Potluck Protections for Handicapped Discriminatees: The Need to Amend Title VII to Prohibit Discrimination on the Basis of Disability

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I don’t mind hiring the handicapped, so long as the public doesn’t have to see them.¹

Our society has made great efforts in the past two decades to insure equal employment opportunities for all people. The litany of “race, color, religion, sex, or national origin”² as unlawful bases for employment discrimination reverberates in the conscience of the American public. Yet, the dream rings hollow for the millions of handicapped Americans facing the frustration of physical and attitudinal employment barriers. Why in this age of awakening social consciousness must the handicapped³ population have to fight in the legislatures and courts for recognition of rights that most people consider basic to any moral system? One individual who spends his working day finding solutions to the architectural barriers facing handicapped individuals is convinced that it is not yet people who

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¹ Comment by one employer as related by Mr. Jack Catlin. Interview with Jack Catlin, Director of Access Chicago, in Chicago, Feb. 4, 1977 [hereinafter cited as Catlin Interview]. Mr. Catlin is a paraplegic serving as Director of Access Chicago, which is a department of the Rehabilitation Institute of Chicago serving to find solutions to the problems of architectural and transportation barriers to disabled persons. Unfortunately, the comment quoted may represent one of the more favorable employer attitudes on the problem. This thought will recur throughout this article, yet it cannot be brought home too vigorously that the problems of handicapped persons are aggravated by the shortsighted perceptions and callow attitudes of society’s mainstream.

² E.g., § 703(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e)-2(a) (Supp. IV 1974).

³ The terms “handicap” and “disability” are used interchangeably throughout this article unless the context indicates otherwise. WEBSTER’s defines “handicap” as “a disadvantage that makes achievement unusually difficult; esp: a physical disability that limits the capacity to work.” WEBSTER’s Third New International Dictionary 1027 (1961). “Disability” is further defined as “the condition of being disabled: deprivation or lack; esp, of physical, intellectual or emotional capacity or fitness.” Id. at 642. These terms have been retained out of deference to their common usage in society. However, their retention is with reservations as to the propriety of perpetuating stereotypes, i.e., that disabled persons are intrinsically handicapped. On the contrary, the physically disabled, for example, are not handicapped in a physical or job environment that takes into account their unique characteristics. It is only in constructing man’s artificial environments—buildings, transportation systems, work functions—that handicaps or barriers are built into the system for those who are not physically identical to the designers’ notions of the “ideal individual.” Burgdorf & Burgdorf, A History of Unequal Treatment: The Qualifications of Handicapped Persons as a “Suspect Class” Under the Equal Protection Clause, 15 SANTA CLARA LAW. 855 (1975) [hereinafter cited as Unequal Treatment]. For a more extreme attempt to desensitize the terms handicapped and disabled, see Achtenberg, “Crips” Unite to Enforce Symbolic Laws: Legal Aid for the Disabled: An Overview, 4 U. SAN FERN. L. Rev. 161 (1975) [hereinafter cited as Achtenberg].
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discriminate; it is policy that causes discrimination. Until these policies and the environments within which they proliferate are changed there will be little, if any, progress made in enhancing the civil rights of society as a whole and of disabled persons in particular. This is the rationale that prompted the passage of Title VII of the Civil Rights Act of 1964.

This article will review the status of the law as it affects the employment rights of handicapped persons and review the factors shaping the exclusionary policies facing handicapped persons. The basic thesis of this article is that an amendment to Title VII is necessary, and that such an amendment can be effective only if at the same time there is a rational coordination of state workmen’s compensation statutes with this amendment’s anti-discrimination provisions.

DEFINING THE PROBLEM: HANDICAPPED-BASED DISCRIMINATION

It was recently estimated that there are twenty-two million physically disabled individuals in the United States, yet only 800,000 of these people are employed. These figures have been roughly broken down by disability. Sixty-six percent of the blind persons, fifty-three percent of the paraplegics, and between seventy-five and eighty-five percent of those persons with epilepsy are unemployed. These high rates of unemployment are a testimony both to the

4. See note 1 supra.
6. S. Rep. No. 319, 93d Cong., 1st Sess. 8 (1973). Striking variations among the estimates of the numbers of affected individuals abound. See, e.g., Note, Affirmative Action Toward Hiring Qualified Handicapped Individuals, 49 S. Cal. L. Rev. 785, 807 n.104 (1976) [hereinafter cited as Affirmative Action], citing Hamer, Rights of the Handicapped, in 1974 Editorial Research Reports 887, 893 n.5 (of 11 million working-age, self-defined handicapped persons in the United States only 58% of the males and 24% of the females—compared to 76% and 42% respectively for the total population—were employed); Note, Abroad in the Land: Legal Strategies to Effectuate the Rights of the Physically Disabled, 61 Geo. L.J. 1501, 1501 n.2, 1512 n.78 (1973) [hereinafter cited as Effectuate the Rights] (11.7 million and 14 million, respectively). The latter commentator explains that the difficulty in accurately assessing the situation arises from “the inability of statisticians to measure the effect of a defined handicap on the capacity of the handicapped to function normally in society.” Id. at 1501 n.2.
7. “Paraplegic” is defined as “persons with loss of use or paralysis of the lower half of the body on both sides.” Unequal Treatment, supra note 3, at 864, citing 118 Cong. Rec. 3321 (1972).
8. Id.
9. These figures do not take into account the “underemployment” factor whereby disabled workers are pigeonholed into jobs that neither adequately utilize the skills possessed nor offer opportunities for progression. See, e.g., Unequal Treatment, supra note 3, at 865 & n.70, citing Diminished People: Problems and Care of the Mentally Retarded 32 (N. Bernstein
waste of human resources and the stereotypes and prejudices that produce such results. These statistics are also testimony to the persistent and growing need for a fair and effective means of correcting a situation that currently operates as a drain on the productive resources of our economy. For example, while fourteen percent of the total United States population is living below the poverty line, over twenty-one percent of the non-institutionalized handicapped population is living below the poverty line.

Before pursuing the major focus of this article, one should be conscious of the fact that the discriminatory policies in the area of employment constitute only one facet of the broad scope of restrictions faced by those who because of physical or mental disability do not conform to society's conception of the "ideal individual." The fronts on which battles have been and continue to be fought include: forced sterilization; limitations on the admission of disabled aliens; and restrictions on the rights to marry, enter contracts, vote, obtain drivers' licenses or hunting and fishing licenses, enter the courts, hold public offices, obtain adequate education, and have access to public transportation facilities, as well as access to buildings held open to the public in general. Until these artificial obstructions are corrected few, if any, solutions to the attitudinal employment barriers will have any meaningful impact. Therefore, while this article focuses on the law relating directly to the discrimination faced in seeking employment, the problem should always be considered in the broader context referred to above.

The reasons offered for the policy of non-employment of disabled
individuals center on assertions that employment of handicapped persons will impede production and result in increased workmen’s compensation premiums. Translated into a functional barrier, the problem is one of ignorance on the part of the industrial segment of society. Legislatures should initiate a system that reflects the morality and attitudes of the majority. And while the law may not be able to legislate attitudes and morality insofar as the practices of the powerful minority segment—employers—is concerned, legislatures may surely establish the environment within which industry’s attitudes incubate. At this juncture it is necessary to examine the justifications that have been offered for the denial of fair employment opportunities to disabled individuals, and the fallacies those control the various areas of human activity. It has been recognized that such victims of misdescription are apt to develop in a manner consistent with the expectations of others that flow from knowledge of the label. Unequal Treatment, supra note 3, at 858; cf. § 7(6) of the Rehabilitation Act of 1973, 29 U.S.C. § 706(6) (Supp. IV 1974) (defining “handicapped individual” for the purposes of subchapters IV and V of the Rehabilitation Act of 1973 as, inter alia, “any person who is regarded as having” a physical or mental impairment which substantially limits one or more of such person’s major life activities) (emphasis added).

The self-fulfilling prophecy is also reflected in the lives of those who actually possess a trait that society characterizes as a handicap. Once the stigma of the label or the characteristic attaches one of two effects may result that can impede successful employment. On the one hand, there is the possibility that the individual will become insulated to the prospect of a life as a handicapped person who is not expected to compete with “normal” people. Thus, there is a danger of unnecessary and counter-productive dependencies being created by the overprotection afforded by legitimately concerned parents and overly interventionist rehabilitation counselors. Catlin Interview, supra note 1. On the other hand, there is a strong chance that the handicapped individual may suffer severely from the effects of self-doubts created as a result of prior encounters with the prejudices of the “normal” population. A. JAFFE, L. DAY, & W. ADAMS, DISABLED WORKERS IN THE LABOR MARKET 105 (1964) [hereinafter cited as DISABLED WORKERS]; A Proposal, supra note 9, at 458 n.7.

The effect of the phenomenon may be more pronounced in connection with certain disabilities than with others. For example, blanket denial to participants in methadone maintenance programs may lead to a further entrenchment of the addiction that caused the problem in the first place. Note, Methadone Maintenance Programs and Participation as a Hiring Criterion, 5 COLUM. HUMAN RIGHTS L. REV. 421, 422 (1973). Also, a recent study has shown that there is a high positive correlation between higher rates of unemployment and higher rates of stress related diseases. [1976] 93 LAB. REL. REP. (BNA) 185 (summarizing the findings of a study conducted by M. Harvey Brenner of Johns Hopkins University for the Joint Economic Committee). The potential cyclical effect of such a phenomenon upon handicapped persons is immediately apparent. Taken together these indirect effects help to explain why handicapped persons have been slow, relative to other depressed minorities, to develop the militancy necessary to effectively pursue and expand the scope of their legal rights. Achtenberg, supra note 3, at 164-65.


17. Skoning Address, supra note 16, at 5.
rationalizations contain. A means by which those justifications may be eliminated will then be offered.

EMPLOYER JUSTIFICATIONS FOR HANDICAPPED EMPLOYMENT POLICIES

Performance

Although employers fear that hiring the disabled worker will impair the efficiency and productivity of his business, studies prove otherwise. Research indicates that, when properly placed, a handicapped worker's performance matches that of a non-handicapped worker. In fact, one association of insurers has concluded that in the course of overcoming the handicapping effects of a disability an individual develops personality traits which enable him to surpass the performance of the general population with respect to production, job turnover, and absenteeism. The key variable in this equation is "proper placement." This, in turn, is a function of both proper appraisal of the job openings and an unbiased and realistic


19. This phenomenon persists even in those positions noted for their high rates of turnover. Harlick, *Rehabilitation of Industrially Injured Workers*, 25 HASTINGS L.J. 165, 168 (1973) [hereinafter cited as *Industrially Injured*], citing ASSOCIATION OF CASUALTY AND SURETY Co’s., THE PHYSICALLY IMPAIRED, GUIDEBOOK TO THEIR EMPLOYMENT 1-3 (1952) [hereinafter cited as *Guidebook*].

20. *Id.* at 172, citing *Guidebook*, supra note 19, at 2.

21. Mr. Catlin suggests that among the factors that should be examined by any placement or vocational rehabilitation counselor in order to place a disabled individual in a mutually satisfactory position are: (1) the product of the firm; (2) the nature of the firm’s production process; (3) the characteristics of the union, if any; (4) the management structure of the firm; and most importantly (5) the visible and invisible rules and regulations that affect an employment relationship with the firm. *Catlin Interview*, supra note 1.

22. Assessment of job openings, of course, should include current job openings that can be filled by a disabled individual both with and without modification of the job and, if modification is required, the degree of modification and the costs thereof. Also essential would be an analysis of future areas of labor shortages that could be filled by disabled individuals. The latter might also include occupations where there is a present scarcity of trained personnel such as welders, cashiers, checkers, hotel clerks, machine operators, and parts sales personnel. *Industrially Injured*, supra note 19, at 168, citing MANPOWER ADMINISTRATION, U.S. DEP’T OF LABOR, HIRING STANDARDS AND JOB PERFORMANCE iii (M.R. Monograph No. 18, 1970).

In addition, "job directed" analysis should strive for the imaginative creation of productive positions that will mesh with changing technology. GREENLEIGH ASSOCIATES, INC., A STUDY TO DEVELOP A MODEL FOR EMPLOYMENT SERVICES FOR THE HANDICAPPED 10, 112-17 (1969) [hereinafter cited as DEVELOP A MODEL]. This is the current critical area of ignorance facing those who would aid in the battle to employ the handicapped. As one supervisor of a placement agency expressed the situation, "We know twice as much as we need to about the clients and nothing at all about the possible jobs for them." *Id.* at 112.

In the past various entities have been able to create jobs in which to place disabled persons. *Industrially Injured*, supra note 19, at 168. These various "created jobs" include what is known as "sheltered workshops" wherein adjustment to a work situation is the primary focus
appraisal\textsuperscript{23} of both the existing skills of the particular individual and those skills that could be developed through the judicious use of vocational rehabilitation.

In turn, the primary factor in the achievement of maximum job placement that will fully utilize current capabilities and provide opportunities for full development of latent skills is the use of broad based data banks and the continued coordination of programs among existing agencies and organizations.\textsuperscript{24} Achievement should be measured along two axes.\textsuperscript{25} The first is the effective rate standard—the measure, in absolute terms, of the development, placement, and advancement of disabled individuals. In addition, the achievement of maximum placement may be measured along the “efficiency” axis—the measure, in relative terms, of the potential for realizing a greater effective rate at the same cost.\textsuperscript{26} Studies indi-
cate that both effectiveness and efficiency in job analysis, development, and modification are integrally related to the degree that these efforts are coordinated with various handicapped hiring programs through linkages that allow input from and distribution of information to the areas served by these programs.\textsuperscript{27}

\textit{Workmen's Compensation}

The second major concern of the industrial community, and the rationalization most commonly resorted to, is that workmen's compensation insurance rates will be increased if disabled workers are hired.\textsuperscript{28} However, the act of hiring a disabled individual will not per se result in an increase in the insurance premiums paid by any given employer. Workmen's compensation insurance premiums are based on the relative hazard of the employer's industry and on the employer's actual accident experience.\textsuperscript{29} Employers, when they are made to understand this, still assert that their merit rates will ultimately be higher if the disabled worker is employed because the disabled worker is more accident prone\textsuperscript{30} than his non-disabled counterpart.\textsuperscript{31}

This, again, is an erroneous assumption perpetuated by prejudice.
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and stereotype. Studies show that the accident experience of properly placed disabled workers is at least equal, if not superior, to that of non-disabled workers. There is no clear evidence that employment of disabled workers results in any increase in an employer's workmen's compensation costs. In fact, one study indicates that the overall safety record for disabled workers exceeds the national average by eight percent. When matched on identical jobs with the same hazard exposure, non-disabling injuries were experienced at the same frequency by groups of impaired and unimpaired workers. The findings also indicate: (1) that there is only a small probability that a subsequent injury will interact with a pre-existing condition to produce a permanent total disability; (2) that unimpaired workers are not put in danger by being required to work alongside disabled individuals; and (3) that a disabled individual who suffers a subsequent disabling injury is likely to, on the average, suffer less time lost from work than is an unimpaired worker.

However, regardless of the irrationality of these fears, they must be confronted so as to remove them as rationalizations for discriminatory denial of employment to disabled individuals. The primary

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33. A Proposal, supra note 9, at 486-88; Industrially Injured, supra note 19, at 172, citing Nat'l Workshop Report, supra note 32, at 105-06.

34. A Proposal, supra note 9, at 486. These safety statistics are explained as being the result of: (1) the disabled individual's realization of the limitations created by his particular disability and of the need to preserve his remaining capacities; and (2) the development of certain traits such as caution, courage, determination, and patience, in an effort to compensate for his disability and for any prejudices that are triggered in the minds of others by the fact of his disability. Epilepsy, supra note 16, at 67; Industrially Injured, supra note 19, at 172.


36. These findings are, of course, subject to the qualification that the disabled individual be properly placed in a job.

37. These findings are born out by the fact that second injury fund payouts are extremely low when considered in light of the number of persons employed. Fabing & Barrow, supra note 28, at 586-87, citing Workmen's Compensation and the Employment of Disabled Workers 58, Table 2 (Report of the State's Vocational Rehabilitation Council Committee on Relations with Workmen's Compensation).

38. In order to conform to the wording of the various workmen's compensation statutes the terms "second injury" or "subsequent injury" will be used to refer both to situations where an individual is injured after returning to work following an industrially-related injury and also where, for example, an individual was born with a disability and was subsequently injured on the job.

39. Fabing & Barrow, supra note 28, at 577-78.
area of employer concern has been that the combined effect of the two disabilities—a pre-existing handicap and a subsequent injury—may be far greater than would result from merely adding together the schedule allowances for each disability separately. For example, an employee with only one leg could be the victim of a work-related accident that results in the loss of his unimpaired leg. Thus, where the loss of one leg was compensated by an award of a twenty-four percent disability benefit, the loss of the second leg might result in a 100 percent disability benefit, not forty-eight percent.

In this regard, the modern trend has been to engraft onto an existing workmen’s compensation statute a provision establishing what is generally referred to as a “second injury fund.” The policy behind these provisions differs from that of the rest of the workmen’s compensation statute in that second injury funds are a positive attempt to encourage employment of handicapped persons as opposed to the general policy of spreading the “costs” of production over a particular enterprise or industry. The provisions generally have the effect of imposing liability on the employer or his insurer only for the degree of disability resulting from the injury arising out of employment with his company. The increment of disability that results because of the existence of a pre-existing im-

40. 2 A. Larson, Workmen’s Compensation Law § 59.10 (1974) [hereinafter cited as Larson].
41. There are two other alternatives that were used in the past, and that may apply to a particular claim to the extent that the second injury fund provision does not govern. Larson, supra note 40, §§ 59.10, 59.20, at 10-262, 10-265. The first, known as the “full responsibility rule,” was based on the theory that an employer “takes his employee as he finds him” and has the effect of rendering the employer or his insurer liable for the entire disability award. The obvious disincentive that this creates in an employer to hire or retain a disabled individual was demonstrated by the discharge of between 7,000 and 8,000 handicapped persons within 30 days after the announcement in Nease v. Hughes Stone Co., 440 Okla. 170, 244 P. 778 (1925), of the adoption of the full responsibility rule. Larson, supra note 40, § 59.31, at 10-286, citing U.S. Bureau of Labor Statistics, Bull. No. 536, at 272 (1931) (statement by I.K. Huber).

The second alternative, known as the “apportionment rule” imposes liability on any given employer for only that degree of disability that results from an injury incurred while in his employ. Both of these alternatives to the second injury fund approach suffer serious deficiencies. Under the first alternative the employer has a strong incentive, at least in his own mind, to discriminate against disabled individuals. Under the second approach the employee is not adequately compensated for his disability.

42. Georgia is the only state that has not adopted some form of a second injury fund. Larson, supra note 40, § 59.31, at 78 (Supp. 1976).
43. This is not intended to imply that these policies are necessarily mutually exclusive. Custy, The Second Injury Fund: Encouraging Employment of the Handicapped Worker in South Carolina, 27 S.C.L. Rev. 661, 674 (1976).
44. Larson, supra note 40, § 59.31, at 10-285 to 288.
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Assuming that Title VII of the Civil Rights Act of 1964 were amended to prohibit employment discrimination on the basis of disability, there are a number of serious deficiencies in the current second injury fund provisions that require correction. These reforms would facilitate enforcement of a Title VII amendment by removing remaining disincentives to employing handicapped persons. At present, the biggest hurdle that must be overcome in order to gain access to the second injury fund is that the initial disability must meet certain stringent requirements. Illinois, for example, requires that the initial disability be the "loss or the permanent and complete loss of use of one member." This type of a statute, then, does not provide access to the fund for pre-existing latent conditions such as epilepsy, asthma, or a coronary ailment. In contrast, the Minnesota statute provides coverage for workers with a pre-existing "physical or mental condition which is or is likely to be a hindrance or obstacle to obtaining employment." Unfortunately, the Illinois provision is representative of the statutes in nearly half of the states.

Another common obstacle to realizing the dual goals of adequate compensation and removal of hiring disincentives is also manifest in the Illinois statute. The employee must, as a result of the combined effect of the initial disability and the subsequent injury, suffer

45. The Illinois statute provides:

If an employee who had previously incurred loss or the permanent and complete loss of use of one member, through the loss or the permanent and complete loss of the use of one hand, one arm, one foot, one leg, or one eye, incurs permanent and complete disability through the loss of the use of another member, he shall receive, in addition to the compensation payable by the employer and after such payments have ceased, an amount from the Second Injury Fund provided for in Paragraph (f) of Section 7, which together with the compensation payable from the employer in whose employ he was when the last accidental injury was incurred, will equal the amount payable for permanent and complete disability as provided in this paragraph in this Section.

ILL. REV. STAT. ch. 48, § 138.8(f) (1975).

46. First along these deficiencies is the pervasive lack of awareness on the part of most of the industrial community of even the existence of second injury funds. Industrially Injured, supra note 19, at 173.

47. ILL. REV. STAT. ch. 48, § 138.8(f) (1975).

48. Epileptics comprise the class of handicapped persons that suffers most severely from the effects of hiring discrimination. Fabing & Barrow, supra note 28, at 576 n.8. One study found that personnel directors were more likely to hire an ex-convict than an epileptic. A Proposal, supra note 9, at 458 n.6, citing Richard, Triandis, & Patterson, Indices of Employer Prejudice Towards Disabled Applicants, 47 J. APPLIED PSYCH. 52 (1963).

49. MINN. STAT. ANN. § 176.131(8) (West 1966).

50. LARSON, supra note 40, § 59.32, at 10-303.

a "permanent and complete disability." Further, restrictions on access to such funds have included contentions that the initial disability must have been incurred in the course of employment and must have been compensable; requirements that the initial disability and subsequent injury must either be causally related or at least interact in some manner; and requirements that the prior injury must have been known to the employer at some point in the pre-accident employment relationship.

Apart from the inadequate and variegated coverage of the current second injury fund provisions, many of the funds are not financed in a manner that appropriately reflects their underlying policies. Nor does the financing reflect the respective benefits received by those with a vested interest in the realization of the policies, i.e., society, industry, and handicapped people. There are three methods, used either independently or in combination, by which these funds have been financed. Illinois finances its second injury fund by requiring the employer to pay into the fund $1,000 in the event of a work-related accident resulting in the death of an employee. Some states only require this form of payment when the employee dies without leaving any dependents.

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52. ILL. REV. STAT. ch. 48, § 138.8(f) (1975).
53. Larson, supra note 40, § 59.32, at 10-295 to 301. In the course of interpreting § 8(f)(i) of the Longshoremen's and Harbor Workers' Act, 33 U.S.C. §§ 901 et seq. (1970) ("If an employee receives an injury which of itself would only cause partial disability but which, combined with a previous disability . . . " ) (emphasis added), the United States Supreme Court held that the policy of aiding non-discriminatory hiring which undergirded the Act, compelled the conclusion that there could be no logical foundation for distinguishing and denying the benefits of the fund to those who had a disability as the result of a non-industrially related cause. Lawson v. Suwannee Fruit & Steamship Co., 336 U.S. 198, 204 (1949).
54. Larson, supra note 40, § 59.32, at 10-310 to 316.
55. E.g., S.C. Code, § 72-601(e) (Cum. Supp. 1975). See generally Larson, supra note 40, § 59.33, at 10-317 to 332. This requirement has both beneficial and detrimental aspects. Custy, supra note 43, at 672-76. On the one hand, it may result in creating another disincentive to the employer to hire handicapped persons inasmuch as some statutes require that written records be filed with the state workmen's compensation commission and with the administrator of the second injury fund. E.g., S.C. Code § 72-601(c) (Cum. Supp. 1975). On the other hand, the notice requirement may encourage the implementation of routine medical re-examination programs and thus result in a more effective placement program for all employees. See text accompanying notes 18-23 supra.
56. Some commentators have suggested that to fully allay the fears of employers, at what could be expected to be a minimal increase in fund payouts, that the workmen’s compensation provisions be amended to prevent an employer’s premium from reflecting merit-rating for: (1) accidents occurring solely because of a pre-existing disability; or (2) that portion of the resulting disability that is attributable to the pre-existing impairment, even though not caused by it, and compensable injuries to co-workers caused by an employee’s pre-existing disability. Fabing & Barrow, supra note 28, at 581-85.
57. ILL. REV. STAT. ch. 48, § 138.7(f) (1975).
financing is to assess the industry\textsuperscript{58} a percentage of its total compensation payments made during a fixed period of time. The third method is to finance the fund from the general tax revenues of the state.\textsuperscript{59}

It is suggested that the third alternative should be used more extensively\textsuperscript{60} than it has been in the past. In the first place, it would help in the transitional period subsequent to a Title VII\textsuperscript{61} amendment by relieving employers of an imagined, yet significant barrier to their acceptance of a policy of non-discriminatory handicapped hiring. In addition, in terms of a cost-benefit analysis approach, the general population would receive many benefits from full utilization of the disabled labor force. Social welfare programs would be freed of the heavy economic burden that disabled persons currently represent.\textsuperscript{62} Employed, the disabled individual would be increasing the gross national product and contributing to the tax revenues himself. Apart from brute economic considerations, the moral and social fiber of our society both calls for and depends upon such a public assumption of a public responsibility. Employment of handicapped persons can result in the preservation of the disabled individual's human dignity and could result in a paradigm for the rest of society to follow.\textsuperscript{63}

\textbf{EQUAL EMPLOYMENT OPPORTUNITIES}

\textit{The Constitutional Protections}

It does not appear likely that the equal protection clause,\textsuperscript{64} and the two-tiered analysis\textsuperscript{65} that has developed under it, will protect the

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\textsuperscript{58} For a complex variation of this scheme see S.C. CODE § 72-602(d) (Cum. Supp. 1975).
\textsuperscript{59} California uses this method exclusively. CAL. LAB. CODE § 4755 (West 1971).
\textsuperscript{60} However, this method should probably not be the exclusive financing method used inasmuch as the employing industry benefits from work performed by disabled individuals and, thus, should be required to bear a part of the resultant costs incurred by the labor force. These costs would probably then be passed on, by increased prices, to those elements of the consuming public that ultimately benefit from such expenditures of life and working capacity. Note, \textit{Workmen's Compensation—Encouraging Employment of the Handicapped in Michigan: A Proposal for Revision of the Michigan Second Injury Fund}, 67 MICH. L. REV. 393, 403 (1968) [hereinafter cited as \textit{Michigan Second Injury Fund}]. The author notes, however, that such a practice would be inhibited to the extent that a particular employer's product would be put at a competitive disadvantage. \textit{Id.} at 403 n.41.
\textsuperscript{62} See text accompanying note 11 supra.
\textsuperscript{63} See generally \textit{Michigan Second Injury Fund}, supra note 60, at 403; Fabing & Barrow, supra note 28, at 585-86.
\textsuperscript{64} U.S. CONST. amend XIV, § 1.
disabled person in the area of employment discrimination. Rarely will a state's classification of disabled persons be held unconstitutional under the minimum rationality analysis. For example, *Spencer v. Toussaint* involved a suit under section 1983 of the Civil Rights Act of 1866 and the equal protection clause of the fourteenth amendment. Plaintiff, who had a prior history of mental illness, applied for a job as a bus driver with the City of Detroit. She

are indications that a less rigid dichotomy between these standards of analysis may be developing. Reed v. Reed, 404 U.S. 71 (1971), overturned an Idaho Supreme Court decision sustaining the validity of a statute granting preference to males over females in the appointment of administrators. The United States Supreme Court, while refusing to find sex a suspect classification, found that the classification in question did not have a "fair and substantial" relationship to the object of the statute involved. See also James v. Strange, 407 U.S. 128 (1972); Eisenstadt v. Baird, 405 U.S. 438 (1972). See generally G. GUNTHER, CONSTITUTIONAL LAW, CASES AND MATERIALS 657-64, 875-88 (1975); The Supreme Court, 1971 Term, 86 HARV. L. REV. 1, 116-22 (1972).

66. "Handicapped persons" may be considered as a class for the purposes of legal analysis even though the underlying characteristics of the members of the class may differ radically. The reason for this is that they all share the characteristic of having been classified by society as "handicapped" with the consequent disparate treatment that label entails. *Unequal Treatment, supra* note 3, at 859 & n.21.

67. See *A Proposal, supra* note 9, at 467-70.

68. See *McDonald v. Bd. of Election, supra* note 1, at 802, 809 (1969). Under this analysis the Supreme Court presumes that the state's classification is constitutional. See Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78-79 (1911). Traditionally, the Court has been willing to hypothesize legitimate state interests that might have been in the minds of state legislators in enacting a statute. See also Goessert v. Cleary, 335 U.S. 464, 466 (1948).


70. See *Roth, supra* note 21, at 5417 (E.D. Mich. 1976).

71. Plaintiff also argued that her right to privacy had been invaded and that denial of public employment without a hearing and the use of a conclusive presumption via decision-making on the basis of prior medical history violated her due process rights. 12 Empl. Prac. Dec. at 5147. The court ruled that the standards established in *Reed v. Reed, supra* note 21, for interests in "property" and "liberty" were not met, and that since plaintiff had not been excluded from all public employment and had not been denied the job in question in a manner that imposed any stigma or other disability so as to foreclose future chances of employment, she had no right to a hearing with respect to the rejection of her application. 12 Empl. Prac. Dec. at 5148-49. Inasmuch as the irrefutable presumption argument also required a constitutionally protected interest in property or liberty and because of the fact that the city considered the medical history of an applicant only as it bore on the question of ability to perform a specific job, the court also found this argument lacking. *Id.* at 5149-50. The right to privacy argument was disposed of on the basis of the employer's overriding interest in information as to the mental health of applicants. *Id.* at 5150-51. However, since plaintiff had not been given reasonable notice of her right to an administrative review, the court indicated that, should she avail herself of the opportunity, any objection with respect to timeliness would be overruled. *Id.* at 5151.

The traditional due process rights developed in *Roth* were acknowledged in Bevan v. N.Y. State Teacher's Retirement System, 44 App. Div. 2d 163, 335 N.Y.S.2d 185 (1974), modifying 74 Misc. 2d 443, 355 N.Y.S.2d 921 (1973). A tenured school teacher became blind but was not allowed to return to work after completing a rehabilitation program. The court affirmed so much of the lower court's opinion as had ordered reinstatement and backpay on the ground that a prior hearing was necessary under the fourteenth amendment to discharge plaintiff for "cause," which could include mental or physical disability. *Id.* at 186, 335 N.Y.S.2d at 187.
was denied the position on the recommendation of the Civil Service Commission's medical examiner who, from a review of her medical history, apparently determined that her prognosis was poor. Similarly, the medical examiner determined that the job in question involved a great deal of stress and implicated the safety of others.\textsuperscript{72}

The district court recognized the city's legitimate interest in attempting to conform to the high standard of care required of common carriers. It ruled that the city's consideration of the nature of the specific job and the applicant's prior mental health and prognosis was not unreasonably related to that legitimate interest.\textsuperscript{73}

The second tier of equal protection analysis requires the showing of a compelling state interest to uphold state action where either an individual's fundamental right is affected or a suspect criterion is used to establish a classification.\textsuperscript{74} While handicapped individuals share many of the sensitive characteristics\textsuperscript{75} that qualify such classifications as race\textsuperscript{76} and national origin\textsuperscript{77} as suspect, it is not likely that the Supreme Court will extend the scope of this more demanding analysis to protect disabled persons.\textsuperscript{78} Further, since there is apparently no fundamental right to public employment, the strict standard of review will not be triggered by a fundamental rights analysis either.\textsuperscript{79}

\begin{footnotes}{
73. Id. at 5149-50. The court, although noting that the method of using only a record of medical history might be less desirable than a current psychiatric examination because of the inequality that might result, ruled that the court was not authorized to establish a better method. Id. at 5150, citing Dandridge v. Williams, 397 U.S. 471, 485 (1970).
75. San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1 (1973), summarized the essential features of a suspect class as being "... saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." Id. at 28. For a strong argument that handicapped persons be accorded the benefits of characterization as a suspect class, see Unequal Treatment, supra note 3, at 902-08.
78. In dicta, one district court stated:
[T]he plaintiff's claim that the blind constitute "suspect classification" is unsupportable. Even admitting that the blind are a small, politically weak minority that has been subjected to varying forms of prejudice and discrimination, the limitations placed on a person's ability by a handicap such as blindness cannot be ignored. Unlike distinctions based on race or religion, classifications based on blindness often can be justified by the different abilities of the blind and the sighted.
However, the due process-irrebuttable presumption analysis\textsuperscript{80} may provide some relief for handicapped persons. \textit{Gurmankin v. Costanzo}\textsuperscript{81} involved a blind plaintiff who applied for a position teaching visually unimpaired children in a school district which maintained a policy against “the blind teaching the sighted.”\textsuperscript{82} Apparently as an exception to this policy, Gurmankin was allowed to take a written examination and was given an oral interview. Though she received a passing score on the examination, the interviewers, who had had no prior contact with blind persons in the teaching profession, believed Gurmankin was unsuitable for the position she sought.\textsuperscript{83} The court found that plaintiff had not been fairly evaluated since the rejection was conditioned “on misconceptions and stereotypes about the blind and on assumptions that the blind simply cannot perform, while the facts indicate that blind persons can be successful teachers.”\textsuperscript{84} However, the court ultimately based its

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\textsuperscript{80} The “irrebuttable presumption-due process analysis” is invoked to require that individual determinations on a case-by-case basis be made where the governmental entity has acted in a manner depriving an individual of liberty or property on the basis of a presumption that is “not necessarily or universally true in fact.” See, e.g., \textit{Cleveland Bd. of Educ. v. LaFleur}, 414 U.S. 632 (1974); \textit{Vlandis v. Kline}, 412 U.S. 441 (1973); \textit{Dep’t of Agriculture v. Murry}, 413 U.S. 508 (1973).

\textsuperscript{81} \textit{Id.} at 986, quoting Dr. Martin Ferrier, Director of Professional Personnel for the school district.

\textsuperscript{82} \textit{Id.} at 987-88.

\textsuperscript{83} \textit{Id.} at 988-91.

\textsuperscript{84} The court also noted that there had been mutual misunderstandings as to the kinds of questions and answers that were expected. In particular, the interviewers did not adequately investigate the possible arrangements that might be made to allow performance of some of the duties they felt Gurmankin’s blindness would inhibit. \textit{Id.} at 988.

One other case has indicated that failure to consider the qualifications of the individual and possible rearrangement of traditional ways of performing a given job in the public employment area may create an unconstitutional irrebuttable presumption. In \textit{Hoffman v. Ohio Youth Comm’r}, 13 Fair Empl. Prac. Cas. 30 (N.D. Ohio 1975), the suit was ultimately dismissed as moot because the plaintiff had apparently ceased seeking active employment with the Commission. \textit{Id.} at 36. However, in lengthy dicta the court noted that ability to perform the essential functions of a given job should be the primary consideration of an employer. Whereas secondary duties would still have to be performed, the court opined that outright refusal to consider a blind applicant without examining alternative means of accomplishing those duties would be violative of the applicant’s due process rights. \textit{Id.} at 34-36.

Another court similarly found a duty to attempt accommodation under a state human rights act. \textit{Holland v. Boeing Co.}, 12 Fair Empl. Prac. Cas. 975 (Wash. Sup. Ct. 1976). Plaintiff, a victim of cerebral palsy (which impairs physical coordination), was satisfactorily employed by Boeing as an electronics technician. When a reduction in force became necessary in his job category, Boeing transferred plaintiff to a job requiring the performance of job functions that were beyond his abilities. \textit{Id.} at 977. As a result of plaintiff’s poor performance in his
determination on the school district's prior refusal to allow plaintiff to take the written examination because of its policy regarding blind applicants. The district court distinguished Weinberger v. Salfi, which had limited the effectiveness of the irrebuttable presumption analysis in challenging classifications, finding that the interest in public employment was sufficiently important to justify application of the principles expressed in Cleveland Board of Education v. LaFleur. Consequently, the court found that the school district had violated Gurman's due process rights by creating an irrebuttable presumption that blind individuals were not capable of teaching sighted children.

Viewed as a whole, however, the constitutional protection of the equal employment rights of handicapped persons is not adequate to meet their needs. Relief in the form of an amendment to Title VII would be the most efficacious way to deal with the problem.

The Statutory Framework

1. Federal Laws

The area of protection of handicapped persons has traditionally been marked by an abundance of statutes of wide variety and little enforcement. At the federal level these enactments may be catego-

58. At Boeing, he was downgraded to a lower paying job. The court found that both the original transfer to a job that Boeing knew or should have known was beyond plaintiff's ability and the subsequent downgrade were violations of WASH. REV. CODE ANN. § 49.60.180(2)-(3) (Supp. 1975), inasmuch as there were alternatives open to Boeing that would not have constituted a burden on the company. Id. at 979. These included transfer of another able-bodied person in the first place or transferring plaintiff to one of the jobs he could have performed.

60. 422 U.S. 749 (1975).
61. 414 U.S. 632 (1974). In Cleveland Bd. of Educ. v. LaFleur, the Supreme Court held that certain broad mandatory leave policies for pregnant teachers penalized them for exercising their fundamental right to procreate and were not reasonably related to the valid state interest of keeping physically unfit teachers out of the classroom. Since some women could perform their duties beyond the arbitrary date established by the school district, the employer was required to provide individualized determinations. However, Salfi held that a social security regulation which denied benefits to widows and stepchildren whose relationship with the wage earner failed to last nine months rationally related to a legitimate legislative purpose. The Supreme Court distinguished LaFleur on the basis that "a non-contractual claim to receive funds from the public treasury enjoys no constitutionally protected status," and refused to employ the irrebuttable presumption analysis. 422 U.S. at 470-73. The Gurman's court was of the opinion that the right of public employment, while not a fundamental right, is more important than that of receiving social security benefits. Additionally, the court found that the differing natures of the classifications involved in Salfi (artificial) and Gurman (objective physical disability requiring "a greater degree of constitutional protection") and the lesser administrative burden involved in determining job qualification as opposed to the bona fide nature of a marriage, required application of the stricter conclusive presumption analysis. Gurman v. Costanzo, 411 F. Supp. 982, 989-92 (E.D. Pa. 1976).

rized as being either merely promotive of employment of disabled persons or as imposing duties with respect to non-discriminatory hiring. Representative of the former are the Randolph-Sheppard Amendments of 1974, which authorize preferential licensing of blind persons among those who apply to operate vending facilities on federal property. Also, the Fair Labor Standards Amendments of 1974 authorize the Secretary of Labor to "provide for the employment under special certificates of individuals . . . whose earning or productive capacity is impaired by . . . physical or mental deficiency or injury" at wages significantly lower than the minimum wage established by section 206 of the Fair Labor Standards Act.

Until recently the federal statutory provisions that prohibited discriminatory hiring were applicable only to the hiring practices of the federal government. However, in the past decade, implementa-

89. 20 U.S.C. §§ 107-107f (Supp. IV 1974). The pre-amendment Act had merely authorized operation of vending stands. In part to reflect the encroachment of automation, the coverage of the Act was extended to include "automatic vending machines, cafeterias, snack bars, cart services, shelters, counters, and such other appropriate auxiliary equipment as the Secretary may by regulation prescribe as being necessary for the sale of the articles or services described in Section 107a(a)(5) of this title and which may be operated by blind licensees . . ." Id. § 107(e)(7).
90. Id. § 107.
92. Id. § 214(c).
93. The general minimum wage for those individuals that the Secretary certifies would be set at no less than 50% of the minimum wage established in § 206 of the Act. Id. § 214(c)(1).
95. The President may prescribe rules which shall prohibit, as nearly as conditions of good administration warrant, discrimination because of physical handicap in an Executive agency or in the competitive service with respect to a position the duties of which, in the opinion of the Civil Service Commission, can be performed efficiently by an individual with a physical handicap, except that the employment may not endanger the health or safety of the individual or others.

With regard to civilian employment with the federal government from 1965 to 1974, while the rate of accession for the total population increased, the rate of accession for the handicapped population decreased markedly. U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES, TABLE No. 409, at 245 (1975).

The Civil Service Commission (CSC) was recently enjoined from failing to investigate adequately charges of handicap discrimination and failing to enforce its regulations. Smith v. Fletcher, 393 F. Supp. 1366 (S.D. Tex. 1975), involved a female paraplegic confined to a wheelchair who was employed by the National Aeronautics and Space Administration (NASA). Plaintiff and two unimpaired males of roughly equivalent qualifications were hired at levels GS-7 and GS-9, respectively in the years 1962-63. By 1969 both of the males had been promoted to GS-13 and had been allowed to perform research utilizing their full capacity. Plaintiff, however, had been downgraded to GS-5 in 1971, after having been promoted to GS-9 in 1963, and the nature of her work had degenerated to menial clerical tasks. Id. at 1367-68. An examiner of the CSC found after a hearing that this disparate treatment was the result
tion of not only non-discriminatory hiring practices but also affirmative action programs has also been required of those who contract with the federal government to do business above certain monetary thresholds. The most comprehensive of these acts to date, in terms of promoting the equal employment opportunities of disabled individuals, is the Rehabilitation Act of 1973. Three sections of subchapter V of the Act deal with employment of “handicapped individuals.”

Section 501 primarily affects the hiring practices of the federal executive agencies and establishes the Interagency Committee on Handicapped Employees. Its functions are to review “the adequacy of hiring, placement, and advancement practices” for handicapped individuals in the executive branch and to aid the Civil Service Commission through a process of “review and consultation.” Section 501 also imposes a duty on the executive instrumentalities to establish, and annually update, an affirmative action program for employment practices within the agency. The Civil

of an arbitrary, unfounded assessment of plaintiff's physical abilities made by her first supervisor and carried forward by subsequent supervisors. Though the examiner recommended that plaintiff be made whole, and though these findings and recommendations were fully adopted by the agency, agreement on the specific relief to be given plaintiff was not forthcoming. The district court found that if plaintiff had nondiscriminatorily been given the opportunity to perform work which she was physically capable of and in which she could have been advanced, she would have reached level GS-13 by February, 1974. Accordingly, her promotion to that level and backpay were ordered. Id. at 1370. But see Atkinson v. United States Postal Service, [1976] 12 Empl. Prac. Dec. ¶ 11,128 (S.D.N.Y. 1976) (granting summary judgment to defendant in a suit by a cerebral palsied plaintiff who had quit and then re-applied for a job, though failing to take the required competitive examination, on the ground that plaintiff failed to carry the heavy burden of proof of showing abuse of agency discretion).


98. The term “handicapped individual” is defined in section 7(6) of the Act, for the purposes of subchapter V, as: “any person who (A) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (B) has a record of such an impairment, or (C) is regarded as having such an impairment.” Id. § 706(6).

99. Id. § 791.

100. But see § 501(c), 29 U.S.C. § 791(c) (Supp. IV 1974) (mandating that the CSC develop “policies and procedures” which the Secretary of Health, Education and Welfare is ordered to encourage the “appropriate State agencies” to “adopt and implement”).

101. Exec. Order No. 11,830, 3A C.F.R. 104 (1975), establishes the composition of the Committee as follows: the Secretary of Defense; the Secretary of Labor; the Secretary of Health, Education and Welfare; the Chairman of the Civil Service Commission; the Administrator of Veterans Affairs; the Administrator of General Services; the Chairman of the Federal Communications Commission; and such others as the President designates.


Service Commission is required to submit yearly reports to Congress with respect to the general effectiveness of these programs.\textsuperscript{104}

The most promising\textsuperscript{105} provision of the Act is section 503.\textsuperscript{106} It applies only to those standing in a contractual relationship with the federal government exceeding $2,500 and mandates\textsuperscript{107} that such contracts and subcontracts contain a clause requiring the employer in question to “take affirmative action to employ and advance in employment qualified handicapped individuals.”\textsuperscript{108} Government contractors holding contracts exceeding $50,000 and having fifty or more employees must, in addition, maintain and annually update an affirmative action program to be made available to employees and applicants upon request.\textsuperscript{109} Section 503 has been interpreted as applying to such employment practices as hiring, transfer, recruitment, layoffs, and compensation.\textsuperscript{110} “[R]easonable accommodation to the physical and mental limitations” of an employee or applicant must be made unless the employer can demonstrate that such an accommodation would impose an “undue hardship” on the conduct of his business.\textsuperscript{111}

Responsibility for enforcement of section 503 was placed in the Office of Federal Contract Compliance Programs (OFCCP).\textsuperscript{112} The

\begin{footnotes}
\item[105] Potentially 15 million handicapped individuals would have the requisite characteristics under the broad definition contained in § 706(6) to benefit from § 503. Lublin, \textit{Lowering the Barriers}, Wall St. J., Jan. 27, 1976, at 1, col. 1 (referring to a Department of Labor statistic). It has been estimated that “[a]pproximately 30,000 prime contractors employing 31 million workers are covered by the affirmative action requirements. . . .” of the total federal contract compliance program. Reed, \textit{Equal Employment Opportunity Under Federal Contracts}, 28 \textit{Lab. L.J.} 3, 3 (1977); \textit{Contract Compliance, supra} note 24.
\item[107] However, § 503(c) allows the President, when he determines that the national interests warrant it, to waive the affirmative action clause requirement for particular contracts. 29 U.S.C. § 793(c) (Supp. IV 1974).
\item[108] § 503(a), 29 U.S.C. § 793(a) (Supp. IV 1974). Some states which have fair employment statutes protecting disabled persons, such as Illinois, also contain an affirmative action program clause requirement for those contracting to do business with governmental bodies. \textit{E.g.}, \textit{ILL. REV. STAT. ch. 48, § 854} (1975).
\item[110] 41 C.F.R. § 60-741.6(a) (1976).
\item[111] \textit{Id.} § 60-741.6(d).
\item[112] \textit{See note 109 supra.}
\end{footnotes}
enforcement mechanism must be initiated by the filing of a complaint by an aggrieved individual.\textsuperscript{113} OFCCP regulations allow for referral to any applicable existing internal review procedure of the contractor\textsuperscript{114} and provide for an investigation by the Department of Labor or designated agency.\textsuperscript{115} In the event that the investigation reveals non-compliance by the contractor,\textsuperscript{116} "informal means, including conciliation, and persuasion, whenever possible" are to be used to resolve the matter.\textsuperscript{117} This emphasis on informality may explain\textsuperscript{118} why there are as yet no reported cases construing section 503 or the regulations.\textsuperscript{119}

Another provision that may ultimately provide relief for handicapped workers is section 504\textsuperscript{120} of the Rehabilitation Act of 1973, which bars discrimination against handicapped individuals by recipients of federal financial assistance. To date there are no judicial decisions applying section 504 in the area of employment;\textsuperscript{121} the

\begin{itemize}
\item \textsuperscript{113} 41 C.F.R. § 60-741.26(a) (1976).
\item \textsuperscript{114} Id. § 60-741.26(b).
\item \textsuperscript{115} Id. § 60-741.26(f).
\item \textsuperscript{116} Violations of the affirmative action clause or the regulations may result in litigation initiated by the Director to enforce the (implied-in-law if not expressly included) affirmative action clause, the withholding of progress payments, termination of the contract, or debarment of the contractor from receiving future contracts. Id. § 60-741.28(b)-(e).
\item \textsuperscript{117} Id. § 60-741.28(a).
\item \textsuperscript{118} Lowering the Barriers, supra note 106, at 177 n.16. The commentator also suggests that a large factor may be the unfavorable publicity that would be generated by having to defend a suit by a disabled individual seeking to enforce his rights. Id.
\item \textsuperscript{119} To date, 1,994 complaints have been filed with the OFCCP involving 33 major kinds of handicaps. They have been disposed of as follows: 1,049 were closed; 204 were settled in favor of the complainant; 366 were closed for lack of coverage; 104 complaints were withdrawn; 180 involved no violation; 154 complainants failed to reply to government follow-up; and 29 complaints were transferred to another agency. Back pay awards under § 503 have totalled more than $115,000 since the first settlement in October, 1975, and have ranged from $231 to $12,000. Back Pay Awards for Handicapped, [1977] 94 Lab. Rel. Rep. (BNA) 117-18.
\item \textsuperscript{120} Section 504 reads as follows:
\begin{quote}
No otherwise qualified handicapped individual in the United States as defined in Section 706(6) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.
\end{quote}

Responsibility for coordinating implementation of § 504 has been reposed in the Secretary of Health, Education and Welfare. Exec. Order No. 11,914, 41 Fed. Reg. 17,871 (1976). Proposed regulations have been issued that would discharge the Department's responsibility of insuring that programs funded by it are free of discrimination on the basis of handicap. 41 Fed. Reg. 29,660 (1976). These regulations do not address the Secretary's responsibility for coordinating the implementation of § 504.
\item \textsuperscript{121} Only one employment related case has mentioned § 504, Gurmankin v. Costanzo, 411 F. Supp. 982 (E.D. Pa. 1976). The section was held not to control the case since the conduct alleged by plaintiff predated the effective date of the Rehabilitation Act of 1973, though the court did note that the refusal to hire plaintiff because of her blindness was the
Seventh Circuit has held, however, that section 504 creates a private cause of action.\textsuperscript{122}

It is submitted that sections 503 and 504 are not an adequate resolution of the problem of employment discrimination facing disabled individuals. In the area of federal contractor employment, there are certain inadequacies in the Act.\textsuperscript{123} In the first place, the contractor is given much broader rights to a formal hearing than is the complainant. While the complainant’s right to a formal hearing rests in the discretion of the Director of the OFCCP,\textsuperscript{124} the contractor may effectively demand a formal hearing not only when the Director proposes to impose sanctions for alleged violations, but also upon completion of an investigation indicating the existence of a violation where informal means have failed to resolve the matter.\textsuperscript{125} Second, there are no provisions of section 503 which would specifically authorize the initiation of civil action by the OFCCP. In contrast, Title VII of the Civil Rights Act of 1964 authorizes the initiation of litigation by both the Equal Employment Opportunity Commission\textsuperscript{126} and the charging party.\textsuperscript{127} The emphasis in the regulations issued under section 503 on informality and persuasion\textsuperscript{128} may operate to unduly delay vindication of the complainant’s rights.\textsuperscript{129} Also

\textsuperscript{122}Lloyd v. Regional Transp. Auth., No. 75C1834 (7th Cir. Jan. 18, 1977).
\textsuperscript{123}Lowering the Barriers, supra note 106, at 185-88.
\textsuperscript{124}4 C.F.R. § 60-741.26(g) (1976).
\textsuperscript{125}Id. § 60-741.29(a).
\textsuperscript{126}42 U.S.C. § 2000e-5(f)(1) (Supp. IV 1974) (authorizing civil action where, after 30 days following expiration of deferral periods or 30 days after the filing of the charge with the EEOC, a conciliation agreement satisfactory to the EEOC has not been reached); see Ashton, The Availability of Preliminary Injunctive Relief to Private Plaintiffs Pending Equal Employment Commission Action Under Title VII of the Civil Rights Act of 1964, 8 Loy. Chi. L.J. 51, 53-60, 63-73 (1976).
\textsuperscript{127}Id. (authorizing private civil action upon receipt from the EEOC of a right to sue letter); see Ashton, supra note 126, at 73-78.
\textsuperscript{128}41 C.F.R. § 60-741.28(a) (1976).
\textsuperscript{129}For a discussion of the possibility of and problems with a suit by the complainant under an implied-cause-of-action theory or under a third-party beneficiary theory, see B. Schlei \& A. Grossman, Employment Discrimination Law 222-24 & nn.26-30 (1976) [hereinafter cited as Discrimination Law].
conspicuous by their absence, especially when compared to Title VII, are explicit authorizations for an award of attorney's fees or a recovery of back pay. These omissions may have the effect of burdening social welfare programs to the extent that an employee's or applicant's need to resort to such aid would be increased by his inability to receive back pay or attorney's fees.

However, the basic inadequacy of the Rehabilitation Act is that it applies only to either public employment or to employment relationships with federal contractors. The handicapped person in search of work has his freedom of choice effectively circumscribed by Congress' lack of commitment. Employers in the private sector who do not wish to or who are unable to do business with the federal government are free to pursue their prejudices at the immediate expense of disabled individuals, and at the ultimate expense of society as a whole. In view of the fact that presumably the same system of values regarding civil liberties operates today as in 1964 when the Civil Rights Act was passed, and in 1972 when its coverage was extended, it is difficult to fathom the lack of congressional action. What is needed is an amendment to Title VII to place disability alongside race, color, religion, sex, and national origin as an impermissible criterion in private employment decision-making.

2. State Laws

Today over one-half of the states have laws protecting the em-
ployment rights of handicapped persons to some degree. Many states have a number of such provisions. As in the case of the federal legislation, some of the state statutes promote the employment of disabled persons, such as the exemption for handicapped workers in the Illinois Minimum Wage Law. Some statutes provide for preferential public employment of handicapped persons; however, these provisions are merely window dressing in the form of policy statements that are devoid of enforcement mechanisms. Even in the few states that impose a criminal penalty for


135. Though not generally providing protection of employment rights, every state has enacted a version of the White Cane Law. E.g., Alaska Stat. §§ 18.06.010-.050 (1974); Conn. Gen. Stat. § 53-211 (Supp. 1976); Ill. Rev. Stat. ch. 23, §§ 3361-66 (1975); Minn. Stat. Ann. § 169.202 (Supp. 1976); N.C. Gen. Stat. § 20-175.1-.3 (1975). Illinois’ White Cane Law is fairly representative of the statutes and contains provisions for a White Cane Safety Day with ceremonial functions to be performed by the Governor; a statement that it is the policy of the state to encourage disabled persons to “participate fully in the social and economic life of the State and to engage in remunerative employment”; and a criminal penalty for interference with the rights of a disabled individual to enjoy the free use of public ways and places open to the public in general. The original White Cane Law was the product of Professor tenBroeck and is printed in full in tenBroeck, The Right to Live in the World: The Disabled in the Law of Torts, 54 Calif. L. Rev. 841, 918-19 (1966).


138. Id. §§ 1001-1015.


141. The Illinois White Cane Law contains such a provision:

It is the policy of this State that the blind, the visually handicapped and the otherwise physically disabled shall be employed in the State Service, the service of the political subdivisions of the State, in the public schools and in all other employment supported in whole or in part by public funds on the same terms and conditions as the able-bodied, unless it is shown that the particular disability prevents the performance of the work involved.
1977] Disability-Based Discrimination 837
discriminatory employment practices, the goal of according disabled individuals equal employment opportunities is not measurably advanced. In the first place, as with most of the other protections afforded handicapped persons, these provisions are not aggressively enforced. Second, these provisions being negative in character do not equal the effectiveness of such positive civil remedies as injunctive relief or damages. In fact, enforcement of these punitive provisions may be counter-productive since an employer's resistance may become further entrenched by sheer resentment.

The modern trend at the state level has been to incorporate by amendment into existing anti-discrimination legislation the protection of the equal employment opportunity rights of disabled persons. This approach has proven insufficient to meet the problems of handicapped persons. The reason for this is that, with the advent of federal protection in private employment in 1964, it has been unnecessary to make extensive use of the state fair employment legislation. Consequently, the development of a private cause of action has not been forthcoming. While the failure to develop this mode of enforcement has not affected those already protected by Title VII, the deficiency may create a serious obstacle for a disabled person attempting to assert his rights.

143. See note 88 supra.
144. A Proposal, supra note 9, at 465.
Coverage of the state laws varies widely. Though the trend has been toward covering both the mentally and the physically handicapped populations, many states provide only for inclusion of physically disabled persons in the protected class. In some states a definition of the protected class of disabled persons is entirely omitted. This is a serious omission since employers may not be given sufficient notice of the extent of their obligation under such statutes. Those statutes that do contain definitions of the protected class vary widely with respect to the types of disability covered. These provisions range from an exceedingly vague Indiana statute to the extremely explicit Maryland act. One promising sign is that those


150. E.g., ALASKA STAT. §§ 18.80-010 - .300 (1974); ILL. REV. STAT. ch. 48, §§ 851-905 (1975); NEV. REV. STAT. §§ 613.310 -.430 (1973). Often these gaps have not been corrected by the issuance of administrative guidelines interpreting the statutes.

151. In two states problems have arisen as a result of an omission of a definition of the protected class. In Chicago, Milwaukee, St. Paul & Pac. R.R. Co. v. Wash. State Human Rights Comm'n, [1976] 11 Fair Empl. Prac. Cas. 854 (Wash. Super. Ct. 1975), the court held the statute, WASH. REV. CODE ANN. §§ 49.60.010 -.320 (Supp. 1975), void because there was no definition of the term "handicapped." It was not until 17 months had passed that the Washington Supreme Court vacated and remanded for further proceedings, after finding that the statute did provide fair notice, adopting the definition found in WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY. See note 3 supra; Chicago, Milwaukee, St. Paul & Pac. R.R. Co. v. Wash. State Human Rights Comm'n, 14 Fair Empl. Prac. Cas. 130, 132 (1976). Of course, even in the statutes that contain elaborate definitions there will be problems in applying the definition to specific disabilities. See, e.g., Providence Journal Co. v. Mason, 13 Fair Empl. Prac. Cas. 385 (1976) (reversing a ruling that whiplash was a "physical handicap" within the meaning of R.I. GEN. LAWS § 28-5-6(H) (Supp. 1976) since it: (1) was only a "temporary" condition; and (2) though it caused pain and discomfort, was not "serious").

152. As Indiana defines the term: "Handicap or handicapped" means the physical or mental condition of a person which constitutes a substantial disability. In reference to employment under this chapter [§§22-9-1-1 to -13] "handicap or handicapped" also means the physical or mental condition of a person which constitutes a substantial disability unrelated to such person's ability to engage in a particular occupation.


153. The Maryland statutes provides:

The term "physical or mental handicap" means any physical disability, infirmity, malformation or disfigurement which is caused by bodily injury, birth defect or illness including epilepsy, and which shall include, but not be limited to, any degree of paralysis, amputation, lack of physical coordination, blindness or visual impairment, deafness or hearing impairment, muteness or speech impediment or physical reliance on a seeing eye dog, wheelchair, or other remedial appliance or device; and any mental impairment or deficiency as, but not limited to, retardation or such other which may have necessitated remedial or special education and related services.
Disability-Based Discrimination

statutes falling in the latter category have apparently gone beyond traditional notions of what constitutes a "handicap" to include such disabling conditions as asthma, diabetes, drug addiction, and alcoholism. 154

Unfortunately, many state anti-discrimination statutes go beyond establishing "disability" as delimiting the protected class, further defining the class in terms of its member's qualifications to perform certain functions. At one extreme, this is a prime example of discrimination against disabled persons. 155 At the other extreme, it is either a lack of faith in or a misunderstanding of the nature of the business necessity 156 and bona fide occupational qualification 157

MD. ANN. CODE art. 49B, § 18(g) (Supp. 1976). Maryland closely parallels the definition found in § 48-1102 of Nebraska's Fair Employment Practice Act. NEB. REV. STAT. §§ 48-1101 to 1125 (1974). This may be the result of the state's interest in an expansive definition and simultaneous desire to promote uniformity among the states. On the other hand, it may merely be an indication that there is even a limit to the variety of ways that the same idea can be expressed by state legislators.

154. DISCRIMINATION LAW, supra note 129, at 227. The danger inherent in the use of an elaborate definition is that the scope of its protection may be limited by the nature of the examples it contains. Compare Providence Journal Co. v. Mason, 13 Fair Empl. Prac. Cas. 385 (1976) (in effect, employing the use of the principle of ejusdem generis in construing R.I. GEN. LAWS § 28-5-6(H) (Supp. 1975), in finding that whiplash did not constitute a "physical handicap"), with Chicago, Milwaukee, St. Paul & Pac. R.R. Co. v. Dep't of Indus., Labor & Human Relations, 62 Wis. 2d 392, 215 N.W.2d 443 (1974) (adopting a broad definition where Wis. STAT. ANN. § 111.32(5)(a) (1974) contained none, and finding that asthma constitutes a "handicap"). Of course, this same result of broad coverage may be achieved by use of a broad definition, generous judicial construction, or a combination of both. For example, Wisconsin's statute fails to define what constitutes "a handicap." Wis. STAT. ANN. § 111.32(5)(a) (1974) (defining discrimination). However, the Wisconsin Supreme Court adopted the definition found in WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, see note 3 supra, and found that asthma is a handicap since it is a disease which makes achievement unusually difficult. Chicago, Milwaukee, St. Paul & Pac. R.R. Co. v. Dep't of Indus., Labor & Human Relations, 62 Wis. 2d 392, 215 N.W.2d 443 (1974). See also Conn. Gen. Life Ins. Co. v. Dep't of Indus., Labor & Human Relations, 13 Fair Empl. Prac. Cas. 1811 (1976) (alcoholism); Fraser Shipyards, Inc. v. Dep't of Indus., Labor & Human Relations, 13 Fair Empl. Prac. Cas. 1809 (1976) (diabetes).

155. The discrimination inheres in: (1) defining the protected class in terms of its members' ability to perform a job; and (2) singling out for this treatment only the protected class of handicapped persons. A Proposal, supra note 9, at 462-64.

156. The business necessity doctrine applies to exempt an employer from the prohibition against discrimination upon his use of a neutral standard that, for example, perpetuates the effects of past discrimination where the following requirements are met: (1) the standard is job-related—designed to identify potentially successful candidates on the basis of a specific complement of job functions, see, e.g., United States v. Georgia Power Co., 474 F.2d 906, 912-13 (5th Cir. 1973); and (2) the standard's use is essential to the safe and efficient operation of the plant, see, e.g., United States v. Bethlehem Steel Corp., 446 F.2d 652, 662 (2d Cir. 1971).

157. By means of the bona fide occupational qualification defense the employer may use the distinguishing characteristic of a protected class itself as his employment criterion where he can show that its use is "reasonably necessary to the normal operation of that particular
 defenses to claims of discriminatory treatment.\textsuperscript{158} Even acknowledging this basic deficiency of such a scheme of legislative protection, the definitions also vary from state to state with regard to the \textit{context} in which the evaluation of the disability is to be made. Ideally, the only time that any employment criterion should be allowed to govern is when it has a substantial predictive value as to capacity to perform the particular job in question. This, in essence, is the thrust of Title VII.\textsuperscript{159}

For example, Kansas in its anti-discrimination laws attempts to narrow the context of evaluation by defining physical handicap as a physical condition "unrelated to such person's ability to engage in a particular job or occupation."\textsuperscript{160} However, by allowing the evaluational context to extend beyond the job in question, the statute singles out only handicapped persons from among the rest of its protected classes and permits their exclusion from an \textit{entire} occupation. While judicial and administrative interpretation could conceivably narrow the effects of this definition, there is a danger that persons fully qualified to perform a given job in a particular occupation will be needlessly rejected. The reason for this danger is that, as a particular disability is measured against an increasingly broadened range of functions, the chances increase of finding a function the performance of which the disability will impede. To the extent that those determinative functions are not necessary for the performance of the job, the door has been left open for discriminatory hiring practices.

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\textsuperscript{158} Employers and courts must consider both the functions of the job and the disability as it affects the particular employee or applicant in question simultaneously. \textit{Cf.} Fraser Shipyards, Inc. v. Dep't of Indus., Labor & Human Relations, 13 Fair Empl. Prac. Cas. 1809 (1976) (holding that the employer had failed to come within an exemption from the discrimination prohibition because while he had shown that diabetes may render certain individuals unqualified to serve as welders, he had "made no such showing with respect to these claimants").

\textsuperscript{159} The EEOC Guidelines on Employee Selection Procedures define discrimination as follows:

\textsuperscript{160} The use of any test which adversely affects hiring, promotion, transfer or any other employment or membership opportunity of classes protected by Title VII constitutes discrimination unless: (a) the test has been validated and evidences a high degree of utility as hereinafter described, and (b) the person giving or acting upon the results of the particular test can demonstrate that alternative suitable hiring, transfer, or promotion procedures are unavailable for his use.

\textsuperscript{160} KAN. STAT. § 44-1002(j) (Supp. 1976).
Illinois' Fair Employment Practices Act\textsuperscript{161} fails to define the protected class, merely making repeated use of the phrase "physical or mental handicap unrelated to ability."\textsuperscript{162} While this definition suffers from the infirmities discussed above, the Illinois Fair Employment Practices Commission has promulgated guidelines\textsuperscript{163} which should effectively correct the situation. The phrase is administratively defined as "any handicap\textsuperscript{164} . . . which, with reasonable accommodation,\textsuperscript{165} does not prevent performance of the essential func-

\begin{itemize}
\item[161.] ILL. REV. STAT. ch. 48, §§ 851-905 (1975).
\item[162.] Id. at §§ 851, 853, 857.
\item[163.] See note 144 supra.
\item[164.] Section 3.2 follows the format of § 7(6) of the Rehabilitation Act of 1973, 42 U.S.C. § 706(6) (Supp. IV 1974). See note 98 supra; 41 C.F.R. § 60-741.2 (1976), in defining the protected class. Section 3.2 reads as follows:
\begin{enumerate}
\item [(A)] Physical or mental handicap shall be defined as any physical or mental impairment resulting from or manifested by anatomical, physiological, neurological or psychological conditions, demonstrable by medically accepted clinical or laboratory techniques, and which constitutes or is regarded as constituting a substantial limitation to one or more of a person's major life activities,
\item [(B)] A handicapped individual is one who:
\begin{enumerate}
\item [1)] has a physical or mental handicap as defined above;
\item [2)] has a record of such a handicap; or
\item [3)] is regarded as having such a handicap.
\end{enumerate}
\end{enumerate}
\textsc{Illinois Guidelines, supra} note 145, at § 3.2(A), (B).
\item[165.] Section 3.2(D) of the Illinois Guidelines explains that employers and labor organizations subject to the Act's jurisdiction must make reasonable accommodation to the handicap of an employee or applicant unless they carry the burden of proving that "such an accommodation would impose an undue hardship on the conduct of its business." The Illinois Fair Employment Practices Commission (FEPC) indicates that an "undue hardship" may be demonstrated by such things as business necessity, or economically prohibitive cost which precludes accommodation. ILLINOIS GUIDELINES, supra note 145, at § 3.2(D). There is no express language in the Illinois Fair Employment Practices Act which imposes an obligation of reasonable accommodation on those subject to the jurisdiction of the statute.

The FEPC's guidelines also contain a section requiring employers and labor organizations to make reasonable accommodations to the religious needs and beliefs of employees and applicants. ILLINOIS GUIDELINES, supra note 145, at § 5.2. The statute, however, merely prohibited discrimination because of religion. In the only reported case dealing with § 5.2 of the Guidelines, an Illinois Appellate Court affirmed a circuit court decision holding that a fair reading of the statute did not indicate that the legislature intended to require affirmative action in the form of accommodation to all of the needs of employees or applicants. Olin Corp. v. FEPC, 34 Ill. App. 3d 868, 341 N.E.2d 459 (5th Dist. 1976). The court relied on the reasoning of Reid v. Memphis Publishing Co. 521 F.2d 512 (6th Cir. 1975) (holding that identical regulations issued by the EEOC under Title VII, prior to its amendment in 1972 to explicitly require accommodation, overstepped its authority to promulgate regulations). The court ruled that the guidelines exceeded the FEPC's statutory authority insofar as they required the imposition of any hardship at all on employers. Id. at 879, 341 N.E.2d at 467. The court found "hardship" in the two possible accommodations that were considered: substitution for the complainant would require the payment of $1,000 in overtime payments over the year, and trading shifts would jeopardize employer-employee relationships because of the complainant's junior seniority status. Thus, there is cause for concern that a court may analogously rule that the guideline requiring an accommodation of an individual's handicap causing any hardship could result in an unwarranted extension of the language of the statute.
tions of the job in question." It is submitted that this distinction pinpoints one of the major problems distinguishing the area of handicap discrimination from other forms of discrimination. Employers too often refuse to hire an individual because of a belief that the "job" could not be performed by that person. Unfortunately, the employer may have as many misconceptions as to the nature of the job and the individual's qualifications as he has misunderstandings of the variety of ways the two may be matched.

Occasionally, the definitions express prejudices that have no relation to the problem of defining the breadth of the protected class of disabled persons. For example, the Montana statute does not prohibit differential treatment of disabled individuals "where the particular employment may subject the handicapped or his fellow employees to physical harm." Presumably, the process of assessing an individual's qualifications to perform the job in question encompasses consideration of the safety of co-workers and, to that extent, the whole clause is unnecessary. In addition, the provision reflects

However, the area of handicap discrimination under the Illinois statute can arguably be distinguished from that of religious discrimination. In the case of religious discrimination the guideline would generally have the effect of requiring the employer to accommodate the absence of an employee whereas in the area of handicap discrimination, accommodation would invariably be to the presence of the employee. That is, the employer, in making accommodation for an individual's handicap, would not be "getting nothing for something." In view of the concern of the Illinois General Assembly expressed in its Declaration of Policy, ILL. REV. STAT. ch. 48, § 851 (1975), over the "failure to utilize the productive capacities of individuals to the fullest extent," and in view of the fact that the legislature must have been aware of the special considerations affecting handicapped persons, a court could conceivably be able to find § 3.2(D) consistent with the provisions of the Act. See note 3 supra and text accompanying notes 6-13 supra.

Should the court's opinion in Olin be upheld, this argument would probably fail or result in a strained interpretation of the language of the statute. However, "ability" does not exist in a vacuum. Ability must be defined in terms of the function to be performed. The Illinois General Assembly by emphasizing "ability" instead of the present nature of the job in question may well have intended that the problem of handicapped discrimination be approached in a manner that accords relatively more flexibility as regards the mode of production and less flexibility with respect to the equal employment opportunity rights of disabled individuals than for other protected classes.

For an extensive discussion in the context of affirmative action programs under 29 U.S.C. § 793 (Supp. IV 1974) (federal contractors under the Rehabilitation Act of 1973), of the different considerations required by the intrinsic characteristics of the various protected classes, see Affirmative Action, supra note 6, at 787-803, 805-12.

166. ILLINOIS GUIDELINES, supra note 145, at § 3.2(c).

167. Cf. Chavich v. Bd. of Examiners, 23 App. Div. 2d 57, 258 N.Y.S.2d 677, 686-87 (1965) (Rabin, J., dissenting) (concluding that the situation in fitting handicapped persons to a given job is "simply one of mutual accommodation and adjustment by all concerned" with "no insurmountable obstacles" to those "willing to meet them.").

168. MONT. REV. CODES ANN. § 64-304 (Supp. 1975). This provision is in addition to a clause providing that it is not discrimination if the disability in question "reasonably precludes the performance of the particular employment." Id.
an overly paternalistic concern for the safety of handicapped workers. This is an encroachment on the self-determination rights of disabled persons. Many unimpaired persons are willing to assume work-related functions that seriously endanger their health. Concededly, there may be some disabilities that impair a person's ability to gauge the risk involved in a particular job and weight it against the monetary incentive offered; however, these disabilities exist in much smaller percentages than people generally expect.169

One aspect of the problem of handicap discrimination that has generated controversy is the question of whether an employer may lawfully consider the possibility that an individual's disabling condition may worsen or become aggravated by some characteristic of the job.170 To the extent that fair employment legislation is generally written in the present tense, there should be no room for an employer to argue that future considerations that do not affect present performance may be allowed to affect his decisions.171 In any case, impaired individuals should be allowed to determine the future risks that they are willing to assume if our society is to correct the paternalistic attitudes that currently obstruct access to the job market.172

169. Catlin Interview, supra note 1.
171. See, e.g., Chrysler Outboard Corp. v. Dep't of Indus., Labor & Human Relations, 14 Fair Empl. Prac. Cas. 344 (1976); Chicago, Milwaukee, St. Paul & Pac. R.R. Co. v. Dep't of Indus., Labor & Human Relations, 8 Fair Empl. Prac. Cas. 937 (1973), aff'd, 62 Wis.2d 392, 215 N.W.2d 443 (1974). But see Clark v. Chicago, Milwaukee, St. Paul & Pac. R.R. Co., 12 Fair Empl. Prac. Cas. 1102 (1975) (apparently construing "[p]rovided, that the prohibition against discrimination because of such handicap shall not apply if the particular disability prevents the proper performance of the particular work involved" as mandating consideration of "any physical deterioration the body of the applicant may experience in the future as a result of this job"). If aggravation were allowed to enter into an employer's decisions, a further question that arises is the degree of certainty that will be required with respect to a prognosis of future degeneration of a person's condition. Compare Clark v. Chicago, Milwaukee, St. Paul & Pac. R.R. Co., 12 Fair Empl. Prac. Cas. 1102 (1975) (finding no discrimination based, in part, on a probability that an operation on the applicant's knee would cause premature arthritic changes in his knees), with Chicago, Milwaukee, St. Paul & Pac. R.R. Co. v. Dep't of Indus., Labor & Human Relations, 62 Wis.2d 392, 299, 215 N.W.2d 443, 446 (1974) (implying that medical testimony to a reasonable degree of medical certainty would be required to show present or future hazard to a worker's health as a result of working conditions).
172. Cf. Conn. Gen. Life Ins. Co. v. Dep't of Indus., Labor & Human Relations, 13 Fair Empl. Prac. Cas. 1811 (1976) (discrimination on the basis of "a drinking problem" violated Wis. STAT. ANN. § 111.32(5)(f) (1974)). "As with many other illnesses employer's ignorance of the disease or fears of potential future problems may result in discrimination completely unrelated to an employee's actual ability to perform on the job." Id. at 1812 (emphasis added).
The potentially hazy parameters of the subject matter, the range of considerations to be addressed through legislation, and the potluck of protections currently afforded by state legislation emphasize the need for an amendment to Title VII. Such an amendment would bring uniformity and aggressive enforcement to the area of handicapped employment discrimination.

CONCLUSION

The disabled of the United States have in recent years become more aggressive in asserting demands on all fronts for non-discriminatory treatment. However, serious problems must be overcome. Although the constitutional protections for the handicapped discriminatees are uncertain, the federal statutes seem to have immense potential for eradicating discrimination in the employment of handicapped persons. However, the primary flaw in both constitutional and federal statutory protections as they presently exist is the constraint on the freedom of choice of disabled persons. These protections only allow equal employment opportunities in the areas of public employment and employment with federal contractors. If prejudice is to be transformed into perception and acceptance of individual capabilities, effective legislation in the area of private employment is also necessary. The state legislation in this regard is highly varied, often uncertain, and inadequately enforced.

All individuals face the potentiality of becoming mentally or physically handicapped. An amendment to Title VII would not only bring uniformity and effective administration to the area of handicapped employment discrimination, but would also achieve a fuller realization of the principled system of morality embodied in the entire Civil Rights Act of 1964. Employers, both public and private, would be forced to abandon their practices which discriminate on the basis of disability, just as they have been forced to abandon discrimination on the bases of race, color, religion, sex, or national origin. Congress could coordinate the amendment with an offering of matching federal funds to states bringing their second injury funds into uniformity with a contemporary federal model. This reform would greatly reduce employer resistance while more accurately reflecting the benefits received by society, industry, and handicapped individuals.

Stephen D. Erf
APPENDIX

MODEL FOR SYSTEM OF EMPLOYMENT SERVICES TO HANDICAPPED PERSONS WHO ARE EMPLOYABLE

OUTREACH RECRUITMENT

INTAKE

DIAGNOSTIC EVALUATION

GROUPING

TRAINING AND EDUCATION

MEDICAL CARE AND/OR SERVICES

COUNSELING

EVALUATION

VARIETY OF SUPPORTIVE SERVICES

JOB PLACEMENT AND FOLLOW-UP

COMPETITIVE EMPLOYMENT

SHARED WORKSITES

HOME-BOUND EMPLOYMENT

CONTINUED CARE SERVICES

TRANSPORTATION

ELIMINATION OF BARRIERS

LABOR MARKET ANALYSIS

JOB MODIFICATION

JOB DEVELOPMENT