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OHIO HANDICAP LAW

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I. INTRODUCTION

Handicap-discrimination law, virtually ignored when passed in Ohio in 1976,[1] is now an employment problem with gargantuan contours. Although the number of handicap-discrimination claims has increased in almost every year since the law's inception,[2] some of the remedial goals of Ohio's handicap-discrimination statute have been thwarted by its clumsy administration. The Ohio Civil Rights Commission (OCRC)[3] has so broadly interpreted the hazy statutory definition of a "handicapped" person that more people fall within this definition than was perhaps originally intended. The result has been a much greater protection for employees and job applicants at a much greater cost to employers.

For example, alcoholism was once considered a valid basis for an employer to terminate or refuse to hire an individual. However, an employer's freedom to act on this condition has been sharply curtailed. Under both Ohio[4] and federal[5] court rulings, alcoholics are protected as handicapped individuals. Since greater protection has been afforded to handicapped workers in recent years, alcoholic employees, now within the scope of statutory coverage, may have greater job security than their non-alcoholic fellow workers.

Aside from this definitional problem, those who must interpret

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1. OHIO REV. CODE ANN. §§ 4112.01–.11 (Anderson 1980); *see also* OHIO ADMIN. CODE §§ 4112-1-01 to -5-08 (1980).

2. The Ohio Civil Rights Commission (OCRC) reports that claims have risen steadily in recent years. For example, the Commission received 293 complaints alleging handicap discrimination in 1983, 440 in 1984, 598 in 1985, 586 in 1986, 752 in 1987, and 780 (as of October) in 1988. OCRC, 1983–1988 ANNUAL REPORTS (on file with University of Dayton Law Review).

3. OHIO REV. CODE ANN. § 4112.03 (Anderson 1980).

4. Babcock & Wilcox Co. v. Ohio Civil Rights Comm'n, 31 Ohio St. 3d 222, 510 N.E.2d 368 (1987); Hazlett v. Martin Chevrolet, Inc., 25 Ohio St. 3d 279, 496 N.E.2d 478 (1986).

5. *See, e.g.*, Ferguson v. United States Dep't of Commerce, 680 F. Supp. 1514 (M.D. Fla. 1988).

Ohio handicap law face a number of other difficulties. First, there is a dearth of published decisions on the substantive points of handicap law because the OCRC does not regularly publish its rulings. This habit creates problems in statutory interpretation and frustrates practitioners who seek guidance. Second, most of the existing statutory interpretation has occurred at the hearing examiner's level rather than at the judicial level. Examiners' reports are often sketchy with regard to factual details, and tend to contain unsupported conclusions regarding the credibility and expertise of witnesses. One Ohio court characterized a particular report as "replete with inaccuracies, inconsistencies, and illogical conclusions of fact . . . ."[6] Third, hearing-examiner reports never cite other hearing-examiner reports for support, and, as a result, no coherent body of handicap law is available. Each report reads as if it were a case of first impression. Fourth, since there is no consistent body of published handicap law, it is difficult, if not impossible, to predict the outcome of future cases. Fifth, although the Executive Board[7] of the OCRC must affirm or disaffirm the hearing examiner's findings,[8] the board almost invariably affirms the examiner's report, which thusly becomes the final OCRC report in most cases.[9] Moreover, the occa-

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6. Consolidation Coal Co. v. Ohio Civil Rights Comm'n, 473 N.E.2d 325, 328 (Ohio C.P. 1981), *rev'g* Roset v. Consolidated [sic] Coal Co., No. 3289 (OCRC 1980).

7. "Executive Board" denotes those in the OCRC who are responsible for approving, modifying, or disapproving a hearing-examiner report pursuant to OHIO ADMIN. CODE § 4112-3-09(C) (1980).

8. OHIO ADMIN. CODE § 4112-3-09(C) (1980).

9. The vast majority of the reports discussed in this article were tried before a hearing examiner whose recommendations were approved by the Executive Board of the Ohio Civil Rights Commission. Hereinafter, such reports shall be cited as "OCRC" reports. These rulings represent the views of the OCRC as of September 2, 1987, with the following notable exceptions: In two specific instances, the hearing examiner's findings and recommendations were expressly reversed. *See* Cedar Heights Clay Co., No. 4129 (OCRC 1985); Murden v. Baltimore & O.R.R., No. 3489 (OCRC 1981). The fact that the Executive Board did not comment on these decisions in a permanent record presents difficulties in interpreting its views. For the purposes of this article, all references favorable to complainants (who had lost before the hearing examiner) in these two cases shall be interpreted as implicitly affirmed, and all negative references shall be interpreted as implicitly reversed.

Furthermore, in several instances the Executive Board of the OCRC has not officially closed the file on a complainant's case, but has affirmed the findings and remedies of the hearing examiner. These cases include: Scanlan v. Lincoln Elec. Co., No. 4495 (OCRC 1987); Still v. Ohio Power Co., No. 4344 (OCRC 1986); Presti v. Village of Walton Hills, No. 4253 (OCRC 1986); Gorby v. Kent State Univ., No. 4250 (OCRC 1986); Fast v. Roadway Express, Inc., No. 4230 (OCRC 1986).

In another instance, the Executive Board reversed the dismissal of a report by a hearing examiner. Patterson v. City of Cleveland, No. 4494 (OCRC 1987). This report, however, has not been closed. References to this report will follow the interpretive framework discussed above for closed reversed reports. In addition, in Walker v. Donn Corp., No. 4456 (OCRC 1987), the Board neither affirmed nor reversed the hearing examiner's report, although its minutes suggest that there were some objections to the report. In two reports submitted to the Board, Anderson v.

sional nonaffirmance of such reports is usually done without explanation. The above limitations are cited to illustrate the legal uncertainty faced by employers, employees, and practitioners interpreting Ohio handicap law.

In Section II of this article, the authors outline the procedural framework that Ohio handicap-discrimination cases follow.[10] Next, the article discusses the burden of proof[11] borne by the parties in a handi-

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Greater Cleveland Regional Transit Authority, No. 4508 (OCRC 1987); *In re* Interlake, Inc., No. 2982 (OCRC 1978), there is no available record of the Board's action.

In a number of reports, judicial activity has been noted in the OCRC Hearing Examiner's docket: Lest v. City of Cleveland, No. 3855 (OCRC 1984), *appeal dismissed as untimely sub nom.* City of Cleveland v. Ohio Civil Rights Comm'n, No. 84510 (Ohio C.P., Cuyahoga County _____ 1984); Hazlett v. Martin Chevrolet, Inc., No. 3736 (OCRC 1983), *aff'd*, 25 Ohio St. 3d 279, 496 N.E.2d 478 (1986); Wirth v. Babcock & Wilcox Co., No. 3694 (OCRC 1983), *aff'd in part and rev'd in part sub nom.* Babcock & Wilcox Co. v. Ohio Civil Rights Comm'n, 31 Ohio St. 3d 222, 510 N.E.2d 368 (1987) (remanding the case to determine whether complainant was impermissibly rejected because of his handicap); Wright v. Western Elec. Co., No. 3611 (OCRC 1983), *rev'd sub nom.* Western Elec. Co. v. Ohio Civil Rights Comm'n, No. 88AP637 (Ohio Ct. App., Franklin County Feb. 12, 1985); Janson v. City of Columbus, Nos. 3677, 3708, 3727 (OCRC 1982), *rev'd sub nom.* City of Columbus v. Ohio Civil Rights Comm'n, 23 Ohio App. 3d 178, 492 N.E.2d 482 (1985); Kyle v. Republic Steel Corp., No. 3409 (OCRC 1981), *rev'd*, No. 037903 (Ohio C.P., Cuyahoga County Oct. 25, 1983); Roset v. Consolidated [sic] Coal Co., No. 3289 (OCRC 1980), *rev'd sub nom.* Consolidation Coal Co. v. Ohio Civil Rights Comm'n, 473 N.E.2d 325 (Ohio C.P. 1981); Capriulo v. Fred W. Albrecht Grocery Co., No. 3182 (OCRC 1977), *discussed in* Capriulo v. Fred W. Albrecht Grocery, No. 10489 (Ohio Ct. App., Summit County June 16, 1982); Fred W. Albrecht Grocery v. Ohio Civil Rights Comm'n, No. 9322 (Ohio Ct. App., Summit County Aug. 17, 1979). Hereinafter, references to OCRC decisions will be made in light of the judicial rulings discussed above.

10. While the primary focus of this article is Ohio law, reference will be made to federal handicap law in order to highlight the differences and similarities that are crucial to an understanding of emerging trends in handicap-discrimination law. Applicable federal law is found in the Rehabilitation Act, Pub. L. No. 93-112, § 2, 87 Stat. 355, 357 (1973) (codified as amended at 29 U.S.C §§ 701–796 (1987)). The Rehabilitation Act, although inapplicable to most private-sector employers, has been the source of new trends in handicap law, and in this respect affects interpretations of Ohio handicap law. For an excellent analysis of the requirements of the Act, see generally Sklar, *An Employer's Duty to Reasonably Accommodate Handicapped Employees and Applicants Under the Rehabilitation Act of 1973*, 2 LAB. LAW. 733 (1986).

11. The elements that constitute a prima-facie showing of handicap discrimination under Ohio law are based upon the elements originally set forth by the United States Supreme Court in McDonnell Douglas v. Green, 411 U.S. 792 (1973). In *McDonnell Douglas*, the Court determined that a complainant charging discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C §§ 2000e to 2000e-17 (1982), must show that (i) he or she belongs to a racial minority; (ii) he or she applied and was qualified for a job the employer was trying to fill; (iii) though qualified, complainant was rejected; and, (iv) that the employer continued to seek applicants with complainant's qualifications. 411 U.S. at 802. For the application of these elements by Ohio courts, see City of Columbus v. Ohio Civil Rights Comm'n, 23 Ohio App. 3d 178, 492 N.E.2d 482 (1985) (handicap-discrimination case), *rev'g* Janson v. City of Columbus, Nos. 3677, 3708, 3727 (OCRC 1982); Plumbers & Steamfitters Comm. v. Ohio Civil Rights Comm'n, 66 Ohio St. 2d 192, 421 N.E.2d 128 (1981) (race-discrimination case). However, it should be noted that one federal appellate court has rejected the *McDonnell Douglas* framework when deciding claims under Section 504 of the Rehabilitation Act. In Pushkin v. Regents of the University of Colorado, 658 F.2d 1372 (10th Cir. 1981), the Court of Appeals for the Tenth Circuit stated that the standards of

cap-discrimination case under Ohio law. The first element of the employee's[12] prima-facie case is discussed in Section III, "Proof of Handicap." Section IV addresses the second element of a handicapped employee's case—whether the employee can safely and substantially perform the essential functions of the job in question. The final element, as discussed in Section V, requires the employee to prove that he or she suffered discrimination because of his or her handicap. Once these elements are proven by a preponderance of the reliable, probative, and substantial evidence, an employee's prima-facie case of discrimination has been made.

Section VI of the article discusses employer defenses to a handicap-discrimination charge. Under Ohio law, an employer must establish one of two defenses in order to avoid liability: either that the discrimination is justified, or that a legitimate, non-discriminatory reason exists for the adverse job action. Once the employer has offered a legitimate, non-discriminatory reason for its action toward the complainant or claimed an inability to reasonably accommodate the affected individual, such employee or job applicant has the opportunity to rebut this defense by establishing that the proffered reasons were mere pretext for discrimination or that reasonable accommodation could have been provided. The employee's rebuttal is discussed in Section VII. Section VIII, "Remedies," discusses the remedies available to an employee or applicant if the employer is found to have engaged in unlawful discrimination.

II. PROCEDURAL MATTERS

The OCRC hearing process begins when an employee or job appli-

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proof should be as follows:

> 1) The plaintiff must establish a prima facie case by showing that he was an otherwise qualified handicapped person *apart from* his handicap, and he was rejected under circumstances which gave rise to the inference that his rejection was based solely on his handicap;
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> 2) Once plaintiff establishes his prima facie case, defendants have the burden of going forward and proving that plaintiff was not an otherwise qualified handicapped person, that is one who is able to meet all of the program's requirements *in spite of* his handicap, or that his rejection from the program was for reasons other than his handicap;
>
> 3) The plaintiff then has the burden of going forward with rebuttal evidence showing that the defendants' reasons for rejecting the plaintiff are based on misconceptions or unfounded factual conclusions and that reasons articulated for the rejection other than the handicap encompass unjustified consideration of the handicap itself.

Id. at 1387.

12. Technically, in these handicap-discrimination cases, the OCRC, through its attorney, prosecutes the complaint. The employee is the complainant; the employer is the respondent. For purposes of clarity, however, this article refers to the prosecuting party as the employee, applicant, or complainant; the responding party as the employer; and the hearing examiner, in affirmed reports, as the OCRC.

cant files a charge.[13] The charge must include a "concise statement of the facts which complainant believes indicates an unlawful discriminatory practice."[14] The statements must be made in writing, under oath, and notarized.[15] Furthermore, the charge must be filed within six months of the claimed discriminatory practice.[16]

The OCRC may, as a first step, initiate an informal investigation, known as a "fact-finding conference," before instituting a formal hearing.[17] The staff member assigned to the charge is instructed to contact the complainant and the employer for the fact-finding conference.[18] The stated purpose of the conference is to investigate the factual basis behind the charge.[19] However, the unstated motive may be to persuade the employer to—in practitioners' terms—"buy out cheaply." The staff member has the authority to "[s]ettle the matter in a manner acceptable to the commission and all parties";[20] to "[r]ecommend that a formal investigation be conducted";[21] or, if "sufficient facts are adduced," to "recommend a finding [of probability or lack of probability of unlawful discriminatory practices] in the same manner as would be made after formal preliminary investigation."[22] If during the preliminary investigation the OCRC finds that the employer has probably not acted in a discriminatory fashion, the commission must notify the complainant that the claim will not be pursued.[23] Such notification must include the specific facts that led to the decision not to pursue the matter further.[24] This initial conference is not mandatory, and the OCRC may proceed directly to a formal preliminary investigation after a charge had been filed.[25]

The next step in the process is a formal investigation. This investigation is not limited to the facts or issues raised in the charge affidavits.[26] If the OCRC staff member discovers facts indicating that the

13. OHIO ADMIN. CODE § 4112-3-01 (1980).
14. *Id.* § 4112-3-01(C)(3).
15. *Id.* § 4112-3-01(B).
16. *Id.* § 4112-3-01(D).
17. *Id.* § 4112-3-02.
18. *Id.*
19. *Id.*
20. *Id.* § 4112-3-02(A).
21. *Id.* § 4112-3-02(B).
22. *Id.* § 4112-3-02(C).
23. OHIO REV. CODE ANN. § 4112.05(B) (Anderson 1980).
24. *Id.* § 4112.05(H).
25. *See* OHIO ADMIN. CODE § 4112-3-03(A) to -03(B) (1980). The regulations indicate that a preliminary investigation may be conducted after a charge has been filed or upon the recommendation of the Commission member assigned to the fact-finding conference, thus suggesting that the initial conference is not mandatory.
26. *Id.* § 4112-3-03(A).

employer has engaged in any unlawful discriminatory practices, the matter is referred to the OCRC by the Executive Director "with a recommendation for proceeding with conciliation."[27] If the OCRC, in turn, determines that probable cause for a finding of unlawful discrimination does exist, it must instruct the OCRC's Executive Director to attempt to eliminate all discriminatory practices by "conference, conciliation and persuasion."[28] The Ohio Administrative Code defines conciliation as "a process to achieve a just resolution which assures that any unlawful discriminatory practice of respondent will be eliminated by requiring appropriate affirmative or other action."[29] Typically, conciliation entails a remittance of back pay to the complainant and a general release of claims against the employer, including a release of claims for reinstatement. If conciliation fails, the OCRC may issue a complaint against the employer. The filing of this complaint initiates the formal hearing process.[30] The OCRC also has the power to issue a complaint on behalf of employees who have not filed a charge with the Commission.[31]

Prior to the formal hearing, a conference takes place between the hearing examiner and the parties.[32] This prehearing conference is designed to simplify and clarify the issues, authenticate evidence, schedule discovery, disclose witnesses, exchange documents, and initiate further attempts at settlement.[33] At the final hearing, testimony is taken under oath, transcribed, and filed with the OCRC. The hearing examiner or examiners are then required to write an opinion based upon all the evidence and the credibility of the witnesses. The hearing examiner's report must contain findings of fact, conclusions of law, and the appropriate remedy.[34] The discharge of this obligation varies widely in quality.

An "aggrieved party" may appeal an adverse decision to the appropriate common pleas court.[35] The OCRC is required to file a transcript of the record with the court. The Commission's findings of fact cannot be disturbed by a reviewing court if such findings are supported

27. *Id.* § 4112-3-03(B).
28. *Id.*
29. *Id.* § 4112-1-01(N).
30. *Id.* § 4112-3-05(A).
31. *See id.* § 4112-3-05(A).
32. *Id.* § 4112-3-07(E).
33. *Id.* § 4112-3-07(E)(1)(a) to -07(E)(1)(*l*).
34. *Id.* § 4112-3-09(A).
35. OHIO REV. CODE ANN. § 4112.06(A) (Anderson 1980). "Aggrieved party" is a statutory term referring to either the employer, the employee, or the OCRC. *See* Western Elec. Co. v. Ohio Civil Rights Comm'n, No. 88AP637 (Ohio Ct. App., Franklin County Feb. 12, 1985), *rev'g* Wright v. Western Elec. Co., No. 3611 (OCRC 1983).

by reliable, probative, and substantial evidence.[36] A complainant can also appeal an OCRC decision not to issue a complaint. However, the reviewing court must uphold the OCRC's decision not to issue a complaint, unless the decision was unlawful, irrational, arbitrary, or capricious.[37]

III. Proof of Handicap

In a handicap-discrimination proceeding before the OCRC, an employee or applicant must initially prove that he or she is handicapped. The following statutory definition of "handicap" is not a model of draftsmanship and its ambiguity is partly responsible for confusion in the decisions construing it. Section 4112.01(A)(13)[38] of the Ohio Revised Code defines a handicap as

> a medically diagnosable, abnormal condition which is expected to continue for a considerable length of time, whether correctable or uncorrectable by good medical practice, which can reasonably be expected to limit the person's functional ability, including, but not limited to, seeing, hearing, thinking, ambulating, climbing, descending, lifting, grasping, sitting, rising, any related function, or any limitation due to weakness and significantly decreased endurance, so that he can not perform his everyday routine living and working without significantly increased hardship and vulnerability to what are considered the everyday obstacles and hazards encountered by the nonhandicapped.[39]

A. General Principles of Handicap Determination

The average person thinks of handicaps as occurring involuntarily: in other words, congenitally, through disease, or because of an accident. These are conditions over which the handicapped person has no control. But, today, many voluntarily-incurred conditions, perceived handicaps, and contagious diseases are also legally-protected handicaps. The issue of voluntarily-incurred handicaps usually arises in the area of chemical dependency. The Ohio Supreme Court has held that Ohio law protects individuals who are addicted to drugs, alcohol, or other chemical substances.[40] In *Hazlett v. Martin Chevrolet, Inc.*,[41] the Ohio Supreme

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36. Ohio Rev. Code Ann. § 4112.06(E) (Anderson 1980); *see also* Sowers v. Ohio Civil Rights Comm'n, 49 Ohio Op. 2d 203 (C.P. 1969).

37. Salazar v. Ohio Civil Rights Comm'n, 39 Ohio App. 3d 26, 28 (1987); City of Columbus v. Ohio Civil Rights Comm'n, 23 Ohio App. 3d 178, 181, 492 N.E.2d 482, 485 (1985), *rev'g* Janson v. City of Columbus, Nos. 3677, 3708, 3727 (OCRC 1982)); McCrea v. Ohio Civil Rights Comm'n, 20 Ohio App. 3d 314, 317, 486 N.E.2d 143, 146–47 (1984).

38. Ohio Rev. Code § 4112.01(A)(13) (Anderson 1980).

39. *Id.*

40. Babcock & Wilcox Co. v. Ohio Civil Rights Comm'n, 30 Ohio St. 3d 222, 510 N.E.2d 368 (1987); Hazlett v. Martin Chevrolet, Inc., 25 Ohio St. 3d 279, 496 N.E.2d 478 (1986).

41. 30 Ohio St. 3d 222, 510 N.E.2d 368 (1987).

Court was faced with the issue of whether chemical addiction should be considered a handicap under Ohio law. Paraphrasing the deposition of a physician, the court stated:

> [D]rug addiction creates in its victims a debilitating chemical imbalance that is an abnormal physical condition. Such condition limits the user's functional ability, including physical endurance, mental capacity and judgment. While treatment of a drug addiction may cause the condition to go into remission, the effects of the drug may remain for a considerable period of time. It is clear to us that alcohol and/or drug addiction falls within the ambit of [section 4112.01(A)-(B)].[42]

The court was careful to note that "if an individual, because of alcoholism or drug addiction is unable to perform his or her responsibilities, he or she may be lawfully discharged."[43] This observation is crucial: handicapped persons must be protected, but their disability is not a license for nonperformance.

The federal Rehabilitation Act[44] covers government employees,[45] employees of government contractors,[46] and those whose employers receive federal funding.[47] These three groups are usually treated equally by federal law. However, employees of government contractors and employees of recipients of federal funds who are alcohol and substance

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42. *Id.* at 280, 496 N.E.2d at 479.

43. *Id.* at 281, 496 N.E.2d at 480. The evidence that shows alcoholism is an inherited trait and, therefore, not "voluntarily" incurred, is beyond the scope of this article.

44. Pub. L. No. 93-112, 87 Stat. 355 (1973) (codified as amended at 29 U.S.C §§ 701–796 (1987)).

45. 29 U.S.C. § 791 (1987).

46. *Id.* § 793.

47. *Id.* § 794. Section 794 also prevents any federal agency or the United States Postal Service from discriminating based upon an employee's or applicant's status as handicapped. However, it should be noted that, in the federal-agency context, alcoholism and drug addiction may not constitute a handicap. In Traynor v. Turnage, 108 S. Ct. 1372 (interim ed. 1988), the United States Supreme Court held that the Veterans' Administration could prevent certain alcoholics from receiving an extension of G.I. Bill educational benefits. *Id.* at 1383. Vietnam veterans must normally use their educational benefits within 10 years. *Id.* at 1376. However, if a veteran was prevented from using his benefits within the 10-year period because of a "physical or mental disability which was not the result of . . . [his or her] own willful conduct," he or she is eligible to receive an extension. *Id.* at 1380 (quoting 38 U.S.C. § 1662(a)(1) (1980)). The Veteran's Administration had long defined alcoholism as willful misconduct. *See id.* at 1383 n.2 (construing 38 C.F.R. § 3.301(c)(2) (1987)). The Supreme Court found that the Rehabilitation Act was extended in 1978 to cover federal agencies one year after the G.I. Bill Improvement Act, Pub. L. No. 95-202, § 203(a)(1), 91 Stat. 1429, 1439 (1977) (codified at 38 U.S.C. § 1662(a)(1) (1982)), was passed and many years after the Veteran's Administration defined alcoholism as willful misconduct. 108 S. Ct. at 1381–82. Therefore, the Court held that since the amendment to the Rehabilitation Act did not explicitly overrule the G.I. Bill provision, Congress did not intend to exclude alcoholics from the term "willful misconduct." *Id.* at 1383. At this point, it is difficult to predict whether *Traynor* will decelerate the national trend toward categorizing alcoholism as a handicap.

abusers are not considered to be handicapped under federal law.[48] Only *federal employees* who are alcoholics and drug addicts are entitled to statutory protection as handicapped individuals.[49] This point was emphasized by the Merit Systems Protection Board in *Ruzek v. General Services Administration.*[50] The Merit Systems Board stated:

> In 1978, Congress amended the definition of the term "handicapped individual" in the Rehabilitation Act to exclude specifically alcoholics and other drug abusers for purposes of sections 793 and 794, relating to the employment of qualified handicapped individuals by parties contracting with, or receiving financial assistance from, the Federal government. However, the fact that Congress did not extend this exclusion to section 791, relating to nondiscrimination against handicapped individuals in Federal employment, buttresses the conclusion that a handicapping condition under that section does include alcohol or drug abuse.[51]

It is still unclear where the OCRC stands with regard to the issue of "perceived handicaps." Perceived handicaps are medical conditions, not handicaps in the traditional sense, that may be treated as such for statutory purposes because of the stereotypical public opinions attaching to such conditions. The term "perceived handicap" may also be used to describe a perfectly healthy individual who is erroneously believed to have a condition constituting a handicap.

One example of the manner in which perceived handicaps are treated by the OCRC is in *Green v. Ohio Department of Education.*[52] The *Green* report was initiated by a complainant whose heart defect had been surgically cured.[53] In evaluating the complainant's legal status, the examiner stated, "The Commission's rule [that the cured heart condition is a handicap] is consistent with a trend toward administratively and judicially extending the definition of handicap to perceived handicap."[54] The *Green* decision relied upon *Barnes v. Washington Natural Gas Co.*,[55] a 1979 Washington State appellate court decision.[56] In *Barnes*, the court held that individuals who are perceived by their employers to be handicapped deserve the same statutory protection as individuals who are in fact handicapped,[57] stating:

> Just as the person who is perceived as belonging to a noncaucasian racial

48. *See, e.g.*, Ferguson v. United States Dep't of Commerce, 680 F. Supp. 1514 (M.D. Fla. 1988); Ruzek v. General Servs. Admin., 7 M.S.P.R. 437 (1981).
49. *See Ruzek*, 7 M.S.P.R. at 439.
50. 7 M.S.P.R. 437 (1981).
51. *Id.* at 439 (citation omitted).
52. No. 3355 (OCRC 1980).
53. *Id.* at 3–5.
54. *Id.* at 7 n.4.
55. 22 Wash. App. 576, 591 P.2d 461 (1979).
56. *Green*, No. 3355, slip op. at 7 n.4.
57. *Barnes*, 22 Wash. App. at ___, 591 P.2d at 465.

> or ethnic group may be discriminated against because of his or her perceived racial characteristics, a person who is perceived to be afflicted with epilepsy may be discriminated against because of his or her perceived handicap even though that perception turns out to be false in either case. . . . Prejudice in the sense of a judgment or opinion formed before the facts are known is the fountainhead of discrimination engulfing medical disabilities which prove on examination to be unrelated to job performance or to be nonexistent . . . . The law's application, therefore, should not be limited to those who actually have handicaps, excluding those who are discriminated against in the same way because they are only thought to have handicaps.[58]

However, the *Barnes* reasoning has received a mixed reception in Ohio. While the *Green* report openly embraces the idea that perceived handicaps should be protected, the OCRC, in *Murden v. Baltimore & Ohio Railroad*,[59] has specifically rejected the *Barnes* approach.[60] In *Murden*, the OCRC stated that "[t]he Ohio Civil Rights Commission has *not* interpreted Ohio's definition of handicap so broadly, as illustrated by Commission Rule § 4112-5-02(I)."[61]

It is well-settled that federal law protects perceived handicaps. According to the Rehabilitation Act, a handicapped individual is "any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) *is regarded as having such an impairment.*"[62] The Department of Labor's regulations state that the phrase

> "[i]s regarded as having an impairment" means (A) has a physical or mental impairment that does not substantially limit major life activities *but that is treated by a recipient [employer] as constituting such a limitation*; (B) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (C) has none of the impairments defined in paragraph (j)(2)(i) of this section *but is treated by a recipient [employer] as having such an impairment.*[63]

Congress amended the Rehabilitation Act in 1974 to cover perceived handicaps.[64] In discussing the congressional intent behind the

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58. *Id.*
59. No. 3489 (OCRC 1981).
60. *Id.* at 8.
61. *Id.* (discussing OHIO ADMIN. CODE § 4112-5-02(I) 1980)).
62. 29 U.S.C. § 706(8)(B) (1986) (emphasis added).
63. 45 C.F.R. § 84.3(j)(2)(iii) (1987) (emphasis added).
64. 29 U.S.C. § 706(8)(B).

1979 amendment, one federal court noted: "Their intent was to protect people who are denied employment because of an employer's perceptions, whether or not those perceptions are accurate. It is of little solace to a person denied employment to know that the employer's view of his or her condition is erroneous. To such a person the perception of the employer is as important as reality."[65]

The legal status of perceived handicaps and the question of whether those with contagious diseases are handicapped will certainly increase in importance as legislators, judges, and practitioners encounter cases in which individuals with Acquired Immune Deficiency Syndrome (AIDS) and Human Immunodeficiency Virus (HIV) claim employment bias based upon their medical condition. The OCRC has yet to face the issue of whether an employer can discriminate based on an employee's status as an AIDS or HIV victim and thus, no Ohio courts have had occasion to rule on this matter.

However, the OCRC has issued a policy statement noting that "any person afflicted with AIDS shall be considered to be 'handicapped' within the meaning of § 4112.01(A)(13)."[66] The statement also issued a warning to employers with regard to mandatory AIDS or HIV testing: "[E]mployers are strongly cautioned that mandatory testing, or the use of the results of such testing may violate Ohio's antidiscrimination laws . . . . In general, therefore, employers must establish a business necessity for testing or for the use of test results."[67] The same theory might also protect carriers of syphilis, gonorrhea, or genital herpes.

Several recent federal cases are instructive as to whether contagious diseases should be viewed as protected handicaps. The most authoritative decision to date is *School Board v. Arline*.[68] In *Arline*, the United States Supreme Court held that a grade-school teacher with tuberculosis was handicapped within the meaning of the Rehabilitation Act, and was therefore part of a protected group.[69] In reaching this conclusion the Court reasoned that

> Arline's contagiousness and her physical impairment each resulted from the same underlying condition, tuberculosis. It would be unfair to allow an employer to seize upon the distinction between the effects of a disease

65. E.E. Black, Ltd. v. Marshall, 497 F. Supp. 1088, 1097 (D. Haw. 1980).

66. OCRC, POLICY STATEMENT ON THE TREATMENT OF CHARGES ALLEGING DISCRIMINATION BASED UPON ACQUIRED IMMUNE DEFICIENCY SYNDROME (AIDS) (1987) (discussing OHIO REV. CODE § 4112.01(A)(13) (Anderson 1980)) (on file with the University of Dayton Law Review).

67. *Id.* at 2.

68. 107 S. Ct. 1123 (interim ed. 1987).

69. *Id.* at 1127.

> on others and the effects of a disease on a patient and use that distinction to justify discriminatory treatment.[70]

The Court continued, "The fact that *some* persons who have contagious diseases may pose a serious health threat to others under certain circumstances does not justify excluding from the coverage of the Act *all* persons with actual or perceived contagious diseases."[71]

In *Chalk v. United States*,[72] another instructive case on contagious diseases as handicaps, the Court of Appeals for the Ninth Circuit held that a school teacher with AIDS was protected from discriminatory demotion by federal handicap laws.[73] The *Chalk* court relied heavily upon the *Arline* decision and stressed that there is no reliable evidence indicating that AIDS is transmitted by normal social contact.[74] However, not all federal decisions have protected AIDS carriers. In *Local 1812, American Federation of Government Employees v. United States Department of State*,[75] a United States District Court held that the State Department could ban individuals with AIDS and HIV from foreign-service positions.[76] The court stated that it was "satisfied that the Department of State . . . demonstrated serious ground for concern about the additional risk that disease will develop from placement of HIV carriers in many foreign posts and that medical care at such posts will be inadequate to diagnose and treat medical problems that may develop in any infected person."[77]

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70. *Id.* at 1128.
71. *Id.* at 1130.
72. 840 F.2d 701 (9th Cir. 1988).
73. *Id.* at 711.
74. *Id.*
75. 662 F. Supp. 50 (D.D.C. 1987).
76. *Id.* at 54–55.
77. *Id.* at 54. The federal cases addressing the contagious-disease issue cited herein were decided before enactment of the Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988). An amendment to the Act added the following provision to the definition of handicap:

> (C) For the purpose of sections 503 and 504, as such sections relate to employment, such term does not include an individual who has a currently contagious disease or infection and who, by reason of such disease or infection, would constitute a direct threat to the health or safety of other individuals or who, by reason of the currently contagious disease or infection, is unable to perform the duties of the job.

Id. § 9, 102 Stat. at 31–32. Since the amendment only applies to sections 503 and 504 of the Rehabilitation Act, it is relevant only to employees who work for government contractors and employers who receive federal funding. Much like the alcoholism provision, discussed *supra* notes 44–51 and accompanying text, the 1987 amendment does not apply to federal employees. The purpose of the amendment was to clarify the Supreme Court's decision in *Arline*. It is unclear whether lower courts will use the statute to remove AIDS victims from the protection of the Rehabilitation Act. If the court decisions discussed herein are any indication of future trends, AIDS victims will remain protected. Courts that have considered the AIDS issue have taken great pains to point out that there is no evidence that individuals afflicted with the disease constitute a

Obesity is another perceived handicap that has received heightened attention in this fitness generation. State courts are divided on the issue of whether obesity constitutes a handicap, either actual or perceived. The OCRC has yet to decide an obesity complaint. The New York Court of Appeals has decided that a 5'6" woman who weighed 249 pounds was protected by New York handicap-discrimination laws.[78] According to the court, New York's statute encompasses

> a range of conditions varying in degree from those involving the loss of a bodily function to those which are merely diagnosable medical anomalies which impair bodily integrity and thus may lead to more serious conditions in the future. Disabilities, particularly those resulting from disease, often develop gradually and, under the statutory definition, an employer cannot deny employment simply because the condition has been detected before it has actually begun to produce deleterious effects. Thus, the Commissioner could find that the complainant's obese condition itself, which was clinically diagnosed and found to render her medically unsuitable by the respondent's own physician, constituted an impairment and therefore a disability within the contemplation of the statute.[79]

On the other hand, a Kentucky statute expressly allows employers to reject a job applicant based on "any handicap which is not demonstrable by medically accepted clinical or laboratory diagnostic techniques, including, but not limited to, alcoholism, drug addition, and obesity."[80]

At the federal level, a district court decision took the middle ground on the obesity issue. In *Tudyman v. United Airlines*,[81] the United States District Court for the Central District of California held that although the Rehabilitation Act may protect some obese people, it does not protect a flight attendant who has exceeded maximum weight requirements as a result of being an avid body builder. The court reasoned that "[f]or the same reason that the failure to qualify for a single job does not constitute a limitation on a major life activity, refusal to hire someone for a single job does not in and of itself constitute perceiving the plaintiff as a handicapped individual."[82] Ultimately, the court determined that "[w]hat plaintiff is really suing for is his right to be both a body builder and a flight attendant, a right that § 504 was

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direct threat to the safety of others.

78. State Div. of Human Rights v. Xerox Corp., 65 N.Y.2d 213, 219, 480 N.E.2d 695, 698 (1985).

79. *Id.*

80. KY. REV. STAT. ANN. § 207.140 (Baldwin 1986).

81. 608 F. Supp. 739 (C.D. Cal. 1984).

82. *Id.* at 746.

not intended to protect."[83]

Smokers, addicted to the powerful dominance of nicotine, receive no similar judicial indulgence. An employer may refuse to permit smoking in any part of the workplace, and it may refuse to hire smokers.

Finally, it should be noted that a previously-handicapped employee who no longer has any functional limitation, but is treated by an employer as handicapped, is probably a protected handicapped person under Ohio law.[84] In *Telatco v. Akron Coca-Cola Bottling Co.*,[85] the OCRC straddled this issue. The *Telatco* report involved an employee who once had a mastoid disease and was improperly diagnosed as being deaf in one ear. According to the OCRC, the applicant proved that he was handicapped under Ohio law; however, the OCRC never expressly stated that the mastoid disease had functionally limited the employee while he suffered from the actual disease.[86] This void leaves the practitioner in a quandary with regard to the status of previously-handicapped employees. However, the legal shortcomings of the *Telatco* report are not atypical: like many other OCRC reports, *Telatco* is conclusory and fails to reveal any of the underlying rationale that the Commission may have utilized in arriving at its decision. Still, the *Telatco* report does come close to holding that a former functional limitation is similar to a perceived handicap, and, in such respect, this decision may stand for the proposition that such conditions are protected handicaps under Ohio law.

B. The First Part of the Handicap Definition: Abnormal, Diagnosable, Long-Term Medical Condition

Under Ohio law, an employee or applicant must initially establish that his or her ailment is an abnormal, diagnosable, long-term condition.

1. Abnormal Condition

A complainant must prove that his or her condition is "abnormal."[87] In one report,[88] involving an individual with chronic back strain that caused intermittent pain, the OCRC concluded that the complain-

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83. *Id.*

84. OHIO ADMIN. CODE § 4112-5-02(I) (1980).

85. No. 3068 (OCRC 1981). This report creates some confusion. Although the OCRC asserted that the applicant suffered from a hearing loss, it also stated that his hearing in the affected ear was at or near the normal range.

86. *Id.* at 16.

87. *See* OHIO REV. CODE ANN. § 4112.01(A)(13) (Anderson 1980).

88. Gray v. Roadway Express, No. 3939 (OCRC 1985).

ant's condition was abnormal, but suggested that many people in their mid-thirties would have to take the same precautions as the complainant.[89] The OCRC suggested that abnormal meant less-than-the-ideal for the species, instead of the more conventional definition, out-of-the-ordinary.[90] Many people commonly experience back strain, and few would consider back aches abnormal. Indeed, another report that involved an individual with a visual impairment concluded:

> We do not know just what the General Assembly intended by its use of the term "abnormal." Any person of common intelligence could reasonably conclude, by surveying the general population, that visual impairments requiring the the use of corrective lenses are quite common. The hearing examiner herself is "abnormal" in this respect. However, the issue must await further development by the Commission and the Courts. We assume for purposes of this case that the General Assembly intended to include visual impairments within the requirement of abnormality.[91]

The OCRC again suggests that abnormal means less-than-perfect for the species. Setting such a minimal standard simply places greater emphasis on the extent to which a condition limits an employee's functional abilities[92] and increases the employee's hardships or vulnerabilities.[93]

One report[94] suggests that some common conditions not usually considered to be abnormal may be *legally* abnormal if they are extremely painful or otherwise more debilitating than usual. The examiner commented:

> Complainant has been medically diagnosed as having disc space degeneration and posterior facet arthritis. These are permanent conditions that affect the vertebrae and back. Although these conditions are not in themselves abnormal in a person of Complainant's age, they become abnormal when, as with Complainant, significant pain and limitations are experienced.[95]

The OCRC's definition of abnormal in this context contradicts the previous "less-than-ideal-for-the-species" definition, and instead adopts the more common definition of out-of-the-ordinary. It also indicates that, at least in application, an ailment with pain may be a different "condition" than an ailment without pain. Pain, therefore, becomes a determi-

89. *Id.* at 7, 9.
90. *See id.*
91. Sonnenstein v. City of Columbus, No. 3536, slip op. at 10 n.2 (OCRC 1981).
92. *See infra* notes 114–25 and accompanying text.
93. *See infra* notes 126–45 and accompanying text.
94. Webster v. J.C. Penney Co., No. 4180 (OCRC 1986).
95. *Id.* at 8.

native factor in the decision of whether a condition is abnormal. Thus, it is important to consider not only the medical diagnosis of a handicap, but also the condition's effects on the employee or applicant.

2. Medically-Diagnosable

An employee or applicant must also prove that his or her condition is medically-diagnosable.[96] At least one state requires that this diagnosis be made through accepted clinical or laboratory techniques.[97] The OCRC has great discretion to weigh the credibility of a particular physician or expert witness. It considers the doctor's knowledge of the specific employee or applicant, the doctor's expertise in dealing with the specific disorder in question, and the doctor's relationship to the parties.[98] A simple note from a doctor—the convenience note—will not be sufficient to establish a medically-diagnosed disease.

Of course, doctors often disagree about the diagnosis of a particular patient. These disagreements create problems in determining whether an applicant or employee is beset with a "medically-diagnosable" handicap. The complainant is often seen by at least three physicians. The first may be his or her own doctor; the second, the employer's; and the third, a neutral physician nominated by both the complainant's and the company's doctors. The OCRC has indicated that it is not bound by the third-party physician's decision, although the complainant may well be bound by his or her own doctor's diagnosis.[99]

The employee or applicant cannot be his or her own diagnostician. In one report,[100] an epileptic lineman who had been free of seizures for twenty years because of medication complained that he could not work more than eight hours per day without risk of a seizure.[101] The OCRC concluded:

> Complainant was obviously using his mild epileptic condition to pressure his employer into treating him differently than other employees. The commission rules do not require Respondent to accommodate a handicapped employee based on the employee's subjective judgment about his limitations. Absent objective medical or other evidence that Complainant

96. *See* OHIO REV. CODE ANN. § 4112.01(A)(13) (Anderson 1980).

97. KY. REV. STAT. ANN. § 207.130(2) (Baldwin 1986).

98. *See* Kline v. Duriron Co., No. 4200, slip op. at 10 (OCRC 1985); Subwick v. Sprayon Prods., Inc., No. 3323, slip op. at 12 (OCRC 1981).

99. *See* Gray v. Roadway Express, No. 3939, slip op. at 4–5 (OCRC 1985) (accepting report of third-party physician, but implying that such reports are not necessarily binding); Carse v. Consolidated Aluminum Corp., No. 4025 (OCRC 1985) (resolving a conflict among physicians with regard to diagnosis of a diabetic condition).

100. Gades v. TRW Replacement Div., No. 3407 (OCRC 1981).

101. *Id.* at 10.

> could not work over eight hours per day without the risk of seizure there is no need or duty to accommodate.[102]

Yet, strange quirks do appear. For example, the OCRC may accept the word of a chemical-dependent complainant as conclusive if he or she voluntarily admits the handicap. One report,[103] involving an applicant who admitted to being an alcoholic, stated:

> The hearing examiner also credited the testimony of the Commission's expert witness who confirmed that a reformed alcoholic would be more likely to mention his alcoholism to a prospective employer, as honesty is one of the principal tenets of Alcoholics Anonymous (AA). In fact, one of the principal underpinnings of AA philosophy is the recognition by the AA member that he is an alcoholic and the ability to profess that fact during AA meetings.[104]

This analysis is clearly fatuous. Alcoholics Anonymous does urge honesty and, as any therapist knows, denial of chemical dependency is one of the hallmarks of addiction. But the merit of AA's general principles cannot cloak every individual. Chemical dependency can be diagnosed, and a medical diagnosis should be required as it is with all other handicaps. Indeed, Wisconsin expressly requires a medical diagnosis of alcoholism.[105]

3. Continuing for a Considerable Length of Time

The complainant must establish that his or her handicapped condition will continue for a considerable length of time.[106] Although the OCRC has not yet formally quantified the time-length requirement, one report[107] has suggested that recovery within a year would not fulfill the time requirement.[108] Given the absence of a clear statutorily-required time-frame, the employee or applicant may have to rely on the testimony of a physician in order to persuade the OCRC. In one OCRC report,[109] a physician noted that the employee would "have to learn how to cope" with the symptoms of degenerative disc disease.[110]

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102. *Id.*

103. Wirth v. Babcock & Wilcox Co., No. 3694 (OCRC 1983), *aff'd in part and rev'd in part sub nom.* Babcock & Wilcox Co. v. Ohio Civil Rights Comm'n, 31 Ohio St. 3d 222, 510 N.E.2d 368 (1987) (remanding the case to determine whether complainant was impermissibly rejected because of his handicap).

104. No. 3694, slip op. at 13–14.

105. Connecticut Gen. Life Ins. Co. v. Department of Indus., Labor & Human Relations, 86 Wis. 2d 393, 408, 273 N.W.2d 206, 213 (1979).

106. *See* OHIO REV. CODE ANN. § 4112.01(A)(13) (Anderson 1980).

107. Hawkins v. Western Elec. Co., No. 3548 (OCRC 1982).

108. *Id.* at 10–12.

109. Presti v. Village of Walton Hills, No. 4253 (OCRC 1986).

110. *Id.* at 7.

The OCRC interpreted the physician's report as indicating "permanence or, at minimum, a condition which is expected to continue for considerable length of time."[111]

C. The Second Part of the Handicap Definition: Functional Limitations Resulting in Significantly-Increased Hardship and Vulnerability to Everyday Obstacles and Hazards

A complainant must also prove that his or her handicapped condition causes functional limitations resulting in significantly-increased hardship and vulnerability to normal obstacles and hazards.[112] This proof must be made in light of the employee's or applicant's routine living and working conditions and not in light of the particular requirements of the job in question.[113]

1. Functional Limitations

The handicapped condition must functionally limit "major life activities." Federal regulations define major life activities as "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[114] The OCRC and Ohio courts have provided a number of examples of conditions that result in functional limitations: lupus erythematosus,[115] drugs (seemingly only those producing strong physical reactions),[116] multiple sclerosis,[117] cervical arthritis,[118] severe infantile polio,[119] and blindness in one eye.[120]

Mere discomfort, however, is not sufficient to establish a functional limitation. For example, one report[121] found that neither hives nor a mild case of high blood pressure constitutes a functional limitation, even though both of these conditions are certainly medically-diagnosable and abnormal.[122] Similarly, pseudofolliculitis barbae (ingrown facial hairs) do not warrant classification as a functional limitation.[123] It should also be noted that these functional limitations must be

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111. *Id.*
112. *See* OHIO REV. CODE ANN. § 4112.01(A)(13) (Anderson 1980).
113. City of Columbus v. Ohio Civil Rights Comm'n, 23 Ohio App. 3d 178, 181, 492 N.E.2d 482, 486 (1985), *rev'g* Janson v. City of Columbus, Nos. 3677, 3708, 3727 (OCRC 1982).
114. 45 C.F.R. § 84.3(j)(2)(ii) (1987).
115. Constant v. Goodyear Aerospace Corp., No. 3860, slip op. at 2 (OCRC 1984).
116. *Hazlett*, 25 Ohio St. 3d at 279, 496 N.E.2d at 479.
117. Alleman v. Youngstown State Univ., No. 3902, slip op. at 2 (OCRC 1984).
118. Combs v. Lutheran Social Serv., No. 3534, slip op. at 14 (OCRC 1982).
119. Gordon v. Medina City Schools, No. 3354, slip op. at 6, 9 (OCRC 1981).
120. Newsome v. General Tel., No. 3494, slip op. at 6 (OCRC 1981).
121. Colson v. Ohio City Mfg., Nos. 3837–3839 (OCRC 1984).
122. *Id.* at 7.
123. Still v. Ohio Power Co., No. 4344, slip op. at 7 (OCRC 1986).

"more than occasional"[124] in their frequency, and "worse than those suffered by a nonhandicapped individual" in their severity.[125]

2. Significantly-Increased Hardship and Vulnerability

The complainant must establish that his or her functional limitation results in significantly-increased hardship and vulnerability to hazards that arise in routine living and working conditions.[126] This requirement should not be confused with the employer's affirmative defense of significantly-increased occupational hazards.[127] While the complainant's proof of hardship and vulnerability deals with hazards found in routine living and working conditions, the employer's affirmative defense concerns hazards that are only encountered in a particular job. Additionally, in making his or her prima-facie case, the complainant need only show significantly greater vulnerability to hazards in routine situations, not an increased chance that the hazard will occur.[128]

By referring to specific job requirements in finding that a complainant is handicapped, the OCRC has attempted to undercut the proposition that the employee or applicant must prove a handicap in light of everyday obstacles. Ohio courts have not approved of the OCRC's position; instead, courts have required the OCRC to examine routine living and working conditions as a whole. One OCRC report,[129] involving visually-impaired individuals applying for positions as police officers, held that it was "of critical importance . . . whether the Complainants' impairments constituted a barrier to employment in their chosen field as opposed to all possible employment."[130] An Ohio appellate court overruled this report, holding that the applicants had not proved that they were handicapped.[131] According to the court, the complainants had not shown that their functional limitations resulted in greater hardship or vulnerability in routine living and working

124. Hawkins v. Western Elec. Co., No. 3548, slip op. at 10 (OCRC 1982); *see also* Scanlan v. Lincoln Elec. Co., No. 4495, slip op. at 8 (OCRC 1987).

125. Gray v. Roadway Express, No. 3939, slip op. at 7–8 (OCRC 1985). The Commission reasoned that the complainant's back problems were no worse than the problems of those who suffer from "recurring illnesses or injuries which cause them to occasionally miss work." *Id.* at 8. Thus, the OCRC held that no accommodation by the employer was needed and that the complainant was properly discharged for failing to show up for work. *Id.*

126. *See* OHIO REV. CODE ANN. § 4112.01(A)(13) (Anderson 1980).

127. *See infra* notes 242–56 and accompanying text.

128. Roset v. Consolidated [sic] Coal Co., No. 3289, slip op. at 15 (OCRC 1980), *rev'd on other grounds sub nom.* Consolidation Coal Co. v. Ohio Civil Rights Comm'n, 473 N.E.2d 325 (Ohio C.P. 1981).

129. Janson v. City of Columbus, Nos. 3677, 3708, 3727 (OCRC 1982), *rev'd sub nom.* City of Columbus v. Ohio Civil Rights Comm'n, 23 Ohio App. 3d 178, 492 N.E.2d 482 (1985).

130. *Id.* at 11; *see also* Rose v. City of Zanesville, No. 3951, slip op. at 7–8 (OCRC 1985).

131. *City of Columbus*, 23 Ohio App. 3d at 181, 492 N.E.2d at 486.

conditions.[132]

Similarly, in another report,[133] the OCRC found that an applicant with a hearing loss was handicapped, since she faced vulnerability to hazards as a miner.[134] The trial court reversed the OCRC and held that the applicant did not establish a functional limitation.[135] The court stated that a functional limitation and hardship must be viewed in light of the complainant's routine living and working conditions, rather than the conditions of the particular job in question. To illustrate this point, the court noted: "[D]uring World War II only midgets could perform certain riveting operations in the tail sections of bomber aircraft. Does this mean that every person who could not fit in the space available for the riveting operation was a 'handicapped' person?"[136]

Under federal law, a different approach is taken. One case stated: "[T]he real focus must be on the individual job seeker, and not solely on the impairment or the perceived impairment. This 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."[137] Several federal cases have held that an employee's or applicant's mere exclusion from a single program or job is not a substantial limitation on a major life activity.[138] Therefore, federal courts seem to take a middle ground: although focusing on the individual job seeker, rather than his or her vulnerability to life's hazards, these courts require rejection from more than one job or position.

If an employee or applicant suffers from an acknowledged but controlled handicap, he or she may have difficulty in establishing a functional limitation. The OCRC has adopted two methods of resolving this difficulty. The first was endorsed in a report involving a controlled diabetic.[139] The OCRC held that since the employee was—at one time—functionally limited, and was currently being treated as a handicapped person, he was statutorily handicapped.[140]

The second method provides that even when an applicant or em-

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132. *Id.*

133. Roset v. Consolidated [sic] Coal Co., No. 3289 (OCRC 1980), *rev'd on other grounds sub nom.* Consolidation Coal Co. v. Ohio Civil Rights Comm'n, 473 N.E.2d 325 (Ohio C.P. 1981).

134. No. 3289, slip op. at 15.

135. *Consolidation Coal Co.*, 473 N.E.2d at 328.

136. *Id.* at 328.

137. E.E. Black, Ltd. v. Marshall, 497 F. Supp. 1088, 1100 (D.C. Haw. 1980).

138. *Tudyman*, 608 F.2d at 745; *E.E. Black, Ltd.*, 497 F. Supp. at 1100; *see also* Doe v. Centinela Hosp., No. CV 87-2514 (C.D. Cal. June 30, 1988).

139. Scott v. City of Dayton, No. 3451, slip op. at 15 (OCRC 1981).

140. *Id.*

ployee has adjusted to his or her condition, the complainant may still be handicapped.[141] This method was utilized in *Newsome v. General Telephone*[142] to protect a truck driver who had lost sight in one eye, but had adjusted to his condition and had no problems driving.[143] This approach suggests that increased hardship is decided not by reference to the effect of the abnormal condition on the complainant, but to its typical effect on a hypothetical individual. This analysis could, for example, be applied to protect a mildly-deaf person with a powerful hearing aid. The phrase in the statutory handicap definition, "can reasonably be expected to limit,"[144] suggests that one should examine hardships for a typical individual; the specific complainant need not actually experience the functional limitations, but must only be "reasonably . . . expected" to experience them.[145]

IV. Proof of Safe and Substantial Performance

The requirement that a handicapped complainant have the "ability to safely and substantially perform the essential elements of the job in question" may arise at least twice during a handicap hearing. The employee or applicant initially bears the burden of proving that he or she can safely and substantially perform the essential elements of the job. In this respect, the employee's or applicant's ability is an element of the prima-facie case.[146] However, the requirement may also be addressed in the employer's affirmative defense. The employer may prove that the applicant or employee cannot safely perform the job in question.[147]

The employee or applicant need only prove that he or she can perform the job in a "safe" manner. As one report[148] explained, "The [complainant's] burden by analogy is to prove that a person applying for the position of proofreader knows how to proofread or a person applying for the position of a carpenter knows how to safely operate a saw."[149]

Since the employee's or applicant's burden requires a showing of potential and not actual performance, the OCRC will, seemingly, accept testimony that the complainant can perform the job at any time during the course of the handicap. The possibility of self-serving testimony is quite obvious. For example, the OCRC determined that an

141. *See* Newsome v. General Tel., No. 3494, slip op. at 6 (OCRC 1981).
142. No. 3494 (OCRC 1981).
143. *Id.* at 6.
144. Ohio Rev. Code Ann. § 4112.01(A)(13) (Anderson 1980).
145. *Id.*
146. Ohio Admin. Code § 4112-5-02(J) (1980).
147. *See infra* notes 242–56 and accompanying text.
148. Walker v. Donn Corp., No. 4456 (OCRC 1987).
149. *Id.* at 10.

alcoholic could safely and substantially perform the function of the job so long as he abstained from drinking; presumably, if he began drinking again, he could be discharged.[150] A similar report held that an alcoholic employee with excessive absenteeism could safely and substantially perform the function of the job when he was present,[151] but did not excuse him from normal attendance requirements. In many respects, this standard is about as meaningful as saying that a clumsy person could safely and substantially perform the job of a mountain guide so long as he or she did not fall off the mountain. Yet, if the employee's standard of proof were any higher, the employer would have no need to prove specific inability as an affirmative defense because such a proof would be subsumed in the employee's case.[152]

The Rehabilitation Act[153] requires a complainant to prove as part of the prima-facie case that he or she is "otherwise qualified" for the position.[154] Many federal handicap cases hinge on the issue of whether an individual is "otherwise qualified." In *Southeastern Community College v. Davis*,[155] the United States Supreme Court attempted to clarify the "otherwise-qualified" requirement. Davis was a partially-deaf student who claimed discrimination when she was denied a position in a nursing program because of her deafness.[156] The Court held:

> Section 504 by its terms does not compel educational institutions to disregard the disabilities of handicapped individuals or to make substantial modifications in their programs to allow disabled persons to participate. Instead, it requires only that an "otherwise qualified handicapped individual" not be excluded from participation in a federally funded program "solely by reason of his handicap," indicating only that mere possession of a handicap is not a permissible ground for assuming an inability to function in a particular context.
>
> The court below, however, believed that the "otherwise qualified" persons protected by § 504 include those who would be able to meet the requirements of a particular program in every respect except as to limitations imposed by their handicap. Taken literally, this holding would prevent an institution from taking into account any limitations resulting from the handicap, however disabling. It assumes, in effect, that a person

150. Wirth v. Babcock & Wilcox Co., No. 3694, slip op. at 13–14 (OCRC 1983), *aff'd in part and rev'd in part sub nom.* Babcock & Wilcox Co. v. Ohio Civil Rights Comm'n, 31 Ohio St. 3d 222, 510 N.E.2d 368 (1987) (remanding the case to determine whether complainant was impermissibly rejected because of his handicap).

151. *See* Hildebrand v. Pennsylvania Crusher Corp., No. 4079, slip op. at 6 (OCRC 1985).

152. *Walker*, No. 4456, slip op. at 10 (OCRC 1987).

153. Pub. L. No. 93-112, 87 Stat. 355 (1973) (codified as amended at 29 U.S.C §§ 701–796 (1987)).

154. 29 U.S.C. § 794 (1987).

155. 442 U.S. 397 (1979).

156. *Id.* at 400–04.

> need not meet legitimate physical requirements in order to be "otherwise qualified." We think the understanding of the District Court is closer to the plain meaning of the statutory language. An otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap.[157]

The Court further stated that the Act does not require "an educational institution to lower or to effect substantial modifications of standards to accommodate a handicapped person."[158]

V. Proof of Discrimination

Once the complainant establishes that he or she is handicapped, the complainant must next prove that an adverse job action was taken by the employer because of the handicap.

If this is established, the complainant's case is completed and the burden shifts to the employer to establish a defense for the adverse job action. Since an adverse job action alone does not establish a prima-facie case, the employee or applicant must also establish that the medical condition leading to the adverse job action satisfies the two-part definition of handicap.[159] Handicap-discrimination law does not protect employees or applicants from adverse job actions predicated on medical conditions that are not handicaps. One report,[160] involving an employer who denied employment to all applicants with back ailments, held: "[T]he Company's policies as they exist would deny employment to a healthy, physically active 18 year old because he or she *might* . . . develop some back difficulties. While we find such a policy unfortunate, the above example does not violate present Ohio law."[161] However, the language of this report should be read cautiously. If perceived handicaps are statutory handicaps under Ohio law,[162] there would appear to be no reason why the complainant's volatile back condition would not qualify as a statutory handicap.

A. Awareness of the Handicap

The employer must have actual or constructive knowledge of an employee's or applicant's handicap to be liable for discrimination. In one OCRC report,[163] a complainant was diagnosed a month after his

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157. *Id.* at 405–06 (citation omitted).

158. *Id.* at 413.

159. *See* Murden v. Baltimore & O.R.R., No. 3489, slip op. at 5 (OCRC 1981). The authors' interpretation of the *Murden* case is discussed *supra* note 9.

160. No. 3541 (OCRC 1979).

161. *Id.* at 9.

162. *See supra* notes 52–61 and accompanying text.

163. Jensen v. Northend Community Center Corp., No. 3532 (OCRC 1981).

termination as being chronically depressed. The complainant's depression had resulted in an explosive personality.[164] The OCRC denied his claim of handicap discrimination.[165] The report concluded, "[C]omplainant was discharged because his supervisor believed his personality caused him to argue and disagree with his supervisor and his coworkers and not because of any mental handicap."[166] In another OCRC report,[167] an employee with an arthritic back condition who re-injured her back and failed to tell her employer about the re-injury was terminated because she refused to work. The OCRC concluded that the resulting discharge was non-discriminatory.[168]

Employers must use reasonable diligence to determine whether an employee's behavior or performance is the result of a handicap. Ignorance is no excuse: the test is whether a reasonable employer or supervisor would attribute the complainant's behavior to a handicap.[169] Still, if there are no outward signs, lack of knowledge is a defense. Thus, an alcoholic who was terminated because of his excessive absenteeism and tardiness was held not to have been the object of discrimination, because his employer was unaware of the condition.[170] There is, however, a recent federal district court case that in effect places a burden of due diligence on the employer. In *Ferguson v. United States Department of Commerce*,[171] a judge of the United States District Court for the Middle District of Florida stated:

> Plaintiff's chronic excessive absenteeism, his frequent failure to return to work on the dates promised with no notification, and failure to obtain appropriate leave slips, occurring after some twenty years of exemplary service, should have signaled an underlying problem requiring further investigation. If Defendant had undertaken that investigation, an analysis of Plaintiff's medical records would have clearly shown that the underlying problem was alcoholism.[172]

B. Forms of Discrimination

Under the Ohio Administrative Code, " '[d]iscriminate' includes segregate or separate, according different treatment, and taking actions

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164. *Id.* at 7.
165. *Id.* at 12–13.
166. *Id.* at 11–12.
167. Webster v. J.C. Penney Co., No. 4180 (OCRC 1986).
168. *Id.* at 9.
169. *See Jensen*, No. 3532, slip op. at 11–12.
170. Thomas v. City of Oberlin Water Pollution Control Plant, No. 3718, slip op. at 6–7 (OCRC 1983).
171. 680 F. Supp. 1514 (M.D. Fla. 1988).
172. *Id.* at 1517.

fair in form but which have different impact."[173] The Code of Federal Regulations provides an instructive list of the areas in which handicapped employees or applicants can suffer discrimination:

> (1) Recruitment, advertising, and the processing of applications for employment; (2) Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff and rehiring; (3) Rates of pay or any other form of compensation and changes in compensation; (4) Job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists; (5) Leaves of absence, sick leave or any other leave; (6) Fringe benefits available by virtue of employment, whether or not administered by the recipient; (7) Selection and financial support for training, including apprenticeship, professional meetings, conferences, and other related activities, and selection for leaves of absence to pursue training; (8) Employer sponsored activities, including social or recreational programs; and (9) Any other term, condition, or privilege of employment.[174]

Ohio has adopted a similar list.[175] Neither list is all-inclusive, but both provide insight into areas in which discriminatory activity can occur.

Discrimination can be blatant or subtle. In one OCRC finding,[176] a school librarian with respiratory difficulties was faced with a choice between returning to work in an atmosphere that would aggravate her condition or being suspended from her job without pay. She chose suspension, and the OCRC held that the suspension constituted handicap discrimination.[177] Another OCRC report[178] addressed the plight of an epileptic telephone lineman who was plagued with seizures. The employer imposed certain work restrictions on employees with seizures.[179] The restrictions could not be lifted unless the employee, while on medication, was seizure-free for one year.[180] That policy effectively prevented the complainant from doing his job. The employer offered him one alternative position at a reduced salary;[181] he refused, and was terminated.[182] The employer contended that the employee was not terminated because of his handicap, but because he failed to accept the other position.[183] The OCRC held: "[I]t is clear that but for Complainant's

173. OHIO ADMIN. CODE § 4112-1-01(A) (1980).
174. 45 C.F.R. § 84.11(b)(1)–(9) (1987).
175. OHIO ADMIN. CODE § 4112-5-08(A) (1980).
176. Burney v. Youngstown City Bd. of Educ., No. 4165 (OCRC 1985).
177. *Id.* at 9.
178. Chamblin v. General Tel. Co., No. 4207 (OCRC 1986).
179. *Id.* at 2–3.
180. *Id.* at 3.
181. *Id.* at 4.
182. *Id.*
183. *Id.* at 6.

handicap he would not have had to choose between accepting a new position and termination of his employment. This is sufficient to establish that Complainant was terminated, at least in part, because of his handicap."[184]

Seemingly-admirable motives, such as reducing the responsibilities and strains on an employee "for his or her health," do not shield an employer from liability for a discriminatory practice.[185] For example, demoting an employee with a heart condition to a lower-paying job with less pressure and strain may constitute handicap discrimination, even when the action has been taken with concern for the employee's health.[186]

There are several points in the hiring process that may give rise to discriminatory practices. Although not creating an automatic violation,[187] pre-employment screening inquiries into an applicant's handicap that go beyond the extent allowed by the Ohio Civil Rights Commission's *Guide for Application Forms*[188] can be discriminatory.[189] A question on an employment application that asks if an applicant has ever received workers' compensation benefits can be discriminatory unless the employer provides compelling reasons for such a question. This type of question can unnecessarily reveal the nature and severity of an applicant's handicap.[190]

The Ohio Administrative Code stringently regulates the administration of pre-employment tests to prevent any adverse effect on the employment opportunity of a handicapped individual.[191] Read literally,

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184. *Id.*

185. *See* Capriulo v. Fred W. Albrecht Grocery Co., No. 3182 (OCRC 1977).

186. *Id.*

187. Volmer v. Western S. Life Ins. Co., No. 2861, slip op. at 10 (OCRC 1984). With regard to discrimination arising from pre-employment screening, the report stated: "Additional facts must be proven in order to create this inference." *Id.*

188. OCRC, GUIDE FOR APPLICATION FORMS.

189. Mozingo v. International Harvester Co., No. 3802, slip op. at 11 (OCRC 1983).

190. Fast v. Roadway Express, Inc., No. 4230, slip op. at 7–8 (OCRC 1986).

191. OHIO ADMIN. CODE § 4112-5-03 (1980). Certain pre-employment inquiries and physical examinations are allowed, subject to the following regulations:

B) Pre-employment inquiries.

1) Pre-employment inquiries are permissible if they are designed to:

a) Determine whether an applicant can perform the job without significantly increasing the occupational hazards to himself or herself, to others, to the general public, or to the work facilities;

b) Determine whether the job requires the handicapped person to routinely undertake any task, the performance of which is substantially and inherently impaired by his or her handicap; and

c) Determine whether the person has a handicap which would require accommodation . . .

2) The pre-employment inquiries permissible under paragraph (E) of this rule [pertaining to reasonable accommodation] should be preceded by a statement that dis-

these regulations could be construed as prohibiting any pre-employment drug testing. Presently, no case or report has prohibited drug testing under this section of the Administrative Code. However, in view of both the wide use of such testing[192] and the public concern over drug abuse, any interpretation that would create a blanket prohibition against drug testing would probably receive a chilly reception in the courts.

These regulations, and the OCRC's position on pre-employment screenings, seem to be at odds with the Ohio Workers' Compensation Act.[193] The Act provides that the state will pay the total cost of compensation benefits if a pre-existing handicap causes a work-related injury, and will share the costs with the employer if the pre-existing handicap contributes to the post-injury disability.[194] The statute contains a long list of conditions deemed handicaps for this purpose.[195] In order to qualify for coverage under the Workers' Compensation Act, the employer has a duty[196] to notify the Ohio Industrial Commission that it has hired a handicapped individual. This reporting requirement presents the employer with a dilemma. An employer who does not make extensive pre-employment inquiries and physical examinations may lack the necessary information to determine if an employee is handicapped for the purposes of the Workers' Compensation Act. How-

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crimination on the basis of a handicap, which does not create the occupational hazards nor prevent substantial job performance . . . is prohibited by state law.

. . . .

C) Pre-employment physical examinations

1) Pre-employment physical examinations may be given if such examinations are used:

a) To determine those matters set out in [the pre-employment inquiry provisions] of this rule;

b) To establish a base line for health records and facilitate medicine programs; or

c) For other reasons demonstrated by the employer to be valid.

Such examinations cannot be used to exclude an applicant unless the handicap resulting in the exclusion creates a significant occupational hazard or prevents substantial job performance as set out in [the reasonable accommodation provision] of this rule.

Id. § 4112-5-08(B) to -08(C).

192. A recent General Accounting Office study showed that at least half of the Fortune 100 companies engaged in some type of drug testing. GENERAL ACCOUNTING OFFICE, EMPLOYEE DRUG TESTING, INFORMATION ON PRIVATE SECTOR PROGRAMS 2 (1988).

193. OHIO REV. CODE ANN. § 4123.343(D) (Anderson 1980).

194. *Id.*

195. *Id.* § 4123.343(A).

196. The statute contains a good-faith exception from the duty to notify the Ohio Industrial Commission prior to the injury. "Any employer who fails to so notify the commission but makes application for a determination hereunder shall be entitled to a determination if the commission finds that there was good cause for the failure to give notice of the employment of such a handicapped employee." *Id.* § 4123.343(C).

ever, an employer who does engage in such pre-employment screening activities may be subject to a discrimination charge. So far no court in Ohio has addressed the divergent positions of the two state agencies.

The OCRC's position on pre-employment testing is similar to federal law. Under federal regulations,

> a recipient [of Education for the Handicap monies] may not conduct a pre-employment medical examination or may not make pre-employment inquiry of an applicant as to whether the applicant is a handicapped person or as to the nature or severity of the handicap. *A recipient may, however, make pre-employment inquiry into an applicant's ability to perform job-related functions.*[197]

Federal law also requires employment tests to be tailored to accommodate an applicant's sensory disabilities if these disabilities are not job-related.[198] In this regard, the Eleventh Circuit required the Tennessee Valley Authority to give an oral General Aptitude Test Battery to a dyslexic employee who applied for a position in a heavy-equipment-operator training course.[199]

VI. EMPLOYER AFFIRMATIVE DEFENSES

Once an employee or applicant establishes a prima-facie case of unlawful discriminatory practice, the employer, in order to escape liability, must establish either an affirmative defense or a legitimate non-discriminatory reason for the adverse job action. Ohio law enumerates four defenses: (1) inability to substantially perform the job, (2) bona-fide occupational qualification, (3) increased likelihood of an occupational hazard, or (4) inability of an employer to reasonably accommodate.[200] Employers face a high burden in establishing defenses: "Like exceptions to all remedial legislation the exceptions here [such as affirmative defenses and legitimate business reasons] are to be narrowly construed."[201]

The traditional reasons for discharge—incompetence, insubordination, or falsification of an employment application—apply to handicapped individuals as to all others, so long as the individual's handicap is not a factor in the discharge. One report,[202] involving a mechanic with tunnel vision, concluded: "Even though Complainant has a vision

197. 45 C.F.R. § 84.14(a) (emphasis added).

198. 29 U.S.C. § 794 (1987).

199. Stutts v. Freeman, 694 F.2d 666 (11th Cir. 1983).

200. OHIO ADMIN. CODE § 4112-5-08(D)(1) (1980).

201. Kyle v. Republic Steel Corp., No. 3409, slip op. at 15 (OCRC 1981) (citing Phillips Co. v. Walling, 324 U.S. 490, 493 (1945)), *rev'd on other grounds*, No. 037903 (Ohio C.P., Cuyahoga County 1983).

202. Burger v. City of Cincinnati Mun. Garage, No. 3836 (OCRC 1984).

problem, there is no evidence that this problem prevented him from performing as an automotive mechanic. Nor was there any evidence that Respondent demoted Complainant for any other reason than Complainant's performance."[203] In another finding,[204] the OCRC denied relief to a handicapped individual who was fired because she lied about her health history on an application for health benefits. The OCRC held that the false report was a legitimate business reason for discharge and that complainant was not terminated because of her handicapped condition.[205]

An employer's business reason for discharging a handicapped employee is strengthened if other applicants with known handicaps are also on the company's payroll.[206] Employers bear a duty to try to "fit" a handicapped employee or applicant into a work program through reasonable accommodation.[207] Still, the OCRC has publicly supported the general rule that an employer may discharge an employee for a good reason, a bad reason, or no reason—absent discrimination.[208] This is consistent with federal law.[209]

A. Inability to Safely and Substantially Perform the Essential Function of the Job

One employer defense to a complainant's case is that the employee or applicant is unable to safely and substantially perform the essential function of the job, even with reasonable accommodation.[210] Unlike the initial employee burden, which requires an employee or applicant to establish that he or she can safely and substantially perform the job,[211] the employer must show with particularity that the complainant is unable to safely and substantially perform the essential elements of a particular job even with reasonable accommodation.[212]

As an illustration of how this argument fits into a handicap-discrimination case, consider a clerical worker who suffers from severe respiratory problems, and is frequently absent from work as a result of office pollutants. The worker is then discharged for poor attendance.[213]

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203. *Id.* at 9.

204. Volmer v. Western S. Life Ins. Co., No. 2861 (OCRC 1984).

205. *Id.* at 9–10. The OCRC has held that discharge for falsifying an application form is discharge for cause, even if the application form is deemed invalid because it elicited information regarding a handicap. Scanlan v. Lincoln Elec. Co., No. 4495 (OCRC 1987).

206. *Volmer,* No. 2861, slip op. at at 9–10.

207. OHIO ADMIN. CODE § 4112-5-08(D)(4)(C) (1980).

208. *See* Sonnenstein v. City of Columbus, No. 3536, slip op. at 13 (OCRC 1981).

209. Tims v. Board of Educ., 452 F.2d 551 (8th Cir. 1971).

210. *See* OHIO ADMIN. CODE § 4112-5-02(J) (1980).

211. *See supra* notes 146–58 and accompanying text.

212. *See* Walker v. Donn Corp., No. 4456, slip op. at 10–11 (OCRC 1987).

213. *Cf.* Subwick v. Sprayon Prods., Inc., No. 3323 (OCRC 1981).

As one element of his or her case, the worker must establish that in a pollutant-reduced office environment he or she can safely and substantially perform the job. To defend, the employer must establish that even with reasonable accommodation, the employee's attendance problem could not be solved. Moreover, the employer must establish that these accommodations would not otherwise enable the employee to safely and substantially perform the job. The employer might also urge that the installation of an air filtration system for one employee is an undue hardship in terms of cost. Such an argument is more fully explored in the discussion of reasonable accommodation.[214]

Employers often use "blanket" tests to determine whether applicants or employees can safely and substantially perform the essential functions of the job. A blanket test is a test administered by the employer to a class of people, usually job applicants; all those who fail such a test are rejected from employment. Blanket tests are appealing because they reduce the costs of both the hiring and promotion processes. However, Ohio law requires that "[t]he determination of whether a handicapped person is substantially unable to perform a job must be made on an individual basis, taking into consideration the specific job requirements and the individual handicapped person's capabilities."[215] Further, Ohio regulations state that "[a] task which is an infrequent, irregular or nonessential element of a job cannot be used to exclude a handicapped person."[216]

The OCRC has reacted strongly against "blanket" tests. One report, involving an applicant who was rejected as a bus driver because of a previous heart condition, held:

> [R]espondent's blanket prohibition of all persons who have a history of heart surgery regardless of the underlying reasons for the surgery or the results thereof is exactly the kind of sweeping disqualification from employment that the legislature must have intended to prevent when it amended Chapter 4112 of the Revised Code to prohibit discrimination based on handicap.[217]

Some blanket tests rejected by the OCRC test for conditions obviously unrelated to the function of the job in question, such as a blood-pressure test for nurses or a driving-ability test for stevedores.[218] Even employment tests expertly designed to correspond to the functions and

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214. *See infra* notes 257–324 and accompanying text.

215. OHIO ADMIN. CODE § 4112-5-08(D)(4)(a) (1980).

216. *Id.* § 4112-5-08(D)(4)(b).

217. Green v. Ohio Dep't of Educ., No. 3355, slip op. at 8 (OCRC 1980); *see also* Murdock v. Baltimore & O.R.R., No. 3541 (OCRC 1982).

218. *See* Kline v. Duriron Co., No. 4200, slip op. at 9 (OCRC 1985); Hixson v. Smith's Transfer Corp., No. 3468, slip op. at 6 (OCRC 1982).

demands of a specific job may be suspect because of the OCRC's distaste for all employment tests. One OCRC report[219] involved a test for railroad employees that was designed by the American Medical Association. The commission stated, "[S]ome cases have held that medical standards which operate to exclude an entire category of handicapped persons cannot of themselves constitute a defense to a case of handicap discrimination unless the handicap is invariable in its disabling effect."[220] Another report[221] dealt with a policy concerning work restrictions for epileptic telephone linemen. The hearing examiner concluded that although the policy itself was reasonable, its application was discriminatory because it unnecessarily restricted a handicapped employee.[222]

The OCRC will seemingly reject all but the most compelling blanket tests, such as those excluding blind applicants from positions as truck drivers. Here again, the OCRC is on a collision course with drug testing and the concomitant, formidable data that a drug-free work force is more productive.

The federal position on blanket tests is analogous to Ohio law:

> A recipient [of Education for the Handicapped monies] may not make use of any employment test or other selection criterion that screens out or tends to screen out handicapped persons . . . unless: (1) The test score or other selection criterion . . . is shown to be job-related for the position in question, and (2) alternative job-related tests or criteria that do not screen out or tend to screen out as many handicapped persons are not shown by the Director to be available.[223]

The OCRC has held that employment decisions must be made on a "case-by-case basis, not on a knee-jerk reaction to a medical label or classification."[224] In short, the OCRC does not favor job-related criteria as a broad defense, and will limit its use whenever possible.

Even if the OCRC rejects an employer's blanket test, the employer has not necessarily committed a discriminatory act when the flawed test produces the correct result. One report[225] involved a handicapped individual suffering from asthma and allergies who was forced to resign

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219. Baldwin v. Norfolk & W. Ry., No. 3498 (OCRC 1981).

220. *Id.* at 8–9.

221. Chamblin v. General Tel. Co., No. 4207 (OCRC 1986).

222. *Id.* at 6–7.

223. 45 C.F.R. § 84.13(a) (1987).

224. Lest v. City of Cleveland, No. 3858, slip op. at 8 (OCRC 1984), *appeal dismissed as untimely sub nom.* City of Cleveland v. Ohio Civil Rights Comm'n, No. 84510 (Ohio C.P., Cuyahoga County July 6, 1983); *see also* Kyle v. Republic Steel Corp., No. 3409, slip op. at 17 (OCRC 1981) (advocating a case-by-case analysis), *rev'd on other grounds,* No. 037903 (Ohio C.P., Cuyahoga County Oct. 25, 1983).

225. Baldwin v. Buttan County Community Action Comm., No. 4327 (OCRC 1986).

as an insulation installer because of his handicap. The employee was discharged without regard to the effect of the handicap on his work. The report concluded:

> [T]he fact remains that respondent was ultimately able to prove that Complainant's handicap fell within one of the exceptions under Revised Code Section 4112.02(L). Therefore, while the Respondent may be criticized for jumping to conclusions without supporting medical evidence, there is no violation of the law when the conclusion turns out to be the correct one.[226]

Finally, promotion of a handicapped employee will facilitate an OCRC conclusion that the employee was qualified.[227] Why else would the employer have promoted the employee?

B. Bona Fide Occupational Qualifications

A potential affirmative defense for the employer is that an applicant or employee did not possess a Bona Fide Occupational Qualification (BFOQ) for the job in question. In many respects, the failure to possess a BFOQ is similar to the defense of inability to substantially perform the elements of the job. Both defenses concern the necessary abilities or skills to perform a particular job. Yet, the Ohio Administrative Code states that BFOQ's "are not generally applicable to handicap discrimination."[228] The OCRC has supported this contention:

> The Commission has apparently limited BFOQ's in handicap discrimination to those situations where a standard has been adopted by a federal agency. Standards that have been adopted by local or state agencies may be considered BFOQ's, unless the Commission finds that the local requirement is not consistent with the laws against discrimination.[229]

Ohio courts have provided some guidance as to what constitutes a valid BFOQ. In *City of Columbus v. Ohio Civil Rights Commission*,[230] an Ohio court of appeals stated two theories of proof that may be utilized to establish a legitimate BFOQ. The first theory requires that the employer

> demonstrate that the job qualifications in question are reasonably necessary, and also that the employer has reasonable cause to believe, based

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226. *Id.* at 13.

227. Newsome v. General Tel., No. 3494, slip op. at 6 (OCRC 1984).

228. OHIO ADMIN. CODE § 4112-5-08(D)(2)(a) (1980).

229. Janson v. City of Columbus, Nos. 3677, 3708, 3727, slip op. at 16–17 (OCRC 1982), *rev'd on other grounds sub nom.* City of Columbus v. Ohio Civil Rights Comm'n, 23 Ohio App. 3d 178, 492 N.E.2d 482 (1985).

230. 23 Ohio App. 3d 178, 492 N.E.2d 482 (1985), *rev'g* Janson v. City of Columbus, Nos. 3677, 3708, 3727 (OCRC 1982).

> upon a factual reason, that all or substantially all of the protected class involved would be unable to perform safely and efficiently the duties of the job, or that some members of this class possess a trait precluding safe and efficient job performance.[231]

The second test requires "the employer [to] . . . have a rational basis in fact to believe that the elimination of its allegedly discriminatory practice would increase the likelihood of risk to the public."[232]

Under either test, even when an employer has an apparently reasonable BFOQ, the OCRC often exercises great discretion to modify the qualification or, in some instances, discard it altogether. In one OCRC report,[233] a one-handed police officer applicant failed a firing-range test. The test required each applicant to be a proficient shot with both hands. The OCRC struck down the police certification requirement, concluding that the "[r]espondents offered no credible evidence that having only one hand would significantly increase the occupational hazards associated with being a patrol officer."[234] The report continued:

> Respondent's justification for not certifying Complainant seems to be that since the firearms course was designed with the expectation that police officers would have a right hand and a left hand, they cannot test the firearms ability of a person with only one hand. This is simply not true. In fact, Complainant demonstrated on a pistol range that he was able to shoot accurately and safely with one hand.[235]

Another OCRC report[236] involved a police department that rejected a recovered-alcoholic applicant with past legal and present psychiatric problems. Although the hearing examiner conceded that the applicant's past and present problems "may have been related to [the applicant's] alcoholism,"[237] he still recommended a dismissal of the complaint. The hearing examiner concluded:

> Complainant was not rejected out of hand because of a history of alcoholism. He was rejected because his employment history, his legal history, his psychiatric evaluation, (as well as the results of the MMPI), indicated that he was not likely to succeed as a police officer . . . I do not believe the law requires Respondent to ignore or excuse Complainant's behavior prior to 1983 [the year of his application] because Complainant is an alcoholic.[238]

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231. *Id.* at 181, 492 N.E.2d at 487.
232. *Id.*
233. Durbin v. Village of Powell, No. 3996 (OCRC 1983).
234. *Id.* at 10.
235. *Id.* at 11.
236. Patterson v. City of Cleveland, No. 4494, slip op. at 9 (OCRC 1987).
237. *Id.*
238. *Id.*

However, the Executive Board of the OCRC overruled the examiner's dismissal and issued a cease-and-desist order, suggesting that the requirements were not acceptable BFOQ's.[239] An employer, therefore, may have difficulty relying on blanket employment qualifications or BFOQ's even in the most reasonable situation.

Since BFOQ's must be consistent with discrimination laws, blanket tests and BFOQ's are functionally similar. Both are sets of predetermined criteria relating to effective job performance. The two tests seemingly approach a single trait from opposite angles. For example, a BFOQ for a stevedore may be a strong back and an applicant may be refused employment as a stevedore under a "blanket test" that screens for weak backs. In practice, the use of BFOQ's or "blanket tests" may be identical.

In any event, Ohio law clearly does not allow "[p]references or objections of coworkers, the employer, clients, or customers" as BFOQ's.[240] Nor does Ohio law allow "[p]hysical or administrative obstacles or inadequacies at work facilities that reasonably can be corrected" to be considered when forming BFOQ's.[241]

C. *Significant Occupational Hazard*

In Ohio an employer may defend a discrimination charge by showing that the employee or applicant would, after reasonable accommodation, "significantly increase the occupational hazards affecting either the handicapped person, other employees, the general public, or the facilities in which the work is to be performed."[242] This increase "must be reasonably foreseeable with a significant probability of [the hazard] happening."[243] Only significant hazards that cannot be avoided through reasonable accommodation are eligible as affirmative defenses.[244]

Although no particular pattern arises from the OCRC's occupational-hazard determinations, the reports do provide some guidelines. A school crossing guard with sight in only one eye, some red-green color blindness, and right-side paralysis, did not have a significantly increased occupational hazard.[245] Furthermore, with regard to a one-handed police candidate, the OCRC stated that "[r]espondents offered no credible evidence that having only one hand would significantly in-

239. *Id.* The fact that the Executive Board of the OCRC failed to explain its overruling of this case creates a problem in interpretation, as the introduction to this article suggests. *See supra* notes 6–9 and accompanying text.

240. OHIO ADMIN. CODE § 4112-5-08(D)(2)(c)(i) (1980).

241. *Id.* § 4112-5-08(D)(2)(c)(ii).

242. *Id.* § 4112-5-08(D)(3)(a).

243. *Id.*

244. *Id.* § 4112-5-08(D)(3)(c).

245. Gordon v. Medina City Schools, No. 3354, slip op. at 16 (OCRC 1981).

crease the occupational hazards associated with being a patrol officer."[246] The police department had shown that the handicapped individual could not safely fire a gun around both sides of a barricade, but the OCRC did not find this functional limitation to constitute a significantly-increased occupational hazard.[247]

The OCRC considers the possible frequency of the hazard to be more important than the gravity of the potential hazard. This penchant was demonstrated in another report involving police officer candidates, *Janson v. City of Columbus*.[248] The original *Janson* report concerned candidates with very poor, but correctable, vision who were denied positions because of the possible loss of their glasses in a violent situation. The report, citing a laboratory study, concluded:

> Respondent offered no credible evidence that 20/40 or less uncorrected visual acuity would significantly increase the occupational hazards associated with being a patrol officer. Respondent proved there was some slight risk that an officer's eye wear could become inoperable, lost or damaged in a shooting situation, but this does not approach a "significant" increase in occupational hazards that affect nonhandicapped patrol officers.[249]

Applying similar logic, the OCRC has found a significant increase in occupational hazards when the hazards themselves are relatively minor, but the probability of occurrence is greater. *Anderson v. Greater Cleveland Regional Transit Authority*,[250] dealt with an alcoholic employee who became physically abusive when drunk, a problem far less serious than a visually impaired police officer who is involved in a shooting incident without his or her glasses.[251] The OCRC concluded, "Respondent provided objective evidence that Complainant's continued employment rises to the level of an occupational hazard, by showing that Complainant, while intoxicated, initiated physical confrontations against other employees."[252] Comparing *Anderson* with *Janson* sug-

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246. Durbin v. Village of Powell, No. 3995, slip op. at 10 (OCRC 1984).

247. *Id.*

248. Nos. 3677, 3708, 3727 (OCRC 1982), *rev'd sub nom.* City of Columbus v. Ohio Civil Rights Comm'n, 23 Ohio App. 3d 178, 492 N.E.2d 482 (1985).

249. Nos. 3677, 3708, 3727, slip op. at 15.

250. No. 4508 (OCRC 1987).

251. *Id.* at 7.

252. *Id.* The report examined at least one federal case construing the treatment of alcoholism in the federal Rehabilitation Act of 1973 and stated: "Implicit in these decisions is the notion that when an employee engages in misconduct related to alcoholism, it is incumbent upon the employer to recognize such conduct as incidences [sic] to a handicap. As with any other condition which rises to the level of a handicap, the employer has the duty to determine what accommodations are necessary to enable the employee to perform his job safely." *Id.* at 8 (construing Mantolete v. Bolger, 767 F.2d 1416 (9th Cir. 1985)).

gests that the OCRC disproportionately favors the frequency of the hazard against its gravity.

An Ohio appellate court, by overruling the OCRC's decision in *Janson*, corrected this discrepancy. The court found that glasses and contact lenses are "subject to displacement" and that "greater visual acuity would be reasonably necessary to ensure the safe firing of guns by officers, and thus necessary to the safety of the officers as well as of the general public."[253] The court directed the OCRC to consider both the possibility of occurrence ("subject to displacement") and the gravity of the hazard ("[un]safe firing of guns").[254]

The United States Supreme Court, in a decision considering the employment of a teacher suffering from tuberculosis, took both the occurrence and the gravity of the hazard into account when it determined that a school district had illegally discharged the teacher.[255] The Court stressed that a significant increase in occupational hazard should be considered in light of the following four factors:

> (a) the nature of the risk (how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious), (c) the severity of the risk (what is the potential harm to third parties) and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm.[256]

The OCRC's bent for frequency is illogical and should not receive judicial encouragement.

D. Reasonable Accommodation

The inability to provide reasonable accommodation is perhaps the most important defense available to employers. An employer has a duty to reasonably accommodate handicapped employees and applicants: "An employer must make a reasonable accommodation to the handicap of an employee or applicant unless the employer can demonstrate that such an accommodation would impose an undue hardship on the conduct of the employer's business."[257] Almost any handicapped applicant or employee, no matter how severe the handicap, can be accommodated given unlimited time and resources. For example, a blind employee can work on an assembly line if a sighted helper can guide his or her hand movements and the line is slowed down sufficiently to permit this help. However, Ohio only requires *reasonable* accommodation; employers are

253. *City of Columbus*, 23 Ohio App. 3d at 183, 492 N.E.2d at 487.
254. *Id.* at 182–84, 492 N.E.2d at 487–88.
255. School Bd. v. Arline, 107 S. Ct. 1123 (interim ed. 1987).
256. *Id.* at 1131 (citing brief of amicus curiae American Medical Association).
257. OHIO ADMIN. CODE § 4112-5-08(E)(1) (1980).

not required to accommodate without regard to cost or effort.

Reasonable accommodation does not have to be expensive, nor does it necessarily have to result in reduced productivity. It might simply involve forewarning an employee about a harmful condition so that the employee can sit at a different desk for a day or letting an employee eat snacks during the course of the day. The OCRC has held that forewarning a handicapped individual with severe respiratory problems about carpet cleaning or insecticide spraying so that she could temporarily work at another location is a reasonable accommodation.[258] The Commission has also suggested that an asthmatic house insulator could be reasonably accommodated by occasional special assignments to protect him from asthma attacks.[259] Allowing a controlled-diabetic police officer to eat a small snack while on duty, to control his blood sugar, would also qualify as a reasonable accommodation.[260]

1. Duties of Both Parties in Reasonable Accommodation

The OCRC requires an employer to demonstrate a good faith attempt to accommodate. One report[261] stated: "[R]espondent still violated the statute by failing to attempt to make a reasonable accommodation."[262] If an employer refuses to accommodate, it must provide compelling evidence that the accommodation sought or indicated would not be reasonable.[263] Ohio follows the federal requirement that imposes a duty upon the employer to "gather sufficient information from the applicant and from qualified experts as needed to determine what accommodations are *necessary* to enable the applicant to perform the job safely."[264]

However, the employee also has obligations. The OCRC requires an employee or applicant to inform the employer of his or her handicap, and, if already employed, to attempt unilaterally to find suitable alternative employment within the company whenever possible. In one report,[265] involving a handicapped individual with sickle cell anemia, the OCRC illustrated this point: "Respondent was not required to accommodate complainant. First, the complainant failed to give proper

258. *See* Gorby v. Kent State Univ., No. 4250, slip op. at 14 (OCRC 1986).

259. Baldwin v. Butler County Community Action Comm., No. 4327, slip op. at 6 (OCRC 1986).

260. Scott v. City of Dayton, No. 3451, slip op. at 19 (OCRC 1981).

261. *Gorby*, No. 4250, slip op. at 14.

262. *Id.*

263. *See id.* at 12.

264. Mantolete v. Bolger, 767 F.2d 1416, 1423 (9th Cir. 1985); *see also Gorby*, No. 4250, slip op. at 13.

265. *In re* Interlake, Inc., No. 2982, slip op. at 21 (OCRC 1978).

notice of his handicap to the employer. Second, there were a number of jobs posted for bid during [the complainant's] employment which were less physically demanding than [the present injurious job]."[266] The report concluded:

> Complainant had many opportunities to help himself, but neglected to do so. Complainant must have known [sic] his illness for sometime prior to being employed by [the employer]. He withheld from the employer his illness, and yet failed to bid on jobs that would accommodate complainant. Therefore, [the employer] was not required to accommodate his illness.[267]

Similarly, federal law requires a good-faith attempt to accommodate on the part of the employee. In *Brener v. Diagnostic Center Hospital*,[268] the Court of Appeals for the Fifth Circuit held that an alleged victim of discrimination had a duty to "make a good faith effort to contact the [other employees] not scheduled for duty . . . to arrange trades on those days" in order to accommodate.[269] Ultimately, the appellate court concluded that "bilateral cooperation is appropriate."[270]

A handicapped employee or applicant in Ohio is not the final arbiter of accommodation. He or she must be flexible and open to accommodation attempts by the employer, and may not turn down suitable alternative employment in the hopes of receiving a more desirable job.[271] Likewise, under federal law, it has been held that "reasonable accommodation need not be on the employee's terms only."[272]

2. Reasonable Accommodation Through Job Restructuring

Ohio law places a duty on employers to reasonably accommodate handicapped employees through "job restructuring."[273] However, job restructuring does not mean that the employer must find the handicapped individual another job.[274] One report did suggest that reasonable accommodation includes a "good faith attempt to place Complain-

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266. *Id.*

267. *Id.*

268. 671 F.2d 141 (5th Cir. 1982). While *Brener* involved reasonable accomodation for religion, the duties of employers regarding reasonable accomodation for handicap are more stringent. *See* Prewitt v. United States Postal Service, 662 F.2d 292, 308 n.22 (5th Cir. 1981) (discussed *infra* notes 311–12 and accompanying text); *see also infra* notes 309–10 and accompanying text.

269. *Brener*, 671 F.2d at 144.

270. *Id.* at 145.

271. *See* Combs v. Lutheran Social Serv., No. 3534, slip op. at 8–14 (OCRC 1982).

272. *Brener*, 671 F.2d at 146 (5th Cir. 1982).

273. OHIO ADMIN. CODE § 4112-5-08(e)(2) (1980).

274. Green v. Republic Steel Corp., No. 2761, slip op. at 13 (OCRC 1983).

ant in another position for which Complainant is qualified."[275] OCRC reports are ambivalent on whether restructuring job duties for a handicapped employee working in a large company means placing that individual in another location within the company or finding the complainant another job. For example, one OCRC report,[276] involving a large company with many divisions, held that transferring a handicapped employee to another division at another location constituted reasonable accommodation. Larger companies, because of their size and diversity, will probably bear the heaviest burden of accommodation through job restructuring, although the OCRC is not likely to state it so boldly. Reasonable accommodation never includes placing a handicapped employee in a position for which he or she has insufficient expertise or experience.[277]

3. Reasonable Accommodation Through Mechanical or Human On-The-Job Assistance

No predictable pattern arises from the reports that focus on the level of reasonable accommodation necessary in situations involving mechanical or human assistance. Reasonable accommodation with regard to a partially-blind applicant for a social worker position could be "an extra set of eyes on a part time basis" or a driver for home visits.[278] In a report not yet considered by the Executive Board of the OCRC, a hearing examiner found that an employee with a severe heart condition, in a job in which employees usually worked in pairs, could be reasonably accommodated by having his partner, or another employee, do the heavy lifting.[279] However, the helper need only assist the handicapped individual in doing the job; he or she is not a job substitute.[280] In this context, a federal appellate court held that a blind attorney could be denied a position with the Equal Employment Opportunity Commission because most of the legal analysis would have to be done by a sighted helper.[281]

Installation of an electrostatic air filter in a school library is a reasonable accommodation for an employee with respiratory problems.[282] But the accommodation must work to fulfill the statutory requirements:

275. Gordon v. Medina City Schools, No. 3354, slip op. at 20 (OCRC 1981).

276. Subwick v. Sprayon Prods., Inc., No. 3323, slip op. at 18 (OCRC 1981).

277. Martin v. City of Cleveland Fire Dep't, No. 3980, slip op. at 9 (OCRC 1985).

278. Maniscalo v. Cuyahoga County Welfare Dep't, No. 3953, slip op. at 11 (OCRC 1985).

279. Walker v. Donn Corp., No. 4456, slip op. at 12–13 (OCRC 1987). As of September 1987, this report had not been considered by the Executive Board of the OCRC.

280. Sklar, *supra* note 10, at 745.

281. Coleman v. Darden, 595 F.2d 533, 540 (10th Cir. 1979), *cert. denied*, 444 U.S. 927 (1980); *see also* Lipshur v. Love, 474 F. Supp. 332 (N.D. Cal. 1979).

282. Burney v. Youngstown City Bd. of Educ., No. 4165, slip op. at 5 (OCRC 1985).

installation of a mechanical device is not necessarily reasonable accommodation if the device fails to cure the problem.[283] Such a failure of accommodation may, however, be proof that effective accommodation is unreasonable.

4. Reasonable Accommodation Through Increased or Reorganized Medical Leaves

Accommodation through increased or reorganized medical leaves is especially germane to a chemical-dependent employee. In *Anderson v. Greater Cleveland Regional Transit Authority*,[284] the OCRC clearly defined the responsibilities of an employer when such an employer is confronted with an alcoholic employee:

> In *Whitlock v. Donovan*, the [United States District Court for the District of Columbia] said that an employer failed to meet its obligation to accommodate when it discharged an employee for work problems related to alcohol without giving him a firm choice between *immediate entry into a treatment program* or disciplinary action. In another case the court found that reasonable accommodation requires forgiveness of alcohol-induced misconduct in proportion to the employee's willingness to undergo treatment . . . .
>
> Based on the foregoing discussion, I find that a reasonable accommodation of Complainant would have been to maintain him on suspension status and offer him the *firm choice of undergoing treatment* or incurring further discipline. The burden rests with Respondent to demonstrate that such an accommodation would impose an undue hardship.[285]

Anderson supports a widely-used personnel device—the "last-chance" agreement. These agreements vary according to circumstances, but typically contain three elements: (1) the employee acknowledges a chemical dependency; (2) the employee agrees to seek treatment, probably through the employer's group insurance policy; and (3) the employer agrees that the employee shall retain employment so long as he or she remains in treatment and is chemical-free. However, the handicapped employee must still observe all of the rules of production and behavior applicable to other employees.

In a union shop, the union's involvement in the drafting of such an agreement is extremely important to the agreement's ultimate success. Overall, last-chance agreements are a desirable method for dealing with the problem of chemical-dependent employees. Such agreements

283. Subwick v. Sprayon Prods., Inc., No. 3323, slip op. at 16 (OCRC 1981).

284. No. 4508 (OCRC 1987).

285. *Id.* at 8–9 (citations omitted) (emphasis added) (citing Whitlock v. Donovan, 598 F. Supp. 126 (D.D.C. 1988)).

further the rehabilitative purposes of Ohio's statute by allowing the employee to retain his or her job, under certain conditions, and allowing the employer to keep its investment in the employee, also under certain conditions. Nevertheless, contrary to the national trend, the OCRC has indicated that a discharge for violation of a last-chance agreement may be discriminatory if the employee is an alcoholic.[286] Both federal courts[287] and labor arbitrators[288] have strongly supported last-chance agreements and agree with discharges when the last-chance agreement is broken. Ohio courts should not uphold the OCRC position that a discharge based on a last-chance agreement is unlawfully discriminatory.

Reasonable accommodation through modified leave does not necessarily require additional sick days or hospital treatment. One report,[289] involving an employee with severe respiratory allergies, suggested that reasonable accommodation would entail allowing the employee to go outside for fresh air periodically to alleviate her symptoms.[290] In another report,[291] the OCRC held that an employee who suffered from rheumatoid arthritis and was frequently absent was not entitled to extra sick days. The Commission concluded: "It is not a reasonable accommodation to allow a handicapped employee an unlimited number of absences because of his or her handicap. Such an accommodation obviously results in an undue hardship and is not required by Commission Rules or law."[292] In *Constant v. Goodyear Aerospace Corp.*,[293] an employee who suffered from systemic lupus erythematosus was not relieved of the obligation of reasonable attendance.[294] The hearing examiner stated that "[r]espondent has a right to determine acceptable attendance and regulate an employee's attendance based on its own determination of what is reasonable."[295]

5. Reasonable Accommodation Through Modified Employment Testing

Most employment-testing litigation concerns applicants rather

286. Hildebrand v. Pennsylvania Crusher Corp., No. 4079, slip op. at 6 (OCRC 1985) (sustaining discharge on other grounds).
287. Bakers Union Factory No. 326 v. ITT Continental Baking Co., 749 F.2d 350 (6th Cir. 1984).
288. *In re* Hayes Int'l Corp., 81 Lab. Arb. (BNA) 99 (1983) (Van Wart, Arb.).
289. Gorby v. Kent State Univ., No. 4250 (OCRC 1986).
290. *Id.* at 11.
291. Harris v. Paccar Inc., No. 4289 (OCRC 1986).
292. *Id.* at 7.
293. No. 3860 (OCRC 1984).
294. *Id.* at 10.
295. *Id.*

than employees. In one OCRC report,[296] a company promulgated a policy of refusing to hire individuals with high blood pressure. Applicants were not hired if their blood-pressure was higher than a certain breakpoint pressure.[297] The OCRC held that reasonable accommodation for prospective employees should consist of a modification of the breakpoint blood-pressure reading and daily monitoring of applicants once hired.[298] The company's policy of testing for high blood pressure among existing employees was highly relevant in formulating this determination.[299] This report also establishes that the OCRC may attempt to require employers to modify their employment tests to reasonably accommodate applicants if established employees do not have to meet similar criteria for continued employment.[300]

The relation of the test to job functions is critical. If that relationship is minor, the OCRC will probably order the test to be modified in order to accommodate handicapped applicants. For example, in *Hexson v. Smith's Transfer Corp.*,[301] an applicant for a position as a stevedore was required to pass an Ohio Department of Transportation driving test. The employer required the test both to provide for flexibility in assignments and to give dock workers opportunities for advancement.[302] As a result of poor hearing, the applicant failed the test, and was not hired.[303] The OCRC held that the test was unrelated to the functions of a dock worker and concluded that prospective stevedores did not have to pass the driving test.[304] However, a test of the stevedore's muscular endurance or ability to read bills of lading would probably meet with a different fate.

6. Undue Hardship and Unreasonable Accommodation

To justify its refusal to accommodate, an employer must establish that the accommodation would impose an undue hardship on the enterprise.[305] The federal definition of "reasonable accommodation"[306] is similar to Ohio's and is instructive when examining undue hardship under Ohio law. Reasonable accommodation under federal law includes the following considerations:

296. Kline v. Duriron Co., No. 4200 (OCRC 1985).
297. *Id.* at 5.
298. *Id.* at 13.
299. *Id.*
300. *Id.*
301. No. 3468 (OCRC 1982).
302. *Id.* at 16.
303. *Id.* at 5–6.
304. *Id.* at 13.
305. OHIO ADMIN. CODE § 4112-5-08(F)(1) (1980).
306. 45 C.F.R. § 84.12.

(1) The overall size of the recipient's [of Education of the Handicap monies] program with respect to number of employees, number and type of facilities, and size of budget;
(2) The type of the recipient's operation, including the composition and structure of the recipient's workforce; and
(3) The nature and cost of the accommodation needed.[307]

The size of the employer will clearly affect the determination of the degree of required accommodation. In the case of a large manufacturer, the Court of Appeals for the Eighth Circuit has held that the loss of efficiency from the accommodation of an employee for religious reasons was so small that it was not an undue hardship.[308] However, the same degree of accommodation could be unduly burdensome to a small company.

The United States Supreme Court, in *Trans World Airlines v. Hardison*,[309] held that in accommodating religious practices anything greater than a de minimis cost is an undue hardship.[310] This holding does not extend to handicap cases. The Court of Appeals for the Fifth Circuit in *Prewitt v. United States Postal Service*[311] stated:

> The *Hardison* principles are not applicable in the federal-employer handicap-discrimination context. Congress clearly intended the federal government to take measures that would involve more than a *de minimis* cost . . . . Congress was even unwilling to approve language that would have limited the government's duty to make reasonable accommodation to instances in which the cost of accommodation does not "disproportionately exceed[] actual damages."[312]

The OCRC has followed the *Prewitt* guidelines and has suggested that certain costly accommodations are reasonable: having a sighted worker lead a visually-impaired maintenance worker to various locations in the plant,[313] giving an "extra set of eyes" and a driver to a visually-impaired applicant for a social-worker position,[314] and providing an electrostatic air filter for an individual with a respiratory disease[315] are all

307. *Id.* § 84.12(c)(1)–(3).

308. Brown v. General Motors Corp., 601 F.2d 956, 959 (8th Cir. 1979) (holding that accommodation of employee created de minimus loss of efficiency). *But see* Murphy v. Edge Memorial Hosp., 550 F. Supp. 1185, 1192 (M.D. Ala. 1982) (applying similar principle but holding that rescheduling of nurses in hospital setting created greater than de minimus loss of efficiency).

309. 432 U.S. 63 (1977).

310. *Id.* at 84.

311. 662 F.2d 292 (5th Cir. 1981).

312. *Id.* at 308 n.22 (citations omitted).

313. Smith v. General Tire & Rubber Co., No. 3406, slip op. at 2 (OCRC 1981).

314. Maniscalo v. Cuyahoga County Welfare Dep't., No. 3953, slip op. at 11 (OCRC 1985).

315. Burney v. Youngstown City Bd. of Educ., No. 4165, slip op. at 5 (OCRC 1985) (em-

reasonable accommodations, according to the OCRC.

Pre-existing, binding contractual agreements may prevent accommodation by the employer.[316] However, there must be a specific conflict, not merely a potential conflict, with a labor agreement or other contract in order for an employer to be relieved of the requirement to accommodate.[317] Collective bargaining agreements cannot be used to facilitate a discriminatory purpose, but may, if consistent, result in a discriminatory outcome.[318] The OCRC has consistently supported an exception to reasonable accommodation where such efforts would breach an existing labor contract.[319] Similarly, federal cases have held that employer violations of seniority provisions may represent actions beyond the scope of reasonable accommodation and thus are not required by law.[320]

Although an employer clearly may not be forced to breach a union contract, the OCRC has held that a "good-faith" attempt to accommodate[321] includes asking the union to approve such a breach.[322] The OCRC has expanded the breach-of-contract exception to include a consideration for the established course of business.[323] It held that a new firefighter with epilepsy did not have to be accommodated with a light desk job, since light jobs had always been reserved for senior firefighters near the end of their careers.[324] Such an accommodation would work an undue hardship on the employer's ordinary course of business.

VII. EMPLOYEE REBUTTAL

After an employer has established an inability to reasonably accommodate, the employee or applicant may still establish that alternative means of accommodation are realistic and not unduly burdensome

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ployer's transfer of complainant would pose no undue hardship, notwithstanding its efforts to install air filter).

316. OHIO ADMIN. CODE § 4112-5-08(E)(3)(b) (1980).

317. Shoemaker v. Consolidated Freightways Corp., No. 4041, slip op. at 7 (OCRC 1985) (potential for filing of grievance by displaced worker does not constitute undue hardship on employer).

318. *See Trans World Airlines*, 432 U.S. at 81–83.

319. Hildebrand v. Pennsylvania Crusher Corp., No. 4079, slip op. at 7 (OCRC 1985); Baldwin v. Norfolk & W. Ry., No. 3498, slip op. at 9–10 (OCRC 1981) (accommodation not reasonable because suitable jobs "were seniority jobs pursuant to the union contract"); Hutson v. Kroger Co., No. 3267, slip op. at 15 (OCRC 1979) ("No reported cases have been found in which reasonable accommodation involved breaching the provisions of a collective bargaining agreement.").

320. Daubert v. United States Postal Serv., 733 F.2d 1367 (10th Cir. 1984); Bly v. Bolger, 540 F. Supp. 910 (E.D. Pa. 1983).

321. Gordon v. Medina City Schools, No. 3354, slip op. at 20 (OCRC 1981).

322. Hutson v. Kroger Co., No. 3267, slip op. at 17 (OCRC 1979).

323. Martin v. City of Cleveland Fire Dep't., No. 3980 (OCRC 1985).

324. *Id.* at 10.

in terms of cost or convenience. The Court of Appeals for the Fifth Circuit has stated:

> When the issue of reasonable accommodation is raised, the burden of persuasion in proving inability to accommodate always remains on the employer; however, once the employer presents credible evidence that reasonable accommodation is not possible or practicable, the plaintiff must bear the burden of coming forward with evidence that suggests that accommodation may in fact be reasonably made.[325]

An employee also has the opportunity to present evidence to rebut an employer's showing of legitimate, non-discriminatory business reasons for an adverse job action by establishing that the proffered reasons are merely a pretext for actual discriminatory motives.[326] The employer would, therefore, be liable for unlawful discriminatory practices if the proffered business reasons for the adverse job action are proven to be shams.

For example, a no-fault absence-control policy may seem to be legitimate and non-discriminatory. However, if the employer fires a handicapped employee with a poor record while retaining a nonhandicapped employee with an even worse record, the discharged employee would be able to prove the discharge was pretextual since the no-fault policy articulates no standards for which level of attendance is worthy of discharge. The OCRC has held that "an arbitrary [absence control] plan *per se* does not rise to the level of violating Ohio Revised Code Chapter 4112.02(A). The [employee] must prove discrimination."[327] Nonetheless, an arbitrary plan may suggest pretextual motives.

The Industrial Commission of Ohio recently passed a non-binding resolution addressing non-flexible attendance policies.[328] Under a non-flexible attendance policy, employees are terminated once they have missed more than a set number of days within a predetermined time period, regardless of the cause of their absence. The Commission's resolution provides:

> [It is neither in the] spirit of Section 4123.90 of the Revised Code nor in the spirit of the Ohio Workers' Compensation Act that an employer's

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325. Prewitt v. United States Postal Serv., 662 F.2d 292, 310 (5th Cir. 1981); *see also* Mantolete v. Bolger, 767 F.2d 1416, 1524 (9th Cir. 1985).

326. Willis Day Indus. Park v. Ohio Civil Rights Comm'n, 30 Ohio B.J. 1, 6 (C.P. 1986); *see also* Plumbers & Steamfitters Comm. v. Ohio Civil Rights Comm'n, 66 Ohio St. 2d 192, 203, 421 N.E.2d 128, 131 (1981) (citing McDonnell Douglas v. Green, 411 U.S. 792, 804 (1973)).

327. Hawkins v. Western Elec. Co., No. 3548, slip op. at 11 n.2 (OCRC 1982); *see also* Harris v. Paccar, Inc., No. 4289, slip op. at 3 (OCRC 1986) (hearing examiner seemingly frustrated that "[r]espondent had no objective guidelines to determine how many absences were too many").

328. Industrial Comm'n of Ohio, Resolution of Sept. 3, 1986.

> absentee control policy will result in injured workers being subject to disciplinary or punitive actions due to absences resulting from recognized work-related injuries or diseases and it is the Commission's belief that any such absentee control policy should be administered to exclude absences resulting from work-related injuries or diseases.[329]

The inconsistent use of employee evaluation systems may also provide evidence that an employer's stated legitimate business reason is merely pretextual. The OCRC has held that an employer "cannot rely on written performance evaluations to justify termination in one case and ignore them when they do not justify termination."[330] Evidence of a non-uniform application of employment criteria, whether a slightly inconsistent absence-control policy or inconsistent use of written evaluations, creates a strong presumption that the handicapped employee or applicant was adversely affected because of the inconsistent application.

VIII. REMEDIES

The most frequent OCRC remedy utilizes reinstatement coupled with back pay.

> If upon all reliable, probative, and substantial evidence the commission determines that the respondent has engaged in, or is engaging in, any unlawful discriminatory practice, whether against the complainant or others, the commission shall state its findings of fact and conclusions of law, and shall issue and . . . cause to be served on such respondent an order requiring such respondent to cease and desist from such unlawful discriminatory practice and to take such further affirmative or other action as will effectuate the purposes of Sections 4112.01 to 4112.08 of the Ohio Revised Code, including, but not limited to, hiring, reinstatement, or upgrading of employees with, or without, back pay, admission or restoration to union membership, including a requirement for reports of the manner of compliance. If the commission directs payment of back pay, it shall make allowance for interim earnings.[331]

In *Ohio Civil Rights Commission v. Lucas County*,[332] an Ohio Court of Appeals discussed the purpose of the back-pay provision. Since *Lucas County* was a case of first impression, the court looked to federal law for guidance.[333] The court reasoned that the back-pay provision of the Ohio law "is neither intended to punish the employer nor to provide a windfall to the victim of said discrimination; the award is

329. *Id.*
330. Colson v. Ohio City Mfg., Nos. 3837–3839, slip op. at 9 (OCRC 1985).
331. OHIO REV. CODE ANN. § 4112.05(G) (Anderson 1987).
332. 6 Ohio App. 3d 14, 451 N.E.2d 1247 (1982).
333. *Id.* at 15, 451 N.E.2d at 1248.

to compensate the victim."[334] The *Lucas County* decision quoted a federal case in arriving at its holding:

> [A]n award of back pay . . . [is] . . . "an integral part of the whole relief which seeks, not to punish the respondents but to compensate the victim of discrimination" . . . . [T]he injured worker must be restored to the economic position in which they *would have been but* for the discrimination . . . .[335]

Since the purpose of the remedy is to put the complainant in the economic position in which he or she would have been absent discrimination, federal courts have refused to follow the National Labor Relations Act[336] model[337] and have deducted collateral benefits such as unemployment compensation, welfare payments, food stamps, temporary wages, and federal, state, and city income taxes from federal EEOC back-pay awards.[338] The *Lucas County* court openly embraced the federal position.[339]

The remedy available to job applicants who are illegally rejected is very similar to the remedy available to employees who are terminated. The applicant is awarded back pay from the time he or she was last considered for employment and rejected to the time of the OCRC decision. The back pay is increased by normal raises that employees would receive over the period. The pay is then reduced by all interim earnings and earnings that would not have been received because of strikes or layoffs.

In September 1987, the Ohio legislature passed a statute that could radically change the remedies available for an employer or applicant. The statute provides that "[w]hoever violates this chapter is subject to a civil action for damages, injunctive relief, or any other appropriate relief."[340] There is no provision requiring the complainant to first pursue administrative remedies. The possible future effects of this statute have been vigorously criticized by many practitioners and there are indications that the statute may be quickly amended. However, at the time of this writing, the statute still stands and has yet to be tested. Many questions remain unanswered. The main ones include the distributions of burdens of proof and production in a private right of action;

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334. *Id.* at 16, 451 N.E.2d at 1249.

335. *Id.* (quoting Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 252 (5th Cir. 1974)) (emphasis added)).

336. 29 U.S.C. § 160(c) (1982).

337. *See, e.g.*, NLRB v. Rutter-Rex Mfg., 396 U.S. 258, 263 (1969).

338. *See* EEOC v. Enterprise Ass'n Steamfitters Local 638, 542 F.2d 579, 585 (2d Cir. 1976).

339. *Lucas County*, 6 Ohio App. 3d at 15–16, 451 N.E.2d at 1249.

340. OHIO REV. CODE ANN. § 4112.99 (Anderson 1987).

whether courts will require standing and exhaustion of administrative remedies; and the ability of a plaintiff to recover compensatory damages, damages for emotional distress, and punitive damages.

IX. CONCLUSION

Ohio handicap law has run a convoluted course in its twelve-year history. The OCRC was placed in an unenviable position when it was given the task of construing this law. Still, the OCRC would do a great service to practitioners, employers, and employees if it clarified its positions on the issues discussed in this article. The OCRC gives precious little guidance to those whom the statute was designed to help, and not much more to those employers who wish to comply with its provisions. The Commission makes its own task of seeking voluntary compliance far more difficult by taking extreme positions calculated to raise confrontation and challenge. The pre-employment testing "regulations" are a prime example. A product of heavy-handed bureaucracy at its worst, these regulations discourage all pre-employment testing. Even federal policy has receded from such extreme dogmatism on the testing issue.[341] In a country where drugs are a prime public concern such a position is ridiculous. A drug-free workplace is essential to high productivity and the workplace is an obvious focal point for promulgation of anti-drug policies. Thus, the OCRC's position is at odds with both the times and reality.

Moreover, the OCRC has exhibited tunnel vision in its enforcement of Ohio's handicap statute. It makes scant use of abundant corollary materials available in deciding its cases: empirical data on drugs, labor arbitrators' decisions on last-chance agreements, and the Supreme Court's criteria on accommodation are all blissfully ignored by the OCRC bureaucracy. To be sure, Ohio courts do correct the OCRC's more obvious mistakes when they surface, but litigation is a long and expensive route.

341. *Cf.* GENERAL ACCOUNTING OFFICE, *supra* note 192, at 2.