The Developing Law on Equal Employment Opportunity for the Handicapped: An Overview and Analysis of the Major Issues

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THE DEVELOPING LAW ON EQUAL EMPLOYMENT OPPORTUNITY FOR THE HANDICAPPED: AN OVERVIEW AND ANALYSIS OF THE MAJOR ISSUES

Jana H. Guy†

This Article examines state and federal law dealing with the obligation of employers to provide employment opportunities to handicapped individuals. The author surveys all pertinent statutes and implementing regulations and explores possible constitutional arguments available in handicap discrimination cases, analyzing the rights and remedies available to handicapped employees, the obligations of and defenses available to employers, and the issues expected to dominate litigation. The author concludes that the regulations promulgated by administrative agencies, pursuant to legislative mandate, impose onerous standards for compliance and may exceed the bounds of statutory authority in some respects.

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I. INTRODUCTION

America's handicapped citizens assert that for 200 years they have been relegated unnecessarily to a position of virtual dependence upon a society blind to their ability to contribute and deaf to their demands for a chance to prove their competence. During the last decade, however, the handicapped have taken a lesson from other disadvantaged segments of the population and have coalesced into a highly visible and vocal minority group intent on obtaining for its members a fair opportunity to achieve independence through employment. Approximately eleven million Americans between the ages of sixteen and sixty-four, or one of every eleven, are members of this newly-identified minority. Half of these handicapped Americans are unemployed and their integration into an already underemployed work force poses a significant problem. This new minority group is highly sensitized to its rights—in part because of the massive publicity given to its cause—and its advocacy has wrought fundamental changes in public, legislative, and judicial attitudes towards the right of the handicapped to an equal opportunity for employment. The result has been the enactment of new, and the revitalization of old, laws to establish rights and remedies for handicapped employees and job applicants, and correlative liabilities for employers.

At the federal level, Congress has prohibited discrimination against the handicapped in programs receiving federal financial

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1. The term “handicapped” is used herein both as an adjective, as in “handicapped citizens,” and as a noun, as in “the handicapped.” Discrimination on the basis of a handicap sometimes will be referred to herein as “handicap discrimination” and “handicapped status discrimination.”


3. Despite the indignities that may have been visited upon the physically and mentally disabled, federal and state governments periodically have expended vast resources to provide better and more humane institutionalization, rehabilitation, and training programs for many handicapped citizens. For a lengthy discussion of the efforts that have been made to improve the lot of the handicapped, see Lenihan, Disabled Americans: A History, 27 PERFORMANCE 1 (November-December, 1976 and January, 1977) (available from the President's Commission on Employment of the Handicapped, Washington, D.C., 20210). Many of the rehabilitation programs were engendered by the perceived need to ready the handicapped for employment opportunities. See Achtenburg, Law and the Physically Disabled: An Update with Constitutional Implications, 8 S.W.L.J. 847, 878 (1976).


5. Id. at 8–9.
assistance. In addition, Congress has mandated that government contractors take affirmative action to assure equal employment opportunities for the handicapped. Moreover, some courts recently have looked to federal civil rights statutes and constitutional guarantees as a basis for invalidating employment practices discriminatory to the handicapped. Finally, federal tax laws now contain incentives for employers who hire and accommodate the needs of the handicapped. State legislators also have responded to the advocacy of this newly-identified minority. While legal recognition of the employment rights of disabled persons is still limited in some states to mere public policy statements, such as those set forth in “White Cane Laws,” a majority of the states have included the handicapped among those minority groups accorded protection under fair employment practice statutes.

Although still very much in its infancy, the body of law on equal employment opportunity for the handicapped has matured sufficiently to allow an overview of the legal developments and an analysis of the emerging major issues. While this article primarily focuses on the legal and practical effect of the law on Maryland employers and employees, the discussion and analysis is pertinent to employment in other states, since a significant portion of the law derives from federal statutes and constitutional considerations. Moreover, many of the state statutes regarding employment of the handicapped are similar, and the courts and administrative agencies are arriving at common answers to the major issues — the problems associated with identifying the handicapped, assessing their job

8. See notes 83-131 and accompanying text infra.
9. Although the new tax laws are not a principal focus of this article, the practitioner should note that § 2122 of the Tax Reform Act of 1976, I.R.C. § 190, permits a taxpayer to deduct up to $25,000 of any amount paid or incurred by him in any taxable year beginning after December 31, 1976, and before January 1, 1980, for the removal of certain architectural and transportation barriers in order to make facilities or public transportation vehicles owned or leased by the taxpayer for use in connection with its trade or business more accessible to, or usable by, handicapped or elderly individuals. The Internal Revenue Service has promulgated temporary income tax regulations to implement § 2122. See Treas. Reg. §§ 7.190-1 to .190-3.
qualifications, and ascertaining the validity, nature, and extent of the duty to “accommodate” the handicapped.

Before the legislative and judicial developments in this area are analyzed in detail, some unique aspects of the problems involved in providing equal employment opportunities for the handicapped should be recognized. The handicapped comprise a novel class of potential employment discrimination victims. Many handicaps are not immediately obvious, so that it may be difficult for an employer to ascertain whether an individual is a member of the protected class. Moreover, some problems that are being recognized as handicaps, such as drug addiction,^{12} are, at least to some degree, volitional in nature.^{13} The minority status of handicapped class members therefore does not always depend upon an immutable and inherent characteristic that is in no way attributable to the fault or lack of self-control of the victim, as has been the case with other protected minority classes.^{14} At the same time, the characteristic that renders an individual a member of the protected class — his health — bears a much more intrinsic relation to ability to perform work than does one’s race, sex, religion, national origin, or age.^{15} The factors that distinguish this newly-identified minority from other disadvantaged groups affect significantly the impact that equal employment opportunity laws for the handicapped may have on employer liabilities, and provide a background for a more meaningful discussion of the law.

12. See discussion at notes 209-211 and accompanying text infra.
14. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e to e-17 (1970 & Supp. V 1975), for example, prohibits employment discrimination on the basis of race, color, religion, sex or national origin. While religion is a matter of choice, and thus not an immutable and inherent characteristic, one’s choice of religion is protected by the first amendment to the United States Constitution, which is not the case with the choice to engage in drug and alcohol abuse to the extent that it becomes an addiction. Although transsexuality and homosexuality also may be a matter of choice, the weight of authority holds that discrimination against transsexuals, e.g., Powell v. Read’s, Inc., 436 F. Supp. 369 (D. Md. 1977); Voyles v. Davies Medical Center, 403 F. Supp. 456 (N.D. Cal. 1975); EEOC Dec. No. 75-030 (1974), and homosexuals, e.g., Smith v. Liberty Mut. Ins. Co., 395 F. Supp. 1098 (N.D. Ga. 1975), is not sex discrimination prohibited by Title VII.
15. Employment discrimination on the basis of age is prohibited by the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1970 & Supp. V 1975). Obviously, one’s age or sex may affect one’s strength and, to this extent, these characteristics may be job-related. It is not, however, the diminished strength that renders one a member of a minority class based on sex or age, but this is precisely the type of physical condition that may render one a member of the “handicapped” minority.
II. OVERVIEW OF LAWS AFFECTING EMPLOYMENT RIGHTS OF THE HANDICAPPED

A. FEDERAL LAWS

Advocates of equal employment for the handicapped have failed thus far to obtain protection for this minority under Title VII of the Civil Rights Act of 1964, although efforts to secure an amendment to this effect continue. The handicapped nevertheless achieved a major legislative goal upon enactment of several federal statutes that affect two specific groups of employers — federal contractors and federally financed programs and institutions.

1. Laws Regulating Government Contractors

a. Section 503 of the Rehabilitation Act of 1973

The Rehabilitation Act of 1973 (hereinafter referred to as the Rehabilitation Act) contains the first congressional affirmative action requirement imposed upon government contractors. Section 503 of the Act requires that any contract exceeding $2,500 for the

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16. Several attempts have been made to amend Title VII to prohibit employment discrimination against the handicapped, e.g., H.R. 13,199, 93d Cong., 2d Sess. (1974); H.R. 10,963, 92d Cong., 1st Sess. (1971).
(a) Any contract in excess of $2,500 entered into by any Federal department or agency for the procurement of personal property and nonpersonal services (including construction) for the United States shall contain a provision requiring that, in employing persons to carry out such contract the party contracting with the United States shall take affirmative action to employ and advance in employment qualified handicapped individuals as defined in section 706(6) of this title. The provisions of this section shall apply to any subcontract in excess of $2,500 entered into by a prime contractor in carrying out any contract for the procurement of personal property and nonpersonal services (including construction) for the United States. The President shall implement the provisions of this section by promulgating regulations within ninety days after September 26, 1973.
(b) If any handicapped individual believes any contractor has failed or refuses to comply with the provisions of his contract with the United States, relating to employment of handicapped individuals, such individual may file a complaint with the Department of Labor. The
procurement of personal property and non-personal services (including construction) entered into by any federal department or agency must contain a provision (an “affirmative action clause”) requiring the contractor to take affirmative action to employ and advance in employment “qualified handicapped individuals” to carry out the contract. A similar provision must be included in any subcontract in excess of $2,500 entered into by the contractor in furtherance of its federal contract.\textsuperscript{21} Thus, the federal contractor and subcontractor become obligated under the government contract to engage in affirmative action to benefit the handicapped in employment.

Section 503 also provides that a handicapped individual who believes a federal contractor or subcontractor has violated the affirmative action clause of its contract may file a complaint with the Department of Labor, which is authorized to investigate such complaints and “take such action thereon as the facts and circumstances warrant, consistent with the terms of such contract and the laws and regulations applicable thereto.”\textsuperscript{22}

The Department of Labor’s Office of Federal Contract Compliance Programs (OFCCP) has promulgated regulations to implement Section 503 (the OFCCP regulations).\textsuperscript{23} These regulations prohibit discrimination against the handicapped in all employment decisions made by federal contractors. Included within the non-discrimination obligation is a duty to “accommodate” the needs of

\begin{itemize}
  \item Department shall promptly investigate such complaint and shall take such action thereon as the facts and circumstances warrant, consistent with the terms of such contract and the laws and regulations applicable thereto.
  \item (c) The requirements of this section may be waived, in whole or in part, by the President with respect to a particular contract or subcontract, in accordance with guidelines set forth in regulations which he shall prescribe, when he determines that special circumstances in the national interest so require and states in writing his reasons for such determination.
\end{itemize}

\begin{enumerate}
  \item \textit{Id.} § 793(a). It is questionable, however, whether a subcontract for supplies essential to every aspect of the prime contractor’s business, such as paper clips, is “entered into . . . in carrying out” a federal contract. Both prime and subcontractors will be referred to hereinafter as “contractors.”
  \item \textit{Id.} § 793(b).
  \item 41 C.F.R. §§ 60–741.1 to .54 (1977). Executive Order No. 11,758, 39 Fed. Reg. 2075 (1974), delegates to the Secretary of Labor the Presidential authority set forth in § 503(b) of the Rehabilitation Act to promulgate implementing regulations. OFCCP also administers the affirmative action programs mandated under Executive Order No. 11,246, which requires federal contractors and subcontractors with contracts for $10,000 or more to engage in affirmative action to eliminate discrimination in employment on the basis of race, color, religion, sex, or national origin. See \textit{id.} pts. 60–1 to 60. Under a recent Presidential reorganization of the federal civil rights agencies, the OFCCP will continue to enforce § 503 of the Rehabilitation Act and § 402 of the Veteran’s Readjustment Act, discussed at notes 36–40 and accompanying text \textit{infra}, as well as Executive Order 11,246 for at least two more years. During the interim, consideration will be given to the transfer of its enforcement responsibility to the Equal Employment Opportunity Commission (EEOC).
\end{enumerate}
qualified handicapped employees and job applicants. The regulations reiterate the statutory requirement for the incorporation of an affirmative action clause regarding the handicapped into all federal contracts that exceed $2,500 with certain minor exceptions. In addition, the regulations impose an obligation upon all contractors or subcontractors who hold federal contracts of $50,000 and employ


The “accommodation” duty imposed by the regulations is discussed in detail at notes 304–345 and accompanying text infra.

25. 41 C.F.R. §§ 60–741.3 to .4 (1977). The affirmative action clause requires the contractor to take affirmative action to employ and advance in employment qualified handicapped individuals and prohibits discrimination on the basis of physical or mental handicap in regard to any position for which the handicapped individual is qualified. In addition, the clause binds the contractor to post notices stating its obligation and the rights of handicapped employees and job applicants under the law, and to notify unions or other employee representatives of its legal obligation under the Rehabilitation Act. Id. § 60–741.4.

The affirmative action clause may be incorporated by reference into the government contract. Id. § 60–741.22. The mere omission of the affirmative action clause from a contract does not relieve the contractor or subcontractor of the obligation imposed by the clause, however, since by operation of law, the affirmative action clause is considered to be a part of every contract and subcontract required by the Rehabilitation Act and the OFCCP regulations to include such a clause, whether or not it is physically incorporated into the contract and whether or not there is a written contract between the agency and contractor. Id. § 60–741.23.

The federal contractor should be aware that the financial amount involved in contracts covered by the Rehabilitation Act, $2,500, is much less than the amount involved in contracts covered under other legislative and executive affirmative action mandates. For example, both Executive Order No. 11,246 and the Vietnam Era Veterans Readjustment Act, 38 U.S.C. § 2012 (Supp. V 1975), apply only to federal contracts exceeding $10,000.

The OFCCP regulations specifically require that the affirmative action clause be included in contracts and subcontracts for indefinite quantities, unless the contracting agency has reason to believe that the amount to be ordered in any year under the contract will be less than $2,500. 41 C.F.R. § 60–741.3(a)(2) (1977). Finally, the regulations specify that no agency, contractor, or subcontractor may procure supplies or services in less than usual quantities to avoid the applicability of the affirmative action clause. Id. § 60–741.3(a)(1).

26. Pursuant to subsection c of § 503, the President has the authority to waive the requirements of the Section when the national interest warrants. The OFCCP regulations provide that the requirements of the affirmative action clause are waived with regard to work performed outside the United States by the contractor’s employees who were not recruited within the United States. The Director of the OFCCP also may waive the application to any contract or subcontract of any part of all of the affirmative action clause, if he deems that the waiver is in the national interest. Moreover, an agency head, with the concurrence of the Director, may grant waivers to groups or categories of subcontracts or contracts of the same type where it is in the national interest, where it is found impracticable to act upon each request for a waiver individually, and where the waiver will substantially contribute to convenience in administration of § 503 of the Act. Such waivers can be withdrawn at the Director’s discretion. In addition, the head of a subcontracting agency may decline to apply any requirement in the regulations to a contract or subcontract.
50 or more persons to prepare and maintain at each establishment\textsuperscript{27} a written program of affirmative action (an affirmative action plan) to employ and advance in employment qualified handicapped individuals.\textsuperscript{28} These affirmative action and non-discrimination

when its award without compliance with the regulatory requirements is necessary to the national security. 41 C.F.R. \S 60-741.3(b) (1977).

It should be noted that \$503 of the Rehabilitation Act requires federal contractors to engage in affirmative action only “in employing persons to carry out the [federal] contract.” The OFCCP regulations contain a conclusive presumption that all \textit{of} the contractor’s employees at the plant or facility where work is being done on the federal contract are in fact engaged in work to carry out the contract. Nevertheless, the fact that an individual complainant was not employed to work on the federal contract, or is involved in a very tangential manner, is a possible defense that should not be ignored by the employer. In this regard, the regulations permit the Director of OFCCP to waive the requirements of the affirmative action clause with respect to any of a prime contractor’s or subcontractor’s \textit{facilities} that he finds to be in all respects separate and distinct from activity of the contractor related to the performance of the federal contract, if such a waiver would not interfere with or impede the effectuation of the Act. The waiver, however, must be specifically requested by the contractor or subcontractor. \textit{Id.} \S 60-741.3(a)(5). With respect to state or local governments that enter into contracts with the federal government, on the other hand, the regulations state that the affirmative action clause does not apply to those local or state governmental agencies, instrumentalities, or subdivisions that do not participate in work on or under the federal contract or subcontract. No request for a waiver of their coverage therefore need be made. \textit{Id.} \S 60-741.3(a)(4).

The private sector federal contractor may be able to exclude \textit{subsidiaries} not involved with the federal contract or subcontract from the affirmative action obligations, if the tests for joint employer status under the National Labor Relations Act are not met. \textit{See Ernst Theodore Arndt, 52 COMP. GEN. 145 (1972); Nash, Affirmative Action Under Executive Order 11,246, 46 N.Y.U.L. REV. 225, 251 (1971).}

\textsuperscript{27} 41 C.F.R. \S 60-741.5(a) (1977). \textit{But see} note 26 supra.

\textsuperscript{28} The elements of the affirmative action plan also constitute the agency’s criteria for determining whether a contractor with less than \$50,000 in government contracts has complied with its obligations under the law. Thus, the only difference the regulations establish between large and small contractors is that the large contractor must set forth its affirmative action policies, practices and procedures in a written plan. \textit{Compare} 41 C.F.R. \S 60-741.5(a) (1977) \textit{with id.} \S 60-741.6.

The discussion herein of the affirmative action program obligations imposed upon government contractors by Section 503 of the Rehabilitation Act is limited to a general overview and to an analysis of the distinctions between affirmative action and nondiscrimination. This article, therefore, will not set forth a detailed discussion of the elements of affirmative action plans. The various items that must be included within affirmative action plans are set forth at 41 C.F.R. \S 60-741.6 (1977). In brief, the plan must contain a statement of the contractor’s affirmative action policy, must set forth plans for the internal and external dissemination of the policy, must assign responsibilities for the implementation of the policy to corporate officials, must show that the contractor has issued an invitation to handicapped employees and job applicants to identify themselves in order to take advantage of the affirmative action program, must provide for a review of personnel processes to determine whether present procedures provide for the systematic consideration of known handicapped individuals for vacancies and promotions, must provide for a review of all physical and mental qualifications for the purpose of ensuring that they do not factor out handicapped individuals for reasons that are not job related or consistent with business necessity and the safe performance of the job, must specify accommodations for the handicapped that are being made or planned, and must set forth other affirmative action programs to benefit the handicapped that the employer is developing or executing. The affirmative action plan required under this
obligations are imposed upon state and local governments and their agencies, as well as private companies, that contract with or do subcontract work for the federal government. 29

The OFCCP regulations also establish complaint procedures and provide for investigation and conciliation of such complaints. 30 If the OFCCP investigation of a complaint reveals contractor noncompliance that cannot be resolved during conciliation, 31 and the opportunity for a hearing is provided, the Director of OFCCP is

section is very similar to that required under Executive Order 11,246 and the OFCCP regulations promulgated pursuant thereto, with the exception that the federal contractor is not required to establish goals and timetables with respect to employment of the handicapped. Compare 41 C.F.R. § 60–741.6 with id. pt. 60–2, especially § 2.12.

Contrary to its approach under Executive Order No. 11,246, OFCCP has been concentrating its enforcement efforts with respect to § 503 on investigation of discrimination complaints rather than on compliance reviews of affirmative action programs. See U.S. DEPARTMENT OF LABOR, EMPLOYMENT STANDARDS ADMINISTRATION, OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS TASK FORCE, PRELIMINARY REPORT ON THE REVITALIZATION OF THE FEDERAL CONTRACT COMPLIANCE PROGRAM 100 (1977) (hereinafter cited as OFCCP TASK FORCE REPORT). The Task Force, however, has recommended that the Agency establish a system for the targeting and conduct of compliance reviews in addition to the complaint system, and that the compliance review program be merged with the one currently in operation to enforce Executive Order No. 11,246. Id. at xviii–iii. The Secretary of Labor recently stated that the Department will begin compliance reviews on randomly selected contractors and subcontractors, to be conducted by OFCCP's regional offices. See [1977] 6 DAILY LAB. REP. (BNA) A–5 to A–6.


29. 41 C.F.R. § 60–741.2 (1977) defines a "government contract" as:

Any agreement or modification thereof between any contracting agency and any person for the furnishing of supplies or services or for the use of real or personal property including lease arrangements. The term "services," as used in this section includes, but is not limited to the following services: utility, construction, transportation, research, insurance and fund depository, irrespective of whether the government is the purchaser or the seller. The term "government contract" does not include (1) agreements in which the parties stand in a relationship of employer and employee, and (2) federally-assisted contracts.

Section 60–741.2 defines a "person" as:

[A]ny natural person, corporation, partnership or joint venture, unincorporated association, state or local government, and any agency, instrumentality, or subdivision of such a government. (emphasis added).


31. Before a contractor will be deemed in compliance after an investigation reveals a violation, it must make a specific written commitment to take corrective action. See, id. § 60–741.26(g)(2). But see OFCCP Policy Clarification Memorandum 78–12/60–2, reprinted in 1978 DAILY LAB. REP. No. 50 (BNA) (written
authorized by the regulations to debar contractors found in violation of the affirmative action clause from receiving further federal contracts, to withhold their contract progress payments, and to suspend, cancel, or terminate their current contracts. The Director also is empowered to seek judicial action to enforce the affirmative action clause, including injunctive relief, without first providing a hearing on the alleged noncompliance.

32. 41 C.F.R. §§ 60-741.28 to .30 (1977). The regulations state that hearings on violations of the Rehabilitation Act must be conducted in accordance with OFCCP's rules of practice applicable to hearings on violations of Executive Order 11,246 which are set forth in 41 C.F.R. pt. 60-30. Id. § 60-741.29(b) (revised in 42 Fed. Reg. 19146 (1977)). Employers who rely heavily on government contracts as a source of business should recognize the risk they take by refusing to conciliate a complaint found meritorious during an OFCCP investigation. If, after a hearing, the Assistant Secretary of Labor, Employment Standards Administration, concludes that a violation of the affirmative action clause occurred, he is authorized by the regulations not only to enjoin the violation and require the contractor to provide remedial relief, but also to impose any of the sanctions discussed in the text supra — i.e., debarment from future contracts, suspension, termination, or cancellation of current contracts, and withholding of progress payments on current contracts. 41 C.F.R. § 60-30.30(a) (1977). The Assistant Secretary's choice of which sanctions to impose is virtually unlimited, with the exception that the regulations require that the OFCCP's "complaint" against the contractor, which is issued prior to the hearing, must include a statement of the sanctions that the government expects to impose. Id. § 60-30.5(b). OFCCP can, in practice, enforce the debarment, suspension, termination, cancellation or withholding of contract progress payments without a court order. Finally, failure to comply with the Assistant Secretary's order "shall result in the immediate cancellation, termination, and suspension of the respondent's contract and/or debarment of the respondent from future contracts." Id. § 60-30.30(a). Under this provision, OFCCP also is enabled to compel compliance with the injunctive and remedial aspects of its orders, which typically would require judicial enforcement, by the threat of withdrawal of government contracts if the orders are not complied with.


33. Compare 41 C.F.R. § 60-741.28(b) (1977) with id. § 60-741.29(a).
to remedy discriminatory acts through conciliation, OFCCP has regularly pursued both reinstatement and back pay relief for handicapped complainants, even though the regulations do not expressly empower the agency to seek such relief. \footnote{34} In part because of these administrative enforcement mechanisms, the existence of a

\footnote{34} The regulations do not specifically provide for back pay awards in conciliation agreements. See id. §§ 60–741.26(g), .28(a). Nevertheless, OFCCP has supervised conciliations wherein the complainant was awarded back pay and reinstatement. See News Release of Employment Standards Administration, Department of Labor (Jan. 10, 1977) (more than $115,000 has been paid to handicapped workers in settlements of charges brought under § 503, with settlements ranging from $231 to $12,000); OFCCP VETERANS AND HANDICAPPED WORKERS PROGRAM OPERATIONS DIVISION, SUMMARY OF BACK PAY CASES (available from United States Department of Labor, Employment Standards Administration, Office of Federal Contract Compliance Programs, Veterans and Handicapped Workers Program Operations Division, Room No. N-3402, New Department Labor Building, Washington, D. C. 20210) (hereinafter cited as OFCCP BACK PAY CASES SUMMARY). See also OFCCP VETERANS AND HANDICAPPED WORKERS PROGRAM OPERATIONS DIVISION, STANDARD OPERATING PROCEDURES MANUAL 40–43 (available from same source) (hereinafter cited as OFCCP STANDARD OPERATING MANUAL).

OFCCP relies upon U. S. v. Duquesne Light Co., 423 F. Supp. 507 (W.D. Pa. 1976), as authority for its assertion of the power to require back pay and reinstatement. In that case, OFCCP sought injunctive relief, including back pay, against Duquesne Light Co. for violations of Executive Order 11,246. The court pointed out that § 209(a)(2) of the Executive Order empowered the Secretary of Labor to recommend to the Department of Justice that “appropriate proceedings” be brought to enforce the contractual provisions set forth in the order, and held that this reference to “appropriate proceedings” conferred discretion to invoke the equitable powers of the court.

While §503(b) of the Rehabilitation Act does not specifically authorize judicial proceedings against violators of the Rehabilitation Act, or make any mention of the type of relief available to discrimination victims, it does empower the Department of Labor to “promptly investigate [complaints of violations of the affirmative action clause] and . . . take such action thereon as the facts and circumstances warrant, consistent with the terms of such contract and the laws and regulations applicable thereto.” This provision does not appear to permit back pay relief for complainants, particularly in light of the fact that when Congress has intended that such back pay relief be made available to discrimination complainants, it specifically has so provided. \footnote{See 42 U.S.C. § 2000e–5(g) (Supp. V 1975) (remedial provision of Title VII). McNutt v. Hills, 426 F. Supp. 990, 1002 (D.D.C. 1977), compared Title VII with § 501 of the Rehabilitation Act, 29 U.S.C. § 791 (Supp. V 1975), which requires federal agencies to adopt plans of affirmative action to employ the handicapped, and reached the conclusion that § 501 did not constitute a waiver of sovereign immunity since, like § 503, it did not mention a back pay remedy. Compare Grinto v. United States, 415 F.2d 1271, 1278 (8th Cir. 1969), cert. denied, 397 U.S. 934 (1970) with Pettit v. United States, 488 F.2d 1026, 1031–32 (Cl. Cl. 1973), which differ on the issue of whether a federal employee may obtain back pay for violations of executive Order 11,246.}

In any event, it can be argued that victims of discrimination violative of an employer’s contract with the federal government are limited to the type of relief generally available in suits by a third party beneficiary to a contract — i.e., specific enforcement rather than damages. The \textit{Duquesne} court rejected this argument, however, holding that the action was actually one to enforce a statutorily authorized administrative program, and "the remedies available to enforce such a measure should not be limited to those discernible by references to ordinary principles of contract law." 423 F. Supp. at 510, n.5.
private cause of action against an employer under Section 503 is doubtful.\textsuperscript{35}  

b. Vietnam Era Veterans’ Readjustment Assistance Act of 1974

Section 402 of the Vietnam Era Veterans’ Readjustment Assistance Act of 1974\textsuperscript{36} (hereinafter referred to as the Veterans’ Readjustment Act) imposes an obligation upon persons that have federal contracts of $10,000 or more to take affirmative action to employ and advance in employment \textit{qualified disabled veterans} and veterans of the Vietnam era. In addition, the Veterans’ Readjustment Act requires government contractors and subcontractors to list job opportunities and to file reports with state employment service agencies.\textsuperscript{37}

\textit{aff’d} \textit{406 F. Supp. 1257} (D.C. Ill. 1976), \textit{aff’d on rehearing}, \textit{559 F.2d} 1077 (7th Cir. 1976) (Title IX of the Education Amendments of 1972 does not imply a private cause of action).\textit{Cannon}’s repeated rejection of attempts to amend Title VII, which does provide a private remedy, to include the handicapped, \textit{see} Note 16 supra, is a further indication that it intended to provide no private remedy for handicap discrimination under \textsection{503}. At the very least, it would appear that a private cause of action to enforce \textsection{503} would be available only when the suit challenges “wholesale . . . discrimination against a large number of [individuals] by a particular . . . institution.” \textit{Cannon} v. \textit{Univ. of Chicago}, 559 F.2d at 1074. The cases that have considered the issue of whether \textsection{503} provides a private cause of action put the weight of authority on the negative side. \textit{Wood v. Diamond State Tel. Co.}, 440 F. Supp. 1002 (D. Del. 1977); \textit{Moon v. Roadway Exp.}, Inc., 439 F. Supp. 1308 (E.D. Ga. 1977); \textit{Coleman v. Darden}, 13 Empl. Prac. Dec. 6788 (D. Colo. 1977) and \textit{Rogers v. Frito-Lay}, Inc., 433 F. Supp. 200 (N.D. Tex. 1977), held that \textsection{503} did not establish a private cause of action, while \textit{Drennon v. Philadelphia Gen. Hosp.}, 428 F. Supp. 809 (E.D. Pa. 1977), concluded that \textsection{503} established a private cause of action, but that administrative remedies must be exhausted prior to suit. It should be noted that the \textit{Drennon} court relied in part upon decisions holding that \textsection{504} of the Rehabilitation Act establishes a private cause of action. Section 504 is distinguishable in that it does not specifically establish a means for administrative enforcement of the nondiscrimination obligation imposed upon programs receiving federal financial assistance. \textit{See} \textit{Wood v. Diamond State Tel. Co.}, 440 F. Supp. at 1008 (legislative history of \textsection{504} not helpful in interpreting whether \textsection{503} establishes private cause of action). In any event, the implication of a private cause of action under \textsection{504} is also questionable. \textit{See} note 70 and accompanying text infra. For an exhaustive analysis of this issue, see \textit{Equal Treatment}, note 28 supra, at 99–97.


\textsuperscript{37} \textit{Id.}
The OFCCP has promulgated regulations (the OFCCP Veterans’ regulations), which correspond closely with those issued pursuant to Section 503 of the Rehabilitation Act, discussed above.\textsuperscript{38} Besides imposing general affirmative action obligations upon federal contractors and subcontractors, the OFCCP Veterans’ regulations require contractors and subcontractors with federal contracts of $50,000 and with 50 or more employees to prepare and maintain at each establishment a written program of affirmative action to employ and advance in employment disabled veterans and veterans of the Vietnam era.\textsuperscript{39} The OFCCP Veterans’ regulations will be separately discussed in this text only insofar as the obligations they impose upon federal contractors with respect to disabled veterans differ from the contractor’s obligations to other handicapped individuals, as set forth in the OFCCP regulations issued under Section 503 of the Rehabilitation Act.\textsuperscript{40}

2. Laws Regulating Programs Receiving Federal Financial Assistance

a. Section 111(b) of the Rehabilitation Act.

Under Section 111(b) of the 1974 amendments to the Rehabilitation Act,\textsuperscript{41} the affirmative action obligations imposed by Section 503

\textsuperscript{38} 41 C.F.R. §§ 60–250.1 to .54 (1977).
\textsuperscript{39} 41 C.F.R. § 60–250.5(a) (1977). Both the OFCCP § 503 regulations and the OFCCP Veterans’ regulations provide that the affirmative action plan required may be integrated into other affirmative action plans of the contractor. Compare id. with id. § 60–741.5(a).

The government contractor who is covered by the Veterans’ Readjustment Act is also covered by § 503 of the Rehabilitation Act in most cases, so that a combined affirmative action plan for the purposes of these two laws may be advisable. There is a strong argument, however, against combining these two plans with that required under Executive Order 11,246, since both the former plans must be made available for employee inspection, 41 C.F.R. §§ 60–250.5(c), 741.5(d), while the latter need not be. See id. pts. 60–1 through 60–2. If the Rehabilitation Act and Veterans’ Readjustment Act affirmative action plans were combined with the Executive Order 11,246 plan, the detailed goals and timetables that must be set forth in Executive Order 11,246 affirmative action plans would then become available to employees.

\textsuperscript{40} The major substantive difference between the two sets of regulations is in the definition of the individuals covered. The OFCCP Veterans’ regulations define a “disabled veteran” as:

[A] person entitled to disability compensation under laws administered by the Veterans Administration for disability rated at 30 per centum or more, or a person whose discharge or release from active duty was for a disability incurred or aggravated [sic] in the line of duty.

\textsuperscript{41} 41 C.F.R. §§ 60–250.2 (1977). The Department of Labor has suggested that a disabled veteran could be protected under the Veterans’ Readjustment Act, but not under the Rehabilitation Act, and vice versa. 41 Fed. Reg. 26386 (1976). But see note 172 infra (suggesting that the OFCCP’s definition of a handicap under the Rehabilitation Act is so broad as to subsume the Veterans’ Act definition).

\textsuperscript{41} 29 U.S.C. § 721(a) (Supp. V 1975). The amendment stated:

Section 101(a)(6) of [the Rehabilitation] Act [which sets forth some of the components of the state plan required under Title I] is amended by
of the Act upon federal contractors are also incumbent upon state agencies and facilities for the handicapped that are funded under Title I of the Rehabilitation Act. The legislative history of the 1974 amendments indicates Congress intended that this affirmative action duty also be imposed upon privately owned rehabilitation facilities and programs for the handicapped to which the states funnel Rehabilitation Act funds available under Title I.  

b. Section 504 of the Rehabilitation Act

In contradistinction to Section 111(b)’s limited applicability to federally funded rehabilitation programs for the handicapped and its mandate for affirmative action, Section 504 of the Rehabilitation Act affects all public and private sector programs that receive federal financial assistance for any purpose, but merely imposes a non-discrimination duty. Section 504 provides:

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 participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

adding at the end thereof before the semi-colon “(including a requirement that the State Agency and the facilities in receipt of assistance under this Title shall take affirmative action to employ and advance in employment qualified handicapped individuals covered under, and on the same terms and conditions set forth in, section 793 of this title).” (emphasis added).

42. The Senate report on the amendment stated:
The new provision requires that each State agency and every other facility in receipt of assistance under title I of the Act must take affirmative action to employ and advance in employment qualified handicapped individuals who are covered under Section 503 (thereby applying the new definition of “handicapped individual” which would be added by Section 111(a) in H.R. 14225 and this identical original bill) and on the same terms and conditions as set forth in Section 503 (relating to the affirmative action requirement under Federal contracts and subcontracts).

...[T]hose State agencies which administer a program for handicapped individuals, along with facilities and other public and nonprofit private agencies which provide services through funds under the Act, are expected to adopt strong affirmative action programs which are at least equivalent to those now being developed for Federal agencies. Moreover, these State agencies and facilities should be held to the same exemplary standard for affirmative action required of the Federal agencies with particular responsibilities for programs affecting handicapped individuals, in order to serve as a model for compliance with the affirmative action that is required of all Federal contractors and all Federal subcontractors under Section 503 of the Act.


44. Id. There is no explanation in the legislative history for Congress' use of the phrase “qualified handicapped individuals” in §503 of the Rehabilitation Act.
The Secretary of Health, Education and Welfare has promulgated regulations implementing Section 504 of the Act with regard to federal financial assistance administered by the Department of Health, Education and Welfare,\textsuperscript{45} (the HEW regulations). Pursuant to Executive Order 11,914, the Secretary has also promulgated regulations (the Executive Order 11,914 regulations)\textsuperscript{46} to coordinate the consistent enforcement of Section 504 by all federal agencies that

while using the phrase “otherwise qualified handicapped individual” in § 504 of the Act. The regulations promulgated to implement § 504 by the Secretary of Health, Education and Welfare, see note 45 infra, use the term “qualified handicapped person.” With respect to this usage, the Secretary of Health, Education and Welfare has explained:

The Department believes that the omission of the word “otherwise” is necessary in order to comport with the intent of the statute because, read literally, “otherwise” qualified handicapped persons include persons who are qualified except for their handicap, rather than in spite of their handicap. Under such a literal reading, a blind person possessing all the qualifications for driving a bus except sight could be said to be “otherwise qualified” for the job of driving. Clearly, such a result was not intended by Congress. In all other respects, the terms “qualified” and “otherwise qualified” are intended to be interchangeable.


46. 42 Fed. Reg. 2132 (1977) (to be codified at 45 C.F.R. pt. 85) (hereinafter cited by C.F.R. title and section number). Section 1 of Executive Order 11,914, 3 C.F.R. 117 (1977), authorizes the Secretary of HEW to coordinate the implementation of § 504 by all federal departments and agencies empowered to extend federal financial assistance to any program or activity. Specifically, the Secretary is authorized to establish standards for determining who are handicapped individuals and to adopt guidelines for determining what are discriminatory practices, which standards and guidelines are set forth in the proposed Executive Order 11,914 regulations.
extend financial assistance, each of which is expected to issue its own regulations effectuating Section 504. All of the Section 504 regulations issued to date purport to govern employment practices, but their authority to do so is far from clear. Although Section 111(b) of the 1974 amendments, discussed above, clearly applies to the employment practices of programs receiving federal funds under Title I of the Rehabilitation Act, Section 504 makes no reference to employment practices of the other federally funded programs to which it applies.

47. Both the HEW and the proposed Executive Order 11,914 regulations define a "recipient" of federal financial assistance governed by the regulations as [a]ny state or its political subdivision[s], any instrumentality of a state or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which federal financial assistance is extended directly or through another recipient, including any successor, assignee, or transferee of a recipient, but excluding the ultimate beneficiary of the assistance. Compare 45 C.F.R. § 84.3(k) with id. § 85.3(d). In Simon v. St. Louis County Police Dept., 14 F.E.P. Cas. 1363 (E.D. Mo. 1977), the court held that a plaintiff charging a violation of § 504 must allege that the particular job category in which he was allegedly discriminated against was part of a program or activity receiving federal funds, unless he asserts that he was discriminated against with respect to all employment in a federally funded program. The case therefore implies that the § 504 obligation applies only to the specific program of a state or local government that is federally funded, and that, for example, the fact that a university's science program is federally funded would not subject its athletic program to the § 504 obligation, unless that program also was federally funded.

"Federal financial assistance" is defined by both the HEW and Executive Order 11,914 regulations as any grant, loan, contract (other than a procurement contract or a contract of insurance or guaranty), or any other arrangement by which the Department [agency] provides or otherwise makes available assistance in the form of:

(1) Funds;
(2) Services of Federal personnel; or
(3) Real and personal property or any interest in or use of such property, including:
   (i) transfers or leases of such property for less than fair market value or for reduced consideration; and
   (ii) proceeds from a subsequent transfer or lease of such property if the federal share of its fair market value is not returned to the Federal Government.

Compare 45 C.F.R. § 84.3(h) with id. § 85.3(e).

49. See 45 C.F.R. §§ 84.11 to .14, 85.52 to .55; 31 C.F.R. §§ 51.52 to .53 (1976).
The wording of Section 504 is similar to that of Section 901 of Title IX of the Education Amendments of 1972, as amended, which prohibits sex discrimination in educational programs receiving federal financial assistance. In Romeo Community Schools v. H.E.W., a federal district court in Michigan held that HEW regulations promulgated to implement Title IX were invalid to the extent that they purported to govern the employment practices of educational programs receiving federal financial assistance. The court reasoned that:

Though cast in broad terms, § 1681 [Section 901 of Title IX] nevertheless addresses itself only to sex discrimination against the participants in and the beneficiaries of federally assisted education programs. Section 1681 must therefore be read to protect from sex discrimination only those persons for whom the federally assisted education programs are established, and this can only mean the school children in those programs. As a reference to faculty employees, the language of § 1681 is indirect, if not obscure. Teachers, in short, are hard pressed to fit themselves within the plain meaning of § 1681’s prohibitory language, general as it may appear on its face. When Congress means to statutorily regulate employment discrimination, it uniformly does so in more explicit terms than this.

52. See 45 C.F.R. §§ 86.51 to .71 (1976).

Both Title IX and § 504 of the Rehabilitation Act track the language of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1970 & Supp. V 1975), which prohibits federally assisted programs from discriminating on the basis of race, color or national origin. The Romeo court rejected an argument that the absence of an explicit provision in Title IX, similar to § 604 of Title VI, 42 U.S.C. § 2000(d)(2), which specifically excludes employment discrimination from coverage of Title VI, showed a congressional intent to make Title IX broader than Title VI in this respect. The court noted that Title IX was enacted as part of a legislative program which also included an amendment to Title VII of the Civil Rights Act of 1964, enlarging the scope of that provision to include sex discrimination in employment, and an amendment to the Equal Pay Act authorizing the Secretary of Labor to regulate sex discrimination in educational employee compensation. Thus, the court held, the addition to Title IX of a provision similar to § 604 in Title VI would have created some inherent contradiction between Title IX, Title VII, and the Equal Pay Act. Romeo Community Schools v. H.E.W., 438 F. Supp. 1021, 1030 (E.D. Mich. 1977).

Like Title IX, § 504 of the Rehabilitation Act does not specifically exclude employment practices from coverage. Although a construction of § 504 that would render it applicable to employment practices would not conflict with Title VII, which does not cover handicapped status discrimination, the defeat of amendments that would have expanded Title VII to provide such coverage buttresses the conclusion that Congress did not mean to cover employment discrimination on the basis of a handicap, except where it specifically so provides. See note 16 supra.
The *Romeo* court's rationale in invalidating employment regulations derived from a statute unrelated to employment is pertinent to the legality of the Section 504 regulations insofar as they attempt to govern employment practices of federally assisted programs. Congress used explicit terms in certain sections of the Rehabilitation Act, such as Section 503 and Section 111(b) of the 1974 amendments discussed above, that were directed towards employment practices, and there are additional specific references to employment practices in the Act. For example, Section 501, entitled “Employment of Handicapped Individuals,” specifically requires federal agencies and departments to prepare affirmative action programs for the employment of the handicapped; requires the Secretary of Health, Education and Welfare to “encourage” the appropriate state agencies to adopt and implement policies and procedures to facilitate the hiring, placement, and advancement in employment of individuals who have received rehabilitation services; and requires that special consideration be given to qualified handicapped individuals in filling vacancies on the President’s Committee on Employment of the Handicapped. The specificity of these provisions strengthens the argument that Congress, which did not include employment language in Section 504, did not intend to regulate the employment practices of programs receiving federal financial assistance.

Notwithstanding the arguments against the application of Section 504 to the employment practices of programs receiving federal financial aid (other than those funded directly under Title I of the Rehabilitation Act), the HEW, Executive Order 11,914, and Treasury regulations all cover employment. For example, the HEW regulations specifically prohibit discrimination against qualified handicapped individuals in all employment practices, including the development and application of employment criteria and pre-employment inquiries. In addition, the recipient of federal financial assistance is required to provide HEW with an “assurance” that its program will be conducted in full compliance with the regulations.

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55. See also discussion at note 79 and accompanying text infra.
56. 45 C.F.R. §§84.11 to .14.
57. *Id.* § 84.5. The “assurance” must be set forth on a form provided by the Secretary of HEW. Breach of the “assurance” can give rise to a judicial action for enforcement. *See id.* § 80.8(a). It therefore is conceivable that federally funded programs could be bound by their assurance to comply with regulations that, in and of themselves, would be unenforceable. Accordingly, some recipients of federal financial assistance have questioned whether they should limit their “assurance” to a promise to comply with all valid regulations. HEW has stated, however, that the assurance does not preclude a recipient from raising the invalidity of a regulation as a defense in an enforcement action. *See Letter from Peter Libassi, General Counsel, HEW, to Jay Hedgepeth, General Counsel, American Hospital Association (July 8, 1977).*
Moreover, the recipient must conduct a “self-evaluation,” enlisting the aid of “interested persons,” such as handicapped persons or organizations representing handicapped persons, to ascertain whether any modifications are necessary to bring the federally financed program into compliance with the regulations, and whether “remedial steps” should be taken to eliminate the effects of past discrimination.58 Any recipient with fifteen or more employees is required to establish grievance procedures for handling complaints under the Act, and to appoint an employee to coordinate its efforts to comply with the regulations.59 The recipient with fifteen or more employees also is required to notify job applicants, employees, and unions or professional organizations with which it has collective bargaining agreements that the recipient does not discriminate on the basis of handicap.60

In some respects, the HEW regulations more closely control employment practices than do the OFCCP regulations addressed to

58. 45 C.F.R. § 84.6. The “self-evaluation” must be completed within one year after the effective date of the regulations — by June 3, 1978. Recipients with fifteen or more employees must maintain a list of the persons consulted, areas examined, problems identified, modifications made, and remedial steps taken on file for three years. The file must be made available for public inspection and provided to the Director on request.

59. 45 C.F.R. § 84.7. When employees are represented by a union, the employer should permit union involvement in the grievance procedure if requested, and obtain union approval before resolving a grievance by making any changes in personnel policies that would conflict with the collective bargaining agreement. See discussion at note 58 supra.

60. 45 C.F.R. § 84.8. The notification requirement was to be complied with by sixty days after the effective date of the regulations, or by August 2, 1977.
affirmative action in employment under Section 503, even though the affirmative action duty of Section 503 connotes, conceptually at least, a more onerous burden than the duty of nondiscrimination imposed by Section 504. The term “nondiscrimination” merely demands neutrality, while “affirmative action” requires a disposition in favor of the protected minority. Moreover, the HEW regulations and the Executive Order 11,914 regulations, like the OFCCP regulations, require recipients to make “reasonable accommodations” to the known physical or mental limitations of qualified handicapped job applicants, unless the accommodations would impose an undue hardship on the operation of the federally financed program. Whether Section 504 authorizes the implementing regulations to impose an “accommodation” burden in employment also is unclear, since accommodation is conceptually an affirmative method of alleviating discrimination that generally is imposed only by a specific legislative or executive mandate for either accommodation or broad affirmative action. No such mandate appears in Section 504.

The HEW regulations incorporate by reference the procedural regulations issued pursuant to Title VI of the Civil Rights Act of 1964, which set forth a complaint procedure for discrimination victims and authorize informal conciliation of complaints. The procedural regulations also permit HEW to suspend or terminate federal financial assistance after a hearing, to refer complaints to the Department of Justice for judicial enforcement of the rights of the United States under “any law of the United States, or any assurance or other contractual undertaking,” and to engage in other applicable proceedings under state or local law. The Executive Order 11,914 regulations instruct other federal agencies to adopt the Title VI procedures. The weight of judicial authority presently

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61. For a comparison of the rules on pre-employment inquiries and physicals under the HEW and OFCCP regulations, see notes 283–295 and accompanying text infra.
63. See 45 C.F.R. §§ 84.12(a), 84.55; 41 C.F.R. § 60–741.6(d) (1977).
64. See discussion at notes 305–308 and accompanying text infra.
65. 45 C.F.R. § 84.61. The Title VI complaint and hearing procedures are set forth at id. §§ 80.6–80.10, 81.1 to .131.
66. 45 C.F.R. § 80.6.
67. Id. § 80.7(d).
68. Id. § 80.8.
69. Id. § 85.5.
supports the existence of a private cause of action under Section 504, at least when the plaintiff exhausts existing administrative remedies.\footnote{A private right of action under § 504 has been recognized in several cases. See Davis v. Southeastern Community College, No. 77-1237 (4th Cir., filed March 28, 1978), rev’d, 548 F. Supp. 1341 (E.D.N.C. 1976); Kumpfeier v. Nyquist, 553 F.2d 206 (2d Cir. 1977) (motion for preliminary injunction denied on other grounds to individual plaintiffs attacking school policy forbidding visually handicapped students to participate in public school contact sports); United Handicapped Fed’n v. Andre, 558 F.2d 413 (8th Cir. 1977) (defendant’s motion for summary judgment denied in class action attacking inequality of access by mobility handicapped persons to urban transportation system); Lloyd v. Regional Transp. Auth., 548 F.2d 1277 (7th Cir. 1977) (defendant’s motion to dismiss denied in class action attacking inequality of access by mobility handicapped persons to public transportation system); Barnes v. Converse College, 436 F. Supp. 635 (D.S.C. 1977) (preliminary injunction granted in private action challenging denial of interpreters to deaf students enrolled in private college that received federal funds); Drennon v. Philadelphia Gen. Hosp., 428 F. Supp. 809 (E.D. Pa. 1977) (defendant’s motion to dismiss denied in private action alleging that the city-owned hospital’s employment policy of denying jobs to persons who had epileptic seizures less than two years before application violated §§ 503 and 504, but action stayed pending administrative proceedings); Sites v. McKenzie, 423 F. Supp. 1190 (N.D. W. Va. 1976) (plaintiff’s motion for summary judgment in private action seeking declaratory judgment that, inter alia, denial of access by prisoner to federally funded prison vocational rehabilitation program violated §504 granted in relevant part); Bartels v. Biernat, 405 F. Supp. 1012 (E.D. Wis. 1975) (permanent injunction granted in class action seeking to restrain transportation board from owning public mass transit system that did not assure availability of mass transportation to handicapped persons). Cf. Crawford v. University of North Carolina, 440 F. Supp. 1047 (M.D.S.C. 1977) (preliminary injunction granted, noting probable jurisdiction under §504); Duran v. City of Tampa, 430 F. Supp. 75 (M.D. Fla. 1977) (preliminary injunction denied on other grounds in private action challenging denial of public employment due to history of epilepsy); Hairston v. Drosick, 423 F. Supp. 180 (S.D. W. Va. 1976) (violation of § 504 found in private action requesting injunction against exclusion of child with spina bifida from public school classroom); Snowden v. Birmingham-Jefferson County Transit Auth., 407 F. Supp. 394 (N.D. Ala. 1975), aff’d, 551 F.2d 862 (5th Cir. 1977) (no violation of §504 found in class action challenging denial to mobility handicapped persons of access to public transportation facilities); Simon v. St. Louis County Police Dept, 14 F.E.P. Cas. 1363 (E.D. Mo. 1977) (individual action challenging employment discrimination in violation of §504 dismissed with leave to amend, due to failure to allege that plaintiff was denied all employment or that the particular job category in which he was the victim of discrimination was a program or activity receiving federal financial assistance). The case most often cited for the proposition that a private cause of action exists under § 504 is Lloyd v. Regional Transp. Auth., 548 F.2d 1277 (7th Cir. 1977), which applied the four standards set forth in Cort v. Ash, 422 U.S. 66, 78 (1975) for determining whether a federal statute provides a private cause of action. The Third Circuit concluded that § 504 was enacted for the special benefit of the handicapped, that the legislative history of the 1974 Amendments to the Rehabilitation Act indicate the Congressional intent to permit private enforcement of §504 of the Act, at least after any administrative remedies are exhausted (see S. Rep. No. 93-1297, 93d Cong., 2d Sess., reprinted in [1974] U.S. CODE CONG. & AD. NEWS 6373, 6390–91), that it is consistent with the underlying purposes of the legislative scheme to imply such a remedy, and that a private suit to enforce §504 is not the kind of suit traditionally relegated to state law in an area basically the concern of the states. 548 F.2d at 1284–87. Lloyd left open the question, however, of whether administrative remedies under the HEW regulations, which were not in existence when the case was decided, must be exhausted prior to a private suit, id. at 1286 n.29. But see Drennon v. Philadelphia Gen. Hosp., 428 F. Supp. 809 (E.D. Pa. 1977). Lloyd also left
Education for All Handicapped Children Act of 1975

Section 6(a) of the Education for All Handicapped Children Act of 1975, which provides for federal assistance to fund public education for handicapped children, requires that each recipient of such assistance take "positive efforts" to employ and advance in employment qualified handicapped individuals in programs funded by the Act. The HEW regulations discussed above cite this Act, in addition to Section 504 of the Rehabilitation Act, as one of the promulgating authorities. Thus, to the extent that the attempt of the HEW regulations to govern the employment practices of federally assisted programs pertains to educational programs for the handicapped, Section 6(a) of the Education for All Handicapped Children Act of 1975 provides legislative support. Moreover, the mandate to take "positive efforts" to employ the handicapped may justify the imposition of such programs of more than a duty to avoid discrimination.

unanswered the question of whether the private cause of action is available only to a large class of plaintiffs and not to individual complainants. 548 F.2d at 1287. On the latter question, see Cannon v. University of Chicago, 559 F.2d 1063, (7th Cir. 1976); Crawford v. University of North Carolina, 440 F. Supp. 1047 (M.D.N.C. 1977). Cf. Lau v. Nichols, 414 U.S. 563 (1974) (Blackmun, J., concurring) (approving court's holding that failure of school system to provide English language instruction to students of Chinese ancestry violates § 601 of the Civil Rights Act of 1964, in view of the large number of children affected by the lack of such a program of instruction). It would appear that private actions alleging a single instance of employment discrimination therefore might be distinguishable from Lloyd, Duran v. City of Tampa, Drennon v. Philadelphia Gen. Hosp., and Simon v. St. Louis County Police Dep't, all of which involved single plaintiffs challenging allegedly discriminatory employment practices, do not speak to this issue, however. Employment discrimination cases are also distinguishable from Lloyd in that the great majority of plaintiffs would have a remedy under state law. See note 137 infra.

It should be noted that § 124 of the State and Local Fiscal Assistance Amendments of 1976, 31 U.S.C.A. § 1244 (West. Supp. 1977) explicitly established a private cause of action for violations of § 504 of the Rehabilitation Act by recipients of revenue sharing funds. See note 35 supra, for cases discussing a private cause of action under § 503. For a detailed analysis of the private cause of action issue under both sections of the Rehabilitation Act. See Equal Treatment, supra note 28, at 89-97.


73. The HEW regulations so assume. 45 C.F.R. § 84.11(a)(2). But cf. United Handicapped Fed'n v. Andre, 558 F.2d 413, 415-16 (8th Cir. 1977) (reversing lower court decision that nondiscrimination duties under § 504 and "special efforts" duties under Urban Mass Transportation Act of 1964, as amended, 49 U.S.C. §§ 1601-1613 (Supp. V 1975), were met, in light of regulations issued
d. Developmentally Disabled Assistance and Bill of Rights Act

The Developmentally Disabled Assistance and Bill of Rights Act\(^7\) provides for federal assistance to states and universities, and for special grants to public and non-profit private entities to fund programs and services for developmentally disabled individuals.\(^7\) Section 106 conditions federal assistance provided pursuant to the Act upon the requirement that

> each recipient of such assistance take affirmative action to employ and advance in employment qualified handicapped individuals on the same terms and conditions required with respect to the employment of such individuals by the provisions of the Rehabilitation Act of 1973 which govern employment (1) by State rehabilitation agencies and rehabilitation facilities, and (2) under Federal contracts and subcontracts.\(^7\)

Although there is scanty legislative history to aid in the interpretation of Section 106,\(^7\) it apparently is intended to add programs receiving federal aid under the Developmentally Disabled Assistance and Bill of Rights Act to the list of employers required to engage in affirmative action to employ the handicapped. As has been discussed above, and as indicated in Section 106, the list already included federal contractors (Section 503 of the Rehabilitation Act of 1973), and state agencies and facilities receiving funds under Title I of the Rehabilitation Act of 1973 (Section 111(b) of the

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\(^{75}\) The Act defines a "developmental disability" as

[A] disability of a person which—

\(\begin{align*}
& (A) \ (i) \ \text{is attributable to mental retardation, cerebral palsy, epilepsy, or autism;} \\
& \quad \ (ii) \ \text{is attributable to any other condition of a person found to be closely related to mental retardation because such condition results in similar impairment of general intellectual functioning or adaptive behavior to that of mentally retarded persons or requires treatment and services similar to those required for such persons;} \\
& \quad \ (iii) \ \text{is attributable to dyslexia resulting from a disability described in clause (i) or (ii) of this subparagraph;} \\
& \quad \ (B) \ \text{originates before such person attains age 18;} \\
& \quad \ (C) \ \text{has continued or can be expected to continue indefinitely;} \text{ and} \\
& \quad \ (D) \ \text{constitutes a substantial handicap to such person's ability to function normally in society.}
\end{align*}\)


\(^{76}\) Id. § 6005.

Moreover, the Education for All Handicapped Children Act, also discussed above, which was enacted shortly after the Developmentally Disabled Assistance and Bill of Rights Act, adds federally assisted education programs for the handicapped to the list of programs having employment obligations with respect to the handicapped, although it requires only "positive efforts," rather than affirmative action.

A comparison of these enactments with Section 504 of the Rehabilitation Act is helpful in analyzing the coverage of Section 504. Since both the Education for All Handicapped Children Act and the Developmentally Disabled Assistance and Bill of Rights Act were enacted subsequent to the Rehabilitation Act, and since, unlike Section 504 of the Rehabilitation Act, both specifically govern employment practices, these laws buttress the argument that Congress did not intend that Section 504 apply to employment practices of programs receiving federal financial assistance. In fact, these enactments and Sections 111(b), 503, and 504 of the Rehabilitation Act, taken together, indicate a congressional scheme to regulate employment practices as they affect the handicapped only with respect to federal contractors and certain federally funded programs specifically designed to benefit the handicapped. HEW has generated confusion in this area by issuing one set of regulations to govern the treatment of the handicapped by all the federally funded programs for which it is responsible, regardless of whether the appropriations statute under which the program is funded imposes any obligation to employ the handicapped and regardless of the nature of any such obligation imposed. To the extent that the

78. The reference to "affirmative action . . . on the same terms and conditions required by the provisions of the Rehabilitation Act of 1973 which govern employment by . . . state rehabilitation agencies and rehabilitation facilities" relates to §111(b) of the Rehabilitation Act, which, as discussed previously, imposes an affirmative action obligation upon state rehabilitation agencies and facilities funded under Title I of the Act. Similarly, the reference to federal contracts and subcontracts apparently relates to §503 of the Rehabilitation Act. Thus, it can be inferred that Congress intended to make these affirmative action obligations incumbent upon federal programs funded under the Developmentally Disabled Assistance and Bill of Rights Act.

79. See also notes 53-57 and accompanying text supra.

The argument can be made, however, that Congress simply intended to impose a more onerous obligation on employers administering those programs — an affirmative action or positive efforts obligation, as opposed to a mere prohibition on discrimination in employment — which arguably had already been imposed by §504 of the Rehabilitation Act. This appears to be HEW's understanding. Compare 45 C.F.R. §84.11(a) with id. §84.11(b). The surface logic of this argument is nevertheless undermined by the specificity of the provisions in the Rehabilitation Act, other than §504, that explicitly apply to employment practices, discussed previously.

80. As stated at p. 205 supra, the HEW regulations cite both the Education For All Handicapped Children Act of 1975, which applies to employment practices of education programs for the handicapped, and §504 of the Rehabilitation Act, which does not apply to employment practices, among its promulgating
regulations purport to govern the employment practices of employers not specifically covered by the statutes cited as promulgating authorities, they therefore are subject to challenge.

As currently interpreted by the implementing regulations, all of the recently enacted statutes discussed above have significant import for both private and public sector employment practices. At least 275,000 businesses and institutions, employing more than one third of the country's work force, are federal contractors affected by Section 503 of the Act and the implementing regulations.\(^1\) In addition, numerous private industries, private and state or municipal hospitals, and educational institutions receive federal financial aid in the form of grants, loans, contracts, or other arrangements with the government under which assistance is made available in the form of funds, services of federal personnel, or governmentally-owned real and personal property. As HEW has interpreted Section 504 of the Rehabilitation Act, all of these federally financed programs are prohibited from discriminating against, and are required to accommodate, qualified handicapped employees and job applicants. Some employers or institutions may be subject to the provisions of both Sections 503 and 504. A notable example is a hospital that receives federal financial assistance in the form of research grants or construction funds, and that also has a contractual arrangement with the government to provide services or to perform research.\(^2\) Because a vast number of public and private entities do business with the federal government, and are affected by the Rehabilitation Act, this legislation greatly increases employment opportunities available to the handicapped and imposes heavy burdens on many employers.

3. Application of Constitutional Provisions and the Civil Right Acts to Handicap Discrimination

In addition to the new statutory remedies discussed above, the handicapped are beginning to use some of the older civil rights

\(^1\) The Wall Street Journal, January 27, 1976, at 1, col. 1.

\(^2\) Whether health care facilities that receive reimbursement for services to Medicare or Medicaid recipients are government contractors is an open question at the moment. In fact, the types of arrangements that will be deemed government contracts is not at all clear. See Drennon v. Philadelphia Gen. Hosp., 428 F. Supp. 809 (E.D. Pa. 1977) (staying action pending exhaustion of administrative remedies, and questioning whether research arrangement between hospital and federal government was contractual in nature). One court has also rejected a contention that a rehabilitation center receiving Medicaid and Medicare reimbursements was a recipient covered by §504. Trageser v. Libbie Rehabilitation Center, Inc., No. 77-0191-R (E.D. Va. Aug. 17, 1977) (app. pending).
statutes and constitutional provisions as means of securing recompense for employment discrimination. An analysis of the applicability of these laws to the handicapped thus is appropriate.


Handicap discrimination by public employers and private employers involved in state action may violate the due process clauses of the fourteenth and fifth amendments. Plaintiffs who have asserted that their due process rights were offended by employment practices discriminatory against the handicapped have found support in the "irrebuttable presumption" analysis developed by the Supreme Court in Cleveland Board of Education v. LaFleur. In Gurmann v. Costanzo, the United States Court of Appeals for the Third Circuit invalidated as constituting an "irrebuttable presumption" a school board rule that prohibited blind teachers, who were otherwise eligible, from taking an exam to qualify them to teach sighted students. As defined by Gurmann, an "irrebuttable

83. Section 1 of the Fourteenth Amendment prohibits states from depriving persons of life, liberty, or property, without due process of law. When the state is emmeshed in the affairs of a private employer, however, the private employer's actions may be held to constitute state action sufficient to subject it to constitutional standards. E.g., Weise v. Syracuse Univ., 522 F.2d 397, 408 (2d Cir. 1975) (employment actions of private university may constitute state action if there is sufficient state financial support and regulation of hiring and the claims to private status do not "by themselves outweigh the peculiar offensiveness of the alleged misconduct"); Christhilf v. Annapolis Emergency Hosp. Ass'n., 496 F.2d 174 (4th Cir. 1974) (hospital's receipt of Hill-Burton Act funds involved state in its affairs sufficiently to warrant imposition of fourteenth amendment procedural due process standards on hospital's dismissal of physician). But see Cohen v. Illinois Inst. of Tech., 524 F.2d 818 (7th Cir. 1975), cert. denied, 425 U.S. 943 (1976) (no state action when state support or control did not contribute to the alleged discrimination).

84. U.S. Const. amend. XIV, §1.
85. Id. amend. V.
86. 414 U.S. 632 (1974). In LaFleur, the Court ruled that a mandatory maternity leave policy under which a pregnant teacher was required to take maternity leave without pay beginning five months before the expected birth of her child, even though many teachers would be physically able to continue working beyond the arbitrary cutoff date, established an irrebuttable presumption of physical incompetency. Such an irrebuttable presumption, the Court held, was a violation of due process of law, although it represented a "good faith effort to achieve a laudable goal," because it unduly penalized a female teacher in the exercise of a basic liberty — the right to bear a child. Id. at 648. "Irrebuttable presumptions" infringing upon a protected right have not been allowed to stand where the fact presumed was not "necessarily or universally true in fact," Vlandis v. Kline, 412 U.S. 441, 452 (1973), where the presumption was permanent, Stanley v. Illinois, 405 U.S. 645 (1972), and where the state had other reasonable alternative means of making the determination presumed to be true. In this connection, it is not sufficient for the state to show merely that the presumption results in greater administrative convenience, speed, and efficiency, id. at 656-57.
88. A condition precedent to due process analysis, of course, is the existence of a protected right. The Third Circuit Court of Appeals found that Ms. Gurmann had a reasonable expectation of being admitted to the qualifying exam, since she...
presumption” arises when public sector employment policies eliminate handicapped individuals from consideration for certain jobs without providing an opportunity for the individuals to demonstrate that, despite their handicap, they can perform the jobs. The attack is not on the rationality of underlying competency requirements for the job or upon the classifications they set forth, but on the denial of an opportunity to prove that the requirements can be met. Thus, the judicial inquiry involves procedural rather than substantive due process or equal protection analysis.

Several other federal courts have refused to dismiss suits by handicapped individuals against public sector employers predicated on the “irrebuttable presumption” theory. On the other hand, in Coleman v. Darden, a federal district court in Colorado refused to apply the theory to a requirement that legal research assistants have the ability to read typewritten characters with the help of corrective lenses. In effect, the court applied a substantive due process test, stating that it was not “arbitrary or capricious” for an agency to set

had previously been issued a professional certificate by the Pennsylvania Department of Education. Under the rules of the defendant school district, this certificate was the only requirement for entrance to the examination. Thus, the court held that the right to take the examination was a right arising under state law, and its deprivation in an arbitrary manner violated due process. 556 F.2d at 188. In most cases of hiring discrimination, however, the establishment of the protected right might be more difficult since there is no fundamental right to public employment, Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976). But cf. Duran v. City of Tampa, 430 F. Supp. 75 (M.D. Fla. 1977) (preliminary injunction denied on other grounds to plaintiff alleging denial of due process in failure to hire due to City Civil Service Board medical standard precluding employment of applicants with a history of epilepsy; court found a substantial likelihood of success on the merits of the fourteenth amendment claim). The establishment of a “reasonable expectation” of continued employment sufficient to warrant due process analysis has proved difficult for some plaintiffs. Compare Bd. of Regents v. Roth, 408 U.S. 564 (1972) with Perry v. Sindermann, 408 U.S. 593 (1972).

The court awarded Ms. Gurmankin “rightful place seniority,” ordering her employment with seniority rights and all other rights that would have accrued had she been permitted to take the examination. The lower court had found that Ms. Gurmankin would have been offered suitable employment by September, 1970, if she had been permitted to take the examination when requested. 556 F.2d at 188.

89. The Gurmankin court distinguished Weinberger v. Salfi, 422 U.S. 749 (1975) (rejecting an “irrebuttable presumption” attack on the duration of relationship requirements of the Social Security Act), on the ground, inter alia, that it involved an attack on the rationality of the law rather than on the denial of an opportunity to rebut a legislative presumption. 556 F.2d at 188 n.5; see 422 U.S. at 772.

90. This approach has been roundly criticized, see, e.g., Note, Irrebuttable Presumptions: An Illusory Analysis, 27 STAN. L. REV. 449 (1974).

91. Duran v. City of Tampa, 430 F. Supp. 75 (M.D. Fla. 1977); Drennon v. Philadelphia Gen. Hosp., 428 F. Supp. 809 (W.D. Pa. 1977); cf. Hoffman v. Ohio Youth Comm’n, 13 F.E.P. Cas. 30 (N.D. Ohio 1975) (dictum indicating that, if case had not been moot, a violation of due process would have been found on the grounds that the refusal to hire a blind plaintiff as a youth counselor because of his blindness constituted an unconstitutional “irrebuttable presumption”).

job-related physical requirements, and that the sight requirement was in fact job-related.93

The vitality of the “irrebuttable presumption” theory in handicap discrimination cases may well depend upon whether the court views the plaintiff’s attack as directed towards an employer’s failure to provide a hearing, thus requiring procedural due process analysis, as did the Gurmankin court; as an attack on the rationality of the underlying employment criteria, requiring substantive due process analysis, as was apparently the case in Coleman; or as an attack on a legislative classification, thus requiring equal protection analysis. Under substantive due process or equal protection analysis, the plaintiff is less likely to prevail.94 The trial court opinion in Gurmankin indicates, however, that when the court is of the view that procedural due process has been offended, it may engage in a searching comparison of job duties and the corresponding competency requirements in its attempt to define the extent to which the defendant must provide handicapped job applicants with an opportunity to prove their ability.95

93. Id. at 6789.
94. See note 97 infra.
95. The Gurmankin trial court took extensive testimony on the methods blind teachers can use to overcome problems that might be encountered as a result of their handicaps. The court concluded:

The School District can reasonably and legitimately consider an applicant’s blindness in evaluating his or her qualifications for a teaching position. The testimony indicated that blind persons could be successful teachers, but that special arrangements were necessary in some areas. For example, blind teachers usually were not assigned to lunchroom or playground supervision, and special arrangements sometimes had to be made for administering tests or keeping records. The special problems encountered by blind teachers and the kinds of adjustments in normal school procedures that may be necessary are relevant to a school district’s evaluation of a blind applicant for a teaching position.

In Ms. Gurmankin’s case, however, the interviewers frequently did not give her an opportunity to explain how she might overcome her handicap, nor did the interviewers have sufficient background information to properly evaluate the prospects of a blind applicant for a teaching position.

411 F. Supp. at 988.

In Hoffman v. Ohio Youth Com’n, 13 F.E.P. Cas. 30 (N.D. Ohio 1975), the trial court engaged in a similar analysis inquiring into minute aspects of the job of a youth counselor, the areas in which a blind person might have difficulty, and the accommodations that could be made by the employer to eliminate the difficulties. The court concluded:

[This Court is of the view that the Ohio Youth Commission could have accommodated Dr. Hoffman and explored the ways in which he could have implemented such alternatives as utilized by Mr. Hallford and the San Diego Department of Social Welfare without infringing upon the rights of the State and its agencies to set National requirements for the position of Youth Counselor . . . and that the irrebuttable presumption indulged in by the Commission in 1969 that a blind person could not perform the duties of a Youth Counselor was unreasonable.

Id. at 35-36. The Hoffman court declined to determine whether the denial of employment to Dr. Hoffman reached the constitutional magnitude of a violation of the due process clause because the claims for relief were moot.
Another potential area of constitutional applicability with respect to the handicapped is the equal protection clause. Several substantive difficulties are associated with suits alleging a violation of equal protection. Judicial inquiry into most such claims is limited to an analysis of whether there is any “rational basis” for the classification attacked, unless a fundamental right or a suspect classification is involved, in which case the courts will apply “strict scrutiny” to the classification and require the state to justify it with a compelling state interest. To date, public sector employment in itself has not been recognized as a “fundamental” right sufficient to invoke the “strict scrutiny” test unless an inherently “suspect” classification was involved, and the handicapped have not been

These opinions indicate that courts inquiring into employment practices alleged to constitute irrebuttable presumptions resulting in handicap discrimination will proceed to a large degree along the same lines of inquiry mandated by the Rehabilitation Act and state fair employment statutes, discussed infra at notes 229-263 and accompanying text. That is, the courts will review physical standards for employment to ascertain whether they are in fact job-related, and also will seek to determine whether reasonable accommodations could have been made for the handicapped individual. To some extent, perhaps, this inquiry is necessary to ascertain whether the irrebuttable presumption is in fact universally true. Actually, however, the courts in irrebuttable presumption cases are requiring that the standards for employment meet a test higher than the rational basis test, see note 97 infra, a requirement that would not be imposed had the attack been made upon the rationality of the employment standards themselves under the equal protection clause.

97. Under this traditional approach to equal protection, most statutory classifications that do not involve a suspect class are upheld, since judicial scrutiny under the rational basis test is extremely limited. Compare Geduldig v. Aiello, 417 U.S. 484 (1974) (state disability insurance program that excluded from coverage certain disabilities resulting from pregnancy upheld as a non-gender based classification, rationally related to the state’s interest in maintaining the self-supporting nature of the insurance program) with Frontiero v. Richardson, 411 U.S. 677, 682 (1973) (plurality opinion) (applying compelling state interest test, on grounds that sex is a “suspect” classification, to a statute that prohibited servicewomen from claiming their husbands as dependents unless they showed that the husband was in fact dependent on the wife for more than one-half of his support). Recently, the Court has begun to apply what appears to be an intermediate test to classifications that, while not inherently “suspect,” are deemed to require close scrutiny. See Craig v. Boren, 429 U.S. 190 (1976) (applying close scrutiny, the Court struck down a statute prohibiting the sale of 3.2% beer to males under the age of 21 and to females under the age of 18); Reed v. Reed, 404 U.S. 71 (1971) (rejecting the “compelling state interest” test but applying close scrutiny to strike down an Idaho statute giving preference to men over women as administrators of a decedent’s estate). For a discussion of this phenomenon in the development of equal protection analysis, see Gunther, The Supreme Court, 1971 Term — Forward: In Search of Evolving Doctrine of a Changing Court: a Model of a Newer Equal Protection, 86 HARV. L. REV. 1 (1972).
98. See Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976) (upholding a Massachusetts statute requiring mandatory retirement of uniformed state police officers at age 50 against a challenge that a classification based on age alone lacked a rational basis in furtherance of any substantial state interest). The Court in Murgia stated that “equal protection analysis requires strict scrutiny of a legislative classification only when the classification impermissibly interferes with the exercise of a fundamental right or operates to
recognized as a “suspect” classification. In fact, Justice Brennan’s plurality opinion in Frontiero v. Richardson, holding that sex is a suspect classification, specifically excluded physical disability from the category. Justice Brennan stated:

[What differentiates sex from such nonsuspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society.]

At least for the present, then, it appears that cases brought by handicapped individuals alleging fourteenth or fifth amendment violations are more apt to be successful if predicated upon irrebuttable presumption theories.

b. The Civil Rights Acts

Several federal civil rights statutes also may have relevance in cases involving allegations of handicap discrimination. Title VII of the Civil Rights Act of 1964, although not applicable to handicapped status discrimination as such, may be helpful to plaintiffs who allege employment discrimination on the basis of handicaps that are particularly prevalent among persons of a particular race, ethnic ancestry, or sex. For example, discrimination because of physical problems associated with sickle cell anemia, which is an inherited disease occurring most frequently in blacks,

the peculiar disadvantage of a suspect class,” Id. at 312 (footnotes omitted), rejecting the contention that the right to public sector employment is a fundamental right.

99. The plaintiff’s argument in Gurmankin v. Costanzo that the blind constitute a “suspect classification” was rejected by the lower court in dictum: 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. 411 F. Supp. at 992 n.8.

To date, race, Bolling v. Sharpe, 347 U.S. 497, 499 (1954), national ancestry, Korematsu v. United States, 323 U.S. 214 (1944), and alienage, In re Griffiths, 413 U.S. 717 (1973), are the only classifications other than sex, see note 97 supra, to be regarded as inherently “suspect” and subjected to “strict scrutiny.” For arguments on whether the handicapped should be considered a suspect classification, Compare Burgdorf, A History of Unequal Treatment: The Qualifications of Handicapped Persons as a “Suspect Class” Under the Equal Protection Clause, 15 SANTA CLARA L. REV. 855 (1975) with Employment and the Disabled, note 2 supra, at 457–58.

101. Id. at 682.
might have such a disproportionate impact upon blacks as to give rise to a cause of action for racial discrimination under Title VII.\footnote{104}

Recourse to Title VII may be limited, however, by judicial decisions holding that Title VII prohibits discrimination only on the basis of those characteristics that are inherently related to one's status as a member of one of the classifications covered by the law.\footnote{105} Thus, the mere fact that, for example, a statistically significant percentage of drug addicts are blacks,\footnote{106} or that heart disease is more prevalent in males than females, would not warrant a holding that employment criteria which deny jobs to individuals with these impairments are prima facie violative of Title VII, absent proof that the impairments are inherently race or sex related.

The same rationale should limit the use of Section 1981 of the Civil Rights Act of 1866\footnote{107} as a remedy for handicapped status discrimination. Although Section 1981 has been held to afford a cause of action for employment discrimination in the private as well as the public sectors,\footnote{108} the statute was enacted pursuant to the thirteenth amendment and its application generally has been limited to discrimination on the basis of race.\footnote{109} It has specifically been held

\footnote{104}Cf. Smith v. Olin Chemical Corp., 555 F.2d 1283 (5th Cir. 1977) (summary judgment for defendant on grounds that business necessity could be presumed for a job requirement of a "good back" in a manual labor position, even though plaintiff claimed that the job criteria impacted adversely upon blacks who suffered from sickle cell anemia); Woods v. Safeway Stores, 420 F. Supp. 35 (E.D. Va. 1976) (discharge of black plaintiff for failure to meet grooming code because of a beard grown on advice of a dermatologist as treatment for a skin condition that affects blacks almost exclusively, upheld on ground that there was a legitimate business purpose for the rule).

\footnote{105}See, e.g., Earwood v. Continental Southeastern Lines, 539 F.2d 1349 (4th Cir. 1976); Fagan v. National Cash Register Co., 481 F.2d 1115 (D.C. Cir. 1973). Both cases refused to strike down a sex differentiated grooming regulation, holding that the regulation did not constitute discrimination based on either immutable sex characteristics or constitutionally protected activities. For a more detailed discussion of the cases on this point, see D. Schlei & P. Grossman, Employment Discrimination and the Law, 337-60 (1976). See also Ogden, Justice and the Problem of the Volitional Victim, 1977 LAB. L.J. 417, 419.


[It is well settled among the Federal Courts of Appeals — and we now join them — that § 1981 affords a federal remedy against discrimination in private employment on the basis of race. An individual who establishes a cause of action under §1981 is entitled to both equitable and legal relief, including compensatory and, under certain circumstances, punitive damages. (citations omitted).]

inapplicable to “pure” handicapped status discrimination, and therefore should have relevance only where a handicap is inherently related to race.

Section 1983 of the Civil Rights Act of 1871 presents another alternative for the redress of discrimination based upon handicapped status — an alternative that already has been recognized in a few federal courts. Section 1983 was enacted pursuant to the fourteenth amendment, and establishes a private cause of action against every person who, under color of any statute, ordinance, regulation, custom or usage of any state or territory, subjects, or causes to be subjected, any citizen of the United States, or any other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution or the laws.

Section 1983 thus provides to the handicapped a statutory remedy for violations of any constitutional or federal statutory right.

Inasmuch as Section 1983 by its terms applies only to discriminatory action engaged in by persons acting under color of state law, relief is generally unavailable against private sector employers not so involved with the state that state action can be found to be present. Although state and local agencies and municipalities recently have been deemed “persons” subject to suit under Section 1983, the plaintiff is limited to recovery for official

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110. Simon v. St. Louis City Police Dep’t, 14 F.E.P. Cas. 1363, 1364 (E.D. Mo. 1977).
111. In some circuits, if the handicap relates to the complainant’s national origin, a § 1981 action would also be possible. See note 109 supra.
117. Monell v. Dep’t of Social Serv., 46 U.S.L.W. 4569 (1978). Monell overruled a substantial body of precedent which had effectively precluded injunctive and monetary relief under § 1983 against state and local agencies and municipalities. See City of Kenosha v. Bruno, 412 U.S. 507 (1973); Singleton v. Vance City Bd. of Educ., 501 F.2d 429 (4th Cir. 1974); Harper v. Kloster, 486 F.2d 1134 (4th Cir. 1973) (city is not a person suable under § 1983). Relying on pre-Monell precedent, however, the courts have permitted plaintiffs to sue local agencies or municipalities directly under the fourteenth
policies or customs that deprive him of civil rights. The local or state
government, thus, cannot be held liable under Section 1983 for the
"constitutional torts" of its employees under the doctrine of
respondent superior.\textsuperscript{118}

Sections 1985(3)\textsuperscript{119} and 1986\textsuperscript{120} of the Civil Rights Act of 1871
also may have utility in employment discrimination cases based on
handicapped status. Section 1985(3) was enacted pursuant to the
fourteenth amendment and provides a cause of action against persons who

conspire or go in disguise on the highways or on the
premises of another, for the purpose of depriving, either
directly or indirectly, any person or class of persons of the
equal protection of the laws or of equal privileges and
immunities under the laws; or for the purpose of preventing
or hindering the constituted authorities of any state or
territory from giving or securing to all persons within such
state or territory the equal protection of the laws.

Section 1986 authorizes suits against persons who have knowledge
that a violation of Section 1985 is about to be committed, but who
neglect or refuse to exercise their power to prevent or aid in
preventing the violation.

To date, there have been no definitive rulings on whether
Section 1985(3) provides a cause of action for conspiratorial
handicap discrimination, although claims under the section have
been raised in a few public sector cases.\textsuperscript{121} Regardless of its

\textsuperscript{118} Most courts, however, have permitted a recovery of money damages against
government officials sued in their individual capacities, although equitable relief
has been denied on the grounds that it is inappropriate relief against one sued in
his individual capacity. \textit{See}, e.g., \textit{Burt v. Bd. of Educ.}, 521 F.2d 1201 (4th Cir.


\textsuperscript{120} \textit{Id.} § 1986.

\textsuperscript{121} \textit{See Simon v. St. Louis City Police Dep't}, 14 F.E.P. Cas. 1363 (E.D. Miss. 1977)
(holding that plaintiff failed to raise factual allegation sufficient to establish a
applicability, there would appear to be few situations in which Section 1985(3) would provide a better basis for a handicap discrimination suit against a public sector employer than that existing under Section 1983, which involves fewer elements of proof. The same limitations on relief and on suable defendants that exist with respect to an action under Section 1983 are applicable in suits against public sector defendants brought under Section 1985(3).

In the private sector, however, Section 1985(3) could provide some plaintiffs with what might be the only means of obtaining federal judicial relief. Even if a private cause of action for employment discrimination exists under the Rehabilitation Act, only those employers who are government contractors or recipients of federal aid would be subject to suit. As mentioned above, Section 1981 would provide a cause of action against private employers only where the basis for discrimination is a race-related handicap. Similarly, Title VII suits would be feasible only where the handicap discrimination has a disparate impact upon the classes protected by that statute. Thus, Section 1985(3) could be valuable to handicapped individuals alleging conspiratorial employment discrimination in the private sector who have no cause of action under the above-mentioned statutes.

Quaere, however, whether § 1985(3) applies to actions against public sector defendants alleging a conspiratorial violation of due process through, for example, an “irrebuttable presumption,” see notes 87–96 and accompanying text supra, as opposed to actions challenging a denial of equal protection. See, e.g., Coltharp v. Cutler, 419 F. Supp. 924 (C.D. Utah 1976). For a discussion of this issue, see C. Antieau, Federal Civil Rights Acts, Civil Practice §§ 96, 99 (1971).
State action is not a prerequisite to Section 1985(3) suits, but in order to obtain relief against private sector defendants the plaintiff must prove a conspiracy based upon “some racial or perhaps otherwise class-based invidiously discriminatory animus” intended to deprive him of equal protection of the laws or of equal privileges and immunities under the law. In addition, the plaintiff must prove an act in furtherance of the conspiracy that either injured him in person or property or deprived him of having and exercising a right or privilege of citizens of the United States. To date, the only private conspiracy that the Supreme Court has recognized as actionable under Section 1983(5) is one intended to deprive Negro citizens of the right to travel or of thirteenth amendment rights. If this limitation is adhered to, the plaintiff would have no cause of action against private sector defendants under Section 1985(3) unless the conspiratorial handicap discrimination also impinged upon one of these rights, so that only race-related handicap discrimination in employment would be actionable. Nevertheless, some lower federal court opinions raise the possibility that “invidiously discriminatory” private conspiracies directed towards classes based on characteristics other than race may be actionable under Section 1985(3).

4. Summary of Federal Laws

The above overview has illustrated that private sector employees and job applicants alleging handicapped status discrimination have

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128. Id. at 102.
129. Id. at 103.
130. Id. at 105.
131. See Westberry v. Gilman Paper Co., 507 F.2d 206, opinion withdrawn and vacated as moot, 507 F.2d 215 (5th Cir. 1975) (reversing dismissal of § 1985(3) suit against private defendants who allegedly conspired to deprive environmentalist of his job); Marlowe v. Fisher Body, 489 F.2d 1057, 1055 (6th Cir. 1973) (action alleging conspiratorial deprivation of equal employment opportunities because of religious beliefs and national origin remanded inter alia on § 1985(3) claim); Action v. Gannon, 450 F.2d 1227 (8th Cir. 1971) (affirming denial of motion to dismiss § 1985(3) action by white plaintiffs to enjoin organizations of blacks from conspiring to interrupt church services and interfering with first amendment rights); Richardson v. Miller, 446 F.2d 1247 (3d Cir. 1971) (reversing order dismissing §1985(3) claim of white persons who advocated racial equality in employment opportunities); cf. Weise v. Syracuse Univ., 522 F.2d 397, 408-09 n.16 (2d Cir. 1975) (remanding, inter alia, on issue of whether conspiratorial sex discrimination is a “class-based invidiously discriminatory” violation of equal protection actionable under §1985(3)). Contra, Cohen v. Illinois Inst. of Tech., 524 F.2d 818 (7th Cir. 1975), cert. denied, 425 U.S. 943 (1976) (conspiratorial sex discrimination held not actionable under §1985(3), absent state action); Bellamy v. Mason’s Stores, Inc., 508 F.2d 504 (4th Cir. 1974) (private conspiracy to deprive Ku Klux Klan members of first amendment rights held not actionable under §1985(3)); Dombroski v. Dowling, 459 F.2d 190 (7th Cir. 1972) (private conspiracy to deprive criminal lawyers of rental office space held not actionable under §1985(3)).
several possible sources of relief under federal law. The Rehabilitation Act provides for relief through the Department of Labor for the failure to meet affirmative action obligations if the employer is a government contractor or subcontractor. If the employer is a federally funded educational program for the handicapped or receives federal financial assistance under Title I of the Rehabilitation Act, relief from discriminatory employment practices is available under the HEW regulations. Although their applicability to the employment practices of other federally funded programs is subject to challenge, the HEW and Executive Order 11,914 regulations purport to provide this alternative with respect to all public and private sector programs receiving federal financial assistance, and the Treasury regulations reiterate this alternative with respect to programs receiving revenue sharing funds. In addition, although it is unlikely that a private cause of action would be implied under Section 503 of the Rehabilitation Act, there is substantial judicial authority that a private suit may be brought under Section 504 of the

132. Another possible mechanism for alleviating certain types of handicap discrimination in employment is found in 42 U.S.C. § 1994 (1970). Section 1994 was enacted pursuant to the thirteenth amendment, and prohibits “the holding of any person to service or labor under the system known as peonage” in any territory or state. The section also invalidates all acts, laws, resolutions, orders, regulations, or usages of any Territory or State, which have heretofore established, maintained, or enforced, or by virtue of which any attempt shall hereafter be made to establish, maintain, or enforce, directly or indirectly, the voluntary or involuntary service or labor of any persons as peons, in liquidation of any debt or obligation, or otherwise.

It has been suggested that § 1994 and other sections of the Civil Rights Acts of 1866 and 1871 could provide a means of achieving redress for handicapped individuals who are forced to perform work at the institutions where they are receiving treatment, sometimes for subminimum wages or no wages at all. See Friedman, The Mentally Handicapped Citizen and Institutional Labor, 87 Harv. L. Rev. 567 (1974). While the practice of requiring patients to perform labor for no compensation or for unequal compensation may violate the ban against discrimination in compensation on the basis of a handicap set forth in the OFCCP and HEW regulations, any private cause of action that may exist under the Act would lie only against government contractors and federally-funded institutions. Although patient workers in private institutions are protected by the minimum wage provisions of the Federal Fair Labor Standards Act; see Souder v. Brennan, 267 F. Supp. 808 (D.D.C. 1973) and 29 C.F.R. pt. 529 (1976), these provisions are not applicable to most public sector employees. See Nat’l League of Cities v. Usery, 426 U.S. 833 (1976).

Section 1994 thus could provide patient workers with a cause of action to fill the gaps, but the elements of the case may be difficult to establish. See Friedman, supra.

133. See note 35 supra.
Act, at least where the plaintiff has exhausted administrative remedies. 134

Moreover, discrimination on the basis of a handicap that is inherently race or sex-related may be challenged under Title VII, and race-related handicap discrimination claims might be raised under Section 1981 as well. A Section 1985(3) conspiracy action could be brought for discrimination on the basis of a race-related handicap, but whether the action is available when the suit is predicated on a private conspiracy directed towards a handicapped class as such is open to question for the present. Legal and equitable relief from private sector defendants is available in suits brought under any one of these latter four statutes.

All of the above alternatives are also available to public sector employees. In addition, the public sector victim of handicap discrimination may be entitled to relief under Section 1983 from officials acting under color of state law, as well as state and local agencies and municipalities, and, under the due process clauses of the fourteenth and fifth amendments, from both persons and entities involved in state action. The public sector employee’s relief from governmental entities, however, may be limited to instances in which an official policy or custom is directly involved. Although state and local government officials may be sued in their individual capacities, equitable relief has been available only when the public official is sued in his official capacity. 135 In addition, the defense of “qualified immunity” may preclude monetary awards against state or local governments or individuals acting in an official capacity unless they have acted in bad faith. 136

While these federal statutes and constitutional provisions establish several possible sources of relief for handicap discrimination in employment, the above discussion also has revealed that each of the remedies is subject to certain limitations. Moreover, there are many unsettled questions of law as to the applicability of some remedies to the handicapped class, the scope of those remedies that may exist, the nature of the relief available, and the defendants who may be called upon to provide such relief. Ample grounds exist, then, for defending employers against administrative action or judicial complaints predicated on an alleged deprivation of federally protected employment rights of the handicapped.

134. See note 70 supra.
135. See note 118 supra.
136. See Wood v. Strickland, 420 U.S. 308, 322 (1975), reh. denied, 421 U.S. 921 (1975) (compensatory awards against individual government officials are appropriate only if they “acted with such disregard of clearly established constitutional rights that [the] action cannot reasonably be characterized as being in good faith”). Cf. Monell v. Dep’t of Social Serv., 46 U.S.L.W. 4569 (1978).
B. STATE AND LOCAL LAWS

At the present time, thirty-seven states and the District of Columbia have enacted laws prohibiting discrimination against the handicapped in employment.\(^{137}\) There are differences among these

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laws as to the type of administrative enforcement and relief authorized, and as to whether they provide for a private cause of action.\footnote{138} Many city and county governments also have adopted ordinances prohibiting employment discrimination against the handicapped.\footnote{139}

For the most part, the state and local employment practice laws do not mandate affirmative action in the absence of a finding of past discrimination.\footnote{140} As will be discussed in more detail below,\footnote{141} however, judicial decisions and regulations promulgated by the agencies authorized to enforce these laws often render this a distinction without a difference, so that many of the same accommodation and affirmative action duties set forth in the OFCCP and HEW regulations have been made incumbent upon employers covered only by state fair employment practice statutes.\footnote{142}

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138. Most state laws establish a human relations commission to investigate complaints of noncompliance, issue determinations of whether a violation occurred, conduct hearings, and issue orders enforceable by the judiciary. The remedies that the commissions may order vary, however. For example, the Maryland statute did not authorize the Maryland Commission on Human Relations to award back pay to victims of unfair employment practices until July 1, 1977. See Md. ANN. CODE art. 49B, § 14(e) (Supp. 1977), as amended by H.B. No. 458, Act of March 22, 1977, ch. 937, 1977 Md. Laws.


139. See, e.g., BALTIMORE CITY CODE art. 4 (1966), amended by Ordinance # 908 (1975).


141. See notes 303-314 and accompanying text infra.

142. Some state laws, however, prohibit the imposition on employers of the duty to make certain types of accommodations. See Fair Employment Practice Law, as amended by ch. 30, 1975 Haw. Sess. Laws (to be codified as HAW. REV. STAT. § 378-97) (unreasonable structural changes or expensive alterations are not required); 1976 Equal Opportunities Act, H.B. 407 ch. 280, Ky. Acts 1976 (to be codified as KY. REV. STAT. § 207.150) (employer not required to modify facilities or grounds or exercise a higher degree of caution for the handicapped); IND. CODE § 22-9-1-13(c) (Supp. 1977) (employer not required to modify physical accommodations or administrative procedures for the handicapped).

On the other hand, some states require accommodations for the handicapped as an element of the nondiscrimination duty. See Colorado Anti-Discrimination Act of 1957, amended by H.B. No. 1454, 1977 Colo. Sess. Laws (to be codified as COL. REV. STAT. § 24-34-306(1)(a) (not unlawful for employer to discriminate against the handicapped if no reasonable accommodation can be made); D.C. CODE ENCYCL. § 34-3.1 (West Supp. 1977-78) (defines handicap as a disability for which reasonable accommodation can be made); MICH. COMP. LAWS ANN. §§ 37.1202(f), (g), 1207 (Supp. 1977-78) (accord).
In addition, many states also have “White Cane Laws” designed primarily to define the rights and responsibilities of blind persons, particularly in relation to the use of white canes and guide dogs.\textsuperscript{143} In some states, White Cane Laws have been broadened to include other types of handicaps as well.\textsuperscript{144} Most White Cane Laws merely set forth a public policy statement or make discrimination on the basis of handicapped status a misdemeanor.\textsuperscript{145} White Cane Laws generally impact only upon employment rights in the public sector, if they apply to employment at all.\textsuperscript{146}

Maryland’s range of laws impacting upon employment rights of the handicapped is fairly typical. The Maryland fair employment practice laws are set forth in Article 49B of the Maryland Annotated Code.\textsuperscript{147} Section 19(a) of Article 49B makes it an unlawful employment practice for employers covered by the law to refuse to hire or to discriminate in terms or conditions of employment against any individual “because of such individual’s . . . physical or mental handicap unrelated in nature and extent so as to reasonably preclude the performance of the employment,” or to classify such individuals in ways that would tend to deprive them of employment opportunities or adversely affect their status as employees.

Complaints of handicap discrimination may be filed with the Maryland Commission on Human Relations (the Commission), which is empowered to investigate, render findings on, and conciliate such complaints.\textsuperscript{148} If conciliation cannot be achieved, the Commission is authorized to hold public hearings, issue enforcement orders, and award relief, including injunctive relief, equitable relief, and back pay.\textsuperscript{149} The Commission is empowered to seek enforcement of its orders in the appropriate equity court of the county where the alleged discrimination took place.\textsuperscript{150} Article 49B does not provide for a private cause of action by discrimination victims.

Section 19(a) of Article 49B applies to all private sector employers with fifteen or more employees,\textsuperscript{151} and the Maryland Court of Appeals recently held in \textit{Maryland Commission on Human Relations v. Mayor of Baltimore},\textsuperscript{152} that employees of the state’s

\textsuperscript{143} See, e.g., LA. REV. STAT. § 46–1951 (West 1977); MD. ANN. CODE art. 30, § 33 (1976).
\textsuperscript{144} See LA. REV. STAT. § 46–1951 (West 1977) (applies to blind, visually handicapped, and “otherwise physically disabled”).
\textsuperscript{145} See, e.g., ILL. ANN. STAT. ch. 23, §§ 3364, 3365 (Smith-Hurd Supp. 1977); MD. ANN. CODE art. 30, § 33(g) (1976).
\textsuperscript{146} See, e.g., ILL. ANN. STAT. ch. 23, § 3365 (Smith-Hurd Supp. 1977).
\textsuperscript{147} MD. ANN. CODE art. 49B, §§ 17–20 (Supp. 1977).
\textsuperscript{148} Id. §§ 12–15.
\textsuperscript{149} Id. § 14(e) as amended by H.B. No. 458, Act of March 22, 1977, ch. 937, 1977 Md. Laws.
\textsuperscript{150} Id. § 15(a).
\textsuperscript{151} Id. § 18(b).
\textsuperscript{152} 280 Md. 35, 371 A.2d 645 (1977).
political subdivisions also are covered. In addition, Section 11(b) of Article 49B prohibits discriminatory employment practices by state agency employees. The authority of the Commission with respect to complaints of violations of Section 11(b) is limited, however, to investigation, conciliation, mediation, and reporting to the governor. Maryland also has a White Cane Law, which provides in part:

It is the policy of this State that the blind or visually handicapped 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 persons not so handicapped, unless it is shown that the particular handicap prevents the performances of the work involved.\footnote{153. Md. Ann. Code art. 30, § 33(b) (1976).}

Although Maryland’s White Cane Law contains no provisions for administrative enforcement, it makes interference with rights of a blind or visually handicapped person under the law a misdemeanor offense.\footnote{154. Id. § 33(g).}

III. ISSUES ARISING UNDER LAWS GOVERNING EQUAL EMPLOYMENT OPPORTUNITY FOR THE HANDICAPPED

The above overview of the laws pertaining to employment discrimination against the handicapped has been limited to an outline of their basic provisions and coverage. The judicial application of these laws to date has not been extensive. Nevertheless, regulations issued by the state and federal agencies and a few isolated lower court cases suggest the types of issues that will likely predominate in handicap discrimination litigation, and some trends as to their probable resolution. It is already clear that three problems will pose difficult issues for the courts. These three problems are: (1) identifying those employees and job applicants who are handicapped within the meaning of the law, (2) determining whether these individuals nevertheless are qualified for a job, and (3) determining whether or to what extent accommodations must be made for their handicaps.

A. IDENTIFYING HANDICAPPED INDIVIDUALS

1. Federal Standards

The identification of individuals who are considered handicapped and thus entitled to benefit from affirmative action or to receive protection from discrimination is the first and most crucial problem for the employer. The difficulty associated with this task is
evidenced by the fact that Congress failed in its first attempt to define adequately the diverse class of "handicapped individuals" entitled to protection under the Rehabilitation Act. In the 1973 Act, the term "handicapped individual" was defined as any individual who (A) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and (B) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services provided pursuant to [Titles I and III] of this Act.\textsuperscript{155}

In less than a year, Congress recognized that this definition was too narrow. First, the definition permitted government contractors to condition the affirmative action required under Section 503 of the Act upon a handicapped individual's having benefited or having a reasonable expectation of benefit from vocational rehabilitation programs. Second, the definition made the protection from discrimination in federally assisted programs accorded by Section 504 of the Act available only to those individuals whose disability was a handicap to employment. The section thus effectively failed to prohibit discrimination in federally assisted housing, medical, or other programs against handicapped individuals who were employed.\textsuperscript{156}

Accordingly, in the 1974 Amendment to the Rehabilitation Act, Congress added a new definition of "handicapped individual," for the purposes of Section 503's affirmative action mandate for federal contractors and Section 504's non-discrimination mandate for programs receiving federal financial assistance. This new definition describes a "handicapped individual" 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 impairment, or (C) is regarded as having such impairment."\textsuperscript{157} This statutory definition is incorporated into the various regulations issued to implement the Act.

The regulations provide further illumination as to certain aspects of the statutory definition. Although the OFCCP regulations do not explain what "physical or mental impairments" are included under the statutory definition, both the HEW and Executive Order 11,914 regulations provide that:

"Physical or mental impairment" means (A) any physiological disorder or condition, cosmetic disfigurement, or anatom-

It should be noted that HEW has not defined the term “impairment” in reference to the degree of severity or duration of the impairing condition. Thus, a minimal and temporary physiological condition affecting any body system, or, in the case of mental disorders, minimal retardation or temporary emotional illness, theoretically is covered. The impairment must “substantially limit” an individual in a “major life activity,” however, before the individual can be deemed “handicapped” under the statutory criteria.

The HEW and Executive Order 11,914 regulations refrain from defining the phrase “substantially limits . . . major life activities,” but the OFCCP regulations state that “a handicapped individual is ‘substantially limited’ if he or she is likely to experience difficulty in securing, retaining or advancing in employment because of a handicap.” Both OFCCP and HEW have attempted to delineate the types of “major life activities” the “substantial limitation” of which results in an impaired person’s being deemed “handicapped.” Appendix A to the OFCCP regulations interprets the phrase “life activities” to

158. 45 C.F.R. §§ 84.3(j)(2)(i), 85.31(b)(i). The Secretary of HEW has noted that although this definition does not list specific diseases or conditions deemed to be handicaps, it covers “such diseases and conditions as orthopedic, visual, speech and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and . . . drug addiction and alcoholism.” 42 Fed. Reg. 22685 (1977).

159. The Secretary’s analysis of the final regulations states, however:

include “communication, ambulation, selfcare, socialization, education, vocational training, employment, transportation, adapting to housing, etc.”\textsuperscript{161} but provides that for the purpose of Section 503, primary attention is given to those life activities affecting employability. Similarly, the HEW regulations define “major life activities” to include “functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.”\textsuperscript{162}

In addition to providing an amplification of the components of clause (A) of the statutory definition of “handicapped individual” (an “impairment” which “substantially limits” one or more “major life activities”), the agency regulations explicate what is meant by clause (B) of that definition (“has a record of such an impairment”), and clause (C) (“is regarded as having such an impairment”). With respect to clause (B), the OFCCP’s Appendix A guidelines\textsuperscript{163} and the HEW and Executive Order 11,914 regulations\textsuperscript{164} indicate that this aspect of the statutory definition of a “handicapped individual” extends the coverage of the Rehabilitation Act to individuals who previously were \textit{erroneously classified} as handicapped — for example, as mentally ill or retarded — and those who may be \textit{recovered} in whole or in part, from a previous physical or mental impairment — such as the mentally restored and those who have had and recovered from heart attacks or cancer. An implication of this aspect of the definition is that an employer may have obligations with respect to individuals who, because of their previous handicaps, have had poor work attendance or productivity records. In other words, such records may not totally justify an adverse employment decision if the record resulted from a past handicap that does not presently exist.

With respect to clause (C) of the statutory definition — “is regarded as having such an [mental or physical] impairment” — the HEW regulations state:

\begin{quote}
“Is regarded as having an impairment” means (A) has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a limitation; (B) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (C) has none of the impairments defined in paragraph (j)(2)(i) of this section but is treated as having such an impairment.\textsuperscript{165}
\end{quote}

\textsuperscript{162} 45 C.F.R. § 84.3(j)(2)(ii); see \textit{id.} § 85.31(b)(2).
\textsuperscript{164} 45 C.F.R. § 84.3(j)(2)(iii); \textit{id.} § 85.31(3).
\textsuperscript{165} \textit{Id.} § 84.3(j)(2)(iv); see \textit{id.} § 85.31(b)(4).
According to the Secretary of HEW's commentary on the regulations, this part is intended to include those persons who are “ordinarily considered” to be handicapped but who do not technically fall within the first two parts of the statutory definition, “such as persons with a limp;” those who might not ordinarily be considered handicapped, “such as persons with disfiguring scars;” and those who actually have no physical or mental impairment but who “are treated by a recipient as if they were handicapped.”

The OFCCP regulations do not define “is regarded as having such an impairment,” but the Appendix A definitional guidelines of the OFCCP regulations state that this phrase refers to those individuals who are perceived as having a handicap, whether an impairment exists or not, but who, because of attitudes or for any other reason, are regarded as handicapped by employers, or supervisors who have an effect on the individual securing, retaining or advancing in employment.

No one agency has issued regulations that explicate all aspects of the statutory definition of a “handicapped individual.” It is possible, however, to read the regulations together, with one set filling in the gaps left by the others, so as to obtain a more complete picture of the agencies' collective interpretation of the elements of the definition. There is some support for this approach, even though, as indicated above, employers are covered by the provisions of Section 504 of the Rehabilitation Act (and the HEW and Executive Order 11,914 regulations) only if they are recipients of federal financial assistance, and by Section 503 (and the OFCCP regulations) only if they are federal contractors. The 1974 Amendment’s definition of a “handicapped individual” applies to both Sections 503 and 504 of the Act, and the legislative history of the Amendment indicates that Sections 503 and 504 are to be administered in a consistent and uniform manner by the federal agencies involved. Accordingly, those aspects of the statutory definition of a handicapped individual that are amplified in the OFCCP regulations, but

    The Secretary shall ensure that such rules, regulations, and orders [adopted to carry out his responsibilities under the Order] are not inconsistent with, or duplicative of, other Federal Government policies relating to the handicapped, including these policies adopted in accordance with sections 501, 502, and 503 of the Rehabilitation Act of 1973, as amended, or the Architectural Barriers Act of 1968 (42 U.S.C. §§ 4151-4157 (Supp. V 1975)).
not in the HEW or Executive Order 11,914 regulations, and vice versa, must be considered by both federal contractors and recipients of federal financial assistance.

Taken together, the definitional aspects of these regulations purport to create a vast class of persons who may be deemed "handicapped," and thus entitled to the protection of Sections 503 and 504 of the Rehabilitation Act. First, as pointed out above, HEW's interpretation of the types of impairments included within the statutory definition of a handicap does not refer to the severity of the impairment, so that handicap discrimination complaints presumably can be asserted by individuals who are impaired only minimally. Second, OFCCP has liberally construed the term "substantially limits" by defining it as "likely to experience difficulty . . . in employment" — a phrase that conceivably could apply to anyone who is denied a job and a phrase that presumes that employment in and of itself, is the type of "major life activity" to which Congress was referring. Thus, an individual with a minimal impairment that has resulted in the loss of a single job opportunity theoretically may be entitled to the protection of Sections 503 and 504 under the combined effect of these regulations, even if his lifestyle has not been affected otherwise by his impairment.

Both OFCCP and HEW appear to have correctly interpreted clause (B), "has a record of such an impairment," and clause (C), "is regarded as having such an impairment." Congress clearly intended to accord protection (1) to individuals who in fact have no impairment, but who are perceived as or have a record of being impaired, and (2) to individuals who have, have a record of, or are perceived as having impairments that actually impose no substantial limitation on their ability to engage in major life activities, but which are treated as imposing such a limitation. A problem with clause (C) of the definition, however, results from HEW's interpretation of "impairment" and OFCCP's construction of "substantially limits." Virtually anyone who has been denied a job because of a failure to meet a physical or mental, as opposed to educational, job requirement could argue that he has been "perceived" as "impaired" and "substantially limited" as a result thereof. The "perceived" impairment apparently need not be an obvious one, and could be so innocuous as the "emotional illness" of fear of height that precludes the job applicant from working on the top floor of a skyscraper. The employer accordingly could be required to establish that the fear of height could not be accommodated by, for example, putting the individual in a job on the first floor of the building.

Such a result admittedly would be possible only under a broad reading of the definitions and regulations. An OFCCP summary of the facts of the cases in which the agency has obtained back pay settlements for handicap discrimination complainants indicates however, that OFCCP intends to apply the "handicapped individ-
ual” definition as broadly as its regulations permit. The “handicaps” involved in these cases included an intestinal infection, an injury to the right elbow, an extra vertebra in the back, a bleeding ulcer, hypertension, anemia, alcoholism, and what was vaguely described as mental instability and emotional illness. There was little significant comment on the severity, duration, or curability of any of these conditions, and there was nothing to indicate that any of the complainants previously had been at all limited in major life activities as a result of their condition, or that they were likely to experience limitations in the future. Moreover, there was no indication in many cases that the complainant had even experienced previously difficulty in obtaining employment. In fact, many of the complainants had obtained jobs with different employers by the time a back pay settlement was made. Clearly, many of these “handicaps” would not substantially limit the individual in terms of general employability, although the handicap may have caused the individual’s rejection for a particular job.

In essence therefore, OFCCP, at least, has made handicapped status a result of one’s treatment by the defendant employer in a discrimination case, rather than a result of the relationship, or generally perceived relationship, of an impairment to one’s ability to function normally. The legislative history of the 1974 Amendment signifies that Congress had precisely the opposite intent. First, it appears that Congress was attempting by the 1974 Amendment to change the emphasis of the statutory definition applied to Section 503 and 504 from a focus on isolated external factors, such as difficulty in obtaining employment or prospects of benefiting from rehabilitation programs, to a focus on the impact of the impairment itself upon normal body functions. Thus, the section by section analysis of the 1974 Amendment, attached to the Conference Committee’s report, indicates that the mere fact that one’s employability is impeded by an impairment is not sufficient to render one handicapped — that employment, in and of itself, is not the type of “major life activity” to which Congress meant to refer. The report states: “In contrast [to the old definition], the definition proposed in the Committee substitute focuses on substantial limitations of one or more of an individual’s major life activities, rather than focusing on handicaps to employment, vocational goals, and prospective benefit from vocational rehabilitation services.”

Moreover, the Senate bill that first suggested an amended definition for “handicapped individual” originally included the phrase “a physical or mental impairment which substantially limits such person’s functioning or one or more of such person’s major life

169. See OFCCP BACK PAY CASES SUMMARY, note 34 supra.
activities.” The deletion of “such person’s functioning” as “redundant” illustrates that Congress intended to use the phrase “major life activities” in its basic sense to convey the notion that the impairments covered by the definition must have a significant impact upon operational ability. 171 “Major life activities” therefore must be those required to maintain the level of autonomy normally expected of individuals of the same age. The term would include locomotion, communication, perception, and other similar “activities,” but not playing, learning, or working. While the extent to which one’s major life activities are limited or are perceived to be limited may be manifested in a decreased access to playmates, an education, or a job, these deprivations are the effect, rather than the cause, of one’s status as a “handicapped individual” as Congress has defined the term. Under OFCCP’s contrary interpretation, the definition is a tautological curiosity that is no help whatsoever to employers, agencies, or the courts.

The available legislative history further indicates that by adding clause (C) — “is regarded as having such an impairment” — to the statutory definition, Congress was not trying to reach individuals who are denied a particular job by a single employer merely because they were erroneously believed to be physically or mentally incapable of performing the job. Instead, Congress intended to protect individuals who have or exhibit the obvious characteristics of impairments that generally are perceived, albeit erroneously, as resulting in a substantial limitation upon functioning. The Conference Committee’s section-by-section analysis of the 1974 Amendment states, as an example of clause (C)’s application, that it pertains to “a person with some kind of visible physical impairment which in fact does not substantially limit that person’s functioning.” 172


An additional argument against a broad application of the statutory definition of a handicapped individual results when that definition is compared with the definition of a “disabled veteran” under the Veterans’ Readjustment Act, i.e., one “entitled to disability compensation under laws administered by the Veterans’ Administration for disability rated at 30 per centum or more, or whose discharge from active duty was for a disability incurred or aggravated in the line of duty.” 38 U.S.C. § 2011(1) (Supp. V 1975). See also 41 C.F.R. § 60-250.2 (1977). It is difficult to conceive of a disabled veteran covered by this definition who would not also be deemed “handicapped” under OFCCP’s broad interpretation of the Rehabilitation Act definition. But see note 40 supra. Yet, if Congress had intended that the definition of a handicapped individual set forth in the Rehabilitation Act be construed so broadly as to include disabled veterans, there would have been no need to cover “disabled veterans,” as well as veterans of the Vietnam Era, under the affirmative action provisions of the Veterans’ Readjustment Act of 1974. The Veterans’ Act was enacted subsequent to the Rehabilitation Act and the 1974 Amendments to the Act, but before the first set of proposed regulations to implement § 503 were issued. With the exception of the requirement that the federal contractor list all employment vacancies with the local employment service office, disabled veterans derive no employment benefits
Notwithstanding these indications in the legislative history that Congress anticipated a narrower construction of the statutory definition of a “handicapped individual,” OFCCP, at least, has tended to assert jurisdiction over complaints filed by any individual who alleged that he had been denied a single job opportunity because of an existing, previous, or perceived mental or physical condition of any type.\textsuperscript{173} Employers, therefore, constantly must be alert to the possibility that an employee or job applicant may consider himself “handicapped.” Perhaps because of the latitude given by OFCCP to the term “handicapped,” however, the agency regulations establish some procedural methods by which a government contractor can alleviate the risk of unexpected complaints of a violation of Section 503. First, the OFCCP regulations require the contractor to issue an “invitation” to all employees and job applicants to identify themselves as “handicapped individuals” if they wish to take advantage of the contractor’s affirmative action plan. If the contractor complies with this requirement, it is not obligated to search the medical records of job applicants or employees to ascertain those who are entitled to the benefit of affirmative action. On the other hand, employees may take advantage of the invitation at any time, and the issuance of the invitation does not relieve the contractor of its obligations to individuals of whose handicaps it has \textit{actual knowledge}, nor does it relieve the contractor of liability for \textit{discrimination} against the handicapped.\textsuperscript{174}

Second, the OFCCP regulations permit the government contractor to require a job applicant or employee to submit medical documentation of an alleged “impairment,” or, in the alternative, to undergo a medical examination at the contractor’s expense. The medical documentation of a handicap required under this provision must be based upon the \textit{American Medical Association Guides to the Evaluation of Permanent Impairment}.\textsuperscript{175} Employers might be well

\textsuperscript{173} See OFCCP Summary of Back Pay Cases, note 34 supra.

\textsuperscript{174} 41 C.F.R. § 60-741.5(c) (1977).

The invitation must state that any information given by the employee is voluntarily provided, that it will be kept confidential, that refusal to provide it will not subject the applicant or employee to any adverse treatment, and that it will be used only in accordance with the Act and the regulations. \textit{Id.} § 60-741.5(c)(1) Appendix B to the OFCCP Guidelines sets forth an acceptable form for such an invitation.

\textsuperscript{175} Id. § 60-741.7(b)(d).

The regulations provide that any determination of a handicap required by the employer must meet the requirements of § 60-741.5(c), which sets forth the safeguards applicable to “invitations” to identify oneself as handicapped. Thus, the medical information obtained must be kept confidential. The provisions of § 60-741.5(c)(1) and § 60-741.7(c) conflict, however, in that the latter section infers that the contractors may \textit{require} medical documentation, while the former
advised to absorb the expense of providing a medical examination conducted by their company physicians in accordance with the *Guides* to any employee or applicant who alleges that he is "handicapped." Interestingly enough, the *Guides* would appear to impose more stringent standards for the assessment of an impairment than those expressed in the definitional aspects of the OFCCP and HEW regulations and guidelines. The *Guides* refer only to *permanent* impairments, which are defined as "an anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved, which abnormality or loss a physician considers stable or nonprogressive at the time evaluation is made." The "evaluation of permanent impairment" conducted by the physician, according to the *Guides*, is "[a]n appraisal of the nature and extent of the patient's illness or injury as it affects his personal efficiency in one or more of the activities of daily living. These activities are self-care, communication, normal living posture, ambulation, elevation, traveling, and non-specialized hand activities."\(^{176}\)

The OFCCP regulations limit the applicability of the *Guides* to the determination of the *existence*, rather than the *degree*, of impairment, however.\(^{177}\) Under the *Guides*, an individual with a 20/25 measure of central visual acuity in one eye has a total visual impairment of only one percent,\(^{178}\) but the OFCCP regulations indicate that, nevertheless, such an individual would be considered "handicapped" if the visual impairment resulted in the loss of a job. For the present, therefore, employers should be made cognizant of the potential for liability under Section 503 and 504 that inures in large measure from the liberal view of the agencies responsible for implementing these sections as to what constitutes a "handicap."

\(^{176}\) *American Medical Association, Committee on Rating of Mental and Physical Impairment, Guides to the Evaluation of Permanent Impairment* preface, iii (1972) (hereinafter cited as *AMA Guides to Evaluation of Impairment*).

\(^{177}\) 41 C.F.R. § 60-741.7(d) (1977).

\(^{178}\) *AMA Guides to Evaluation of Impairment*, ch. VII, Tables 1 and 5.
2. Maryland Standards

Most of the state statutes prohibiting discrimination in employment against the handicapped also set forth a definition of the class of individuals entitled to statutory protection. The variety of definitions provided further illustrates the difficulty in formulating a description of this diverse minority class. The state definitions generally differ in several significant aspects from the definition in the Rehabilitation Act. The Maryland statute, which is more specific than most, 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.


It first should be noted that the Maryland definition does not narrow the types of handicaps covered to those that substantially limit major life activities, as does the Rehabilitation Act. On its face, then, the definition would appear to cover an individual with any one of the listed disabilities, no matter how minor its effect on his lifestyle. The Maryland Commission on Human Relations at one time limited the breadth of the definition by promulgating proposed regulations183 intended to serve as “guidelines” for employers, which stated in a “working definition” that a handicapped person was “a person with a physical or mental disability or impairment, or a person with a record of this impairment, which results in a barrier to employment.”184 The Commission has since revised its definition to comport with that set forth in the statute.185

It further should be noted that although the Maryland statute on its face covers only existing impairments, the Commission’s original “working definition” purported to expand the coverage to include persons with a record of an impairment. Although this aspect of the regulatory definition also has been deleted since, and, even if finally adopted, would not have had the force of law,186 the original draft indicates that the Commission may attempt to assert jurisdiction over, investigate, issue determinations, and hold hearings on complaints filed by individuals who are not currently impaired but who only have records of impairments. The doctrine requiring exhaustion of administrative remedies makes it difficult for employers to challenge this practice until after the Commission has issued an order against them. The Commission, however, never has included individuals who are regarded as having handicaps within


The Maryland Commission’s Notice of Intended Action states that the regulations “will establish guidelines for anti-discrimination as it relates to the physically and mentally handicapped.” 4 Md. Reg. 967 (1977). The Administrator of State Documents originally declined to publish the proposed guidelines because Article 49B does not delegate to the commission the power to promulgate rules or regulations, and the administrator could find no implied power. The Maryland Attorney General rendered an opinion, however, that the commission’s proposed guidelines could be categorized as “interpretive rules without the force of law for which the Commission needs no express statutory to promulgate.” 62 Op. Atty. Gen. 77-20 (1977).

184. XVI COMAR §14.03.02B (emphasis added).

185. 5 Md. Reg. 532 (1978) (to be codified as XVI COMAR § 14.03.02). The revised regulations were originally intended to become effective on or about June 2, 1978. The Commission is currently reevaluating the regulations, however, and as of this date (June 20, 1978) has not issued a final rulemaking.

186. See notes 183 & 185 supra.

187. See Soley v. Maryland Comm’n on Human Relations, 277 Md. 521, 356 A.2d 254 (1976). In Soley, the plaintiffs requested a declaratory judgment that the Maryland Commission had issued complaints that were not in compliance with §12(b) of Article 49B. The court specifically rejected the contention that
its “working definition.” Thus, in Maryland, an individual who is
denied an employment opportunity because he is perceived as
suffering from an impairment that is included within the Maryland
definition of a handicap should not be that fact alone become
entitled to the protection of the statute.

It should be recognized that the Maryland statutory definition of
a “handicap” includes an enumeration of specific types of impair­
ments deemed to be handicaps, which may result in the exclusion of
some physical or mental problems that might otherwise appear to be
covered by the general language in the definition. A recent decision
by the Rhode Island Supreme Court, construing a statutory
definition of “handicap” that tracks Maryland’s in structure and
language,188 exemplifies this point. The court concluded in Provi­
dence Journal Co. v. Mason,189 that its state legislature could not
have intended the unreasonable and burdensome consequences that
would flow from interpreting a statutory definition of the term
“handicap” so broadly as to encourage persons with any medical
problem whatsoever to seek relief from the state employment
practices commission.190 Thus, the court held, the more general
language in the statutory definition of a handicap, which would
appear to include any physical disability no matter how slight, was
limited by the enumeration of several specific injuries, infirmities,
and malformations that are deemed to be physical handicaps. The
court found that all the impairments listed were of a serious or
permanent nature, inferring therefrom a legislative intent to accord
protection only to those individuals suffering from either a serious
injury or an impairment of more than a temporary nature. The court
then concluded that the plaintiff’s “whiplash” injury, which had
caused only “some pain and discomfort,” was not a handicap of such
a serious or permanent nature.191

The same analysis should be applied to the Maryland statute.192
Carrying this analysis a bit further, a close inspection of the

exhaustion of administrative remedies is not required where the act of the
administrative agency is alleged to be illegal. The plaintiffs could not attack the
Commission’s action on this ground, said the court, until they had exhausted the
statutory remedy available to them. Id. at 528, 356 A.2d at 258.

188. See R.I. GEN. LAW § 28-5-6(H) (Supp. 1976). The Rhode Island statute describes
physical handicaps in precisely the same language used in the Maryland statute,
but does not cover mental handicaps.


190. Id. at 620, 359 A.2d at 686.

191. Id. at 620-21, 359 A.2d at 687.

Some state statutes specifically provide that “handicaps” or “disabilities”
covered by the law must be permanent. See Fair Employment Practice Law,
amended by chs. 30 and 109, 1975 Haw. Sess. Laws (to be codified as HAW. REV.
STAT. § 378-1(7); OHIO REV. CODE ANN. § 4112.01(m) (Page Supp. 1976).

192. Maryland case law adopts the principle that general words in a statute, followed
by a specific enumeration, should be regarded as limited by the subsequent more
specific terms, Maguire v. State, 192 Md. 615, 623, 65 A.2d 299, 302 (1949); cf.
State Dep’t of Assessments & Taxation v. Ellicott-Brandt, Inc., 237 Md. 328, 335,
Maryland definition of a handicap reveals that it does not purport to cover injuries, birth defects, or illnesses as such. Instead, it covers their results — *i.e.*, a “physical disability, infirmity, malformation or disfigurement . . . caused by bodily injury, birth defect or illness, including epilepsy.” Thus, a person is not handicapped under the Maryland definition merely because he has a birth defect or suffers from an illness or injury — even one that is serious or permanent. The birth defect, illness, or injury must have resulted in a “disability, infirmity, malformation or disfigurement.” With respect to mental handicaps, there must be a mental, not merely emotional, impairment or deficiency. To the extent, then, that illnesses (such as allergies, infectious diseases, or a bleeding ulcer), injuries (such as a sprained back or a whiplash), and birth defects (such as a bad back, flat feet, or an extra rib) have not resulted in severe or permanent disabilities, infirmities, malformations, disfigurements, or mental impairments or deficiencies, they should not be considered handicaps in Maryland.

Moreover, the physical and mental disabilities enumerated in the law share characteristics other than severity and permanence. The physical disabilities specifically deemed to be handicaps include “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.”\(^\text{193}\) With respect to mental impairments or deficiencies, those specifically included are “retardation or such other which may have necessitated remedial or special education or related services.”\(^\text{194}\) All of these impairments affect the capacity of an individual to move freely about or control his environment, impeding his functional ability, which in turn may affect his general employability. It therefore reasonably can be assumed that the Maryland General Assembly was attempting to provide protection from job discrimination to those handicapped individuals whose general opportunities for employment are so

\(^{193}\) MD. ANN. CODE art. 49B, § 18(g) (Supp. 1977).

\(^{194}\) Id.
severely limited that it behooves the state to ensure that they are not further limited for reasons that bear no relationship to their ability to work. As was pointed out with respect to the Rehabilitation Act definition of handicapped, however, the criterion for handicapped status should not be the individual's difficulty in obtaining a particular job, but rather the lack of functional ability that often causes difficulty in obtaining any employment at all.

Finally, it should be observed that the Rhode Island court's disjunctive characterization in *Providence Journal v. Mason* of the impairments specifically enumerated in the Rhode Island and Maryland statutory definition of "handicap" as "serious or non-temporary" is somewhat erroneous. In fact, each of the listed impairments is *serious*. Not all non-temporary impairments, however, share this characteristic. For example, an individual may never feel any functional effects from an extra rib. Such a "non-temporary" birth defect should not fairly be described as an impairment of the type covered by the Maryland statute.

To date, there have been no judicial decisions in Maryland analyzing the statutory definition of a handicap. With the exception of the Rhode Island decision, mentioned above, however, the few opinions rendered by other state courts have devoted almost no analysis to the issue of whether the complainant was actually handicapped within the meaning of the pertinent statutory language. If a judicial trend on this issue can be perceived, it is evidenced best by the latitude given to the term "handicapped" by the courts in states where the fair employment practices statutes do not set forth a definition of the term. These cases indicate that the courts will tend to provide remedies to discrimination complainants without consideration of the type or effect of the handicap involved. In *Milwaukee Road v. Wisconsin Department of Labor and Human Relations*, for example, the Wisconsin Supreme Court, lacking a statutory definition for "handicap," defined the term as "a disadvantage that makes achievement extremely difficult," and concluded that diseases such as asthma fall within this definition. Circuit courts in Wisconsin subsequently have interpreted the state employment practices law to provide protection to individuals suffering from such "handicaps" as a deviated septum and alcoholism.

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195. See notes 170–172 and accompanying text supra.
196. See note 180 supra.
199. 62 Wis. 2d at 398, 215 N.W.2d at 446.
200. *Journal Co. v. Wisconsin Dep’t of Indus., Labor and Human Relations*, 13 F.E.P. Cas. 1655 (Wis. Cir. Ct., Dane County, 1976).
201. *Connecticut Gen. Life Ins. Co. v. Wisconsin Dep’t of Indus., Labor and Human Relations*, 13 F.E.P. Cas. 1811 (Wis. Cir. Ct., Dane County, 1976). Other disabilities found to constitute handicaps by Wisconsin circuit courts have
3. Summary

Most of the judicial decisions and administrative regulations that have read the term “handicapped” broadly seem to proceed on the assumption that the purpose of statutes mandating equal employment opportunities for the handicapped is to eliminate discrimination based upon unnecessary physical or mental job standards, and that such statutes should be liberally construed to permit any complainant to point out the irrelevancy of the standard that resulted in his rejection for a job opportunity. After all, so the argument goes, if the standard is in fact relevant, the employer will have the opportunity to prove his case and the result will be a finding of no discrimination.202

This rationale ignores some realities that may persuade the courts and administrative agencies to adopt a more restricted construction of the statutory definition of “handicapped.” First, the courts and agencies should be reminded of their experiences in applying the 1964 Civil Rights Act and similar state statutes prohibiting employment discrimination against other minorities, and of the problems that have arisen in implementing equal employment opportunity laws that have been given too broad a sweep. Eager to assert their authority, the Equal Employment Opportunity Commission and state fair employment practice agencies at first took jurisdiction over, investigated, and often found probable cause to believe discrimination had occurred in complaints that patently lacked legal sufficiency. Eventually, however, implementation of the laws bogged down in the slough of petty complaints that resulted from public awareness that every claim, no matter how minor, would receive agency attention. Consequently, the agencies soon found themselves lacking the time and resources to tackle the larger task of eliminating more serious and widespread discriminatory practices without delay.203

Many of these agencies now have reconsidered their approach and currently take the position that complaints over which the agency patently lacks jurisdiction will be dismissed quickly, if included rheumatoid arthritis, J. C. Penney Co. v. Wisconsin Dep’t of Indus., Labor and Human Relations, 12 F.E.P. Cas. 1109 (Wis. Cir. Ct., Dane County, 1976), diabetes, Fraser Shipyards, Inc. v. Wisconsin Dep’t of Indus., Labor and Human Relations, 13 F.E.P. Cas. 1809 (Wis. Cir. Ct., Dane County, 1976), a heart murmur, City of Wisconsin Rapids v. Wisconsin Dep’t of Indus., Labor and Human Relations, [1977] 171 DAILY LAB. REP. (BNA) A–1 (Wis. Cir. Ct., Dane County, 1977); and acute lymphocytic leukemia, Chrysler Outboard Corp. v. Wisconsin Dep’t of Indus., Labor and Human Relations, 14 F.E.P. Cas. 344 (Wis. Cir. Ct., Dane County, 1976).


203. See Interview with Eleanor Holmes Norton, Chairman of the Equal Employment Opportunity Commission, [1977] 135 DAILY LAB. REP. (BNA) D–1. See also H.R. Rep. No. 238, 92d Cong., 2d Sess. 12 (1972): “[T]he burgeoning workload [of the Commission], accompanied by insufficient funds and a shortage of staff has, in many instances, forced a party to wait 2 to 3 years before final conciliation procedures can be instituted.”
accepted at all, and that probable cause will be found only in "litigable" complaints.\textsuperscript{204} As the courts became overburdened with discrimination complaints that obviously lacked merit, or failed to conform to procedural prerequisites, they also began to appraise with a more critical eye the limitations in the coverage of the civil rights acts.\textsuperscript{205} The hard-earned lesson that an inflationary construction of the coverage of discrimination laws results in their delayed and diluted enforcement should not be lost on the courts and the agencies as they encounter new laws to protect a newly recognized minority.

A second consideration mandating a narrower approach to construction of statutory definitions of "handicapped" is the scope of the problem these statutes were intended to solve. The individuals who have been relegated to dependent positions by societal attitudes based upon erroneous notions about ability have not included those \textit{temporarily} hampered by injuries or illnesses, or those who suffered from mild neuroses, allergies or unnoticeable birth defects.\textsuperscript{206} Although such physical or mental conditions may cause a few isolated instances of difficulty in obtaining employment, they do not generally eliminate one from equal consideration for the great majority of jobs. Inasmuch as employment anti-discrimination and affirmative action statutes traditionally are geared to remedy deprivations resulting from broad-based and irrational classifications that \textit{significantly} affect employment opportunity,\textsuperscript{207} it is

\textsuperscript{204} For example, the EEOC's recently amended procedural regulations provide that the Commission will dismiss any charge which reveals on its face that it was not timely filed or otherwise failed to make a claim under Title VII. 42 Fed. Reg. 55391 (1977) (to be codified as 29 C.F.R. § 1601.19(a)). See also EEOC Draft Memoranda on New Procedures for Processing Title VII Complaints, [1977] 141 DAILY LAB. REP. (BNA) E-1; Interview with Eleanor Holmes Norton, Chairman of the Equal Employment Opportunity Commission, [1977] 135 DAILY LAB. REP (BNA) D-1, D-4 to D-5.

\textsuperscript{205} For example, three recent decisions by the Supreme Court have restricted the applicability of Title VII. \textit{See, e.g.,} United Airlines v. Evans, 431 U.S. 553 (1977) (rehired employee may not attack policy that resulted in earlier separation from employment and loss of seniority under neutral seniority system as a "continuing violation" of Title VII); \textit{Int'l Bhd. of Teamsters v. United States}, 431 U.S. 324 (1977) (neutral application of bona fide seniority system does not violate Title VII even though it perpetuates effects of pre-Act discrimination); \textit{General Electric Co. v. Gilbert}, 429 U.S. 125 (1976) (disability income protection plan that excludes disabilities arising from pregnancy does not constitute gender-based discrimination in violation of Title VII, EEOC Guidelines to the contrary notwithstanding).

\textsuperscript{206} Cf. Nagi, McBroome & Collette, \textit{Work, Employment And The Disabled}, 31 AMER. J. ECON. & SOCIO. 21 (1972) (survey of studies related to work, employment, and disability dealing primarily with individuals who have severe impairments, such as paraplegics, cardiacs, amputees, persons with spinal cord injuries, deafness, and persons with severe mental or psychiatric disorders).

\textsuperscript{207} One reason, for example, that Title VII has not been held applicable to grooming codes that treat males differently from females is that the courts have interpreted Title VII to prohibit only discriminatory practices that impose a \textit{significant} economic detriment to members of one sex, by substantially depriving them of opportunities for employment. \textit{See, e.g.}, \textit{Knott v. Missouri Pac. R.R.}, 527 F.2d
unreasonable to assume that in this instance the laws were intended
to pertain to individuals who have never been victimized previously
in any general way. It is questionable, for example, whether
Congress intended that tax dollars should be spent to process the
complaint of a flat-footed person who is denied a job as a foot
patrolman, a person allergic to chlorine who is denied a job as a
swimming pool lifeguard, or a person with a bad back who is denied
a job as a furniture mover.

Third, it is questionable whether the same legislative bodies
whose previous equal employment enactments have been interpreted
as directed solely towards the protection of individuals who unfairly
had been denied jobs on the basis of characteristics that were not of
their own making208 have, in this instance, intended to protect
individuals who are discriminated against as a result of characteris­
tics acquired by choice. Thus, the decisions of HEW, OFCCP, and at
least one lower level state court to include such conditions as
alcoholism and drug addiction under the term “handicapped”209 can
be criticized severely. Alcoholics and drug addicts are not entirely
innocent victims of a handicap, as are the victims of race, sex,
national origin and religious discrimination.210 Moreover, addictions
are not traditionally or popularly regarded as handicaps and it is
questionable whether many individuals who have these conditions
consider themselves “impaired.”211 Certainly, such individuals

1249, 1251 (8th Cir. 1975); Willingham v. Macon Tel. Pub. Co., 507 F.2d 1084,
1091–92 (5th Cir. 1975); Dodge v. Giant Food, 488 F.2d 1333, 1335–37 (D.C. Cir.
Supreme Court has also recognized the relevance of the traditional concept of
example, where the Court found no gender-based discrimination in a disability
insurance program that excluded pregnancy, the opinion stated:

The concept of “discrimination,” of course, was well known at the
time of the enactment of Title VII, having been associated with the
Fourteenth Amendment for nearly a century, and carrying with it a long
history of judicial construction. When Congress makes it unlawful for an
employer to “discriminate . . . because of . . . sex . . . .” without further
explanation of its meaning, we should not readily infer that it meant
something different from what the concept of discrimination has
traditionally meant. (citations omitted and emphasis added).

429 U.S. at 145.
208. See notes 14 and 105 supra.
209. The Secretary of HEW has specifically stated that the regulations cover drug
OFCCP’s summary of back pay cases, supra note 34, includes a case where the
alleged “handicap” was alcoholism. In Connecticut Gen. Life Ins. Co. v.
Wisconsin Dept. of Indus., Labor and Human Relations, 13 F.E.P. Cas. 1811
(Wis. Cir. Ct., Dane County, 1976), the Dane County Circuit Court of Wisconsin
held that alcoholism or a “drinking problem” constitutes a handicap within
the meaning of the Wisconsin Fair Employment Act.

210. For a discussion of the volitional nature of alcoholism and drug addiction, see
Ogden, Justice And The Problem Of The Volitional Victim, 1977 LAB. L.J. 417.
211. After the first set of proposed regulations for the implementation of § 504 of the
Rehabilitation Act was issued by the Secretary of HEW, numerous comments
were received on the proposed inclusion of drug addicts and alcoholics under the
would not be entitled to benefit under current equal protection analysis, even if handicapped status were otherwise held to be a suspect classification, since these handicaps are not "immutable characteristic[s] determined solely by the accident of birth" or by a constitutionally protected choice.212

Finally, a broad definition of the handicapped class would be incompatible with some of the standards of proof applied in discrimination litigation. Under Title VII of the Civil Rights Act of 1964, for example, which was enacted to protect readily identifiable members of minority groups that historically had been victimized by individually motivated treatment, the plaintiff is not required to establish the defendant's specific intent to discriminate when the evidence reveals discriminatory effects, such as the "disproportionate impact" upon minorities of a facially neutral employment criterion that is not justified by business necessity. Moreover, when the complaint is predicated upon the "disparate treatment" of minorities, intent is often inferred from the mere fact of differences in treatment.213 Unlike inequality of treatment because of race, sex, religion or national origin, handicap discrimination often stems from a sympathetic or benign intent, or at least from a lack of

definition of a "handicapped individual." The Secretary noted, in issuing a second set of proposed regulations, that:

Commentators made a number of arguments against including alcohol and drug addicts and homosexuals: That these conditions are self-inflicted; that section 504 is not the proper vehicle for eliminating discriminations based on these characteristics; that the term "handicapped person" does not, from either an historical or popular viewpoint, denote addicts or homosexuals; that such persons, and in particular homosexual persons, would not agree with the notion that they are handicapped; and that inclusion of these groups would detract from the emphasis upon eliminating discrimination against those persons traditionally thought of as being handicapped.

41 Fed. Reg. 29548-49 (1976). The Secretary decided, however, to include drug addicts and alcoholics as "handicaps" but determined that homosexuals were not "handicapped individuals."


In Washington v. Davis, 426 U.S. 229 (1976), however, the Supreme Court recently held that the "disproportionate impact" theory of proof of employment discrimination had been applied erroneously in a claim alleging state action in violation of the equal protection clause and that proof of a racially discriminatory purpose must be established in such cases. In distinguishing Title VII from the equal protection clause, the Court intimated that it is the language of Title VII that eliminates the need for proof of discriminatory intent in disproportionate impact cases, stating: "Under Title VII, Congress provided that when [employment] practices disqualifying substantially disproportionate number of blacks are challenged, discriminatory purpose need not be proved." Id. at 247. Section 703(b) of Title VII makes it unlawful to classify or limit employees or job applicants in any way that "would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee because of . . . race, color, religion, sex, or national origin." 42 U.S.C. § 2000e(2) (1970 & Supp. V 1975) (emphasis added). The Rehabilitation Act includes no such language and the courts therefore might apply to this statute the rules for ascertaining intent set forth in Washington.
knowledge about the effects of certain medical conditions. Moreover, the characteristics that place an individual within the protected “handicapped” class, as it is currently being construed, will often be much less recognizable than the badges of race, age, national origin, or sex, and many will not be recognized at all in the absence of a physical examination. Further, because of the infinite variety of “handicaps,” many of which only members of the medical profession would recognize, it will be impossible, in many cases, for the employer to foresee that a physical job standard might have a disproportionate impact upon the handicapped. Similarly, if the term “handicap” includes minor physical conditions that ordinarily are not thought of with that connotation, the employer may be totally unaware that its actions constitute “disparate treatment” of the handicapped as that term is used in the Title VII context.


[The employer [must meet] “the burden of showing that any given requirement [has] ... a manifest relation to the employment in question.” This burden arises, of course, only after the complaining party or class has made out a prima facie case of discrimination, i.e., has shown that the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants. If an employer does then meet the burden of proving that its tests are “job related,” it remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer’s legitimate interest in “efficient and trustworthy workmanship.” (citations omitted).

Id. at 425.
216. In McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), the Supreme Court set forth the standards of proof in a case alleging disparate treatment:

The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant’s qualifications. . . .

The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for [complainant’s] rejection.

Id. at 802. Thus as stated in the text supra, although proof of discriminatory intent is required to make the prima facie showing in an individual disparate treatment case, proof of discriminatory intent can be inferred from the mere fact that an individual was treated differently. See Int'l Bhd. of Teamsters v. United States, 431 U.S. 324 n.15 (1977). The employer who denies a secretarial position to an individual who suffers from migraine headaches, and hires instead an individual who does not have such a condition, and who otherwise is not as qualified or, in some circuits, is no better qualified than the rejected applicant, therefore, may have met each of the elements of handicap discrimination under the “disparate treatment” theory, even though the employer may not perceive migraine headaches as a handicap. Cf. East v. Romine, Inc., 518 F.2d 392 (5th Cir. 1975) (defendant must articulate not only a legitimate non-discriminatory reason for its choice, but also must show that other person hired subsequent to the defendant’s rejection of plaintiff were better qualified).
A broad construction of the term “handicapped,” especially if applied in connection with standards of proof that obviate the need for evidence of discriminatory intent, could therefore have harsh consequences for employers. Moreover, when it is patently impossible for employers to identify the members of a class, or if individuals become members of the class as a result of their treatment by the defendant employer, rather than as a direct result of some inherent characteristic, there is room to challenge laws protecting that class on the grounds of vagueness.\textsuperscript{217}

Thus, although it can be argued that the precise intent of legislative bodies that have enacted handicap discrimination laws was to force employers to make demonstrably job-related employment decisions, there is a strong equitable, historical, and practical argument to support the proposition that there was no intent to so thoroughly police employment practices of businesses. A more rational inference is that the legislative intent is to hold employers liable only to individuals with handicaps that seriously impair their functional ability and thus their general employability. Current agency and judicial interpretations of the scope of handicap discrimination and affirmative action laws arguably have exceeded statutory authority and furthermore, may be counterproductive in overreaching the intended beneficiaries of the law. Legal develop-

\textsuperscript{217} A statute so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates due process, and the rule is applicable to regulations. Boyce Motor Lines, Inc. v. United States, 342 U.S. 337, 340 (1952). In \textit{Boyce}, the Court upheld a regulation, attacked as impermissibly vague, in part because the statute pursuant to which it was promulgated included culpable intent as a necessary element of the offense. The Court stated, “this requirement . . . does much to destroy any force in the argument that application of the Regulation would be so unfair that it must be held invalid.” \textit{Id.} at 342. The problem with the Rehabilitation Act’s definition of a handicap, as applied to impairments that are not readily ascertainable or commonly recognizable as “handicaps,” is that the defendant is subjected to liability for his treatment of individuals whom he understandably would not consider “handicapped” and thus would have no intent to make a victim of discrimination on the basis of handicap. OFCCP regulations providing for an invitation to the handicapped to identify themselves and for medical documentation of handicaps, discussed at note 174 and accompanying text \textit{supra}, may result from the agency’s recognition of the susceptibility of its regulations to a vagueness challenge.

In any event, however, it is extremely difficult to obtain the invalidation of a statute on the grounds that it is impermissibly vague. See Milwaukee Road v. Washington Human Rights Comm’n, 87 Wash. 2d 802, 557 P.2d 307 (1976) (statute forbidding discrimination on basis of handicaps is not void for vagueness, even though statute does not contain definition of “handicap,” because term has well understood, common meaning); \textit{accord}, Milwaukee Road v. Wisconsin Dep’t of Indus., Labor and Human Relations, 62 Wis. 2d 392, 215 N.W. 2d 443 (1974); cf. Tietze v. Richardson, 342 F. Supp. 610 (S.D. Tex. 1972) (standard for disability under the Social Security Act, — “unable to engage in substantial gainful activity” — as applied by the Social Security Administration is precisely defined in the Social Security Act, and thus must be upheld as against challenge of vagueness). For a comprehensive discussion of the vagueness doctrine, see 1 A. C. SAND, STATUTES AND STATUTORY CONSTRUCTION § 21.16 (4th ed. 1972).
ments in this area are still at the sprout stage, however, and before the dust settles from the “planting season,” the courts may well be persuaded by practical, equitable, and policy considerations, such as those discussed above, to more stringently apply the rules of statutory construction in ascertaining the intended coverage of the laws.

B. IDENTIFYING “QUALIFIED HANDICAPPED INDIVIDUALS”

Regardless of whether an individual is “handicapped,” the equal employment opportunity laws do not entitle him to the benefit of affirmative action or to protection from discrimination unless he is able to do the job he is seeking. The Rehabilitation Act covers only “qualified handicapped individuals” and, while there is no definition of the term “qualified” in the Rehabilitation Act itself, the OFCCP regulations provide that a handicapped individual meets this standard only if he is “capable of performing a particular job with reasonable accommodation to his or her handicap.” The HEW and Executive Order 11,914 regulations make one variation on this standard; under their definition of “qualified,” the handicapped individual need be capable of performing, with “reasonable accommodation,” only the “essential functions” of the job.


219. 41 C.F.R. § 60–741.2 (1977). The OFCCP Veterans’ regulations track the OFCCP handicapped regulations in this regard. Id. § 60–250.2. For a discussion of the meaning of the word “qualified” as applied in other contexts, such as under the Social Security laws, see Equal Treatment, supra note 28, at 72 n.24.

220. See 45 C.F.R. §§ 84.3(k)(1), 85.32(a). The HEW Secretary’s analysis states that the phrase “essential functions” is included to emphasize that handicapped individuals should not be disqualified merely because of difficulty in performing tasks that bear only a “marginal relationship” to a job, and that it is “not inconsistent” with the Department of Labor’s interpretation of “qualified.” 42 Fed. Reg. 22676, 22687 (1977). See also 43 Fed. Reg. 2132, 2134 (1978).

The term “otherwise qualified” is interpreted somewhat differently by HEW when applied in the context of federally financed educational programs. Section 84.3(k)(3) defines a “qualified handicapped person” with respect to post secondary and vocational educational services as “[a] handicapped person who meets the academic and technical standards requisite to admission or participation in the recipient’s educational program or activity.”

In Davis v. Southeastern Community College, No. 77–1237 (4th Cir., filed March 28, 1978), rev’g 424 F. Supp. 1341 (E.D.N.C. 1976), the Fourth Circuit Court of Appeals recently relied on § 84.3(k)(3) as the basis for its reversal of a district court holding that an applicant for a nursing educational program was not “otherwise qualified” because her hearing deficiency would prevent her from safely performing the clinical training for a nursing degree and would, after her graduation, restrict her in the pursuit of her proposed profession. The fourth
The Maryland law similarly makes handicap discrimination in employment unlawful only when it is based upon a physical or mental handicap “unrelated in nature and extent so as to reasonably preclude the performance of the employment,”221 and most other state statutes include the same type of limitation.222 In addition, the laws of some states, including Maryland, provide that where “physical or mental qualification is a bona fide occupational qualification reasonably necessary to the normal operation of [a] particular business or enterprise,” it is not an unlawful practice for the employer to base employment decisions upon physical or mental qualifications.223

Thus, although the drafters of state and federal laws affecting the employment rights of the handicapped have phrased the caveat in varying terms, none of the legislation forbids the rejection of applicants whose handicaps render them unqualified for a job. As interpreted by the courts and administrative agencies, however, these laws make the process of distinguishing between qualified and unqualified handicapped individuals substantially more complicated than it might appear to be. A two-tiered inquiry is required under these interpretations. Initially, it must be determined whether the handicap is “job-related,” and there are restrictions upon the factors that may be considered and the methods that may be used to ascertain this fact.224 Second, if the handicap is “job-related,” the question becomes one of whether “reasonable accommodations” for the handicap can be made in order to alleviate the impediment it imposes to employment.225 The duty to make “reasonable accommo-

224. See 41 C.F.R. § 60–741.6(b), (c), –250.6(b), (c) (1977); 45 C.F.R. §§ 84.13; 85.54.
225. The second line of inquiry is necessary because both the OFCCP and HEW regulations build into the definition of “qualified” the concept that “reasonable

dations” for the handicapped, which has ramifications beyond its application to the question of whether an individual is qualified, will be discussed in more detail later, while the instant discussion will deal with the more immediate problem of identifying job-related handicaps.

1. The Concept of Job-Relatedness

An individual’s handicap can be deemed “job-related” only to the extent that it prevents him from meeting “job-related” requirements for employment. In other words, a handicapped individual is not “unqualified” because he fails to meet or pass job qualifications that do not measure, and have no relevance to, his ability to perform the specific job sought.

In irrebuttable presumption cases, the courts have applied this standard to allegations of a deprivation of fourteenth amendment rights, holding that public employers may not reject a job applicant because of a handicap that would not necessarily impede his ability to perform the employment. The OFCCP regulations impose the same restriction on government contractors, requiring them to review all physical and mental job qualification requirements for the purpose of ensuring that they do not tend to exclude qualified handicapped applicants from consideration for reasons that are not “job-related and . . . consistent with business necessity and the safe performance of the job.” The burden is placed on the contractor to demonstrate that its job qualification requirements meet this standard. The HEW and Executive Order 11,914 regulations similarly require federally financed enterprises to ensure that employment selection criteria which tend to screen out the handicapped are “job-related.” The Maryland proposed regulations on the handicapped impose the same obligation by providing that employers must adopt

[physical standards for employment that are fair, reasonable, and adapted to the actual requirements of this employment; these standards shall be based on complete

226. See notes 303–304 and accompanying text infra.
227. See Gurmankin v. Costanzo, 556 F.2d 184 (3d Cir. 1977); Duran v. City of Tampa, 430 F. Supp. 75, 77–78 (M.D. Fla. 1977); Hoffman v. Ohio Youth Com’n, 13 F.E.P. Cas. 30 (N.D. Ohio 1975) (dictum); cf. Coleman v. Darden, 13 Empl. Prac. Dec. 6789 (D. Colo. 1977): “There can be no question but that sufficient visual acuity to enable the employee to read has a direct relationship to the [paralegal] job.”
228. 41 C.F.R. § 60–741.6(c)(1) (1977); see id. § 60–250.6(c)(1).
229. Id. § 60–741.6(c)(2); see id. § 60–250.6(c)(2).
230. 45 C.F.R. §§ 84.13(a), 85.54.
factual information concerning working conditions, hazards, and essential physical requirements of each job; physical standards may not be used to arbitrarily eliminate the disabled person from consideration.  

a. Proof of Job-Relatedness

While the regulations make it clear that handicapped individuals may not be disqualified from employment on the basis of nonjob-related criteria, they provide no guidance as to the types of physical and mental employment criteria that will pass the “job-related” test. Some guidance by analogy can be derived, however, from judicial rulings that various types of employment selection criteria, such as diploma, license, and financial requirements, and certain educational, skill, and aptitude tests, impacted disproportionately upon racial minorities and females in violation of Title VII of the Civil Rights Act of 1964. In general, the courts have required employers to prove the “business necessity” of job standards found to exclude a significantly greater percentage of protected minority group members than nonminorities from employment, and have accepted proof of the “job-relatedness” of the standards as an adequate showing of “business necessity.” Since these Title VII cases are the source of the “job-relatedness” concept, they may be helpful in predicting the manner in which the concept will be applied with respect to the newly-recognized handicapped minority.

A recent decision by the Supreme Court, Dothard v. Rawlinson, typifies the approach taken in Title VII attacks on standards for employment. The Court found that height and weight requirements for guards in a prison for males, although facially neutral,  

231. XVI CoMAR § 14.03.04B(2)(c). The Maryland proposed regulations include this requirement among the suggestions for “reasonable accommodation” to the handicapped, but the prevailing standards for ascertaining whether discrimination has occurred would impose this requirement in the absence of any duty to accommodate. See note 233 infra.  

232. For a discussion of the cases dealing with this issue under Title VII, see B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW chs. 4-6 (1976).  

233. In Griggs v. Duke Power Co., 401 U.S. 424 (1971), the Supreme Court forbade the use of a high school diploma or a general intelligence test as a criteria for promotion because significantly more blacks than whites failed to meet both criteria, the criteria had been adopted “without meaningful study of their relationship to job performance ability,” and there was no proof of job-relatedness or any other “genuine business need.” Id. at 431-32.  

The terms “job-relatedness” and “business necessity” are frequently used interchangeably, and it has been suggested that

“job-relatedness” is merely one means of proving business necessity, although it may be in some circumstances the only means of proving business necessity if the purpose of the criteria is to predict the capacity of a particular individual to successfully perform the job. . . . In other areas . . . [g]iven proper proof of a substantial disparate effect, the issue of business necessity would turn not on predictive factors relating to the employee’s performance, but upon the burden to the business.  

B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 133 (1976).  

had a disproportionate impact on female applicants for the position.\textsuperscript{235} The defendant alleged that the height and weight requirements were related to the physical strength essential to effective performance of the guard's job, but failed to introduce evidence to verify this contention. The requirements were struck down, with the Court commenting that "if the job-related quality . . . is bona fide, the defendant's purpose could be achieved by adopting and validating a test for applicants that measures strength directly."\textsuperscript{236}

The \textit{Dothard} opinion illustrates that where a facially neutral\textsuperscript{237} job criterion is found to impact adversely on a minority protected by

\textsuperscript{235} Id. at 331. In \textit{Dothard}, a statistical showing of adverse impact triggered the employer's burden to prove "business necessity." Under the HEW regulations, at least as interpreted by the Secretary, no statistical proof of adverse impact is required. The complainant need show only that an employment test "substantially limits" the job opportunities of handicapped persons in order to give rise to the employer's burden to prove "job-relatedness." 42 Fed. Reg. 22676, 22688-22689 (1977).

\textsuperscript{236} 433 U.S. at 332 (emphasis added).

\textsuperscript{237} Some employment criteria are invalidated not because their facially neutral character belies a disproportionate impact unjustified by business necessity, but because they absolutely exclude members of a protected class from certain jobs. The \textit{Dothard} decision sets forth standards for upholding this type of employment criterion as well. Even though the Court would not permit the virtual exclusion of women from guard positions in male prisons through the use of facially neutral height and weight requirements not justified by their job-relatedness, the defendant was allowed to absolutely exclude women from assignments to guard positions that involved "contact" with male prisoners, via the Court's holding that sex was a "bona fide occupational qualification" ("BFOQ") for such positions. This result was justified, in the Court's opinion, because the evidence demonstrated that women guards would be more susceptible than males to assault by male sex offenders which could cause them to lose control over prison security. 433 U.S. at 336.

The Court articulated, without specifically adopting, several verbal formulations of the test for a BFOQ, including a standard that would permit the employer to rely on the exception when it had "reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved." \textit{Id.} at 2729, (quoting \textit{Weeks} v. \textit{Southern Bell Tel. & Tel. Co.}, 408 F.2d 228, 235 (5th Cir. 1969)). The Court also quoted another standard: "[D]iscrimination based on sex is valid only when the essence of the business operation would be undermined by not hiring members of one sex exclusively." 433 U.S. at 333, (citing \textit{Diaz} v. \textit{Pan American World Airways}, 442 F.2d 385, 388 (5th Cir. 1971), cert. denied, 404 U.S. 950 (1971)).

The Court's discussion of the BFOQ issue might appear to have limited application to handicap discrimination since, unlike Title VII, see 42 U.S.C. § 2000e-2(e) (Supp. V 1975), the Rehabilitation Act does not contain a specific BFOQ exception. Under handicap discrimination laws that specifically limit applicability to "qualified" handicapped individuals, a strong argument can be made that a BFOQ exception is necessarily implied, however. Cf. 13 C.F.R. § 113.3-1(b) (1977) (providing that nothing in the SBA regulations issued pursuant to § 504 prohibits "the restriction of certain jobs to qualified handicapped persons or to members of one sex if a bona fide occupational qualification can be demonstrated by the . . . recipient."). Moreover, as discussed at note 223 supra, some state handicap discrimination laws, including the Maryland laws, specifically include a BFOQ exception. When an employer can establish that the physical condition required for a particular job is a BFOQ, it
Title VII, the courts ordinarily will not uphold the criterion in the absence of specific evidence to substantiate its job-relatedness, at least where a validated test could be used in lieu thereof.238 In most cases the burden of proof requires the submission of detailed evidence of job duties and conditions, and statistical demonstrations of the validity of the criterion as a predictor of job performance.239

A few Title VII cases have deviated somewhat from a rigid application of this onerous proof burden, and have articulated the principle that there is a narrow class of job qualifications so manifestly job-related that no evidentiary showing is required to justify their imposition.240 Recently, in Smith v. Olin Chemical

should logically be permitted to frame employment criteria or inquiries in absolutely exclusionary terms, rather than be forced to struggle with the difficulties often involved in drafting the facially neutral inquiries or criteria that OFCCP and HEW apparently intend to require. See discussion at note 283-295 infra.

238. In Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975), the Court stated that even though an employer proved a job criterion was job-related, the criterion could still be struck down if the plaintiff showed that alternatives with a lesser impact on minorities could be used to accomplish the same business purposes. Dothard reiterated this view at the beginning of the opinion, 433 U.S. at 329, but the statement quoted in the text at note 237 supra, implies that proof that no less restrictive alternative exists — such as, in that case presumably, a validated test — might be required from the defendant as part of its initial burden, rather than from the plaintiff. Several federal circuit courts have adopted this approach. E.g., Wallace v. Debron Corp., 494 F.2d 674, 677 (8th Cir. 1974); Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 244 n.87 (5th Cir. 1974).

HEW has taken the position that the job-relatedness required under the § 504 regulations may be demonstrated by methods other than a validated test. 42 Fed. Reg. 22676, 22688-89 (1977). Moreover, the regulations place the burden on the Director to advance less restrictive alternatives. 45 C.F.R. § 84.13(a)(2). The OFCCP regulations are silent on this point.


240. In McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), for example, where the company had refused to hire a black man who had participated in illegal picketing at its premises, the Supreme Court held that although the plaintiff had established a prima facie case of discrimination, see note 216 supra, the defendant had met its burden of proof by articulating a legitimate non-discriminatory reason — the illegal picketing — for the rejection. The defendant was not required to prove the business necessity for this standard and the case merely was remanded to afford the plaintiff an opportunity to show that the defendant’s stated reason for the rejection was in fact a pretext for discrimination.
Corporation,\textsuperscript{241} for example, the United States Court of Appeals for the Fifth Circuit held that the need for a manual laborer to have a “good back” is such a manifestly job-related criterion. The plaintiff in the case was discharged from a laborer’s position due to a company doctor’s diagnosis of spinal degeneration, explained by the plaintiff’s history of sickle cell anemia. Since this disease is found almost exclusively in Blacks, the plaintiff alleged that the “good back” criterion impacted adversely upon members of his race. The Fifth Circuit affirmed the district court’s grant of summary judgment for the defendant, holding that, inasmuch as a “good back” is “manifestly necessary” to work as a manual laborer, an employer does not have to justify with evidentiary proof of business necessity the exclusion from manual labor of any person with “bone degeneration in his spinal region,” a bad back, even if such practice affects disproportionately some class protected by Title VII of the Civil Rights Act of 1964.\textsuperscript{242}

Where “manifestly necessary” job criteria, such as a “good back,” can be identified,\textsuperscript{243} they logically should be upheld against any claim of disproportionate impact, whether predicated on the

\textsuperscript{241} 555 F.2d 1283 (5th Cir. 1977).
\textsuperscript{242} Id. at 1288. The court inferred from McDonnell Douglas, which involved disparate treatment, a suggestion that, even in a disparate impact case, “a facially neutral job criterion can be so manifestly job-related so [sic] as not to be the kind of ‘artificial, arbitrary and unnecessary barrier’ Title VII prohibits.” Id. at 1287. Thus, in essence, the fifth circuit held that where the peculiar circumstances of a disproportionate impact case so require, the rules governing the burden of proof in a disproportionate treatment case can be applied. Whereas the traditional burden of proof rules for a disproportionate impact case applied in Griggs v. Duke Power Co., 401 U.S. 424 (1971), and Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), see note 215 supra, require the defendant to make a strong showing of business necessity in order to counter the plaintiff’s prima facie case, the rule set forth in Smith requires only the articulation of some legitimate non-discriminatory justification for the allegedly discriminatory act, for which no evidentiary proof is required. The employer who meets this lesser burden would prevail, in the absence of a claim by the plaintiff that the employment criterion was used as a pretext for discrimination.

\textsuperscript{243} Industrial physicians have conducted a number of research studies that could be helpful in proving the “manifest necessity” of a physical job standard. See, e.g., Bond, Low-Back X-Rays — Criteria for Use in Placement Examination in Industry, 6 J. OCCUPATIONAL MED. 373 (1964). See also AMA GUIDES TO EVALUATION OF IMPAIRMENT, note 176 supra. The GUIDES set forth methods for calculating degrees of impairment, which could be correlated with specific job functions. The OFCCP regulations currently authorize the use of the GUIDES, but only with respect to an evaluation of the existence of an impairment, and not with respect to an evaluation of the degree of impairment. See notes 175–178 supra and accompanying text supra.

If HEW adheres to its current position that a handicapped complainant need show only that a job criterion “significantly limits” employment opportunities in order to establish the invalidity of the criterion’s application to determine whether he is “qualified,” instead of a statistically significant showing of disproportionate impact, see note 236 supra, the employer’s burden of proof to
characteristic of race, sex, national origin, or handicapped status — at least if the employer establishes that the handicap could not reasonably be accommodated in the job. In addition to the “good back” criterion for applicants for laborer positions, the list of “manifestly necessary” physical qualifications should include good vision for a driver and good hearing for a telephone operator. Other examples can be derived from cases where the courts have refused to hold that an employer discriminated on the basis of race or sex when its actions were predicated on physical or mental job requirements which the plaintiff was unable to meet, and which were not found to be mere pretexts to cover a discriminatory motive.

With the exception of the few cases where specific physical or mental job requirements have been upheld as valid when interposed as a defense to claims of race, sex, age, or national origin discrimination, however, judicial authority under Title VII and other equal employment opportunity statutes protecting other minorities is helpful in the handicap discrimination context only insofar as it establishes a methodology for proving job-relatedness. Some variations in this methodology may be urged in handicap discrimination cases. First, physical condition — the very characteristic that places an individual in the protected handicapped minority — is generally more closely related to job performance than the characteristics peculiar to other minorities. Second, as the Smith case illustrates, the relationship will sometimes be so obvious as to eliminate the necessity for statistical proof. Finally, because the Rehabilitation Act and most state handicap discrimination laws counter this contention also should be lightened. The approach taken by the fifth circuit in Smith therefore is a reasonably equitable allocation of proof burdens that should be considered seriously by agencies and courts confronted with a plaintiff’s claim that he cannot be deemed “unqualified” under a job standard that disproportionately impacts upon individuals with his handicap.

244. The nature and extent of the employer’s duty to “accommodate” the handicapped is discussed at notes 303-344 and accompanying text infra. It is logical to assume, however, that administrative agencies and courts will conclude that just as some job criteria are “manifestly necessary,” so also some accommodations are manifestly inappropriate, since they clearly would impose an “undue hardship” on the conduct of business. No evidentiary support should be required, for example, of an employer’s contention that it is impossible to accommodate the blindness of an individual who seeks a job as a driver.

245. Several courts have denied claims alleging discrimination on the basis of race, sex, and age, after concluding that the discriminatory act was justified by the defendant’s need for employees who met certain physical or mental standards. See, e.g., Boyce v. Reynolds Metals Co., 532 F.2d 638 (8th Cir. 1976) (discharge of black plaintiff justified by his asthmatic condition); Thompson v. Chrysler Corp., 382 F. Supp. 1317 (E.D. Mich. 1974) (preliminary injunction denied to female who claimed that discharge because of hypertension constituted discrimination on the basis of race and age); Dorcus v. Westvaco Corp., 345 F. Supp. 1173 (W.D. Va. 1972) (failure to hire black complainant justified by knee condition); Johnson v. Pittsburgh-Des Moines Steel Co., 2 F.E.P. Cas. 668 (N.D. Ala. 1970) (inability of obese person to make rounds of job site justified discharge).

246. See, e.g., discussion at note 15 supra.
apply only to qualified handicapped individuals, the complainant’s prima facie case of discrimination should consist of more evidence than that he is handicapped and that the job requirement under which he was rejected falls more harshly upon individuals with his handicap than upon normal individuals. Such facts do not establish that the complainant is a “qualified handicapped individual” within the protected class, much less a prima facie case of handicap discrimination. Despite the assertions of administrative agencies that the burden is on the employer to prove the job-relatedness of its employment criteria, the complainant in a handicap discrimination case therefore should be required to put forth some evidence that his handicap is not job-related, and that he falls within the protected class of “qualified handicapped individuals,” before the defendant’s burden to rebut this contention arises.

By their very nature, almost all physical job requirements will have a disproportionate effect on individuals who can claim that they are handicapped under the definitions of “handicap,” discussed above. Thus, there is an explosive potential for litigation on job-relatedness issues. To date, however, few handicap discrimination cases attacking the predictive validity of physical job requirements have reached the courts and it is difficult to foretell the extent to which the methodology developed in Title VII cases will be varied to meet the unique characteristics of the handicapped and of the laws protecting them.

247. See Kampmeier v. Nyquist, 553 F.2d 296, 299 (2d Cir. 1977) (no evidence that children sighted in only one eye are “otherwise qualified” under §504 to play contact sports); Montgomery Ward & Co. v. Bureau of Labor, 28 Or. App. 747, 561 P.2d 637 (1977) (holding that employer’s refusal to hire individual for position as heavy appliance salesman on basis of physician’s diagnosis that the individual’s heart condition precluded him from such work was not discriminatory under state law).

248. Proof that one is a member of the “protected class” is usually the first element of proof in a discrimination suit. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). Unlike the Rehabilitation Act, the language of most other equal employment opportunity statutes does not specifically limit the “protected class” to “qualified” individuals, so that for example, in a disproportionate impact case of race or sex discrimination, the plaintiff’s job qualifications technically are not required to be proved before the burden shifts to the defendant to establish the “job relatedness” of the criterion under which the plaintiff was excluded from employment. Under the McDonnell Douglas standards for proof in Title VII cases predicated on disparate treatment, on the other hand, the plaintiff must establish as part of his prima facie case that he was qualified for employment, in addition to his status as a member of the “protected class.”

249. The plaintiff might meet this burden with medical evidence, or with evidence that he has previously done similar work elsewhere. See, e.g., Boynton Cab Co. v. Dept of Indus., Labor and Human Relations, No. 157-111 (Wis. Cir. Ct., Dane Co., filed Jan. 24, 1978), where the defendant was required to hire as a taxicab driver an individual with only one arm. The plaintiff established that he had been successfully employed as a cab driver for nine months, and that he had a driver’s license. The court noted that the defendant failed to submit any medical evidence, actual driving comparisons, or statistical evidence relative to the type of handicap involved to overcome the plaintiff’s showing that he was qualified.

250. Cases arising under the Age Discrimination in Employment Act (the “ADEA”), 29 U.S.C. §§621-634 (Supp. V 1975), provide a closer analogy for the
b. Does Job-Relatedness Include More Than Present Ability To Do The Job?

The predictive validity of physical employment standards that exclude handicapped individuals as unqualified is only one of the issues that can be raised in the process of ascertaining whether a handicap is “job-related”. Even when there is no question as to a handicapped individual’s present ability to do a job, there may be other grounds, properly characterized as “business necessity,” to justify his rejection for employment. One question that has arisen in this context is whether the possibility that exposure to certain job conditions would aggravate a preexisting handicap is sufficient “business necessity” to justify a refusal to hire the handicapped individual.

Some state statutes deal directly with this issue, specifically providing that it is not discriminatory to deny employment to a handicapped individual because of the safety hazard that would result to the employee and his co-workers, or the general public. While the Maryland statute does not speak to this point, the Maryland Commission’s proposed regulations recommend that an

251 See note 233 supra.


Such provisions have been criticized roundly on the grounds that anyone who undermines safety would be unqualified for a job in any event, and that the incorporation of these provisions into laws dealing specifically with the disabled infers that there is something peculiar about this classification that distinguishes it from other protected minorities. See Employment and the Disabled, supra note 2, at 463. It further has been suggested that “allowing an employer to discriminate against disabled applicants who might represent a single ‘danger’ to themselves’ exemplifies the very paternalism of which the disabled complain.” Id. This argument ignores the fact, however, that in most cases the employer must compensate the handicapped individual for on-the-job injuries, and that an employer who is precluded both from considering the likelihood that the handicapped individual will suffer an on-the-job injury and from obtaining a waiver of the right to compensation for such injury, see discussion notes at 269-71 infra, truly is caught between the proverbial rock and hard place.
assessment of the applicant’s qualifications should include a determination of whether an applicant is physically and mentally qualified to do the work “without adverse consequences, such as creating a dangerous condition to life or health of self or others.” The OFCCP regulations include “safe performance of the job” among the factors to be considered in the development of job criteria, and although the HEW regulations do not specifically discuss safety considerations, the Secretary’s comments indicate that they are relevant.

All of these regulations appear to support employer concerns for the safety of the handicapped individual’s co-workers and the general public, but only the Maryland proposed regulations clearly permit the employer to consider the danger to the handicapped job applicant that would result from his employment. There may be some question as to whether even this permission can be read so broadly as to allow the employer to consider the possible aggravation of an impairment that could result from job conditions. The central issue concerns the extent to which the employer may make a health decision for the handicapped job applicant.

There is some judicial support for the proposition that, despite the absence of a statutory provision specifically permitting consideration of the danger to which a handicapped employee would be subjected in a job, the employer may impose his judgment and deny employment for this reason, even though the handicapped applicant is unconcerned about the danger to his health. For example, in Montgomery Ward & Co. v. Bureau of Labor, in which the issue was whether a pre-existing heart condition was related to the complainant’s ability to work as a heavy appliance salesman, the Oregon Court of Appeals held:

[W]e interpret the Act as providing that an employer may refuse to hire an applicant with such a “handicap” where there is a reasonable medical possibility that the applicant might, because of the extent of disability and the nature of the work, be unable to perform the work or could experience injury as a result of attempting to perform it.

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253. XVI COMAR §14.03.04A(2) (emphasis added).
254. 41 C.F.R. §60-741.6(c)(2). See also id. §60-250.6(c)(2).
255. For example, in discussing pre-employment inquiries in his analysis of the HEW regulations, the Secretary stated:

[Employers may make inquiries about an applicant’s ability to perform a job safely. Thus, an employer may not ask if an applicant is an epileptic but may ask whether the person can perform a particular job without endangering other employees. 42 Fed. Reg. 22676, 22689 (1977) (emphasis added).

257. Id. at 750, 561 P.2d at 639 (emphasis added).
Other judicial opinions concerned with this issue have been rendered in appeals from administrative agencies heard at the state circuit court level. In Washington, 258 the circuit courts have taken the position that safety hazards to the job applicant and his co-workers and the possibility of aggravation of a pre-existing handicap may be considered in determining whether an individual is qualified for the job. In Rhode Island 259 and Wisconsin, 260 on the other hand, the circuit courts generally have refused to consider anything other than present ability to do the job. Specifically, the Wisconsin circuit courts have held that an employer may not consider in employment decisions such factors as the high risk of frequent illness and absenteeism typical of a leukemia patient, and the resulting probability of higher rates for employer-supplied

258. In Milwaukee Road v. Washington Human Rights Comm'n, 11 F.E.P. Cas. 854 (Wash. Super. Ct., King County, 1975), rev'd on other grounds, 87 Wash. 2d 802, 557 P.2d 307 (1976), a Washington county court held that a railroad was not required to hire as a brakeman an individual who had undergone surgery on his knees, since there was a significant likelihood of further future degenerative changes in the knees. See Clark v. Milwaukee Road, 12 F.E.P. Cas. 1102, 1104 (Wash. Super. Ct., Spokane County, 1975) (connected case):

In determining whether the denial of employment to an allegedly handicapped person is discriminatory under the laws of the State of Washington, one must look at more than present ability to do the job. One must also examine the safety hazard to the applicant and to his co-workers and any physical deterioration the body of the applicant may experience in the future as a result of this job, as compared to a person without the alleged handicap.

259. In Providence Journal Co. v. Rhode Island Comm'n for Human Rights, 13 F.E.P. Cas. 168 (R.I. Super Ct., Providence County, 1975), aff'd sub. nom. on other grounds, Providence Journal Co. v. Mason, 116 R.I. 614, 359 A.2d 682 (1976), a Rhode Island county court held that the fact that a whiplash injury might be aggravated by a desk job was not a defense to a charge of a discriminatory refusal to hire an individual with such an injury.

260. See notes 261–263 infra. But see Milwaukee Road v. Wisconsin Dep't of Indus., Labor & Human Relations, 8 F.E.P. Cas. 937 (Wisconsin Cir. Ct., Dane County, 1971), aff'd 62 Wis. 2d 392, 215 N.W.2d 443 (1974), where the employer's rules prohibited individuals with asthma from working in a diesel roundhouse because of the fact that the fumes would aggravate the asthmatic condition. The court commented:

Common sense should make an employee hesitate to take or continue in work which may cause him injury even if he exercises due care. And if the law makes it discrimination to refuse to employ on that ground, even if the possibility of injury is not to a reasonable certainty but presents a known hazard, it would seem that the law is doing the employee, as well as the employer, a great disservice and probably exposing him to harm. Id. at 938. The court rejected the employer's defense, however, holding that the Wisconsin law permitted the consideration only of present ability to perform the job sought and did not permit the consideration of possible hazard to health. Id. The Wisconsin Supreme Court affirmed the judgment on the basis of the lack of evidence that the plaintiff was able to efficiently perform the duties of his job. It commented, however, that “in fact, there was no medical testimony that, to a reasonable degree of medical certainty, that [sic] the working conditions were or would be in the future hazardous to his health.” This statement leaves open the question of whether the presence of such evidence would have changed the results. 62 Wis. 2d at 399, 215 N.W.2d at 446.
insurance, or the safety hazard resulting from the possible blackout of a diabetic, absent proof that the plaintiff actually created such a hazard.

To date, there have been no decisions on this issue under Section 503 of the Rehabilitation Act. The OFCCP summary of backpay cases and the facts involved in the administrative complaints issued by the agency indicate that OFCCP does not give significant weight to employer defenses grounded on the possibility that a handicapped individual’s condition would be aggravated by a particular job, the possibility of increased absenteeism, or the possibility of increased insurance costs. As Smith v. Olin Chemical Corporation, discussed above, illustrates, however, the federal courts frequently have found such defenses sufficient to justify discharges or refusals to hire that were alleged to constitute race or sex discrimination. In age discrimination cases, some courts have based holdings that age is a bona fide occupational qualification (BFOQ) for a particular job on evidence establishing the probability that individuals older than the cut-off age, while able to perform the job at the time of their rejection, would experience future physical degeneration, not readily detectable, that would have a detrimental impact on job performance. The same types of defenses should be accepted in handicap discrimination cases. Although employers may not be entitled in all cases to paternalistically prevent job applicants and employees from taking the risks associated with a particular job, substantial proof that there is a probability of increased danger to employee health, and a resulting probability of a substantial detrimental impact on the business through excessive absenteeism

261. Chrysler Outboard Corp. v. Wisconsin Dep’t of Indus., Labor and Human Relations, 14 F.E.P. Cas. 344 (Wis. Cir. Ct., Dane County, 1976).
262. Fraser Shipyards, Inc. v. Wisconsin Dep’t of Indus., Labor and Human Relations, 13 F.E.P. Cas. 1809 (Wis. Cir. Ct., Dane County, 1976).
263. See OFCCP BACK PAY CASES SUMMARY, supra note 34.
264. 555 F.2d 1283 (5th Cir. 1977) (increased risk of back pain or injury to black with “bad back” in laborer position justifies discharge).
265. E.g., Boyce v. Reynolds Metals Co., 532 F.2d 638 (8th Cir. 1976) (danger to black asthmatic employee held sufficient to justify discharge); Thompson v. Chrysler Corp., 382 F. Supp. 1317, 1319-20 (E.D. Mich. 1974) (preliminary injunction denied to hypertensive employee claiming race and age discrimination because “[t]he objective standards which the law establishes in commercial settings must yield at times to the frailties of human life. This court cannot approach the plaintiff's motion without considering the possible harm to her own health a decision in her favor may entail”); Johnson v. Pittsburgh-Des Moines Steel Co., 2 F.E.P. Cas. 668 (N.D. Ala. 1970) (inability of obese female to safely make rounds of job site justified discharge). But cf. Dothard v. Rawlinson, 433 U.S. 321, 334 n.20 (1977) (noting that “[i]n the usual case, the argument that a particular job is too dangerous for women may appropriately be met by the rejoinder that it is the purpose of Title VII to allow the individual woman to make that choice for herself,” but finding a BFOQ where danger to woman guard in male prison resulted in danger to co-workers and inmates).
or higher insurance rates, should constitute sufficient business necessity to justify the exclusion of handicapped individuals from jobs involving dangers to which they are peculiarly susceptible.

A somewhat related question is whether an employer may legally decline to hire or retain an individual who refuses to sign a waiver of his right to workmen’s compensation for on-the-job injuries caused or contributed to by a pre-existing disability or injury. Many state workmen’s compensation statutes permit such waivers for “second-injuries.”267 If equal employment opportunity laws for the handicapped are interpreted to preclude the consideration in employment decisions of the probability that an existing disability would be aggravated, or would increase the risk of subsequent injury, employers may attempt to use “second injury waivers” to limit their liability for workmen’s compensation. A direct conflict is predictable between the workmen’s compensation statutes that explicitly condone such waivers as an approved means of encouraging the employment of the handicapped,268 and anti-discrimination and affirmative action statutes that might be interpreted to prohibit such waivers as constituting a discriminatory treatment of the handicapped.269

There may be a similar conflict with various state and federal laws and regulations governing employment in certain jobs. For example, Maryland health regulations preclude the employment of individuals with certain types of infections or communicable diseases in some positions in hospitals, or in jobs in industries where contact with food or food containers is involved.270 Similarly, regulations promulgated pursuant to the federal Comprehensive Drug Abuse Control and Enforcement Act of 1970271 by the Drug Enforcement Administration272 place a voluntary obligation on

270. See, e.g., X Comar §10.02.04.203 (obstetrical service personnel in general hospitals must be free of communicable disease, respiratory infections, diarrhea, and skin lesions), §10.03.15.30 (employees in contact with food in eating or drinking establishments must be free of communicable disease, boils, infected wounds and acute respiratory infections) §10.03.18.582 (employees in contact with milk or milk products in milk processing or distribution plants may not have or be suspected of having communicable disease).
272. See 21 C.F.R. §1301.90 to .93 (1977). The regulations include among the suggested inquiries the following: “In the past three years, have you knowingly used narcotics, amphetamines or barbituates, other than those prescribed to you
employers who manufacture or distribute "controlled substances" to implement a standard screening procedure for employees who will have access to controlled substances. 273 In addition, standards promulgated pursuant to the federal Occupational Safety and Health Act 274 by the Occupational Safety and Health Administration275 mandate that certain types of protective apparatus be used or worn in dangerous job situations. In some cases, however, the protective apparatus may pose an even greater danger than the existing job situation to handicapped employees.276

It would seem that compliance with such laws and regulations would constitute sufficient "business necessity" to justify a determination that a handicap is "job-related."277 When the law or regulation is designed to ensure public safety or the safety of co-workers, there is little room for argument. When the law is one that originally was designed merely to encourage employment of the handicapped, however, such as the "second-injury" waiver provision discussed above, the question is much closer. In their relationship to the Rehabilitation Act, such laws may be analogized to state protective legislation for women that, in some cases, was struck down because of conflict with Title VII.278 The continued validity of

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276. The OSHA standards provide, for example, that persons should not be assigned to tasks requiring use of respirators unless they are physically able to work and use the equipment. 29 C.F.R. § 1910.134(b)(10) (1976). Thus, persons with asthma, who sometimes find it difficult to use respirators, would effectively be precluded from many production jobs in certain industries, e.g., pesticide production, coal mining, and coke-producing. It is often difficult, moreover, for persons wearing glasses to obtain a proper fit with a respirator, and contact lenses may not be worn. Id. § 1910.134(e)(5)(ii).
277. But cf. 45 C.F.R. § 84.10(a), which provides:
   The obligation to comply with this part is not obviated or alleviated by the existence of any state or local law or other requirement that, on the basis of handicap, imposes prohibitions or limits upon the eligibility of qualified handicapped persons to . . . practice any occupation or profession.
278. For a discussion of the cases on this point, see B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 299-305 (1976). Although not necessarily protective of the handicapped, second injury laws were designed to encourage their employment, at a time when there were few laws prohibiting employment discrimination, by alleviating the employers' fears of increased liability under Workmen's Compensation laws. Some recent studies have cast doubt on the
second injury provisions therefore likewise may be called into question, or the application of such provisions narrowed.279

Another difficult problem will probably arise in attempts to distinguish between those “unqualified” handicapped employees to whom subminimum wages may be paid in certain circumstances permitted by the federal Fair Labor Standards Act,280 and those “qualified” handicapped individuals for whom such differentiation in compensation is prohibited under the more recent equal employment opportunity laws for the handicapped.281 The onus will be on the Department of Labor to resolve this issue, however, since subminimum wages may be paid to the handicapped only upon issuance of a certificate of approval from the Department.282

2. Methods For Ascertaining Whether A Handicapped Individual Is “Qualified”

Even if job criteria comport with the “job-relatedness” and “business necessity” tests, the methods used to ascertain whether applicants for employment meet these criteria may violate handicap discrimination and affirmative action laws. These laws and the implementing regulations curtail the extent to which pre-employment inquiries as to existing mental or physical condition and pre-employment physical examinations and other tests may be used to ensure that employees are qualified.

OFCCP permits government contractors to conduct comprehensive pre-employment physical examinations, but the results of such examinations must be used in accordance with the regulations requiring that all standards for employment be job-related, and must

279. In some cases, however, the individual who is requested to waive the right to workmen’s compensation for a “second injury” in fact may not be handicapped and entitled to the protection of anti-discrimination laws. For example, the pre-existing disability may not limit the individual’s “major life activities.”

280. Section 14(c) of the Fair Labor Standards Act, 29 U.S.C. § 214(c) (Supp. V 1975), authorizes the Secretary of Labor to issue special certificates to employees permitting the payment of subminimum wages to workers whose earning or productive capacity is impaired by physical or mental deficiency. The regulations implementing this provision are set forth at 29 C.F.R. pts. 524, 525 (1976).

281. Inasmuch as the subminimum wage provisions are applicable only to those individuals who cannot perform at normal productivity standards, see 29 C.F.R. §524.2(a), .2(b), .5 (1976), such individuals would appear to fall outside the definition of a “qualified handicapped individual” to whom the Rehabilitation Act pertains. See 41 C.F.R. § 60-741.2 (1977); 45 C.F.R. § 84.3(K)(1). The OFCCP regulations permit the government contractor to contract with “sheltered workshops” (which may be established under the Fair Labor Standards Act in order to facilitate the training and employment of the handicapped at less than the minimum wage) to obtain handicapped employees, but stipulate that the use of employees from “sheltered workshops” does not relieve the government contractor from his other obligations to the handicapped. 41 C.F.R. § 60-741.6(j) (1977).

be kept confidential.\footnote{283}{OFCCP also permits the employer who needs a determination of whether an applicant or employee is handicapped to require the individual to undergo a special medical examination at the employer's expense, or, alternatively, to require the individual to provide medical documentation of his impairment.\footnote{284}{While OFCCP does not directly prohibit government contractors from making inquiries concerning a job applicant's or an employee's physical or mental condition,\footnote{285}{some restrictions on these inquiries are implied in the regulation requiring the contractor to invite all handicapped job applicants and employees to identify themselves and take advantage of the contractor's affirmative action program.\footnote{286}{The invitation must state that information as to handicapped status is requested only on a voluntary basis, that refusal to provide it will not subject the employee to any adverse treatment, and that the information will be used only in accordance with the contractor's obligations under the Rehabilitation Act. Information obtained in any inquiry into handicapped status, like physical examination results, must be kept confidential.

The HEW regulations issued to implement Section 504 of the Act are somewhat at variance and are more specific in some respects than the OFCCP regulations. Although the recipient of federal financial assistance, like the federal contractor, is prohibited from using any employment tests or other selection criterion that tend to screen out handicapped persons unless such tests are job-related, the federal aid recipient also is prohibited from using even job-related tests, if alternative job-related criteria that screen out fewer

\footnote{283}{41 C.F.R. §§ 60–741.6(c)(3), 250.6(c)(3) (1977). The confidentiality requirements are as follows:

\[\text{(i)}\] Information obtained in response to such . . . examination[s] shall be kept confidential except that:
\[\text{(i)}\] Supervisors and managers may be informed regarding restrictions on the work or duties of handicapped individuals and regarding accommodations; and
\[\text{(ii)}\] First aid and safety personnel may be informed, where and to the extent appropriate, if the condition might require emergency treatment; and
\[\text{(iii)}\] Government officials investigating compliance with the Act shall be informed.

\footnote{284}{Id. § 60–741.7(b), (c), (d). See id. § 60–250.7.

The distinction between 41 C.F.R. § 60–741.6(c) and § 60–741.7 appears to be that the former section deals with pre-employment physicals required of all employees, while the latter deals with an employer's need for physical information relating to a particular individual who may not have been subjected to a pre-employment physical but who the employer suspects may be unqualified for a job because of a disability. In the former case there is no express requirement in the regulations that the employer pay for the examination, while in the latter case the employer is specifically required to undertake the cost.

\footnote{285}{See 41 C.F.R. §§ 60–741.6(c)(2), 250.6(c)(2) (1977).

\footnote{286}{Id. §§ 60–741.5(c), 250.5(c). See discussion at note 174 and accompanying text supra.}
handicapped persons are shown by the Director of the Office of the Civil Rights of HEW to be available. 287 Moreover, the HEW regulations provide that any tests used must accurately measure job skills, aptitude, or whatever other factor the tests purport to measure, rather than merely reflect the handicapped applicant or employee's impaired sensory, manual, or speaking skills, except where these skills are what the test purports to measure. 288 The analysis of the HEW regulations notes that, for example:

[A] person with a speech impediment may be perfectly qualified for jobs that do not or need not, with reasonable accommodation, require ability to speak clearly. Yet, if given an oral test, the person will be unable to perform in a satisfactory manner. The test results will not, therefore, predict job performance but instead will reflect impaired speech. 289

Second, unlike OFCCP, HEW generally prohibits pre-employment inquiries into whether an applicant is handicapped, or the nature and severity of a handicap. 290 The employer may, however, inquire as to an applicant's ability to perform job-related tasks. The distinction is narrow indeed. As an example, the analysis states that while an employer may not ask if an applicant is epileptic, it may ask whether the applicant can perform a particular job without endangering other employees. 291

The only exception to HEW's prohibition on pre-employment inquiries into handicapped status occurs when the employer makes the inquiries in conjunction with (1) voluntary action to overcome past conditions that may have limited the employment of the handicapped, (2) the fulfillment of a duty to take remedial action to correct discrimination, or (3) the fulfillment of a duty to take affirmative action under Section 503 of the Rehabilitation Act, if it is a government contractor as well as a recipient of federal financial assistance. 292 Under these circumstances, the employer may invite

287. 45 C.F.R. § 84.13(a). The Executive Order 11,914 regulations are not quite as specific. They prohibit only discriminatory employment tests, without mention of "job-relatedness," and do not require the use of less restrictive tests found by HEW to be available. Id. § 85.54. The Secretary's comments to these regulations indicate, however, that tests that are not "job-related" are per se discriminatory. 43 Fed. Reg. 2132, 2135 (1978).
288. 45 C.F.R. §§ 84.13(b), 85.54.
290. 45 C.F.R. §§ 84.14(a), 85.55.
292. 45 C.F.R. § 84.14(b), 85.55. In its analysis of the more recently adopted Executive Order 11,914 regulations, HEW comments that while its regulations may differ on this point from those of OFCCP, there is no real inconsistency. According to these comments, the HEW regulations require merely that the recipient postpone inquiries or examinations directed towards the ascertainment of the nature and severity of a handicap until after the employment decision. 43 Fed. Reg. 2132,
individuals to identify themselves as handicapped if the invitation includes the same safeguards required by the OFCCP invitation. Neither the OFCCP nor HEW regulations comment upon the fact that inquiries into mental or physical condition traditionally are included in the medical history forms completed as part of a physical examination, which may be required under some circumstances. Presumably, however, inquiries essential to a thorough medical examination are not unlawful.293

HEW differs from OFCCP on a third point. Under the HEW regulations, employers may condition an offer of employment on the results of a medical examination conducted prior to the employee’s commencement of work only if the examination is given to all entering employees regardless of handicap.294 In addition, as under the OFCCP regulations, the results of such examinations must be used in accordance with the employer’s obligations under the regulations and must be kept confidential.295 Thus, the HEW regulations start out with a broad prohibition on pre-employment inquiries or medical examinations directed towards the ascertainment of handicapped status, but create exceptions to this general rule, while the OFCCP regulations contain no such broad prohibition.

293. The job applicant is under an obligation to respond truthfully to all lawful and relevant pre-employment inquiries, and proof that an applicant accepted for employment has lied on application forms may constitute just cause for discharge. The discharge of individuals for falsification of employment records has been upheld against claims that the discharge was unlawfully discriminatory. See, e.g., Firestone Tire & Rubber Co. v. NLRB, 539 F.2d 1335 (4th Cir. 1976) (finding no discrimination on basis of union activism).

294. 45 C.F.R. §§ 84.14(c), (d), 85.55. The proposed § 504 regulations of the SBA flatly prohibit pre-employment physical examination unless the recipient is taking remedial voluntary or affirmative action to hire the handicapped. 13 C.F.R. § 113.3(b)(2).

295. The discussion of pre-employment physicals in the comments to the Executive Order 11,914 regulations strongly suggests that HEW permits physicals only after an offer of employment has been made, and that the offer may be conditioned on nothing other than successful completion of the physical. In other words, any reference checks or skill tests should be conducted prior to the offer of employment, if the employer intends to condition the offer on the physical exam. 43 Fed. Reg. 2132, 2135 (1978). The comments to the OFCCP regulations are rather sparse, and contain no indication as to whether OFCCP contemplates such a strict rule. This restriction serves to box the employer into an employment decision based solely on physical condition, so that any claims of discrimination by individuals rejected after a pre-employment physical could not be defended on the ground that the applicant was unqualified for some reason other than physical condition.

Although the HEW regulations state that pre-employment physicals may not be given unless all entering employees are subjected to a physical, employers who give such physicals only to entering employees in certain departments probably would not be held in violation if there is a business justification for the differentiation.
The Maryland proposed regulations clearly contemplate the use of pre-employment physical examinations and employment tests, but likewise indicate that such devices should be directed towards determining whether an applicant for a job meets certain criteria — whether he has the physical and mental ability to perform the duties of the position, is professionally competent or has the necessary skills and ability to become professionally competent to perform the job, has compensated for his limitation through prosthesis or rehabilitation training, and, as mentioned above, whether he can do the work without adverse consequences to himself or others.296 Like the HEW regulations, the Maryland proposed regulations impose on employers the duty to provide handicapped job applicants with the opportunity to demonstrate their ability through testing methods adapted to their handicap.297 Otherwise, the Maryland proposed regulations do not comment upon pre-employment inquiries. In this connection, however, employers should recognize that a specific provision in the Maryland Annotated Code prohibits them from requiring a job applicant to answer a question “written or oral, pertaining to any physical, psychiatric or psychological illness, disability, handicap or treatment which does not bear a direct, material and timely relationship to the applicant’s fitness or capacity to properly perform the activities or responsibilities of the desired position.”298

Those employers who give pre-employment physical examinations will no doubt be concerned about the extent to which they are entitled to rely upon the opinion of a company doctor or the physician to whom they refer job applicants for pre-employment physicals. Initially, it should be recognized that the physician cannot make “job-related” employment judgments in a vacuum. If the physician is effectively making the employment decision to reject job applicants on the basis of physical problems, the regulations mentioned above require that he be provided with sufficient information to ascertain the job-relatedness of a particular impairment, such as job functions like weight lifting and other physical effort requirements; exposure to conditions, such as noise, heat, fumes, airborne particles, and various chemicals; and potential hazards, such as whether the job involves work at great heights, in close proximity to heavy machinery, or with dangerous tools. If, on

296. XVI Comar § 14.03.04A.
297. Id. § 14.03.04B(2)(d).
The provision does not, however, prohibit medical evaluation by a physician for the purpose of assessing an applicant’s ability to perform the job.

The Division of Labor and Industry of the Maryland Department of Licensing and Regulation has taken the position that open-ended questions such as “Have you ever been treated for alcoholism or delerium tremors?” or “Have you ever been hospitalized?” would violate the provision. Letter from Harvey A. Epstein, Commissioner, Division of Labor and Industry, to Maryland State Chamber of Commerce (Dec. 29, 1976).
the other hand, the physician merely provides the company's employment office with a list of physical restrictions for each job applicant, and does not make the decision to accept or reject, he need not be provided with such detailed job information.

Regardless of the type of input that the physician has into employment decisions, however, the question remains whether the employer is entitled to rely on the opinion of its doctor that a job applicant has physical limitations on his capacity to do work, or whether it must also consider an opinion submitted by the handicapped individual's personal physician. Only one handicap discrimination case has specifically dealt with this issue. In *Montgomery Ward & Co. v. Bureau of Labor*, the Oregon Court of Appeals was confronted with medical opinions by both the complainant's physician and the company doctor differing on whether the complainant was able to perform the work of a heavy appliance salesman without serious risk of a heart attack. The court ruled that the question before it was not which of the doctors' opinions was more persuasive. The proper rule, it held, was:

> [W]here an employer requires a job applicant to undergo a medical examination by a licensed physician, and the physician renders a reasonable and good-faith opinion that the applicant's condition is not compatible with the projected employment, the employer should not be held in violation of the Act for rejecting the applicant in reasonable and good-faith reliance on the advice of the physician. 300

This interpretation of the standard against which an employer's decision to reject an employee for medical reasons should be measured is manifestly appropriate. The problems encountered by the judicial system in dealing with the widely differing views of physicians on almost every medical problem called into question in medical malpractice litigation, amply illustrate the difficulties involved in considering the opinions of more than one physician. This interpretation also would be consistent with the great weight of authority in arbitration decisions. Absent a collective bargaining provision to the contrary, most arbitrators do not set aside company decisions.

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300. *Id.* at 750, 561 P.2d at 639-40. *Kampmeier v. Nyquist*, 553 F.2d 296, 299 (2d Cir. 1977), indicates that a defendant's reliance on a medical opinion is entitled to some deference under § 504 as well. The court refused to grant a preliminary injunction under § 504 to children who had been denied participation in contact sports, since the defendant had relied on the opinion of a school physician that the children, who were sighted in only one eye, would run a high risk of eye injury. The plaintiffs had come forward with little evidence to the contrary, and the court ruled that there was insufficient likelihood of success on the merits of plaintiffs' contention that they were "otherwise qualified" under § 504 to warrant a preliminary injunction.
decisions made in good faith reliance on medical advice from company doctors.301

3. Summary

As shown by the above discussion, there remains considerable legal uncertainty regarding the proof that will be required to validate a physical requirement for employment as “job-related,” and regarding the “business necessity” sufficient to justify the rejection of handicapped individuals who have the present ability to perform the job sought. It is clear, however, that one of the major purposes of the laws mandating equal employment opportunity for the handicapped is to ensure that members of this new minority are not excluded from employment on the basis of their handicaps, unless the adequate performance of a given job necessitates that applicants pass muster under the physical and mental standards being imposed. Thus, employment decisions made on the basis of anything other than present ability adequately to perform the job without risk to co-workers and the public are subject to attack. Experience may well temper the current negative attitude of administrative agencies towards the consideration of factors such as the medically significant probability that an individual’s existing disability will be aggravated or will subject him to a greater risk of injury in the job sought. More credence may be given to such justifications when employers establish that the employment of individuals with specific disabilities in certain jobs not only increases the business’ risk of liability for injury, thus deferring resources that might otherwise be used to increase production, but also increases the risk that handicapped individuals will, because of illness or injury, lose the independence that equal employment opportunity laws are designed to help them obtain.

The methods an employer uses to ascertain the qualifications of handicapped individuals thus far have received less attention from the federal agencies than the job standards themselves, in part because OFCCP has concentrated its efforts on handling individual discrimination complaints. Such individual complaints usually involve a challenge to the validity of the employer’s qualifications rather than a challenge to the procedure by which one’s “qualified” status is ascertained. Recently, however, OFCCP has shifted its focus and indicated that it will begin to undertake compliance reviews of affirmative action programs for the handicapped.302


Despite the justifications for permitting the employer to proceed on the advice of its doctor, OFCCP and the Maryland Commission on Human Relations consistently permit the complainant to submit another medical opinion, and, in some cases, base findings of probable cause on the opinion of the complainant’s physician, even though the company had relied on the opinion of its doctor.

302. See note 28 supra.
Agency auditors can be expected to review closely the pre-employment inquiries and physical examinations utilized by the employer.

C. THE VALIDITY AND EXTENT OF THE DUTY TO MAKE "REASONABLE ACCOMMODATIONS"

As discussed previously, the OFCCP, HEW, and Executive Order 11,914 regulations require that before a determination can be made on whether a particular handicapped individual is qualified for a job, the "reasonable accommodations" that could be made for his handicap must be considered. A similar accommodation obligation is imposed by the Maryland Commission's proposed guidelines on handicap discrimination. The validity and effect of this "accommodation" duty, as well as the expense and effort it requires, have been the subject of controversy and confusion.

Initially, there is some question of whether an administrative agency can enforce such a requirement, in the absence of a specific legislative mandate for accommodation. When Congress and state legislatures have intended that accommodations be made to the needs of a particular minority group, their enactments have so stated in no uncertain terms. Until 1972, for example, when Congress amended the Civil Rights Act of 1964 to require accommodation to the religious needs of employees, the authority of the Equal Employment Opportunity Commission (the EEOC) to impose such a requirement through administrative guidelines had been severely questioned. In refusing to rehear its decision in Dewey v. Reynolds Metals Company that the employer did not violate the

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303. The duty initially arises out of the definition of a "qualified handicapped individual," that is, one who can perform the tasks required "with reasonable accommodation." See 41 C.F.R. § 60-741.2 (1977); 45 C.F.R. §§ 84.3(k); 85.32(a). The nature of the accommodation duty is spelled out in more detail elsewhere in the regulations. See 41 C.F.R. § 60-741.6(d) (1977); 45 C.F.R. §§ 84.12; 85.53. The same accommodation duty arises under OFCCP's regulations issued pursuant to the Veteran's Readjustment Act. See 41 C.F.R. § 60-250.2, .6(d) (1977).

304. See XVI COMAR § 14.03.04B. Some state laws include a statutory mandate for accommodation, while others specifically prohibit the imposition of any such requirement. See note 143 supra. The Maryland statute, however, omits any mention of accommodation for the handicapped.

305. Equal Employment Opportunity Act of 1972, § 701(j), 42 U.S.C. § 2000e(j) (Supp. V 1975). The amendment added a new definition of religion, which had previously been among the prohibited bases of discrimination. The new definition specifically spells out the duty to accommodate as follows: The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business. Id. (emphasis added). A similar amendment was added in 1973 to the Maryland law. See Md. Ann. Code art. 49B, § 18(f) (Supp. 1977).

306. 429 F.2d 334, denying reh. of 429 F.2d 324 (6th Cir. 1970), aff'd without written opinion by an equally divided Court, 402 U.S. 689 (1971). The original Dewey
Civil Rights Act of 1964 by terminating an employee who refused to work on his sabbath, the Court of Appeals for the Sixth Circuit recognized the absence of any legislative authority for the EEOC guidelines, stating:

Nowhere in the legislative history of the Act do we find any Congressional intent to coerce or compel one person to accede to or accommodate the religious beliefs of another. The requirement of accommodation to religious beliefs is contained only in the EEOC Regulations, which in our judgment are not consistent with the Act.\(^{307}\)

The *Dewey* court further stated that the nondiscrimination duty did not include any obligation to make accommodations, commenting that “[t]he fundamental error of *Dewey* and the Amici Curiae is that they equate religious discrimination with failure to accommodate. We submit these two concepts are entirely different.”\(^{308}\)

Since neither the Rehabilitation Act, nor the provisions of Article 49B of the Maryland Annotated Code, impose upon employers any specific duty to accommodate the needs of the handicapped, it would appear that the administrative agencies attempting to impose such a duty have erred in the same direction as the EEOC in 1967. OFCCP, however, could argue to the contrary that Section 503’s requirement of affirmative action includes a duty to accommodate the handicapped. Under the authority vested in it by Executive Order 11,246, which similarly requires government contractors to take affirmative action to employ and advance in employment members of religious minorities,\(^{309}\) OFCCP has required such contractors to make reasonable accommodations for the religious needs of employees since 1973.\(^{310}\) Congress, so the argument would go, contemplated accommodations to the handicapped as a means of fulfilling the affirmative action obligation it imposed subsequently under Section 503 of the Rehabilitation Act.\(^{311}\)

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307. 429 F.2d at 334.
308. *Id.* at 335. The legislative history of the subsequent 1972 amendment that incorporated the accommodation duty reveals Congress’ recognition of the need to provide a statutory basis for the duty: “The purpose of this subsection is to provide the statutory basis for EEOC to formulate guidelines on discrimination because of religion such as those challenged in *Dewey* v. Reynolds Metals Co.” 118 Congo Rev. 7167 (1972). In Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 76 n.11 (1977), the Supreme Court viewed the subsequent amendment as a ratification of the guideline justifying its application to pre-1972 conduct.
309. See note 23 supra.
311. There is nothing in the legislative history of the 1973 Rehabilitation Act to indicate, however, that Congress was aware that the Department of Labor...
With respect to Section 504, the argument can be made that, notwithstanding Dewey, the nondiscrimination mandate of this section also connotes affirmative rights that suggest, though perhaps to a lesser degree, an accommodation duty. The Secretary of HEW has justified the accommodation duty on the grounds that the unique characteristic of the handicapped minority will, in many cases, make equal treatment discriminatory.

It must be remembered, however, that under both Sections 503 and 504, no duty arises except with respect to “qualified” or previously had required accommodations for religion under an affirmative action mandate. The only support of the accommodation duty is a letter, attached as an appendix to the Senate Report on the 1974 amendments to the Act, to the Secretary of Labor from Senators Williams, Cranston, Randolph and Stafford, questioning the nature of the extenuating factors listed as grounds for mitigating the accommodation duty in the Department of Labor’s initial regulations promulgated pursuant to Section 503. S. REP. No. 93-1297, 93rd Cong. 2d Sess., reprinted in [1974] U.S. CODE CONG. & AD. NEWS 6373, 6427-31.

312. Cf. Lloyd v. Regional Transp. Auth., 538 F.2d 1277 (7th Cir. 1975) (Rehabilitation Act of 1973 established affirmative rights which could be vindicated by a private cause of action). But cf. Snowdon v. Birmingham-Jefferson Co. Trans. Auth., 407 F. Supp. 394 (N.D. Ala. 1975), aff’d 551 F.2d 862 (5th Cir. 1977) (no violation of §504 in failure of mass transit authority to provide means of access to public buses to those confined to wheelchairs when special efforts had been made to aid handicapped persons other than those confined to wheelchairs, and when modern technology had not progressed to point of doing any more).

313. See 42 Fed. Reg. 22676 (1977). The argument is that merely providing handicapped individuals with the opportunity to participate in federally financed programs is meaningless if there is no way they can take advantage of the opportunity unless special arrangements are made. Cf. Lau v. Nichols, 414 U.S. 563 (1974) (under nondiscrimination mandate of Title VI of Civil Rights Act, school board required to provide educational accommodations for non-english speaking students). While there may be some merit to such an argument in the context of federal programs that provide benefits and certain entitlements for participants, it has no relevance to employment, which is only a by-product of most federal programs. There is no entitlement or right to federally financed employment. See Murgia v. Massachusetts Bd. of Retirement, 427 U.S. 307 (1976).

The possibility of a reverse discrimination suit resulting from affirmative action for or accommodations to the handicapped is remote under the current status of the law. The handicapped constitute a unique classification in that there is no obvious correlative class protected by any law, other than the equal protection clause of the Constitution, that can challenge affirmative action for the handicapped as discriminatory. Where laws prohibit discrimination on the basis of race, sex, religion or national origin, on the other hand, individuals of one race, for example, may contend that affirmative action for persons of another race results in discrimination against the first group. Under most state laws, however, discrimination is prohibited not with respect to physical or mental condition, but on the basis of a handicap or disability. One therefore must be handicapped or disabled to be protected. Likewise, §504 of the Rehabilitation Act prohibits discrimination against otherwise qualified handicapped individuals. Thus, in the absence of any indications from the Supreme Court that it will uphold a constitutional challenge to the imposition of an affirmative action duty in the absence of a finding of discrimination, cf. Bakke v. Board of Regents, 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680 (1976), cert. granted, 45 U.S.L.W. 3570 (1977), argued Oct. 12, or the unusual situation where affirmative action for the handicapped violates the rights of another protected minority, it is unlikely that a challenge to the validity of the accommodation duty would be raised by anyone other than the employer on whom it is imposed.
“otherwise qualified” handicapped individuals. The term “qualified” ordinarily implies the absence of a need for any special accommodation. Its use of this terminology is yet another indication that Congress intended only to eliminate employment practices that exclude handicapped individuals who are fully capable of performing the employment sought. It therefore appears that both OFCCP and HEW have committed an error in logic by imposing upon employers the duty to make reasonable accommodations for handicapped individuals who might in fact be “unqualified,” and not entitled to the protection of the Act, were it not for such accommodations.314

Notwithstanding their arguable lack of authority to impose such a duty, it is clear that HEW, OFCCP, and the Maryland Commission on Human Relations have deemed “accommodation” a proper means for achieving nondiscrimination and affirmative action for the handicapped, and that efforts to accommodate the needs of a handicapped individual must be made prior to a determination that the individual is not qualified for a particular job. Under the OFCCP, HEW, Executive Order 11,914, and Maryland proposed regulations, an employer must make such “reasonable accommodations” unless it can demonstrate that the accommodation would impose an undue hardship on the conduct of its business.315

The OFCCP regulations state that, in determining the extent of a contractor's accommodation obligation, factors such as business necessity and financial costs and expenses may be considered.316 While the Executive Order 11,914 regulations provide no explication of the extent of the accommodation duty, the HEW regulations state

314. Compare 45 C.F.R. § 84.12 (where in detailing the reasonable accommodation duty, HEW states that the duty arises only with respect to the “known” limitations of “otherwise qualified” [see note 44 supra] handicapped individuals) with id. § 84.3(k) (where a qualified handicapped individual is defined as one who can perform essential functions of the job “with reasonable accommodations”). Compare id. § 85.53 with id. § 85.32, and compare 41 C.F.R. § 60–741.6(d) (1977) (requiring that reasonable accommodation be made “to the physical or mental limitations of an employee” with id. § 60–741.2 (where OFCCP defines a qualified handicapped person as “one who can do a job with reasonable accommodations”).

315. See 41 C.F.R. §§ 60–741.6(d), -250.6(d) (1977); 45 C.F.R. §§ 84.12, 85.53; XVI COMAR § 14.03.03(b)(1).

316. 41 C.F.R. § 60–741.6(d) (1977). An earlier version of the OFCCP regulations included “resulting personnel problems,” but this factor was later deleted as “confusing and misleading.” See 41 Fed. Reg. 16147, 16148 (1976). The earlier version also listed various types of accommodations that might be required, including “providing access to the job, job restructuring, acquisition or modification of equipment or devices.” Job restructuring was defined to include “realignment of duties, revision of job descriptions or modified and part-time work schedules.” 40 Fed. Reg. 39887, 39889, at proposed § 60–741.5(c)(1) (1975). These examples were deleted when the requirement that contractors provide examples of proposed accommodations in their affirmative action program was dropped, see 41 Fed. Reg. 16147, 16148 (1976), but nevertheless are indicative of the type of accommodations OFCCP may expect.
that the following factors can be considered in assessing whether a particular accommodation would constitute an "undue hardship" on a federally assisted program:

(1) The overall size of the recipient's program with respect to number of employees, number and type of facilities, and size of budget;
(2) The type of the recipient's operation, including the composition and structure of the recipient's workforce; and
(3) The nature and cost of the accommodation needed.\textsuperscript{317}

The comments of the Secretary of HEW accompanying these regulations further indicate that these factors will be measured in relative terms and that greater efforts probably will be required of larger establishments, in view of the larger number of handicapped individuals affected.\textsuperscript{318}

The HEW regulations also set forth some examples of the types of accommodations that may be expected, such as job restructuring, part-time or modified work scheduling, providing readers or interpreters, and making facilities readily accessible to and usable by handicapped persons.\textsuperscript{319} In a separate subpart of the regulations, entitled "program accessibility," HEW mandates that recipients make all programs or activities accessible to the handicapped within 60 days of the effective date of the regulations, June 3, 1977, except where structural changes to existing facilities would be necessary. If the latter is the case, the recipient must develop within six months of the effective date of the regulations a transition plan detailing the changes required and must complete the changes within three years.\textsuperscript{320} Although not directly related to the employment aspects of the regulations, these requirements clearly are indicative of the intent behind the regulatory statement that "reasonable accommodations" to handicapped employees include making facilities readily accessible to and usable by them.

The Maryland Commission's proposed regulations include a similarly broad accommodation duty. Like the federal agencies, the Maryland Commission has stipulated that business necessity may be considered in determining whether a particular accommodation imposes an undue hardship on a business.\textsuperscript{321} The proposed regulations also set forth a listing of the types of accommodations

\textsuperscript{317} 45 C.F.R. § 84.12(c).
\textsuperscript{319} 45 C.F.R. § 84.1(b).
\textsuperscript{320} See id. §§84.21 to .22, 85.56 to .57. New facilities and alterations also must be designed for accessibility by the handicapped. Id. §§ 84.23, 85.58.
\textsuperscript{321} XVI COMAR §14.03.04B(1).
that are contemplated in employment, including probationary trial periods in employment for entry-level positions, and occupational training and re-training programs, such as guidance programs, apprentice training programs, and executive training programs.\textsuperscript{322}

The Commission's proposed regulations indicate that the reasonable accommodation duty may require the employer to facilitate access by handicapped employees to its work, toilet, eating, resting, and recreational facilities. The employer may be required to provide ramps for mobility-handicapped individuals, extra wide doorways and corridors to provide passage for persons in wheelchairs and on crutches, and handrails in restrooms. Further required accommodations may include the installation of public telephones, water fountains, elevator buttons, and other amenities at a height that is reasonably accessible to persons in wheelchairs, and the waiver of any no-pet requirements to permit the use of seeing eye dogs.\textsuperscript{323}

Under all of the above-mentioned regulations, the employer has the burden to demonstrate that a particular accommodation for the handicapped constitutes an undue hardship. The decisions rendered to date in cases involving violations of Section 504 of the Rehabilitation Act and of state fair employment practice laws indicate that this burden may be onerous. For example, in \textit{Barnes v. Converse College},\textsuperscript{324} a South Carolina federal district court recently granted a preliminary injunction sought under Section 504 to compel the college to provide and compensate a sign language interpreter for a deaf student. Although the court found "obvious inequities" in the imposition of such a requirement on the college,\textsuperscript{325} it deemed itself bound to enforce a Section 504 regulation that required the provision of auxiliary aids for students with impaired sensory skills.\textsuperscript{326} Section 84.12(b) of the HEW regulations, which sets forth the reasonable accommodation duty for employers, likewise mandates, among other things, the provision of interpreters and readers for handicapped employees. It appears, then, that under Section 504 at least, the accommodation duty may require significant expendi-

\textsuperscript{322} \textit{Id.} §14.03.04B(2).
\textsuperscript{323} \textit{Id.} §14.03.04H.
\textsuperscript{324} 436 F. Supp. 635 (D.S.C. 1977). \textit{See} Crawford v. Univ. of North Carolina, 440 F. Supp. 1047 (M.D.N.C. 1977). \textit{Cf.} Davis v. Southeastern Community College, No. 77-1237 (4th Cir., filed March 28, 1978), \textit{rev'd}, 424 F. Supp. 1341 (E.D.N.C. 1976) (instructing court on remand to review applicability of Section 504 regulations requiring modifications in academic program to plaintiff who had been denied admission to nursing training program due to hearing impairment, noting that "precedent supports the requirement of affirmative conduct on the part of certain entities under § 504, even when such modifications become expensive.") \textit{Id.}, slip op. at 11.
\textsuperscript{325} 436 F. Supp. at 638-39.
\textsuperscript{326} 45 C.F.R. §84.44(d).
tures to provide special privileges for handicapped beneficiaries or employees of federally assisted programs.327

Some decisions rendered by state courts in interpreting fair employment practice statutes indicate that employers also may be required to change employment practices in order to accommodate the handicapped — to the possible detriment of other employees. For example, in *Holland v. Boeing Company*,328 a Washington county superior court held that the Boeing Company illegally discriminated against a plaintiff who suffered from cerebral palsy by transferring him, during a reduction in force, to a job that he could not adequately perform because of his disability. The plaintiff's inadequacy in his new job resulted in poor evaluations, culminating in his rejection for a better position and his eventual downgrading.

The court mentioned several options that should have been considered by the defendant as alternatives to the transfer of the plaintiff. Another able-bodied person could have been transferred to the job, and, if further reductions had occurred, the plaintiff could have been transferred to open jobs in other departments that later were filled by other workers: he could have been laterally transferred to a suitable job under the company's collective bargaining agreement; other able-bodied employees could have been transferred to other jobs, leaving open positions that the plaintiff could fill; a surplus could have been declared within the plaintiff's classification with the result that layoffs would have taken place in order of seniority so that the plaintiff's relative seniority would have protected his job; finally, the company's past practice of creating jobs for individuals in some types of circumstances could have been applied in this case.329 In short, the court saw in the plaintiff's well-documented presentation of alternatives a variety of means by which the defendant could have accommodated the handicapped individual, including alternatives that could have been exercised only at the expense of other employees.

The case further indicates, as do the HEW and Maryland proposed regulations, that an individual need not be capable of

327. There are some indications to the contrary. In a recent public statement, David S. Tatel, Director of HEW's Office for Civil Rights, commented, for example, that despite the fears of college administrators that all buildings must be made accessible in three years pursuant to 45 C.F.R. §§84.21–23, the intent of HEW is to require merely that programs be made accessible, which would involve structural changes in some, but not all, buildings. See Statement by David Tatel, Director, Office for Civil Rights, U.S. Department of Health, Education and Welfare, 1977 (available from HEW's Office for Civil Rights).

328. 12 F.E.P. Cas. 975 (Wash. Super. Ct., King County 1976).

329. *Id.* at 978.
performing all jobs in a promotion or seniority sequence, or even all the tasks involved in a particular job, in order to be deemed “qualified”. Although the OFCCP regulations do not comment on this point, the HEW regulations specifically state that an individual need be capable only of performing “essential” job functions, and the Maryland proposed regulations suggest the elimination of minor job functions as one means of accommodation.

These types of accommodation requirements have not been limited to cases involving allegations of statutory violations. Federal courts reviewing charges that job standards created constitutionally impermissible “irrebutable presumptions” similarly have suggested the necessity for reasonable accommodation to the needs of handicapped job applicants. One characteristic common to these cases is the courts’ thorough analysis of the job in question, with a view towards determining whether special arrangements could have been made for the handicapped individual. For example, the trial court opinion in Gurmankin v. Costanzo, striking down a school board policy excluding blind persons from teaching sighted students, mentioned several means by which the special problems incurred by blind teachers could be avoided, and indicated the court’s opinion that the utilization of such alternatives would not impose an undue burden on school authorities. Specifically, the court noted that problems associated with the use of a black board could be avoided by using students to write material on the black board, or by utilizing mineographed materials in lieu of the black board; problems associated with proctoring exams could be avoided by using students or teachers with a free period as exam proctors; the blind teacher could use a reader to assist in reviewing student papers and educational material; and sighted instead of blind teachers could be assigned to playground and lunchroom supervision. The court further indicated, as do the OFCCP and Maryland proposed regulations, that handicapped job applicants must be given a fair chance to explain how their problem reasonably could be accommodated.

Similarly, in Hoffman v. Ohio Youth Commission, the district court’s decision that the case was moot nevertheless was punctuated with a point-by-point analysis of the employer’s reasons for rejecting the blind plaintiff’s application as a youth counselor for delinquent boys. The court concluded that many of the reasons were related to secondary aspects of the job and that alternative means for

330. 45 C.F.R. §§ 84.3(K)(1); 85.32.
331. XVI COMAR § 14.03.04B(2)(a).
332. See note 95 supra.
334. Id. at 986.
335. 41 C.F.R. § 60-741.5(c)(1) (1977); XVI COMAR § 14.03.04(B)(3)(g).
337. 13 F.E.P. Cas. 30 (N.D. Ohio 1975).
overcoming such secondary problems should have been pursued prior to the plaintiff's rejection.\textsuperscript{338}

The initial response of the courts to the notion of reasonable accommodation to the needs of the handicapped, whether considered pursuant to a constitutional or statutory claim, clearly has been to impose rather stringent requirements upon employers. The ripple effect of a recent decision by the Supreme Court, rendered in the context of the Title VII duty to accommodate the religious needs of employees, may curtail this trend to some extent. In \textit{Trans World Airlines, Inc. v. Hardison},\textsuperscript{339} the Court reversed an Eighth Circuit Court of Appeals holding that TWA had not satisfied its duty to accommodate the religious needs of an individual who was discharged because he refused to work on Saturday. The court of appeals had suggested, first, that TWA should have accommodated Hardison's religious beliefs by permitting him to work a four-day week, utilizing in his place on the fifth day a supervisor or another worker who was assigned to duty elsewhere, even though this might have caused other shop functions to suffer. Second, the court of appeals stated that TWA could have used other available personnel to fill Hardison's job on Saturdays, even though this alternative would have necessitated additional premium overtime pay. Third, the court held that TWA could have permitted a swap of jobs between Hardison and another employee on Hardison's sabbath, even though this would have involved a breach of the seniority provisions of its union contract. The Supreme Court reversed, holding that each of these alternatives constituted an "undue hardship" for TWA.\textsuperscript{340}

The Court laid down three basic guidelines for assessing whether a particular religious accommodation constituted undue hardship. First, the Court ruled that "reasonable accommodation" does not require an employer to deny the shift and job preferences of some employees in order to accommodate the religious needs of others.\textsuperscript{341} Second, it held that employers were not required by the accommodation duty to carve out a special exception to a negotiated seniority system in order to help employees meet their religious obligations.\textsuperscript{342} Finally, the Court held that requiring an employer to bear more than a de minimis cost to institute an accommodation constitutes an undue hardship.\textsuperscript{343}

Although the \textit{TWA} decision was rendered in the context of the employer's duty imposed by Title VII to make reasonable accommo-

\textsuperscript{338} Id. at 35.
\textsuperscript{339} 432 U.S. 63 (1977).
\textsuperscript{340} Id. at 77.
\textsuperscript{341} Id. at 81. See \textit{Jordan v. North Carolina Nat'l Bank}, 565 F.2d 72 (4th Cir. 1977) (plaintiff's request for a guarantee of no work on Saturday was per se unreasonable and granting it would result in an undue hardship).
\textsuperscript{342} 432 U.S. at 83.
\textsuperscript{343} Id. at 84.
dations to the religious needs of employees, the Court did not base its decision on first amendment considerations. The majority decision concentrated instead on defining the extent of "undue hardship" sufficient to alleviate the accommodation duty. It therefore appears that the analysis is equally applicable to any statute or agency regulation that requires accommodation only where there would be no resulting "undue hardship" to the employer on which the obligation is imposed. Such is the case, of course, with all of the regulations that mandate accommodation to the handicapped. Agencies attempting to require accommodations that unduly interfere with business operations therefore should be reminded of the TWA decision.

Unfortunately, the controversial accommodation duty is one of the least explicated aspects of the equal employment opportunity laws for the handicapped. Notwithstanding initial judicial and administrative indications as to the breadth of the obligation, which portend expensive and disruptive results for business, employers have several grounds for challenging, first, the underlying validity of the obligation imposed by agency regulations absent a statutory mandate, and second, any attempt to require significant interference with the rights of other employees or more than a de minimis expenditure. The employer who seeks to avoid the high costs of litigation in this area, however, is well advised for the present to make whatever accommodations its business can tolerate and to document all accommodations, thereby establishing a record of good faith compliance with the law. The best way for an employer to defend itself against charges that it has acted unreasonably in failing to make a particular accommodation is to present evidence that it gave the aggrieved employee the opportunity to suggest accommodations, that it gave due consideration to all accommodations suggested, that it made other reasonable accommodations when implementation did not result in undue hardship, and to present evidence of documentation of the justification for failure to make the accommodations in question.

IV. CONCLUSION

The gains in status achieved by racial minorities and females upon obtaining legislative support for their goal of equal opportunity in employment have prompted America's handicapped citizens to enlist the aid of Congress and state legislatures to assist in their efforts to achieve employment equality. Their efforts have been rewarded by statutes requiring federal contractors to take affirma-

344. It has been suggested that any requirement for significant expenditures is also challengeable as a taking of private property for public use without just compensation, violative of the fifth amendment. See, e.g., Epstein & Manson, First Questions on the HEW Handicap Regulations, 51 J. AMER. HOSP. ASS'N 57, 60 (1977).
tive action to employ the handicapped, and prohibiting recipients of federal financial assistance from discriminating against this group, by protective legislation in most states, and by judicial receptiveness to discrimination claims asserted under constitutional doctrines or the Reconstruction Era civil rights acts.

As occurred under statutes protecting the job rights of other minorities, the administrative agencies charged with enforcement of the recently-enacted employment opportunity laws for the handicapped have construed their mandates broadly and have imposed onerous standards for compliance. Since the surge in litigation that usually results from the recognition of minority rights has not yet had time to fully develop, there has been no significant guidance from the courts on substantive problems such as the scope of the class of individuals who can be characterized as "handicapped" within the meaning of the law, the factors that may be considered in ascertaining whether these individuals are "qualified" for a particular job and the standards for proof of that fact, or the validity and extent of the administratively imposed duty to make "reasonable accommodations" for the handicapped. The few scattered cases indicate, however, a judicial tendency to approach administrative interpretations with the same deference, to apply the same standards of proof, and to vocalize the same rationalizations for doing so that characterize opinions rendered under laws pertaining to the equal employment rights of sexual and racial minorities.

Yet, as this article has pointed out, there are distinctions between the handicapped and the other minorities for whom the primers on anti-discrimination law were written. Handicap discrimination is fostered, not by the invidious motives that resulted in discrimination against blacks, females, and immigrants, but by myths that advanced medical knowledge has only recently begun to dispel, by ignorance as to the effects of a disability, by misconceptions as to the work capacity and needs of the afflicted individual, and by benign or compassionate attitudes. Moreover, handicapped status is largely a matter of degree, and handicaps take a variety of forms, many of which are not as obvious as the badges of race, sex, age or national origin, and some of which are the result of the victim's own volition. Unlike racial and sexual characteristics, physical or mental condition is usually, rather than rarely, related in some way to work capacity. Finally, although some severely handicapped individuals have been excluded from virtually all employment, many individuals with minor or obscure impairments, covered under expansive interpretations of the law, have not been victimized by pervasive discrimination. While employers may have erroneously presumed that the physical or mental condition of these individuals precluded adequate performance in one job, the presumption was not carried over to all jobs, so that these individuals have not suffered from a general and broad-based deprivation of opportunities for employment or for advancement.
Although there is a paucity of legislative history from which to infer the intent of the drafters, the differences between the structure and phraseology of the equal employment laws for the handicapped and those protecting other minorities may have resulted from cognizance of the characteristics and problems that are peculiar to the handicapped minority. Thus, administrative directives to employers that effectively preclude consideration of an applicant's physical or mental condition in employment decisions, except where the employer can establish the necessity for doing so, may exceed the authority granted by the statutes, which call only for the elimination from consideration of nonjob-related handicaps. The former is more costly for employers to accomplish, as well as more difficult for agencies to police. Similarly, since most of the laws specifically limit the protected class to qualified handicapped individuals, the enforcement agencies may have erred in assigning proof burdens, and in imposing an obligation to make costly and disruptive accommodations for handicapped applicants who otherwise would not be able to meet performance standards.

As developments proceed in this area of the law, the courts may be persuaded by these legal and factual distinctions to re-evaluate the mandates asserted by administrative agencies. Experience under other equal employment opportunity statutes has taught that inflationary interpretations often hinder, rather than speed implementation, and that judicial and administrative attitudes become more balanced as they perceive this effect. This evolution is hastened when enforcement authorities recognize that employers have familiarized themselves with the legislative and judicial developments, have honestly assessed their attitudes and employment practices, and have made earnest efforts to comply with the spirit of the law.