justice and equality that Rawls describes simultaneously serve as societal ballasts, guides, and goals in the delicate weighing and coordinating of various social interests and policies, as society attempts to resolve the crucial equality struggle within the employment context.

10. 497 F. Supp. 1088 (D. Hawaii 1980).

11. For other analyses, see Cook, *Nondiscrimination in Employment Under the Rehabilitation Act of 1973*, 27 AM. U.L. REV. 31 (1977), and Guy, *supra* note 8, at 224-33. Cf. *Advocates for the Handicapped v. Sears, Roebuck & Co.*, 67 Ill. App. 3d 512, 517; 385 N.E.2d 39, 43 (1978), *cert. denied*, 44 U.S. 981 (1979); *Burgess v. Joseph Schlitz Brewing Co.*, 298 N.C. 520, 524-27, 259 S.E.2d 248, 250-53 (1979); *Chicago, M., St. P. & Pac. R.R. v. Washington State Human Rights Comm'n*, 87 Wash. 2d 802, 805-06, 557 P.2d 307, 310 (1976); *Barnes v. Washington Natural Gas Co.*, 22 Wash. App. 576, 591 P.2d 461, 463-65 (1979); *Chicago, M., St. P. & Pac. R.R. v. State Dep't of Indus., Labor & Human Relations*, 62 Wis. 2d 392, 215 N.W.2d 443, 446 (1974). See also Note, *Employment Discrimination—*

understands the complexity of this definition and which has offered, accordingly, its own refinement of the administrative regulations under sections 503 and 504, with an eye toward correctly capturing the spirit of the opening quote and the Rehabilitation Act.

This article will closely examine the court's opinion in *E.E. Black, Ltd.* to illuminate the court's refinement of the definition of "handicapped individual," so that the reader may understand what the court actually stated in addition to further analysis. To accomplish this goal, the background and concepts of the case will be examined.

II. THE FACTS OF *E.E. BLACK, LTD.*

The facts of *E.E. Black, Ltd.* provide insight into the problems created by the Rehabilitation Act's definition of "handicapped individual." In 1973 George Crosby, a thirty-one year old man, entered the apprenticeship training program of the United Brotherhood of Carpenters in Honolulu, Hawaii.¹² The program, which required 8000 hours of field work, involved on-the-job training designed to teach the basic carpentry skills necessary to attain the status of journeyman carpenter.¹³ Between 1973 and 1976, Crosby worked for several construction contractors. In the process, he amassed in excess of 3600 hours of field work toward his journeyman's certificate.¹⁴ During 1974, however, Crosby injured his lower back on a construction site in the act of transporting lumber. The injury required several months of medical treatment.¹⁵ Although Crosby subsequently complained of pain in his lower back while laying concrete forms, the attending physician was unable to locate the source of pain and Crosby immediately returned to work.¹⁶

In 1976, the union referred Crosby and other apprentice carpenters to E.E. Black, Ltd., a general construction contractor.¹⁷ Crosby's back was radiographed during a pre-employment physical examination required by Black of all apprentice contractor applicants.¹⁸ The x-rays indicated that Crosby was suffering from a congenital lower back anomaly, diagnosed as a partially sacralized transitional vertebra,

Judicial Identification of the "Handicapped Person" in North Carolina, 16 WAKE FOREST L. REV. 836 (1980).

12. *E.E. Black, Ltd. v. Marshall*, 497 F. Supp. 1088, 1091 (1980).

13. *Id.* at 1091.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

otherwise known as a "lumbosacral anomalous joint."¹⁹ Consequently, the physician recommended that Crosby was a "poor risk" for heavy work, and Black rejected Crosby for the apprentice opening.²⁰

Subsequent to these events, a second physician, an orthopedist who was not associated with Black, examined Crosby.²¹ In addition to the lumbosacral anomalous joint, the physician uncovered other anomalies: a spina bifida occulta and a mild rotoscoliosis.²² Nonetheless, this physician concluded that the lower back conditions did *not* disqualify Crosby from performing the duties of an apprentice, indicating that Crosby could control this condition through a good physical fitness program.²³ Although Crosby supplied Black with the second physician's diagnosis, Black refused to hire him.²⁴

Later in 1976 Crosby filed a complaint with the State of Hawaii Department of Labor alleging that Black had refused to employ him as an apprentice carpenter "because of a congenital abnormality in his back."²⁵ The Hawaii Department of Labor referred the complaint to the United States Department of Labor [hereinafter "DOL"].²⁶ The Office of Federal Contract Compliance Programs [hereinafter "OFCCP"] investigated the complaint and concluded that Black had violated the Rehabilitation Act, section 503, and the implementing regulations.²⁷ For this reason, the OFCCP issued an administrative complaint, specifically charging Black with violating the Rehabilitation Act and the regulations by "failing and refusing to hire qualified handicapped individuals and by failing and refusing to take affirmative action to employ, advance in employment and otherwise treat qualified handicapped individuals without discrimination."²⁸

In a 1978 hearing, *Office of Federal Contract Compliance Programs v. E.E. Black, Ltd.*,²⁹ the administrative law judge dismissed the entire complaint against E.E. Black, Ltd. and the other defendants, reasoning that Crosby was not a "handicapped individual" under section 503 of

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* at 1092.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* at 1093.

28. *Id.*

29. See 19 Fair Empl. Prac. Cas. (BNA) 1624 (1979), wherein the Assistant Secretary of Labor for Employment Standards summarizes the unreported opinion of the administrative law judge.

the Rehabilitation Act.³⁰

The OFCCP then appealed the judge's Recommended Decision and Order to the Assistant Secretary of Labor, Employment Standards Administration.³¹ The Assistant Secretary, after denying a motion by the defendants to disqualify the Secretary of Labor, the DOL, and the Assistant Secretary, issued a Decision and Order affirming several of the judge's rulings, findings, and conclusions, and modifying the remainder.³² The Assistant Secretary reasoned that Crosby *was* a "handicapped individual" under section 503 of the Rehabilitation Act; thus, Crosby deserved the relief sought by OFCCP for E.E. Black, Ltd.'s violation of the statute.³³

The Assistant Secretary's decision was upheld by the district court in *E.E. Black, Ltd. v. Marshall*,³⁴ and partial summary judgment was granted against E.E. Black, Ltd. The court upheld the constitutionality of the definition of "handicapped individual" contained in both the Rehabilitation Act and the regulations and held that Crosby was a "handicapped individual" within its provisions.³⁵

III. THE DEFINITION OF "HANDICAPPED INDIVIDUAL" IN THE REHABILITATION ACT OF 1973

The definition of "handicapped individual" in the Rehabilitation Act evolved over a short span of time. Congress initially defined the phrase with an emphasis on employment and vocational rehabilitation.³⁶ In 1974, Congress redefined the phrase to encompass a much broader group of persons.³⁷ Finally, in 1978, Congress expanded the

30. *Id.* at 1626. The administrative law judge, according to the Assistant Secretary, "held that only persons with impairments, as of the time of the alleged discrimination, which impeded their ability to perform many or most jobs, measured against the full spectrum of possible employments, were covered under the Act as a 'handicapped individual.'" *Id.* The judge concluded that Crosby did not come within this category. *See also id.* at 1632-33.

31. *Id.* at 1627.

32. *Id.* at 1627-33.

33. *Id.* at 1636-37.

34. 497 F. Supp. at 1104.

35. *Id.*

36. "[A]ny individual who (A) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and (B) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services provided pursuant to Title I and III of this Act." Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (1973) (current version at 29 U.S.C. § 706(7)(B) (Supp. V 1981)).

37. "For the purposes of titles IV and V of this Act, such term means any person who (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." Pub. L. No. 93-516, § 111(a), 88 Stat. 1619-20 (1974) (codified

definition specifically to exclude from the employment related sections "any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs [either] prevents such individual from performing the duties of the job in question or . . . would constitute a direct threat to property or the safety of others."³⁸

The brevity of the statutory definition and the complexity of the subject necessitated promulgation by the various administrative agencies having responsibility for section 503 and 504 of a more detailed statement of the definition of "handicapped individual" in their administrative regulations.³⁹ For example, the Secretary of Labor issued sec-

at 29 U.S.C. § 706(7)(B) (Supp. V 1981)). For a full discussion of the legislative philosophy underlying the changes, see the Senate Committee Report that accompanied the bill. S. REP. No. 93-1297, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS, 6388-90.

The Senate Committee Report summed up the new definition as follows: "The proposed definition basically is divided into two parts: Clause (A), which deals with persons who actually have physical or mental impairments; and clauses (B) and (C) dealing with persons who are the subjects of discrimination because they are *seen* as having such impairments." *Id.* at 6414.

38. Pub. L. No. 95-602, § 122(a), 92 Stat. at 2984-85 (codified as amended at 29 U.S.C. § 706(7)(B) (Supp. III 2979)). For an illuminating discussion of this amendment, see the remarks of Sen. Cannon (the author of the Senate version), Sen. Williams, and Sen. Hathaway in 124 CONG. REC. S15566-15569 (Sept. 20, 1978). In particular, Sen. Williams noted that Sen. Cannon's amendment sought to remedy the injury of the House bill, H.R. 12467, which would have excluded alcoholics and drug abusers "in need of rehabilitation"; instead the amendment protects persons in need of rehabilitation, provided they can perform the essential functions of the job—in essence, they are "qualified." *Id.* at S15567-15568. See also Jacobs, *Employment Discrimination and the Handicapped: Some New Teeth for a "Paper Tiger"—The Rehabilitation Act of 1973*, 23 How. L.J. 481, 488-89 (1980).

39. Under the coordination of the United States Equal Employment Opportunity Commission, [hereinafter "EEOC"] all federal agencies are required to formulate plans for an affirmative action program for handicapped individuals.

In section 503, Congress imposed a duty of affirmative action on all parties who contract with a federal agency or department for goods and services for contracts in excess of \$2,500 to employ and advance all "qualified handicapped" individuals. Pub. L. No. 93-112, § 503, 87 Stat. 393 (1973) (codified as amended at 29 U.S.C. § 793 (1976 & Supp. V 1981)). Additionally, section 503 provides a grievance procedure for handicapped persons who believe that they have been injured by a federal contractor or subcontractor. Pursuant to statutory authority, the Office of Federal Contract Compliance Programs in the Department of Labor has promulgated regulations to implement section 503. 41 C.F.R. §§ 60-741.1 to 60-741.54 (1982). According to Executive Order No. 11,758, 39 Fed. Reg. 2075 (1974), the President delegated authority to the Secretary of Labor to promulgate regulations implementing § 503(a). Pursuant to Executive Order No. 11,246, the OFCCP administers the affirmative action programs, which require that federal contractors and subcontractors with contracts for \$10,000 or more engage in affirmative action to eliminate discrimination in employment on the basis of race, color, religion, sex, or national origin.

Pursuant to section 111(b) of the 1974 Amendments to the Rehabilitation Act, Pub. L. No. 93-651, 89 Stat. 2-3 (1974) (codified at 29 U.S.C. §§ 701-794 (Supp. III 1979)). Congress imposed the section 503 affirmative action obligations on state agencies and on facilities for

tion 503 regulations explaining the phrase in this manner:

"Handicapped individual" means any person who (1) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (2) has a record of such impairment, or (3) is regarded as having such an impairment. For purposes of this part, a handicapped individual is "substantially limited" if he or she is likely to experience difficulty in securing, retaining or advancing in employment because of a handicap.⁴⁰

In a further attempt at clarification, the Secretary of Labor provided detailed definitions for such key terms as "impairment,"⁴¹ "major life activities,"⁴² and "substantially limits."⁴³ The DOL also explained the very important phrase "is regarded as having such impairment" in the section 503 regulations.⁴⁴

On the other hand, the Department of Health and Human Services [hereinafter "HHS"] and the DOL in the later section 504 regulations, give the same terms more specific explanations than does the DOL in its section 503 regulations.⁴⁵

Plainly, this multi-tiered definition of "handicapped individual"—"handicapped individual" is itself a tier of the larger category of "handicap"⁴⁶ in the HEW section 504 regulation, which combines "handicapped individual" with "qualified handicapped person"⁴⁷ to

handicapped persons funded under title I of the Rehabilitation Act. Pub. L. 93-651, § 111(b), 89 Stat. 2-5 (1974) (codified at 29 U.S.C. § 721(a) (Supp. 1981)).

40. 41 C.F.R. § 60-741.2 (1982).

41. "(d) All medical documentation required under this section shall be based upon the American Medical Association Guides to the Evaluation of Permanent Impairment, provided that the Guides shall be used only to determine the existence of impairment without regard to the degree of impairment." 41 C.F.R. § 60-741.7 (1982).

42. "'Life Activities' may be considered to include communication, ambulation, self-care, socialization, education, vocational training, employment, transportation, adapting to housing, etc. For the purpose of section 503 of the Act, primary attention is given to those life activities that affect employability." 41 C.F.R. § 60-741 Appendix A (1982).

43. "The phrase '*substantially limits*' means the degree that the impairment affects employability. A handicapped individual who is likely to experience difficulty in securing, retaining or advancing in employment would be considered substantially limited." *Id.*

44. "'*Is regarded as having such an impairment*' refers to those individuals who are perceived as having a handicap, whether an impairment exists or not, but who, because of attitudes or for any other reason, are regarded as handicapped by employers, or supervisors who have an effect on the individual securing, retaining or advancing in employment." *Id.*

45. 45 C.F.R. §§ 84.3(j)(2)(i), (ii), (iv), and § 32.3 (1982); 45 Fed. Reg. 66,706, 66,709 (1980) (codified at 29 C.F.R. § 32) (1982).

46. *See* 45 C.F.R. § 84.3(e) (1982).

47. *See* 45 C.F.R. § 84.3(b) (1982). *See also* Guy, *supra* note 8, at 269-70, & nn.313, 314. An employer faces the difficult task of ascertaining the line separating the "otherwise quali-

complete the "statutory handicap,"—creates a description of the phrase that is consonant with both the social realities and the social policies that underlie the concept of EEO for the handicapped. The description neither focuses narrowly on the reception of governmental benefits, such as vocational rehabilitation services,⁴⁸ nor on a host of other designations such as those in our medical etiology, rehabilitation statutes, traditional societal notions, or the views of various individuals.⁴⁹ The statute and regulations adroitly incorporate all of the above compo-

fied handicapped person"—the individual who, although impaired, can with reasonable accommodations perform the essential functions of the job—from the "unqualified handicapped person"—the individual who cannot perform the essential functions of the job even with accommodations. To make that judgment, employers must face two general questions: first, who is a "handicapped person"; and second, when is the person "unqualified" to perform the work tasks. While this latter question is second in the order of the analysis, it dwarfs the first in order of importance and difficulty. See *Southeastern Community College v. Davis*, 442 U.S. 397, 412-13 (1979). By the very nature of the immensity, subtlety, and complexity of this second question, employers, as well as critics, may misperceive its resolution.

48. See *supra* note 39.

49. See, e.g., CAL. GOVT. CODE § 12926(h) (West Supp. 1982); KY. REV. STAT. § 207.130(2) (1982); N.Y. EXEC. LAW § 292(21) (McKinney 1982); MINN. STAT. § 129A.01(d) (Supp. 1980); MINN. STAT. § 176.131(b) (1980); Chicago, M., St. P. & Pac. R.R. v. State Dep't of Indus., Labor & Human Relations, 62 Wis. 2d 392, 398 n.1, 215 N.W.2d 443, 446 n.1 (1974). See also C.R. ATHERTON, D. BRIELAND & L. CASTIN, *CONTEMPORARY SOCIAL WORK: AN INTRODUCTION TO SOCIAL WELFARE* 321-22 (1975) (Major disabling conditions (50% of all disabled persons) are heart conditions, arthritis, and rheumatism; other major conditions are "impairments of the back or spine, lower extremities, and hips; mental and nervous conditions; visual impairments; and hypertension." The conditions vary according to age, however, with the back or spine being the major disabler for those age 17 through 44, and heart disease for persons over 44.); Baker & Karol, *Employee Insurance Benefit Plans and Discrimination on the Basis of Handicap*, 27 DE PAUL L. REV. 1013, 1026 n.40 (1978) (citing an HEW publication that lists health conditions according to activity limitations: heart conditions, arthritis with rheumatism, and hypertension are leading activity limitations; paralysis, visual impairments, amputations, and mental retardation, while still considered handicaps, are less limiting to activities).

Shortly after the passage of the Rehabilitation Act and the disability amendments to the Minnesota Human Rights Act in 1974, the author conducted an informal survey of several Minnesota-based corporations concerning their employment practices in light of the statutes. In one of these surveys, a corporate official indicated that his company adopted the commercially-shaped definition of "occupational disabled." Interview with Corporate Interviewee No. 4 (Feb. 10, 1975). In sum, this company turned its determination of the statutory coverage of the health condition on "what occupation is under consideration." *Id.* Another interviewee from a different corporation offered the vague, but far from socially maverick definition of a "health condition of less than wholeness." Interview with Corporate Interviewee No. 5 (Feb. 10, 1975). Still a third interviewee argued that the handicap in a commercial setting is often a "complex of factors," or it is a "combination of conditions" that renders a given individual "handicapped" in the eyes of an employer. Interview with Corporate Interviewee No. 3 (Jan. 22, 1975). For instance, this interviewee stated that although high blood pressure alone is not usually considered a handicapping condition, the confluence of age and high blood pressure may discourage employers from hiring. *Id.* Moreover, one of the above interviewees also adopted the approach of excluding "curable conditions,"

nents into the description, sensitively playing upon the societally derived nature and source of the term "handicap." In addition, the definition makes a revolutionary step forward: it incorporates the *treatment* by societal members of the individual who possesses an objectionable and stigmatized health condition. In short, the various phrases—"handicapped person," "impairment," "major life activities," "substantially limits," and "is regarded as having an impairment"—evince a legislative recognition that a "handicap" is a complex concept. The "true disability" in the employment context is a complicated composition of societal views formulated around a variety of health conditions, resulting in prejudice that denies employment access to the myriad of individuals who possess these health conditions.⁵⁰

Based on the above, one can conclude that Congress adopted a view different from those in society whose definition of "handicapped individual" turns solely on the presence of severe dysfunctions (as if this dysfunction is reified apart from a social context), horrible disfigurements and dreadful diseases, referred to by some as "severely impaired individuals," "severely disabled individuals," or simply "substantially handicapped individuals."

The Rehabilitation Act recognizes that the term "handicap," in cases of employment discrimination, signifies either: (1) a health dysfunction which does not disqualify an individual but requires reasonable accommodation; or (2) an employer's view of a health condition as a permanent limitation on the social mobility of a given individual. An employer's adherence to this second interpretation "handicaps" the prospective job applicant, regardless of whether that person's condition severely impairs physical movement. Consequently, Congress clarified this point by adopting the above definition of "handicap" in the Rehabilitation Act; if employers make a "social handicap" a complicated web of attitudes affecting employment decisions, the statutory definition cannot escape possessing a complicated character.

A brief examination of the differences between section 503 and

because the term "handicap" generally connotes a "relatively permanent" health condition. Interview with Corporate Interviewee No. 4 (Feb. 10, 1975).

As shown by the surveys, the general public's attitudes are diverse. This diversity demonstrates the complexity of the social realities confronting any handicap employment discrimination statute. The court in *E.E. Black, Ltd. v. Marshall*, 497 F. Supp. 1088 (D. Hawaii 1980) appeared to understand the breadth of the definition, observing that Congress did not intend to restrict the definition to the medical etiology. *Id.* at 1098. This definitional approach leaves open the possibility of the future inclusion of health conditions that societal attitudes transform into "handicaps." See Cook, *supra* note 11, at 47 n.100.

50. See *supra* note 1 and accompanying text.

section 504 affecting the definition of "handicapped individual" is instructive. In section 503, Congress imposed upon all parties who contract with the federal government for goods and services in excess of \$2,500 a duty to employ and advance all "qualified handicapped individuals."⁵¹ On the other hand, in section 504 Congress sought to prevent discrimination against an "otherwise qualified handicapped individual" in the operations of all public and private sector activities or programs that receive federal financial assistance.⁵² Despite the different orientations and scopes of the two provisions, both refer to the definition of "handicapped individual" set forth in the Rehabilitation Act. It has been argued, however, that the employer who is asked to take affirmative efforts to employ and advance a "qualified handicapped individual" should be governed by a narrower definition of this phrase. Under this interpretation, the term "impairment" as applied to the employer governed by section 503 would apply only to the "most disabling" impairments, thus distinguishing between the definition of "handicapped individual" for sections 503 and 504. The implication is that Congress sought to give affirmative action benefits *only* to a limited number of severely disabled persons under section 503, while providing broad protection against discrimination for all handicapped persons under section 504. Although the certainty of this interpretation is attractive to employers, it does not receive clear support in the language of the Rehabilitation Act; indeed, the Rehabilitation Act's language contravenes this interpretation.

IV. THE AMBIGUITY AND CONCEPTUAL PROBLEMS IN THE REHABILITATION ACT'S DEFINITION OF "HANDICAPPED INDIVIDUAL"

While the definition of "handicapped individual" in the Rehabilitation Act is consonant with the social policy of providing broad statutory protection for the myriad of persons who are discriminated against on the basis of their health conditions, at the same time it presents *troublesome* ambiguities and conceptual problems for those applying the definition. Indeed, a superficial examination of the language fails to illuminate the *significant* amount of complexity that lies beneath the surface of the definition. It is therefore essential that employers avoid

51. Pub. L. 93-112, § 503, 87 Stat. 393 (1973) (codified as amended at 29 U.S.C. § 793 (Supp. V 1982)).

52. Pub. L. 93-112, § 504, 87 Stat. 393, 394 (1973) *amended by* the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978, Pub. L. 95-602, §§ 119 and 122(d)(2), 92 Stat. 2982, 2987 (1978) (codified in 29 U.S.C. § 794 (Supp. V 1982)).

hasty judgments about who is a "handicapped individual." Nonetheless, ambiguities and conceptual problems are endemic to the process of creating the *complicated web-like* definition for "handicapped individual" to provide for equal employment opportunity. For example, if the phrase "handicapped individual" covers individuals who possess health conditions other than those traditionally viewed as severe mental and physical dysfunctions, and the statutory definition makes the treatment by employers a focal point, how does the definition avoid having a *totally open-ended* character?⁵³ Hence, any person who closely examines the definition of "handicapped individual" in the Rehabilitation Act soon discovers what the HHS admitted earlier in promulgating its section 504 regulations: that great complexities confront any legislative and administrative attempts to address "handicap" employment discrimination.⁵⁴ Accordingly, all analyses must adjust to these endemic difficulties. The critical analytical question becomes: can the type of definition in the Rehabilitation Act adequately protect the myriad of health conditions that form the basis for employers' irrational employment decisions, while providing a specific and workable formula to enable employers to distinguish the protected health conditions from the unprotected conditions?⁵⁵

53. See S. REP. NO. 93-1297, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 6373, 6413, (emphasis added) setting forth this cautionary note:

The Act presently contains in section 7(6) one definition of "handicapped individual" to apply to all programs and provision in the Act. Experience since enactment has indicated that the existing definition which was derived from the previous Vocational Rehabilitation Act with some modifications, is far too narrow and constricting when removed from the context of trying to focus on the needs of individuals for vocational rehabilitational services in connection with a vocational goal. Thus, a new definition has been developed which would provide sufficient latitude (but still not be *totally open ended*), particularly for the nondiscrimination programs carried out under sections 501, 503, and 504 with respect to the employment of handicapped individuals in the Federal Government, under Federal contracts and sub-contracts, pursuant to the provision of Federal financial assistance

54. See *supra* note 4.

55. The "critical analytical question" is actually a modification of a much larger societal problem. See E. BODENHEIMER, *POWER, LAW, AND SOCIETY* at 133-34 (citation omitted). Bodenheimer observes:

The truly critical problem posed to legal and social policy is not to extirpate all forms of inequality, but to segregate irrational and arbitrary categories of differentiation from reasonable and constructive schemes and to eliminate or reduce the former ones. It will always be necessary to preserve those inequalities which are indispensable to the effective discharge of social functions.

American society is constantly engaged in attempts to resolve this "crucial equality struggle" in various contexts, including the employment context. In fact, our social ethic centers on the resolution of this struggle, as the Declaration of Independence and the Constitution demonstrate. The quality of an individual's social existence in America, and therefore the smooth functioning of society, depends upon the avoidance and satisfactory

This question cannot be answered without first examining several of the ambiguities and conceptual problems in the Rehabilitation Act's definition. First, the analyzer discovers a vague statutory explanation for the term "impairment." Certainly the term denotes those mental and physical conditions, disorders, or anatomical losses that *functionally affect* the bodily systems.⁵⁶ Is this sufficient, however? Should not the term also include those mental and physical health conditions that merely *arise out of* or *relate to* the body's operations, but that *do not actually impair* the body's operations? In addition, should not the term also include health conditions that "impair" (actually "stigmatize") the individual only in the sense of diminishing that individual's employment value for a given employer or set of employers, using the statutory phrase "is regarded as having an impairment" to support this interpretation? While some analyzers might argue that this phrase encompasses only health conditions viewed by employers as physical interferences with a given job, both DOL and HHS in their section 503 and 504 regulations adopt the "diminishment of employment value" idea.⁵⁷ Hence, one must comprehend the shift in the "impairment" explanation; the term has two aspects, a "dysfunction" aspect and a "treatment" aspect.

Despite this interpretation's uncertainty, the governmental agencies have adopted a logically defensible idea. Many individuals who face job discrimination do not experience a physical interference with their job performances; these persons most likely have cosmetic problems or radiographic anomalies. Indeed, several of these persons are not aware of their physiological variances until the employer in-

removal of any discord caused by inequalities not compelled by serious social demands. As the "rational concepts" of EEO represent society's mechanisms for distinguishing between the appropriate and inappropriate employment practices, the latter being socially destructive modes of behavior, a cornerstone of those concepts is the determination of the individual or class of individuals deserving protection at any given moment. Hence, the definition of "handicapped individual" is a *vital* part of the relational concept of EEO for the handicapped.

56. The HEW regulation excluded discrimination based on age, homosexuality, lack of talent, cultural disadvantage, economic disadvantage, and the status of convicted criminal. Hence, an individual can make a claim to be handicapped, relying on any of the above statuses, but not the statuses themselves. For instance, a hockey player who is rejected by a professional hockey team on the basis of a lack of hockey talent cannot argue that he possesses an "impairment" under the Rehabilitation Act type definition; however, if he possesses vision only in one eye, then he can claim that he possesses an "impairment" under this type of definition. *See, e.g., Neeld v. American Hockey League*, 439 F. Supp. 459 (W.D.N.Y. 1977).

57. *See* 41 C.F.R. § 60-741.2, Appendix A (1982), explaining the phrase "is regarded as having such an impairment"; 45 C.F.R. § 84.3(j)(2)(i) and (iv)(A) (1982).

forms them that the respective health condition diminishes their employment value. Hence, the "impairment" for these individuals relates primarily to the employer's *treatment* often originating in indistinct and unrefined perceptions of job fitness or job suitability. Accordingly, the perception of these health conditions illustrates that the idea of "impairment" is inextricably intertwined with the complicated web of employment attitudes about certain health conditions. The employer's treatment can transform a seemingly insignificant health condition into a meaningful employment barrier within the spirit of the term "impairment."

Second, the analyzer discovers a nebulous statutory explanation for the phrase "major life activities." While the interpreter could adopt the approach of DOL in the section 503 regulation by broadly defining the phrase so as to encompass "those life activities that affect employability,"⁵⁸ such a definition addresses only part of the concern and even misdirects attention. Moreover, both the approach of HHS in its section 504 regulation and the approach of DOL in its section 504 regulation—where the agencies use the phrase "major life activities" to cover "working"⁵⁹—leave the subject unclear. At some moments, as the previous "impairment" discussion illustrated, the statute must refer to other concerns *beyond* the physical interference that the health condition creates with the individual's performance of a given job. The statute must consider employment realities; it must recognize employment treatment that interferes with the *securement, advancement, or retention* of a given job based on stereotypical attitudes about health conditions.

In sum, one must closely examine "major life activities" so as to interpret the phrase in a manner that captures the spirit of the statutory definition of "handicapped individual;" as a result, one must expand the ideas of "those life activities that affect employability" and "working" to cover *the employer's* behavior, and not restrict these phrases to the impact that the health condition has on a given job *performance*. One could simply take the approach that DOL adopts in its section 503 regulation by attaching these ideas to the meaning of "substantially limits";⁶⁰ however, this approach unacceptably submerges the employer's treatment within the "activity" of the health condition—i.e., the health condition "substantially limits"—without sharply declaring

58. See 41 C.F.R. § 60-741, Appendix A (1982).

59. See 45 C.F.R. § 84.3(j)(2)(ii) (1982); 45 Fed. Reg. 66,710 (1980) (codified at 29 C.F.R. 32.3).

60. See 41 C.F.R. § 60-741, Appendix A (1982).

that either the health condition or the employer's treatment can affect these "major life activities" in the employment context. This approach of the DOL section 503 regulation, therefore, compels an examination of the phrase "is regarded as having an impairment"⁶¹ to uncover the above-mentioned ideas about "impairment" and "major life activities."

Third, the analyzer discovers an uncertain statutory explanation of the phrase "substantially limits." When read together with the other phrases mentioned above, what does "substantially limits" mean? For example, should the analyzer adopt only a quantitative meaning for the phrase? Should it refer only to the number of jobs that the health condition or the employer's treatment affects, or, stated differently, should the phrase encompass only the effect on the *general employability* of a given individual? On the other hand, should the analyzer adopt both a quantitative and qualitative meaning? In essence, should the analyzer interpret the phrase to encompass the effect that the "impairment" has on a *specific employability* of a given individual?

Certainly one can adopt the view that the phrase covers an "impairment" that makes a particular individual generally unemployable. Because a given health condition can foreclose numerous job opportunities, in the dysfunction sense of "impairment," the health condition will materially affect the general employability of the particular individual in the quantitative sense of the phrase "substantially limits." For example, health conditions such as paraplegia, a total loss of vision, or a total loss of hearing may physically interfere with a given individual's performance of many jobs, assuming that the employer has identified job-related, necessary job functions.⁶² Moreover, these health conditions often lead to the belief that the work performance of the persons who possess them will be impaired on numerous jobs, regardless of whether the conditions actually create such physical interferences; indeed, even if these health conditions do not so generally limit the given individual, many employers will still believe that these types of health conditions have the *potential* for such sweeping impact

61. *Id.*

62. The requirement of job-relatedness in the handicap context assumes the character of a *very* demanding test of the connection of the employment selection criteria to each job for which an employer uses them. In an effort to escape the numerous conceptual and practical problems, employers must assume a *heavy* responsibility to broaden their job-relatedness assessments so that they contain the needed rigor and so that they avoid adoption of superficial and emotion-based speculations. The idea of job-relatedness in the handicap setting denotes more than the words of *Griggs v. Duke Power Co.*, 401 U.S. at 431, actually denote about the concept of job-relatedness. For an intimation of this point, see generally, *South-eastern Community College v. Davis*, 442 U.S. 397 (1979).

on *general employability*. Hence, individuals who possess these types of health conditions discover that many employers believe that the conditions "make achievement unusually difficult," and that, in turn, many employers will disqualify these individuals for numerous jobs.

Correspondingly, one can expand the quantitative analysis beyond the above idea. In several instances, the foreclosure of numerous employment opportunities relates, at best, only to the health condition's effect—through the employer's treatment—on the securement, advancement, or retention of a given job, not to the actual physical interference or potential physical interference with the performance of a given job. For example, individuals who have "cured" or "controllable" health conditions often experience general employment foreclosures because of employers' perceptions of their unsuitability for various jobs by making others feel uncomfortable,⁶³ or by increasing

63. The word "perceived" denotes the shift in focus in examination of the interaction of certain health conditions and the work environment. The focus centers on the perceptions (and resulting attitudes) of the employers, in contrast to the employer's observations or a history of verifiable dysfunctions. In essence, the perceptions of dysfunction or social unsuitability spring from the stereotypes and prejudices of the general society, not necessarily from the actual functional limitations caused by the individual's health condition. This Article refers to these conditions as "Perceived Handicaps." See also Gittler, *Fair Employment and the Handicapped: A Legal Perspective*, 27 DE PAUL L. REV. 953 at 983-84 (1978); Barnes v. Washington Natural Gas Co., 22 Wash. App. 576, 591 P.2d 461 (1979) wherein the court stated:

It is the intent of the legislature to prohibit discrimination in employment against a person with a sensory handicap. It would be an anomalous situation if discrimination in employment would be prohibited against those who possess the handicap but would not include within the class a person "perceived" by the employer to have the handicap.

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

Some of these "Perceived Handicaps" are rooted in the potential for dysfunction of certain health conditions, which the jaundiced perceptions of the societal members make the focal point of any judgments about the capabilities of the individuals who possess these stigmatized health conditions. With this potential, particularly in light of its nexus to the idea of job capabilities and work productivity, the individual who has a "Perceived Handicap" has a particularly difficult time convincing courts that handicap employment discrimination happened.

A new frontier of "Perceived Handicaps" may be unfolding in the employment practices of some American industrial companies: the rejection of numerous individuals whose inherent and immutable health conditions concern employers because these individuals possess a perceived "hypersusceptability" to a variety of diseases, cancers, and industrial injuries that their industrial jobs may trigger. See *Genetic Tests by Industry Raise Questions on Rights of Workers*, N.Y. Times, Feb. 3, 1980, § 1, at 1, col. 1; *Psychosomatic Medicine Finds Why Work Can Be Sickening*, N.Y. Times, Feb. 3, 1980, § 4 (This Week In Review), at 22E. Moreover, the perception of unfitness for a given employment setting may or may not relate to concerns of future dysfunctions; often the unfitness perception is grounded only in fears of future legal liability and paternalism.

On the other hand, some persons with "Perceived Handicaps" are individuals whose health conditions cause embarrassment, uneasiness, and fear in other members of society.

employers' insurance rates.⁶⁴ Nevertheless, should the analysis end here? Is it possible to move beyond the above meanings for "substantially limits"? Unfortunately, the analyzer confronts an ambivalence in answering this last question. If one turns away from the quantitative analyses, troublesome conceptual problems are encountered. If one adopts only the quantitative analyses, the employer's task of identifying a "handicapped individual" is apparently simplified while objectionable statutory ambiguities and ironies are created in the definition of "handicapped individual." On the other hand, if one also adopts a qualitative analysis, the statutory definition becomes greatly complicated, as does the identification task of employers; for, in effect, the qualitative interpretation connotes an expansion of the statutory definition to encompass *every* rejection by *every* statutorily covered employer because the decision based on the health condition *amounts* to a "substantial limitation."⁶⁵ In essence, this qualitative analysis appears to "trivialize" the phrase "substantially limits" to the point that the latter seems boundless and hence rather nonsensical.

Notwithstanding the above fear and projected difficulty with the qualitative analysis, social realities compel use of a qualitative analysis in interpreting the phrase "substantially limits." Situations arise where the loss of even a single job by an individual based on an "impairment"

The perception of unsuitability for a given employment setting does not necessarily relate to a dysfunction, although the employer may disingenuously clothe his judgments about these health conditions in terms of dysfunctions. Hence, the focal point becomes the employer's treatment, not the dysfunction caused by the health condition.

64. See, e.g., Baker & Karol, *supra* note 49; Fabing and Barrow, *Encouragement of Employment of the Handicapped—Extension of Second Injury Fund Principles to Persons Having Latent Impairments*, 8 VAND. L. REV. 575 (1955). See also Chrysler Outboard Corp. v. Department of Indus., Labor & Human Relations, 13 Empl. Prac. Dec. (CCH) ¶ 11,526 at 6883 (Wis. Cir. Ct. 1976) (the employer also used the risk of higher insurance costs as a justification for denying employment to a handicapped individual); Journal Co. v. Department of Indus., Labor & Human Relations, 13 Empl. Prac. Dec. (CCH) ¶ 11,400 at 6361 (Wis. Cir. Ct. 1976) (the Wisconsin Fair Employment Act prohibited an employer from extracting a blanket medical claim waiver from an employee who had a pre-existing health condition); *Advocates for Handicapped v. Sears, Roebuck & Co.*, *supra* note 11.

65. For a consideration of this point, see the report of the SENATE COMM. ON LABOR AND HUMAN RESOURCES, EQUAL EMPLOYMENT OPPORTUNITY FOR HANDICAPPED INDIVIDUALS ACT OF 1979, S. REP. NO. 316, 96th Cong., 1st Sess. (1979). The Senate Report states:

It is, therefore, the Committee's intention that the term "impairment" as used in the definition of "handicap" does not extend to individuals with only minor or very temporary impairments or to those who do not have any condition that is stigmatizing or that otherwise more generally limits employment or some other major life activity. Rather the term is intended to apply only to more long-term or permanent, or recurring, conditions.

Id. at 6.

surely comes within the meaning of "substantially limits," owing to the privation coming within the spirit of the term "handicap." For example, one can assume that a governmental unit rejects a candidate for an engineering position because that person has a history of epilepsy. As this employer is the first employer to base its decision on this health condition, the quantitative foreclosure consideration does not easily apply, even if this employment action is projected into numerous other employment settings to infer that this particular employer exhibits the first of many such actions. Such projections are difficult without further qualification of the phrase "substantially limits;" one does not simply predict that other employers will reject the applicant on this basis. Moreover, it is probable that this applicant may still use his engineering background to secure many other jobs, including other engineering jobs. Hence, it is difficult to give content to the phrase "substantially limits" in the context of *general employability*. Still, we can clearly state one point: the employer's attitudes about the health condition certainly limit this individual's securement of a *desired* engineering job to which this individual can apply his *special training*.⁶⁶ Accordingly, we can state that the employer treats this "impairment" as if it "substantially limits" the specially trained individual from obtaining the job he desires.

Yet, even an applicant who does not possess special training can experience this type of qualitative employment loss. For example, an individual who recently returned to work in a state government's department of natural resources after treatment for chemical dependency applies for a position, which he has long deserved, as a conservation officer with that same agency. Because he only recently acknowledged the chemical dependency, he lacks a history of rejections based on this condition. Further, this individual might still locate other jobs. Nonetheless, this individual experiences a substantial limitation on his *desired* occupational choice, regardless of his other occupational opportunities. Moreover, the employer treats this "impairment" as if it "substantially limits" the individual's securement of this job. Hence, one could argue that the synergism of the thwarted desires and the employer's treatment gives "substance" to this qualitative analysis within the phrase "substantially limits."

Although these two qualitative interpretations make the phrase "substantially limits" difficult to apply within the matrix of "impairment" and "major life activities" in the definition of "handicapped in-

66. See *E.E. Black, Ltd. v. Marshall*, 497 F. Supp. 1088, 1099 (1980).

dividual," the spirit of the EEO concept within the Rehabilitation Act impels the adoption of these interpretations. The concern over the slurring of the boundaries of the phrase "substantially limits," prompted by the fear that every isolated and single job denial, promotion refusal, or termination based on an "impairment" will constitute a statutorily cognizable action, should not compel a rejection of the qualitative interpretation. If the qualitative interpretation is rejected, the spirit of the concept of EEO for the handicapped is disjoined from a concordant statutory coverage that encompasses numerous significant social privations, and, in the process, even greater conceptual problems are created than would exist under a qualitative interpretation. In essence, the integrity of the statutory definition of "handicapped individual" requires the adoption of this qualitative interpretation of the phrase "substantially limits."

Rather than resting on the assertion made above, an examination of the conceptual problems that the rejection of the qualitative analysis would create is edifying. If the analyzer rejects the qualitative analysis in certain "first-time rejection" fact situations—the facts of *E.E. Black, Ltd.*, for example—the statute would create an "anomalous gift" for the employer: one free act of handicap employment discrimination that the statute does not treat as a cognizable act, even though the employer's behavior plainly falls within the spirit of the statute. The net effect is obvious: the first employer can unfairly treat the applicant based on the latter's health condition without fear of statutory retribution, while the statute penalizes each successive employer who mistreats this applicant owing to the fact that these subsequent acts come within the *quantitative* interpretation of "substantially limits."

Also, a rejection of the qualitative analysis in the above types of situations multiplies the ironies. For instance, how should one analyze Crosby's reapplication to *E.E. Black, Ltd.*? Do the seriatim rejections come within the phrase "substantially limits" owing to the quantitative factor? Or does one separate these rejections from the original rejection, saying that each subsequent rejection is a distinct treatment that fails to come within the statute? If one treats these employment acts cumulatively as quantitative limitations, a shrewd applicant merely has to return one or more times to the same employer to activate the statute. On the other hand, isolation of these employment acts as separate, qualified limitations creates a conceptual difficulty for the quantitative interpretation. Moreover, what if four other candidates who have health conditions similar to Crosby apply to *E.E. Black, Ltd.* on or about the same time as Crosby, and *E.E. Black, Ltd.* gives them their

first rejection simultaneously with Crosby? Must the analyzer interpret the phrase "substantially limits" as if those five simultaneous rejections (or seriatim rejections if this pattern exists) are isolated, noncognizable qualitative limitations? Or should one interpret these rejections as a series of acts that are only cognizable under the statute as quantitative limitations, as if the series of rejections is only significant due to the combined force and frequency of the rejections? If one treats these rejections separately, this interpretation places each applicant in the position of the single applicant who was discussed above, encouraging each of the applicants to pursue the route of reapplying to set the stage for the quantitative analysis. On the other hand, if the analyzer combines the various rejections on the basis that together they give content to the quantitative interpretation, this approach turns the statutory coverage for each individual on the fortuity of each individual applying at the same moment or within close proximity of other applicants who are similarly rejected.

In addition, the rejection of the qualitative interpretation creates another interesting irony: the same employer who rejects Crosby, or who rejects Crosby and the other four applicants—although only the first such employer—*treats* each applicant as if the "impairment" "substantially limits" each person's employability, while simultaneously arguing that the "impairment" *does not* "substantially limit" each individual's employability. In sum, this employer comes within the spirit of the statute—even if the particular applicant or others fail to view the applicant as "handicapped." Certainly *fundamental fairness* impels one to disregard the employer's sophistry about "substantially limits" when the employer's behavior indicates a contrary view.

Finally, the rejection of the qualitative interpretation *encourages* all statutorily covered employers to commit at least "one free violation" of the statute—against not just one individual but against numerous applicants who have a variety of health conditions that the employer treats as "handicaps" within the spirit of the statute. In essence, the rejection of the qualitative interpretation fosters an emasculation of the statute, all in the laudatory quest of gaining clarity and certainty in the statutory interpretation of the phrase "handicapped individual."

Notwithstanding the adoption of the qualitative and quantitative interpretations for the phrase "substantially limits," a serious question remains about the boundaries of the phrase, and, by extension, about the definition of "handicapped individual."⁶⁷ On one hand, if only the

67. *See supra* note 53 and note 65.

quantitative interpretation is adopted, the definition of "substantially limits" seems simple, though this approach compromises the integrity of the definition of "handicapped individual." On the other hand, if both meanings of "substantially limits" are adopted, one must establish some boundaries for "substantially limits," or accept the criticism that this approach makes the definition of "handicapped individual" *totally open-ended*.

What course of action should the analyzer follow? More importantly, what course of action seems consonant with the spirit of the Rehabilitation Act? The adoption of the two meanings for "substantially limits" harmonizes the definition of "handicapped individual" with the spirit of the statute even in the face of the complication it creates. Apparently both HHS and DOL hold similar views, with the first manifesting its view through the explanation of the phrase "is regarded as having an impairment,"⁶⁸ while the second manifests its view through the same phrase⁶⁹ and through its definition of the phrase "substantially limits."⁷⁰ It should be noted, however, that neither administrative effort fully addresses the matter of the *totally open-ended* definition; indeed further analysis of the definition of "handicapped individual" is necessary beyond the language in the DOL's section 503 regulation, and even beyond the language in HHS's section 504 regulation, to discover the boundaries of the definition.

Finally, there is one other important ambiguity: whether the phrases "impairment" and "substantially limits" introduce a duration requirement in the definition of "handicapped individual." For example, must one speak in terms of a permanent, progressive, or recurring "impairment," in contrast to speaking in terms of a temporary or controllable "impairment?" Certainly the introduction of such a temporal feature would serve to delimit effectively the statutory definition of "handicapped individual," so that the objectionable *minor* and *temporary* "impairment" falls outside of the statutory coverage. Such a requirement in the statutory definition seems inappropriate, however, as a general policy; an "impairment" should qualify under the statute even though that mental or physical condition would be temporary or controllable, as the discriminatee will still experience a denial of employment access in the short run, and may even experience a denial of employment access in the long run if a given employer stigmatizes the health condition and treats the person as a "handicapped individual"

68. 45 C.F.R. § 84.3(j)(2)(iv).

69. 41 C.F.R. § 60-741, Appendix A.

70. *Id.*

regardless of the duration of the health condition. Moreover, this requirement would diminish the role of the employer's treatment in determining who is a "handicapped individual" in many instances. In effect, this requirement would seriously narrow the role of the employer's treatment within the matrix of "impairments," "major life activities," and "substantially limits" within the definition. For these reasons, and possibly for others, neither HHS nor DOL inserted this duration requirement within their administrative interpretations, nor did the Congress originally insert this requirement within the statutory language.

The ambiguity and conceptual problems inherent in the Rehabilitation Act's definition of "handicapped individual" are also found in the definitions contained in various state unfair discriminatory practices statutes. In fact, in comparison with the state statutes, the definitional effort of the Rehabilitation Act is a model of clarity.⁷¹ The conclusion may be drawn, therefore, that ambiguity and conceptual problems are endemic to all legislative and administrative efforts to define "handicapped individual" in the setting of equal employment opportunity.

Returning to the critical analytical question, the Rehabilitation Act's definition of "handicapped individual" adequately protects the myriad victims of handicap employment discrimination, and provides a specific and workable formula for employers. However, in some *limited* instances—the exact number cannot be determined—the definition protects the handicapped job applicant while supplying a blurred formula for employers. Such was the backdrop facing the adjudicatory bodies in the various stages of the *E.E. Black, Ltd.* case.

71. Two words accurately characterize the legislative and administrative efforts of the states: *uncertainty* and *confusion*. Several legislatures exhibit an uncertain commitment to the concept of EEO for the handicapped, which is manifested in their uncertainty over who is "handicapped" and whether the latter term should embrace the concept of "reasonable accommodation." Also, several legislatures and administrative agencies manifest confusion about the meaning of equal employment access for handicapped individuals; they have difficulty translating this meaning into a fairly clear definition of "handicapped individual" in light of employers' complex irrational behavior in the area of health-based discrimination. Consequently, several of these state definitions lack the intellectual rigor that surfaces in the Rehabilitation Act's definition; indeed the more intellectually rigorous of the state definitions either parallel or adopt the definition and attendant interpretations of the Rehabilitation Act. For these reasons, the definition of the Rehabilitation Act, even with its ambiguity and conceptual problems, represents a very strong effort to define "handicapped individual."

V. *E.E. BLACK, LTD.*A. *The Administrative Law Judge's Opinion*

Following an administrative hearing, wherein both the administrative complainant and the respondent presented testimony—including a large amount of medical testimony⁷²—the administrative law judge issued a decision. While the law judge acknowledged that the parties agreed that Crosby could presently “perform all the physical functions of a carpenter’s apprentice,”⁷³ the medical disagreement centered on whether Crosby’s health condition “tends to lead to back pain and injury in the future.”⁷⁴ Yet, the law judge did not make this controversy a focal point of the opinion; rather, he focused on the statutory term “impairment” in response to the interpretation of the Rehabilitation Act and regulations by all parties.

In this regard, the law judge rejected the respondent’s argument about the meaning of the term: that “impairment” referred “only to those impairments referenced in the American Medical Association Guides to the Evaluation of Permanent Impairment.”⁷⁵ Instead, the law judge reasoned that this view too narrowly interpreted the statute, as the statute itself did not mention the Guides, the only reference thereto appearing in the regulations.⁷⁶ In the law judge’s opinion, one could not adopt the respondent’s view absent a clear reference to the Guides in the statute.⁷⁷ The law judge reasoned the regulations mention the Guides only to create a “reference point for standardizing the medical documentation apt to be required in Section 503 matters and that the Guide was not to be used to circumscribe substantive rights.”⁷⁸ Consequently, the law judge adopted a “plain ordinary everyday meaning” for the term: “any condition which weakens, diminishes, restricts, or otherwise damages an individual’s health or physical or mental activity.”⁷⁹

The interpretation of the phrase “substantially limits” became the second focal point of the decision.⁸⁰ The judge reasoned that Congress sought to effect a limited purpose with the enactment of section 503 by

72. See 19 Fair Empl. Prac. Cas. (BNA) at 1628-29.

73. *Id.* at 1629.

74. *Id.* at 1629-30.

75. *Id.* at 1631.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

protecting *only* the most "disabling" impairments, rather than *all* impairments.⁸¹ In the law judge's view, "not every person who actually experiences difficulty in getting a job because of an actual or perceived impairment"⁸² comes within the definition of "handicapped individual." He thus required the DOL to demonstrate that Crosby's impairment was so severe that it limited his employment generally; in essence that Crosby's impairment at the time of the discrimination impeded "activities relevant to many or most jobs, measured against the full spectrum of possible employments."⁸³ However, as the DOL had not demonstrated that Crosby's "perceived impairment" had "present functional significance," the law judge stated that "it follows *a fortiori* that this impairment was not perceived as impeding activities indigent to many or most jobs or as limiting any of Mr. Crosby's major life activities."⁸⁴ Moreover, the law judge reasoned that any future functional significance for the "perceived impairment" did not affect this analysis, even if it played a role "in establishing that employment was substantially limited."⁸⁵ The DOL would still fall short in its proof because the foreclosed opportunities in heavy labor jobs comprised *only* a relatively small "percentage of all jobs available in the labor force,"⁸⁶ and this disqualification "would not necessarily affect his ability to perform the vast majority of jobs."⁸⁷

B. *The Assistant Secretary's Opinion*

After the above decision, the OFCCP filed exceptions with the Assistant Secretary of Labor, Employment Standards Administration.⁸⁸ The Assistant Secretary generally adopted the findings of fact of the law judge,⁸⁹ however, the Assistant Secretary did not adopt all of the law judge's legal analyses. The Assistant Secretary agreed that the law judge correctly interpreted the term "impairment."⁹⁰ In the Assistant Secretary's view, that interpretation properly captured the spirit and

81. *Id.* at 1632.

82. *Id.*

83. *Id.* See also *E.E. Black, Ltd. v. Marshall*, 497 F. Supp. at 1094.

84. *E.E. Black, Ltd. v. Marshall*, 497 F. Supp. at 1094.

85. *Id.* The quote is the district court speaking, *not* the administrative law judge.

86. *Id.*

87. *Id.*

88. 19 Fair Empl. Prac. Cas. (BNA) at 1627; see also *E.E. Black, Ltd. v. Marshall*, 497 F. Supp. at 1094.

89. 19 Fair Empl. Prac. Cas. (BNA) at 1627-33; see also *E.E. Black, Ltd. v. Marshall*, 497 F. Supp. at 1094.

90. 19 Fair Empl. Prac. Cas. (BNA) at 1631; see also *E.E. Black, Ltd. v. Marshall*, 497 F. Supp. at 1094.

intent of the 1974 amendments to the Rehabilitation Act,⁹¹ which revised the definition of "handicapped individual." The Assistant Secretary rejected the administrative law judge's interpretation of "substantially limits." In essence, the former viewed the latter's interpretation as too restrictive.⁹²

To support the decision, the Assistant Secretary first analyzed the three clauses in the section 7(6) definition of "handicapped individual" in the Rehabilitation Act.⁹³ This analysis laid the foundation for an interpretation of the third clause: "*is regarded as having* a physical or mental impairment which substantially limits one or more major life activities."⁹⁴ The Assistant Secretary's view of this clause coincided with the OFCCP's interpretation that the clause protected a wide range of "perceived handicaps," thus including such a person as Crosby, because Crosby's physician perceived Crosby as possessing a "physical condition which lessened the strength and integrity of his back, predisposing him to back disease and/or injury."⁹⁵ While the impairment had a less than substantial effect upon a major life activity, the federal contractor *regarded* the impairment as a substantial limitation. Accordingly, the Assistant Secretary rejected the administrative judge's proof requirement—the showing that the impairment impeded activities relevant to many or most jobs.⁹⁶ In its place, the Assistant Secretary adopted this approach: the impairment need only be a "current bar to the employment of one's choice with a federal contractor which the individual is currently capable of performing."⁹⁷ Thus, the Assistant Secretary determined that because perceived impairment prevented Mr. Crosby from securing the job he wanted, he was a handicapped individual under the definitions set forth in the Act and regulations—irrespective of the impairment's lack of present functional significance.⁹⁸

C. *The District Court's Opinion*

The federal district court examined E.E. Black's motion for summary judgment.⁹⁹ In response to the constitutional challenges, the

91. 19 Fair Empl. Prac. Cas. (BNA) at 1631.

92. *Id.*

93. *Id.*

94. *Id.* at 1632 (emphasis in original).

95. *Id.*

96. *Id.* at 1633.

97. *Id.*

98. *Id.*

99. E.E. Black, Ltd. v. Marshall, 497 F. Supp. at 1096.

court first considered the definitions of "impairment" and "is regarded as having an impairment."¹⁰⁰ As the administrative law judge and the Assistant Secretary had done, the district court acknowledged the absence of definition of "impairment" in the statute, and found that the common sense definition best corresponded to the intent of Congress in enacting the Rehabilitation Act.¹⁰¹ Moreover, the court stated that this meaning of "impairment" makes the phrase "is regarded as having an impairment" "almost self-explanatory."¹⁰² Consequently, the court reasoned that "persons of common intelligence should have had fair warning that the term impairment" possesses the common sense definition accorded to it by the administrative law judge and Assistant Secretary.¹⁰³ Accordingly, owing to the imprecision of words and the congressional intent "to protect a large number of people in a broad range of situations,"¹⁰⁴ the court accepted the imprecision of the statutory definition and acknowledged that the statute may fail to furnish a "fair warning of its meaning" in some instances.¹⁰⁵ Nonetheless, the court concluded that E.E. Black, Ltd. had fair warning that their action in disqualifying Crosby on the basis of a perceived abnormality came within the meaning of the statute.¹⁰⁶

Next, the court turned to the definitions of "substantially limits" and "substantial handicap to employment." Following a reference to the relevant statutory passage and regulations, the court reviewed the interpretations of the administrative law judge and the Assistant Secretary, but the court refused to accept either interpretation.¹⁰⁷ The court called the Assistant Secretary's interpretation of the Act and regulations "overbroad," because it included too many persons within the statutory coverage.¹⁰⁸

On the other hand, the court called the administrative law judge's interpretation invalid because it created a very restrictive definition of

100. *Id.* at 1097.

101. *Id.* at 1097-98.

102. *Id.* at 1098.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at 1099.

108. *Id.* The court held that Congress did not intend to make the statute so broad as to include an employer's rejection of an individual capable of performing a given job based on a real or perceived impairment. If such had been its intent,

Congress would not have used the terms *substantial* handicap or *substantially* limits—they would have said 'any handicap to employment' or 'in any way limits one or more of such person's major life activities.' The Assistant Secretary's definition ignores the word *substantial*. Such a definition contravenes the statutory language and is therefore invalid.

"handicapped individual."¹⁰⁹ In the court's view, the "impairment" need not affect the individual's "employability generally."¹¹⁰ Thus, the court concluded:

The definitions contained in the Act are personal and must be evaluated by looking at the particular individual. A handicapped individual is one who "has a physical or mental disability *which for such individual* constitutes or results in a substantial handicap to employment" It is the impaired individual that must be examined, and not just the impairment in the abstract.¹¹¹

Interestingly, the court proceeded to analyze further the administrative law judge's interpretation. The court took great care to address the law judge's fear "that focusing on particular jobs or particular fields rather than employability in general would lead to anomalous results."¹¹² The court concluded that such concerns are unnecessary because of the statute's provision that some individuals are incapable of performing a particular job and hence are not qualified handicapped individuals under the statute.¹¹³ Consequently, the court made the *touchstone* of the definition of "handicapped individual" the "individual job seeker," not the objectified or perceived impairment.¹¹⁴ Moreover, the court pointed out that this approach "necessitates a case-by-case determination of whether the impairment or perceived impairment of a rejected, qualified job seeker, constitutes, for that individual, a substantial handicap to employment."¹¹⁵

In an effort to give substance to its interpretation, the court re-

109. *Id.*

110. *Id.*

111. *Id.* (emphasis in original).

112. *Id.* at 1099-1100.

113. *Id.* at 1100. In responding to the concern of the administrative law judge about the undesirable consequences of adopting a broad definition that focuses on the denied access to particular jobs rather than denied access to general employability, the court analyzed the administrative judge's examples of a frustrated aspirant who is refused a job as a Dallas Cowboy running back because he is unable to run 100 yards in 10 seconds or less, an aspiring concert pianist who is denied a job because of small hands, and an aspiring professional basketball player who is denied a job because he is 5'5". The court concluded that the three individuals were outside the Act, not because their impairments did not substantially limit employability, but because they were not capable of performing a particular job. In effect, these individuals were not "qualified handicapped individuals." This analysis is sound, as it gives due consideration to the distinction between a "handicapped" person and a "qualified handicapped individual." Thus, one could view the above three individuals as "handicapped" persons using the court's analysis of "substantially limits," even though they may fail to be "qualified handicapped individuals" who receive the full protection of the statute.

114. *Id.*

115. *Id.*

vealed the "factor analysis" it recommended for a "case-by-case" approach. First, the court reasoned, the "[f]actors that are important in the case-by-case determination are the number and types of jobs from which the impaired individual is disqualified."¹¹⁶ Importantly, the court started with the view that the analysis should encompass only generally used criteria or qualifications, not those "job criteria or qualifications used by the individual employer."¹¹⁷ This starting point prevents a wily employer from using an "aberrational type of job qualification" that would screen out an impaired individual who is capable of performing a particular job, saying that since others do not use this criterion the "impairment does not constitute a substantial handicap to employment," and, therefore, the individual is not "handicapped."¹¹⁸ Nonetheless, the court noted that such a view can lead to the improper hypothesis "that if the criteria of the rejecting employer were generalized to all employers, then all employers would have to be viewed as if they would reject the applicant."¹¹⁹ The court argued that such a conclusion seems untenable because an employer's rejection depends more on a particular location than on a particular job, making the rejecting employer's criteria inapplicable to other employers.¹²⁰ Hence, the court suggested that the analysis requires the ascertainment of the "number of employers in the relevant area" to whom the criteria do apply.¹²¹

After ascertaining the number of employers affected by the controlling criteria, the court reasoned that one must ascertain to what types of jobs the rejection would apply.¹²² This quest, like the search for the controlling criteria, demands objectivity; it involves rejecting the superficial disclaimers that the job applicant unfortunately did not qualify for the only available position, but that the person would qualify for other jobs.¹²³ The court argued that the analyzer must discover the genus of foreclosed jobs, which, in the instant case, were "all jobs that required heavy lifting."¹²⁴

Beyond the above, the court reasoned that one must determine to

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 1101.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

what geographical area the applicant possesses reasonable access.¹²⁵ This view relates to the position noted earlier that the location often affects the rejection more than the particular job. Accordingly, this quest demands ascertainment of the geographical area to determine whether other employers could offer the applicant the same or a similar job.¹²⁶ In the court's view, rejection by the only employer for a given position in the affected area constitutes more of a handicap than there would be if 100 other employers in the same area offered the same job.¹²⁷

Second, the court reasoned that the analysis should consider the individual applicant's job expectations and training.¹²⁸ Yet, the court noted that the narrowness of the analysis eludes easy articulation of the breadth of the disqualification, given the "entire spectrum of available jobs," to identify the individual with a substantial handicap.¹²⁹ In the court's view, the analysis of the Assistant Secretary came closer to an adequate solution than that of the administrative law judge.¹³⁰ Hence, the court reasoned that if the individual experiences a disqualification "from the same or similar jobs offered by employers throughout the area to which he had reasonable access," the real or perceived impairment constitutes a substantial handicap.¹³¹

In concluding this portion of the analysis, the court made an important observation about the obvious compromise compelled by the Rehabilitation Act's definition:

Predicting whether the Act provides coverage in certain difficult or close cases may be hard for an employer. Yet, the court believes that Congress intended the coverage of the Act to be broad in scope and intended that questions as to that coverage be answered on a case-by-case basis. Both of these intentions would be defeated if the coverage of the Act were reduced because of narrow definitions of "substantially limits" and "substantial handicap to employment."¹³²

Openly, then, the court admits that the definition cannot possess a crystal clear character, for any attempt to mirror the complex social interac-

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* at 1102.

tions that underlie the term "handicapped" leads to a large margin of elasticity and, hence, ambiguity in the statutory definition.

In order to apply the above analysis, the court examined the facts in light of its interpretation of the Act. First, the court addressed the existence of an "impairment." In its view, Crosby undoubtedly possessed an "impairment," or was *regarded* as possessing an "impairment."¹³³ Black perceived Crosby's "back problem" as weakening, diminishing, and restricting Crosby's physical activity; it therefore deemed Crosby unsuited for jobs involving heavy labor.¹³⁴

Second, the court concluded that "Crosby's impairment constituted, for him, a substantial handicap to employment."¹³⁵ Black's rejection based on Crosby's health disqualified Crosby for all of Black's apprentice carpenter positions. Moreover, the court noted, if "all firms offering similar positions involving heavy lifting used the same criteria as Black," Crosby would have experienced similar disqualifications.¹³⁶ Considering Crosby's need to amass the 8,000 hours for his journeyman status, and Black's failure to demonstrate that similar positions or similar fields would have been available to Crosby had all such firms used Black's criteria, Black's disqualification constituted a substantial handicap to employment.¹³⁷ Moreover, the court indicated the significance of the dimensions of "substantially limits:" "men of common intelligence would not be shocked to find out that a person is substantially impaired in finding employment if he is disqualified from pursuing the profession of his choice."¹³⁸ The court concluded this discussion with two points: Black used a criteria that related to the job, not to a particular location, and Crosby would not have obtained a similar position if Black's criteria had applied generally.¹³⁹

Finally, the court considered Crosby's capability of performing the job of apprentice carpenter at the moment of rejection. The court reasoned that the only relevant inquiry was the present capability to perform the job; the "[n]on-imminent risk of future injury may possibly be a reason for rejecting an applicant, but it does not make an otherwise capable person incapable."¹⁴⁰

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* at 1103.

140. *Id.*

VI. AN ANALYSIS OF THE DISTRICT COURT'S OPINION

The article shall now examine whether, in light of the ambiguity in the Rehabilitation Act's definition, the district court's refinement of the workable formula for determining who is a "handicapped individual" adequately reduces the vagueness in the definition. As stated, any definition that attempts to capture the *cultural dimension* of disability—that "assumptive framework of myths, stereotypes, aversive responses, and outright prejudices"¹⁴¹—cannot escape a measure of openness, as the definition must contain sufficient fluidity to encompass this *dynamic and complicated web of attitudes* that impede employment access to handicapped individuals. For this reason, this article cannot unfairly criticize the district court's opinion for failing to render an interpretation that removes all ambiguity. Thus, the inquiry becomes what is the *acceptable range of ambiguity*, and how well does the district court's opinion guide us in this quest?

It should be noted that the district court rejected the efforts of E.E. Black, Ltd. to disjoin the section 503 definition of "handicapped individual" from the section 504 definition. First, the court rejected the argument "that all impairments must be defined by reference to the American Medical Association Guides to the Evaluation of Permanent Impairment."¹⁴² Second, the court rejected the administrative law judge's view that Congress sought to protect only persons with the "most disabling" impairments. Accordingly, the district court implied that the general orientation of section 503 should not lead to a different definition of "handicapped individual" than can be found in section 504.¹⁴³

Further, it should be noted that the district court's analysis of "impairment" and "regarded as having an impairment" seems open to challenge. In point of fact, the district court adopted the "impairment" interpretation of the administrative law judge: an "impairment" is "any condition which weakens, diminishes, restricts, or otherwise damages an individual's health or physical or mental activity."¹⁴⁴ This interpretation can unfortunately narrow the scope of the phrase "is regarded as having an impairment." In essence, the district court's

141. See *supra* text accompanying note 1.

142. See *supra* note 75 and accompanying text.

143. It runs counter to common sense that Congress would create separate definitions—one for affirmative action purposes under section 503, which would protect only the "most disabling" impairments, and another for the general anti-discrimination purposes under section 504—for both the severely disabled and the less severely disabled.

144. E.E. Black, Ltd., 497 F. Supp. at 1093.

"impairment" definition can easily lead to a physical interference orientation for the phrase "is regarded as having an impairment," leading the phrase to be interpreted as relating to those impairments that physically interfere with working. The opinion appears to disregard the idea that "impairment" should also cover those physical and mental conditions *arising from* or *relating to* the body's operations, simply diminishing, from an employer's perspective, the employment value of an individual. By failing to underscore this view, the court's opinion fails to give the recognition to the interpretation of "is regarded as having such an impairment" that the administrative agencies have adopted: that "impairment" also arises when the treatment and attitudes of others have a substantial impact on an individual's securement, retention, or advancement in a given job.

The above criticism may best be illustrated through several hypotheticals. Suppose that Mr. Crosby's health condition had not resulted in pain, discomfiture, or physical interference with his job, and E.E. Black, Ltd.'s rejection represented the first time any employer had informed Crosby about the existence of his lower back condition. Further, suppose that an individual who has facial and bodily disfigurements from fire burns encounters an employer who rejects this individual based on the disfigurements. This person also has never experienced a physical interference with employment tasks, though he may have experienced previous pains of discomfiture. While the employer may argue that each of the above health conditions might cause a future injury to the particular individual on a given job, or that each condition might create some other problem for the business operations, the *pivotal* consideration is the treatment by the employer. Indeed, the argument that these health conditions have the potential for physical interference quite frequently is a disingenuous claim which serves to mask other reasons for a rejection by creating the "aura of plausibility." The touchstone here is not a health condition that *disables* in the physical sense, but a health condition that *stigmatizes* in the value diminishment sense.

Notwithstanding the above criticism, the argument remains that the definition of "impairment" should not be so broad as to contribute to a *totally open-ended* definition of "handicapped individual." Put another way, many persons do not want to extend the term "impairment" to cover a variety of "minor or temporary impairments," or to cover those individuals who lack a stigmatizing health condition.¹⁴⁵ For ex-

145. See *supra* note 71; Guy, *supra* note 8, at 229-31.

ample, many persons dread the thought that individuals who have small facial moles, broken hands, sprained ankles, and broken legs, will make successful claims that they have been discriminated against because they possess an "impairment" under the definition of "handicapped individual."¹⁴⁶ This concern can encourage persons to retreat from the expansive treatment notation in the phrase "is regarded as having such an impairment" by using a narrow antecedent meaning for "impairment" which implies health conditions that physically interfere with bodily activities.

Given such dangers, the district court made an admirably strong analysis of the phrases "substantially limited" and "substantial handicap to employment." Quite plainly, the above-outlined concern has another dimension: that those two phrases will also contribute to the *totally open-ended* definition of "handicapped individual." As the following lengthy quote illustrates, some persons desire to close off the meaning of "impairment" and "substantially limits" so that the definition of "handicapped individual" covers only certain types of social actions based on health conditions:

Accordingly, an individual with a minor physical or mental condition which is alleged to have caused employment discrimination in a single instance will not necessarily be within the protection of the Act. It is only where the condition the individual has, has had, or is regarded as having is such that the individual is likely to more generally experience unjustified difficulty in securing, retaining or advancing in employment that the individual is within the protection of the definition. Thus, for example, a person with ordinary near-sightedness whose vision is fully correctable with glasses will not be within the definition of the term "handicap" even if an employer incorrectly regards him as handicapped with respect to a particular job. Likewise, an individual who alleges employment discrimination because of a very temporary condition, such as a simple fracture, would not be within the protected class. This legislation is intended to eliminate deeply-rooted, particularly objectionable discrimination based upon invidious distinctions; but it does not attempt to reach every unfair employment decision that might arise in an isolated instance.¹⁴⁷

146. See *supra* note 71.

147. SENATE COMM. ON LABOR AND HUMAN RESOURCES, EQUAL EMPLOYMENT OPPOR-

Notwithstanding this type of reasoning, the court demonstrated that both qualitative and quantitative meanings for the phrase "substantially limits" must be adopted, even if this adoption creates complications in the "single instance discrimination" and "first-time discrimination" settings, as a given employer perceives difficulty in distinguishing minor limitations and non-cognizable "irrational impulses" from cognizable health-based discrimination.

Hence, one can view the district court's decision as outlining a *formula* for interpreting the phrase "substantially limits" when it set forth its "factors analysis." The court demonstrated that this analysis would go far toward addressing the "single instance discrimination" and the "first-time discrimination" settings. Yet, one must ask how much more clearly the court's *formula* addresses these settings and, accordingly, the fear of having a *totally open-ended* definition, than did the arguments of the litigants, the other adjudicators, or the regulations of the administrative agencies. In sum, does this *formula* substantially advance the definition of this important part of the phrase "handicapped individual?"

A response to this question is manifold. First, the court's *formula* represents an important advance in the interpretation of the phrase "substantially limits;" it supplies a valuable illumination of how to handle the "single instance discrimination" and "first-time discrimination" situations. Other attempts to define "substantially limits," even the valuable interpretations from the administrative agencies, do not penetrate the phrase as deeply. On the other hand, the court's *formula* does not greatly lessen the fears about a *totally open-ended* definition. Indeed, the court accepted this drawback of its interpretation, pointing to the intent of Congress to rely on a "case-by-case" method for defining the "handicapped individual,"¹⁴⁸ thus permitting the court to use its expansive interpretation of "substantially limits" without much concern for the drawbacks of the interpretation. In essence, the court observed that the best anyone can achieve is an interpretation of "substantially limits" that turns on individualized assessments, rather than a logically defensible, abstract interpretation that avoids all ambiguity.

Second, while this author agrees with the court's analysis, perhaps further illumination may be supplied for the phrase "substantially limits" and, by extension, for the definition of "handicapped individual."

TUNITY FOR HANDICAPPED INDIVIDUALS ACT OF 1979, S. REP. NO. 316, 96th Cong., 1st Sess. 7 (1979).

148. *E.E. Black, Ltd. v. Marshall*, 497 F. Supp. at 1102.

For example, assume that several employers reject for various jobs several different applicants who have, respectively, acrophobia,¹⁴⁹ spondylolisthesis,¹⁵⁰ facial moles, a broken leg, and a sprained ankle. How can we determine whether these impairments "substantially limit" each applicant so that he is a "handicapped individual" within the statute? Arguably, the determination hinges upon the *interplay* of several factors: the nature and magnitude of the health condition, the actual employment sought, the intersection of the health condition and the job function, the geographical location of the job, the historical social experiences of the subject health conditions, in general and with particular reference to employment, the individual's expectations and training, and an assessment of the probability that other employers will duplicate this employment reaction in the future. The determination emerges after an examination of the total picture of the intersection of a given health condition with a particular employment context in light of the potential injuries which the statute seeks to prohibit, the profile of the individual, our past and present social experiences, our inferences about this particular job, and our inferences about the negative reaction of other employers toward this health condition in the future.¹⁵¹

Perhaps the court's opinion does not sufficiently illuminate the past social experiences and the inferences that one must make when attempting to determine whether a given person is a "handicapped individual" in the "single instance discrimination" and "first-time discrimination" setting. For example, persons who have acrophobia and

149. The district court actually discussed this health condition. 497 F. Supp. at 1099.

150. This health condition refers to a spinal column that has undergone a gradual shifting and displacement of the discs, oftentimes in the L-4 and L-5 disc spaces, such that the more frequently viewed vertical positioning of discs is replaced with horizontal shifts of discs in varying degrees.

151. This approach may appear unnecessary in light of the language in "is regarded as having an impairment," *see, e.g.*, 45 C.F.R. § 84.3(j)(2)(iv) (1982), because the health condition qualifies as "handicap" even if it *does not* substantially limit, so long as the employer *treats* the health condition as such a limitation. However, the user of this language encounters difficulty ascertaining whether *one* employer treats the health condition as if it "substantially limits" simply based on one *isolated* employment treatment. For this reason, the court in *E.E. Black, Ltd.* felt logically compelled to uncover a formula for applying the "is regarded as having an impairment" language in the single instance employment treatment. The court discerned what any analyzer of the Rehabilitation Act type of definition discovers: at some point one inevitably turns to inferences to explain the definition of "handicapped individual."

Using the *total picture* of the intersections of a given health condition and the particular employment context seems consistent with the employment realities that the corporate interviewees outlined. *See supra* note 49. Society encounters serious difficulties defining "handicapped individual" in the abstract; the term gains meaning only in its cultural context, as tenBroek noted. *See supra* text accompanying note 1.

spondylolisthesis have had measurably different social experiences—particular job rejections—than those who have had facial moles, broken legs, and sprained ankles. Further, those persons who have acrophobia and spondylolisthesis experience a high probability that other employers will view these health conditions as undesirable for one or more jobs. Conceivably, only an infinitesimal number of employers would treat a job applicant negatively based on the facial moles, broken leg, and sprained ankle; in essence, these negative treatments represent occurrences without the significant potential of recurrence. Moreover, if we individualize the assessment of persons who have acrophobia and spondylolisthesis with the introduction of heavy maintenance work and construction labor, that significant potential of recurrence takes on added substance.

Consequently, the above ideas help us understand why the court adopted its *formula* when interpreting “substantially limits.” While this article’s approach does not supply a precise measurement tool for the phrase “handicapped individual” when one looks through the perspective of “substantially limits,” it can assist in acceptably drawing the boundaries around the definition so that a combined quantitative-qualitative interpretation of “substantially limits” is retained. In short, this article formulates an analysis that posits arguments which possess a high degree of rationality; these arguments can claim the weight accorded compelling arguments, while they do not masquerade as certainties. Together with the court’s *formula*, the article outlines a framework for identifying those employment decisions that are made within the employment setting of a single job denial and the like, where the statute does not clearly indicate whether a given person is a “handicapped individual,” and where one finds sketchy or unclear the existence of all factors that might assist in ascertaining statutory cover, using an accretion of evidence to increase our confidence in our inferences and decisions about the statutory coverage.¹⁵²

152. In essence, this approach relies on a combined inference to draw the boundaries around the “statutory handicap” in the *single instance* employment treatment setting. *Cf.* Securities & Exchange Comm’n v. Texas Gulf Sulphur Co., 401 F.2d 833, 849 (2d Cir. 1968), wherein the court attempted to give meaning to the securities violations under § 10b of the Securities Exchange Act of 1934 and the Commission’s Rule 10b-5 by “balancing of both the indicated probability that the event will occur and the anticipated magnitude of the event in light of the totality of the company activity”; *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947), wherein Justice Learned Hand wrestled with the definition of negligence, which he approached from the perspective of the concept being a function of three variables: (1) the probability of a given event; (2) the gravity of the resulting injury if the given event occurs; and (3) the burden of undertaking adequate precautions to offset the proposed event and the dreaded injury. While the article’s approach is far from a *precise*

VII. CONCLUSION

As has been noted, the Rehabilitation Act's definition of "handicapped individual" contains significant ambiguity and thus demands further interpretation particularly in the "single instance discrimination" and "first-time discrimination" settings.¹⁵³ The federal district court in *E.E. Black, Ltd.* removed some of the ambiguity with its formulaic refinement. Still, the decision leaves little doubt that a precise definition of "handicapped individual" for sections 503 and 504 eludes society. Hence, all statutes that adopt the approach of the Rehabilitation Act can, at best, achieve only refinements of the statutory formula, even then admitting that we must ultimately rely on a combination of factors heavily weighted in favor of the individual employment setting, a profile of the individual job applicant, inferences, and historical experiences. In sum, our definition must, in the final analysis, depend

measurement of who is a "handicapped individual," it can assist in drawing the necessary boundaries around the meaning when one encounters the "blurred region" of the definition.

153. Some critics of the expansive definition may still argue that this approach results in an unwarranted extension of the idea of "handicap" beyond its traditional notions, overlooking the conceptual difficulties one faces in sharply outlining those traditional notions. Perhaps a part of the deeply-rooted emotionalism so fervently attached to the sanctity of these traditional notions is the unexplained concern over procedural difficulties. In sum, these arguments may continue to arise because some persons confuse the "extension" concern with the concerns about the proof problems associated with making a prima facie claim and with carrying the burdens of persuasion in a given case. In fact, persons with these covert procedural concerns fail to appreciate the winding and perilous road that a handicapped claimant must travel to prove a claim of handicap employment discrimination—either through a governmental agency or through "private rights of action." The handicapped person, both conceptually and practically, has a very difficult task (assuming no quick conciliation) in properly stating the claim of discrimination (in light of the complexities of the employment process and the complexities of handicap discrimination), in navigating through the various employers' responses (replete with the exceptions and defenses that themselves have the potential for harboring stereotypical reasoning), in navigating through the proof process with its tricky, shifting burdens, in navigating through the complex weighing and balancing that the concept of EEO mandates that judges undertake, and in navigating through the potentially ingrained stereotyping of numerous administrative hearing examiners and judges. For these reasons, the article finds the criticism of a broad "statutory handicap" definition an unpersuasive challenge.

Still other critics of an expansive definition, particularly those who view themselves as handicapped or as advocates for handicapped persons, raise a more troubling, though equally unpersuasive, challenge than the critics above. These persons worry that a very broad definition will encourage numerous, frivolous complaints from persons who have "minor impairments," which will eventually clog up a state administrative agency so that the agency cannot process the serious claims of the severely handicapped persons. See SENATE COMM. ON LABOR AND HUMAN RESOURCES, EQUAL EMPLOYMENT OPPORTUNITY FOR HANDICAPPED INDIVIDUALS ACT OF 1979, S. REP. NO. 316, 96th Cong., 1st Sess. (1979). While one can sympathize with this concern, one should not permit sympathy to dim the powers of reasoning.

heavily upon what the opening quotation underscored: our cultural practices.