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IMPROVING HANDICAPPERS' CIVIL RIGHTS IN MICHIGAN—PREVENTING DISCRIMINATION THROUGH ACCOMMODATION

If you look around carefully, you will understand that people who are handicapped are just like people who are not. We are still people, who want the chance to walk the golden road to success. We don't ask you to give us success, just the chance to succeed without put-downs or ridicule.¹

Ten years ago, the Michigan legislature recognized the problem of discrimination against the handicapped² and acknowledged the need to provide handicapped individuals with an equal opportunity to succeed³ by enacting the Michigan Handi-

1. H. Parsons, Jr., The Handicap Plea (unpublished essay), reprinted in Dear Abby, Ann Arbor News, Aug. 22, 1986, at B2, col. 1. Mr. Parsons was born with German measles, which left him deaf, blind in one eye, and 50% brain-damaged. At the time he asked Abby to print his plea, he was 21 years old and a student at the Rochester Institute of Technology.

2. A legislative analysis indicated that “[t]raditional attitudes often work against handicappers even though they are perfectly capable of performing the jobs for which they apply.” Michigan House Civil Rights Comm. and Michigan Senate State Affairs Comm., Analysis Section, S.B. 749, at 1 (July 27, 1976) [hereinafter Bill Analysis]. The analysis further suggested that handicappers are denied equal opportunity in areas of public accommodation, education, and employment. Id. Another source described what it was like to be handicapped in Michigan in the mid-1970’s:

To be handicapped in Michigan with visible handicapping conditions is to be expected to be smiling, simple, helpless and grateful. To be handicapped with non-visible handicapping conditions is to be told that you are too dangerous to be allowed to work. To be handicapped physically and confined to a wheelchair is to be unable to carry on normal community affairs because of the barriers of steps, curbs, remote parking and lack of suitable public transportation, and to be denied employment because employers are unwilling to make reasonable changes in the working environment.


3. Speaking in support of the enactment of the Michigan Handicappers' Civil Rights Act, State Senator Faust stated, “Handicapped persons wish to [be], and, when the legislation is enacted into law, must be judged and accepted based on their ability.” JOURNAL
cappers' Civil Rights Act* (MHCRA). The MHCRA prohibits discrimination in several areas—employment, housing, public accommodation, public services, and education. Unfortunately, many handicappers are still deprived of the crucial element for success—the opportunity to obtain employment*—because the MHCRA as currently interpreted denies protection to those individuals whose handicaps are related to their ability to perform particular job duties. Although the MHCRA specifically provides for accommodation of handicaps, those provisions are only available if the handicap is unrelated to job duties. On the surface, this limitation appears consistent with traditional antidiscrimination theory. Under Title VII of the Civil Rights Act of 1964* (Title VII) employers may base employment decisions on "job-related" criteria. This superficial analysis, however, ne-

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6. President Kennedy, in his message to Congress introducing the legislation that would later become the Civil Rights Act of 1964, stated, "There is little value in a Negro's obtaining the right to be admitted to hotels and restaurants if he has no cash in his pocket and no job." 109 Cong. Rec. 11,159 (1963). This proposition is likewise true for the handicapped. The fact that, in the first year of the MHCRA's implementation, 94% of the cases filed with the Department of Civil Rights alleged employment discrimination offers further evidence of the significance of employment. See Civil Rights, supra note 2, at 24. The remaining cases were distributed between public accommodation and public service. Id.

7. The Michigan Supreme Court recently held that "the only handicaps covered by the [MHCRA], for purposes of employment, are those unrelated to ability to perform the duties of the position." Carr v. General Motors Corp., 425 Mich. 313, 321-22, 389 N.W.2d 686, 689 (1986), reh'g denied, 426 Mich. 1231, 393 N.W.2d 873 (1986).
8. Mich. Comp. Laws Ann. § 37.1102(2) (West 1986). The statute does not define accommodation, but the term carries a connotation of modifying the work situation to enable the individual to do a job that he could not otherwise do as a result of a handicap. This is consistent with the common definitions of accommodate: "[to] make fit, suitable, or congruous . . . to furnish with something desired, needed or suited." Webster's Third New International Dictionary 12 (1971).
9. See supra note 7. If a handicap is related to job duties, it is not a "handicap" and therefore is not protected by the remaining provisions of the Act. In Carr, the Michigan Supreme Court held that summary judgment had been properly granted because the plaintiff's handicap was not a "handicap" under the MHCRA, and therefore plaintiff failed to state a claim. Carr, 425 Mich. at 316, 323, 389 N.W.2d at 687, 690.
11. The United States Supreme Court has said with respect to racial discrimination: "If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." Griggs v. Duke Power Co., 401
glects to take into account important differences between handi-
cappers and other protected groups.\textsuperscript{12}

The MHCRA provides protection that is substantially inferior
to that offered to others.\textsuperscript{13} Whereas Title VII prohibits "artifi-
cial, arbitrary, and unnecessary barriers to employment,"\textsuperscript{14} the
MHCRA permits existing formulations of job duties to limit job
opportunities for handicappers.\textsuperscript{15} The MHCRA must be
amended to remove these barriers and allow handicappers to
compete fairly for jobs. This Note suggests that amending the
MHCRA to require accommodation even where the handicap re-
lates to job duties\textsuperscript{16} will provide handicappers protection
equivalent to that provided to other individuals and will insure

U.S. 424, 431 (1971). By inference, if a practice is "job-related," then it is not a pro-
scribed discriminatory action.

12. "[E]ach class carries its own legacy, its own unique characteristics and its own
problems. Once this is acknowledged, it becomes clear that even where the ultimate goal
is the same for each, the means of effectuating that goal will differ with the class and
must be tailored to the individual needs." Gittler, \textit{Fair Employment and the Handi-

13. The idea that unalterable physical and mental characteristics are not handicaps
because they are related to job duties sets individuals with handicaps apart from others
protected by the civil rights laws. An individual's race, color, sex, religion, or national
origin is not determined by the ability to perform job duties. By focusing on whether an
individual is "handicapped," the statute fails to consider the important question of
whether the individual is discriminated against on the basis of a determinable physical
or mental characteristic. Protection of individuals distinguishable because of race or the
other Title VII classifications focuses on whether a particular individual is a victim of
discrimination, and is thus superior to that provided by the MHCRA.


15. According to the Michigan Supreme Court, the individual's handicap need only
relate to some assigned job duty to fall outside the protection of the Act. Carr v. General
Motors Corp., 425 Mich. 313, 389 N.W.2d 686 (1986). The distribution of job duties in
most work environments developed during a period in which discrimination against the
handicapped was accepted practice. Cf. Burgdorf & Burgdorf, \textit{A History of Unequal
Treatment: The Qualifications of Handicapped Persons as a "Suspect Class" Under
historically unequal treatment of the handicapped as evidenced in state laws and institu-
tions). This distribution reflects an assumption that the entire work force has "normal"
capabilities. That assumption must be rejected outright before barriers to handicappers'
employment can be overcome. New assessments can then be made concerning the appro-
priate distribution of duties in an environment where the labor pool contains individuals
with differing abilities and limitations.

16. Although the handicap itself is related to specific job duties, the handicapper
should not be excluded from consideration for a position if accommodation can make
that person capable of performing the essential functions of the job. This involves two
propositions. First, "the qualifications of disabled applicants are to be measured after
accommodation to the disability of the applicant is made." B. Sales, D. Powell, R. Van
Sales]. Second, "it is not necessary that the individual perform every task involved in a
job. The fact that an individual has difficulty in performing tasks which are marginally
related to the job should not bar his or her employment." \textit{Id}.
that handicappers are judged on the basis of their abilities, not their disabilities.

Part I of this Note explains the development of the current state of handicappers' civil rights law in Michigan, beginning with legislative initiatives and progressing to administrative and judicial decisions. Part II analyzes traditional antidiscrimination theory and suggests how that theory can be adapted to handicappers. By examining hypothetical situations, Part III exposes the disparity between the current state of the law in Michigan and the proposed theoretical analysis and suggests amendments to the MHCRA to reconcile this disparity.

I. THE PRESENT EFFECT OF THE MHCRA

In Carr v. General Motors Corp.,\textsuperscript{17} the Michigan Supreme Court overturned several lower court decisions that held that the MHCRA requires accommodation for job-related handicaps.\textsuperscript{18} This decision prompted nine concerned organizations,\textsuperscript{19} including the Michigan Civil Rights Commission and the Department of Civil Rights, to file amicus curiae briefs in support of the plaintiff's petition for rehearing.\textsuperscript{20} When rehearing was denied,\textsuperscript{21} the amici united to seek a change in the legislation.\textsuperscript{22} To appreciate the objections to the Carr decision, an understanding of the relevant statutory provisions and the varying interpretations they have received is essential.

\textsuperscript{17} 425 Mich. 313, 389 N.W.2d 686 (1986); see also infra notes 54-64 and accompanying text.


\textsuperscript{19} These organizations were the Michigan Civil Rights Commission, the Michigan Department of Civil Rights, the Michigan Trial Lawyers Association, the Easter Seal Society of Michigan, Inc., the Women Lawyers Association of Michigan, the Asbestos Victims of America, the Michigan Association of Human Rights, the Michigan Lupus Foundation, and the Michigan Protection and Advocacy Service. See Carr v. General Motors Corp., 426 Mich. 1231, 393 N.W.2d 873 (1986) (denying a rehearing).


\textsuperscript{21} Carr v. General Motors Corp., 426 Mich. 1231, 393 N.W.2d 873 (1986) (denying a rehearing).

\textsuperscript{22} Couter letter, supra note 20.
A. The Statutory Provisions

The MHCRA guarantees as a civil right the opportunity to obtain employment without discrimination because of a handicap. The MHCRA explicitly defines "handicap." Any identifiable physical or mental trait or quality that distinguishes an individual may qualify as a handicap if there is some physiological cause. The MHCRA narrows this definition by requiring that the characteristic be unrelated to the individual's employment qualifications or ability to perform job duties. This stipulation does not limit the characteristics that may qualify as handicaps; rather, it limits the jobs for which a given characteristic will be considered a handicap. The statute implies that an individual may have a handicap for one job position that does not qualify as a handicap for a different position. For example, a paraplegic confined to a wheelchair...
may be a "handicapper" subject to statutory protection when applying for a job in an office, but not when applying for a job on a loading dock.

2. Prohibiting employment discrimination—A separate portion of the MHCRA prohibits various discriminatory employment practices. Employers cannot discriminate against an individual on the basis of a handicap that is unrelated to the individual's ability to perform a particular job. Physical or
capped. Statutes that define the class of protected handicappers in terms of the members' qualifications to perform job functions have been criticized for discriminating against handicappers by imposing a prerequisite for membership not required of any other protected class. B. SALES, supra note 16, at 176; see also Note, Potluck Protections for Handicapped Discriminantes: The Need to Amend Title VII to Prohibit Discrimination on the Basis of Disability, 8 LOY. U. CHI. L.J. 814, 839-43 (1979). Whether or not an individual is a member of a racial minority protected by Title VII is not determined on the basis of ability to perform job duties. Nor is meeting job qualifications determinative of an individual's color, sex, religion, or national origin.

32. The statute provides:

(1) An employer shall not:

(a) Fail or refuse to hire, recruit, or promote an individual because of a handicap that is unrelated to the individual's ability to perform the duties of a particular job or position.

(b) Discharge or otherwise discriminate against an individual with respect to compensation or the terms, conditions, or privileges of employment, because of a handicap that is unrelated to the individual's ability to perform the duties of a particular job or position.

(c) Limit, segregate, or classify an employee or applicant for employment in a way which deprives or tends to deprive an individual of employment opportunities or otherwise adversely affects the status of an employee because of a handicap that is unrelated to the individual's ability to perform the duties of a particular job or position.

(d) Fail or refuse to hire, recruit, or promote an individual on the basis of physical or mental examinations that are not directly related to the requirements of the specific job.

(e) Discharge or take other discriminatory action against an individual on the basis of physical or mental examinations that are not directly related to the requirements of the specific job.

(f) Fail or refuse to hire, recruit, or promote an individual when adaptive devices or aids may be utilized thereby enabling that individual to perform the specific requirements of the job.

(g) Discharge or take other discriminatory action against an individual when adaptive devices or aids may be utilized thereby enabling that individual to perform the specific requirements of the job.

(2) This section shall not apply to the employment of an individual by his parent, spouse, or child.

MICH. COMP. LAWS § 37.1202 (1979).

33. MICH. COMP. LAWS § 37.1202(1)(a)-(c) (1979); see supra note 32.

These sections repeat the job-relatedness requirement that first appeared in the statutory definition of handicap. The employment provisions effectively provide that an employer cannot discriminate against an individual because of a handicap that is unrelated to the individual's ability to perform the duties of a particular position. MICH. COMP. LAWS § 37.1202 (1979). Inserting the definition of handicap into this provision yields the following: "[a]n employer shall not: ... discriminate against an individual ... because
mental exams that do not directly relate to the requirements of a specified job may not be used as a hiring or promotion criterion. Further, employers cannot discriminate against individuals if adaptive devices or aids can be utilized to enable the individual to perform the specific requirements of the job.

3. The obligation to accommodate—The MHCRA contains a provision obligating employers to accommodate handicapped individuals unless "the accommodation would impose an undue hardship" on the employer. This obligation is illusory because of the definition of handicap. Under a literal interpretation of the MHCRA, because the statutory definition of handicap excludes persons whose distinguishing characteristic is unrelated of a ['determinable physical or mental characteristic . . . unrelated to the individual's ability to perform the duties of a particular job or position or . . . unrelated to the individual's qualifications for employment,' Mich. Comp. Laws § 37.1103 (1979),] that is unrelated to the individual's ability to perform the duties of a particular job or position." Mich. Comp. Laws § 37.1202 (1979). Read together, the provisions are at least redundant and are more probably misleading and ambiguous because it is impossible to give effect to both limitations. One Michigan Court of Appeals panel essentially ignored the limitation in the definition by finding that the plaintiff's condition qualified as a handicap prior to a determination of whether it was job related. Shelby Township Fire Dep't v. Shields, 115 Mich. App. 98, 320 N.W.2d 306 (1982).

34. Mich. Comp. Laws § 37.1202(1)(d)-(e) (1979); see supra note 32.
35. Mich. Comp. Laws § 37.1202(1)(f)-(g) (1979); see supra note 32. The statute does not define "adaptive devices or aids," nor has case law explained the term. One case suggested that an adaptation to the gas mask of a firefighter to allow the mask to seal despite the growth of facial hair might qualify as an aid under the statute. The hair growth was prescribed as treatment for pseudofoliculitis barbae. Shelby Township Fire Dep't v. Shields, 115 Mich. App. 98, 320 N.W.2d 306 (1982); see also Couter letter, supra note 20.
to the prospective job opportunity, the accommodation requirement only applies if the individual is fully capable of performing job duties. The Michigan Supreme Court in *Carr* adopted this strict interpretation of the statute. Because a fully capable individual presumably needs no accommodation, however, other authorities have interpreted the statute differently.

### B. Administrative and Judicial Interpretation

Prior to *Carr*, liberal judicial and administrative interpretation allowed the MHCRA to function despite the apparent contradiction between the employer’s duty to accommodate and the statutory definition of handicap. The Department of Civil Rights and the Court of Appeals interpreted the MHCRA in light of its perceived mandate: “employment of the handicapped to the fullest extent reasonably possible.”

38. The statute provides that “[a] person shall accommodate a handicapper.” Mich. Comp. Laws Ann. § 37.1102(2) (West 1985). Because a handicapper is a person with a handicap, Mich. Comp. Laws § 37.1103(c) (1979), and a handicap is a “determinable physical or mental characteristic . . . unrelated to the individual’s ability to perform the duties of a particular job or position or . . . unrelated to the individual’s qualifications for employment,” Mich. Comp. Laws § 37.1103(b) (1979), only a fully qualified and able individual need be accommodated.


40. The Michigan Court of Appeals has taken this approach, see infra notes 44-49 and accompanying text, as has the Department of Civil Rights, see infra notes 50-53 and accompanying text.

41. See supra note 38 and accompanying text.


The Court of Appeals/Department of Civil Rights approach— Prior to the Michigan Supreme Court’s decision in Carr, the Michigan Court of Appeals liberally construed the MHCRA, believing that the law’s purpose was remedial. This approach led the court to avoid literal interpretations that would limit the protection of the Act. In Wardlow v. Great Lakes Express Co., the plaintiff suffered an injury but returned to work with a lifting restriction. When later he was laid off, he requested a transfer to a job that included lifting. The defendant argued that the plaintiff was not handicapped within the meaning of the Act and was therefore not entitled to accommodation. The Court of Appeals conceded that a literal reading of the statute supported the defendant’s position. Nevertheless, the court rejected this interpretation, pointing out that the defendant’s argument would require accommodation only if the handicap were unrelated to the plaintiff’s work. No accommodation would be needed in such a situation.

The court in part justified its liberal approach by deferring to the position of the Michigan Department of Civil Rights. The Department of Civil Rights interprets the statutory provisions to require accommodation for any handicap, not just those unreflecting with the statute is also evident in the cases dealing with the conflict between the statutory definition and the duty to accommodate. See infra notes 46-48 and accompanying text.

43. Carr v. General Motors Corp., 425 Mich. 313, 389 N.W.2d 686 (1986). This case is discussed infra notes 54-64 and accompanying text.
44. Rancour, 150 Mich. App. at 285, 388 N.W.2d at 340; Allen, 132 Mich. App. at 537, 349 N.W.2d at 207; see also 3 C. Sands, Sutherland Statutory Construction § 72.05, at 392 (4th ed. 1973 & Supp. 1986) (“There has now come to be widespread agreement, however, that civil rights acts are remedial and should be liberally construed in order that their beneficent objectives may be realized to the fullest extent possible.” (footnotes omitted)).
45. In one case, the court set out the full statutory definition of handicap and stated its opinion that the plaintiff had a “handicap” within the meaning of the MHCRA prior to a determination of whether his condition was related to his ability to perform the duties of the job. Shields, 115 Mich. App. at 103, 320 N.W.2d at 308. This sort of improvising with the statute is also evident in the cases dealing with the conflict between the statutory definition and the duty to accommodate. See infra notes 46-48 and accompanying text.
47. Id. at 59, 339 N.W.2d at 672.
48. The Court of Appeals stated:
If we were to accept defendant’s arguments, the act would be practically meaningless. [The Act] requires accommodation. However, if we ruled that an employer need not accommodate whenever the handicap is related in any way to the job, we would be ruling that the employer need accommodate only if the handicap is not related to the work. Of course, in that situation, no accommodation is needed in the first place.
49. Id. at 64, 339 N.W.2d at 674.
lated to the ability to perform specific tasks, unless the accom-
modation would cause undue hardship to the employer.50 Ac-
cording to the Department, there are two aspects to the
obligation to accommodate: (1) altering the physical structure to
provide access; and (2) modifying the job to permit actual job
performance.51 The first aspect conforms to a literal reading of
the statute, requiring the employer to make structural changes
so that the handicapper can get to a job he is capable of per-
forming. The second aspect is incompatible with a literal read-
ing; modifications to the job duties would be unnecessary be-
cause an individual's handicap is by definition unrelated to the
duties. In the Department's view, accommodation means remov-
ing barriers to the employment of the handicapped.52 Although
an employer need not create a job for a handicapper, nonessen-
tial job features may not exclude handicappers from positions
where they could be useful employees.53

50. Id.
51. Id. at 65, 339 N.W.2d at 674-75. The court cited an administrative decision, Ding-
ger v. General Motors Corp. (No. 37293-E1, decided Oct. 23, 1979), in which the Depart-
ment of Civil Rights concurred with the referee who stated,

The obligation to accommodate a handicapped person is twofold. It concerns
both alterations to physical structures and modifications to the job. The first
class of accommodation is necessary to provide access to the place of employ-
ment. It may include the installation of a ramp or elevator or the reassignment
of parking spaces. The second class of accommodation is necessary to permit
actual performance of the job duties. It may include the reassignment of certain
peripheral duties to other employees or the rearrangement of equipment or fix-
tures in the work area.

52. This is made clear in Wardlow, which refers to the position taken by the Depart-
ment of Civil Rights in Garcia v. Dannon Milk Products (No. 36557-E7, decided Jan. 22,
1980): "the department once again adopted the referee's conclusions: 'Accommodation *
** requires an employer to reasonably attempt to successfully remove the barrier which
excludes a handicapped person from employment . . . .'" Wardlow v. Great Lakes Ex-
53. Subsequent decisions by the Court of Appeals clarified the Wardlow analysis. In
one case, the court determined that the employer did not have to apply a plaintiff-spe-
cific cost analysis to show that he was unduly burdened. Gloss v. General Motors Corp.,
a plant could support only a limited number of favored jobs and that transfer to another
plant would violate contractual procedures. The court indicated that the defendant's
claims were sufficient to show undue hardship if supported by the evidence, but re-
manded the case because the trial court had not made specific findings on the evidence.
Id. at 284-85, 360 N.W.2d at 599.

In another case, the court limited the duty to accommodate to alteration of physical
structures and modifications of peripheral duties to allow job performance, and held that
the duty to accommodate does not include new job placement or vocational rehabilita-
276, 279, 388 N.W.2d 336, 337 (1986). The court held that an employer is not required to
do everything reasonably necessary to provide a job for an employee who sustains an
2. The Michigan Supreme Court’s reading—The issue before the Michigan Supreme Court in Carr\textsuperscript{54} was whether a disability related to performance of particular job duties was a "handicap" under the MHCRA.\textsuperscript{55} The Court determined that the Act covered only conditions unrelated to ability to perform\textsuperscript{56} and found that the lower court had misconstrued the legislative intent behind the MHCRA.\textsuperscript{57}

The facts in Carr were similar to those in Wardlow. In Carr, the plaintiff underwent back surgery and returned to work with medical restrictions. He was later denied a transfer to a job that required lifting in excess of his medical restriction. In finding for the defendant, the Court indicated that it was bound by the "plain language of the statutory definition."\textsuperscript{58} The plaintiff argued that the Act was ambiguous because to read the statutory definition literally would render the accommodation requirement meaningless.\textsuperscript{59} The Michigan Supreme Court dismissed the plaintiff’s argument, finding that accommodations existed that were both unrelated to ability to perform and meaningful in terms of removing employment barriers.\textsuperscript{60}
This determination was so contrary to previous interpretations of the MHCRA that Carr, armed with assorted amicus curiae briefs, petitioned for rehearing. The petition was denied. The Court amended one footnote to its original opinion, but refused to reconsider the opinion, thus leaving intact a decision

62. Id.

6. It should be noted that our holding that the plaintiff in the instant case is not a handicapped person in relation to this position for purposes of [the MHCRA] and is, therefore, not covered by the provisions of the act, necessarily precludes us from making any determination as to the proper interpretation of the terms "reasonable accommodation" and "adaptive devices" as used in the [MHCRA].

Carr v. General Motors Corp., No. 74825, slip op. at 7 n.6 (Mich. Feb. 7, 1986) (copy on file with U. MICH. J.L. REF.). In denying the petition for rehearing the court altered the footnote to read:

6. Our holding that this plaintiff who concedes that he cannot perform the duties of a particular job and who claims that his employer must provide another employee to handle part of his duties, had not stated a claim upon which relief can be granted, necessarily precludes us from making any determination as to the proper interpretation of the term "reasonable accommodation" as used in the [MHCRA].

We note that plaintiff here has not alleged in his pleadings or to this Court that there are adaptive devices or aids which would enable this individual to perform the specific requirements of the job or that the fifty-pound weight lifting requirement is merely a pretext for discrimination against the handicapped. Carr, 425 Mich. at 323 n.6, 389 N.W.2d at 690 n.6.

In changing the footnote, the Court retreated from the position that it was precluded from interpreting the term "adaptive devices" by its finding that the plaintiff did not meet the statutory definition of handicap. This change is consistent with the literal language of the statute because the provisions dealing with the use of adaptive aids or devices apply to "individuals" and are not restricted to "handicappers." See MICH. COMP. LAWS § 37.1202(f)-(g) (1979), supra note 32.

The court, nevertheless avoided dealing with the "adaptive devices" term by noting that the plaintiff did not allege that such aids would enable performance of job requirements. Carr, 425 Mich. at 323 n.6, 389 N.W.2d at 690 n.6. This appears to leave open the possibility that a plaintiff could allege that adaptive devices might be used to overcome the job-relatedness of a disability. Schervish, Carr v. General Motors: Death Knell for Handicappers' Job Accommodations?, 66 MICH. B.J. 26, 28 (1987). The court also opened the possibility that a handicapped plaintiff could allege that a particular job requirement or duty was a mere pretext for discrimination because of a handicap. The notion of pretext comes from traditional civil rights analysis and is discussed infra note 97 and accompanying text. This addition to the footnote recognizes the doctrine that an employer may not consciously discriminate against handicappers by establishing job requirements that relate to their disabilities.

Those who supported Carr in the petition for rehearing were not impressed with the altered footnote:

This modification does little to change the devastating impact of the Court's decision on handicappers who require reasonable accommodation in order to perform particular job functions. It remains to be seen, in future litigation, how the courts will interpret the "adaptive aids and devices" language . . . of the Act. Cases which allege that facially neutral job requirements are really a pretext
that severely limited the employment opportunities of the handicapped. 64

II. EXTENDING CIVIL RIGHTS TO HANDICAPPERS

As interpreted by the Michigan Supreme Court, the MHCRA does not require an employer to accommodate an individual with a handicap that relates to his ability to perform job duties, unless adaptive aids or devices would allow performance. 65 Although the Michigan Supreme Court looked at the Act's legislative history, these sources do not conclusively support a literal interpretation of the Act. First, the Court cited Senator Faust to support the proposition that handicaps related to the individual's ability to perform job duties are unprotected by the Act. 66 Senator Faust commented that "if a handicapped person seeking employment meets the qualifications of the job and can attain the performance levels required within a reasonable time, he must, by law, be given the same opportunity as the other applicants to secure the position." 67 The Senator's language does not support the Court's assertion. He states that a handicapper may be able to attain necessary performance levels within a reasonable time. It follows, therefore, that the handicapper need not be able to perform all duties at the time of hiring.

Second, the House Legislative Analysis quoted by the Michigan Supreme Court provides support for both an expansive and a restrictive view of the Act. 68 The legislative analysis mentions...
traditional attitudes that bar handicappers from jobs they are "perfectly capable of performing," but it also notes that handicappers receive less protection than other traditional victims of discrimination. The key, then, to resolving the problem is not only to overcome traditional attitudes, but to raise the level of protection of handicappers to that of others. This was the legislature's intent. Handicappers were originally included in what became the Elliott-Larsen Civil Rights Act (Elliott-Larsen), the provisions prohibiting discrimination under the MHCRA, Elliott-Larsen, and Title VII are similar. The intent of the legislature is further illuminated by Senator Faust's comment that "[t]he bill essentially spells out the . . . areas of civil rights, now guaranteed to all, and applies them with equal force under the

Although Michigan law offers protection in most situations from discrimination based on race, color, religion, national origin, and sex and in some situations from discrimination based on age and marital status, existing law offers handicappers [sic, less?] than for others. Traditional attitudes often work against handicappers even though they are perfectly capable of performing the jobs for which they apply.

Carr, 425 Mich. at 319, 389 N.W.2d at 688 (quoting Bill Analysis, supra note 2) (alterations are those of the court).

69. See supra note 68.

70. See supra note 68.

71. H.B. 4055 was originally "[a] bill to define civil rights; to prohibit discriminatory practices, policies, and customs in exercise of those rights based upon religion, race, color, national origin, age, sex, physical handicap, or marital status." H.B. 4055, 78th Leg., 1st Sess. (1975) (emphasis added). The Department of Civil Rights objected to the inclusion of the handicapped and supported separate legislation. Although part of the justification for separate legislation was the particular problems of the handicapped, the major objective for the Department of Civil Rights in opposing inclusion of the handicapped in the House bill was the hope that in so doing they might relieve themselves of administrative responsibility for the handicapped. Interview with Arthur Stine, District Executive, Michigan Department of Civil Rights (October 28, 1986); see also Department of Civil Rights Memorandum to the Executive Office, Analysis of H.B. 4055, Substitute H-4 (Jan. 7, 1976) (copy on file with U. Mich. J.L. Rep.). The Department felt that responsibility for administering legislation for the handicapped would be better placed on "other departments [that] possessed the expertise to handle the highly technical problems of the handicapped." See Michigan Dept. of Civil Rights, Summary of P.A. 220 History 1 (undated in-house document) (copy on file with U. Mich. J.L. Rep.). That this was the Department's primary motivation for endorsing separate legislation is made clear by the Department's later opposition to being placed in a position of authority with respect to the handicapped under Senate Bill 749, which became the Handicappers Civil Rights Act. See Department of Civil Rights Memorandum to the Executive Office, Analysis of S.B. 749 (June 4, 1975) (copy on file with U. Mich. J.L. Rep.). Including handicappers in the original comprehensive civil rights bill demonstrated an intent to provide them with the same protection as others, and no negative inference can be drawn from their subsequent removal from that legislation.

law to this new category." Therefore, the intention of the legislature in passing the MHCRA can be understood by studying the rights currently guaranteed to others.

A. Antidiscrimination Theory Under Elliott-Larsen and Title VII

When the legislators thought of the "rights guaranteed to all," they were no doubt thinking of the rights guaranteed by Elliott-Larsen and Title VII. Both statutes, like the MHCRA, address the problem of employment rights by prohibiting discrimination. Discrimination in employment "occurs when persons who are equally capable and qualified for employment are treated differently because of a factor that is irrelevant to their performance as employees." The American public considers differential treatment on the basis of certain classifications antisocial, and making employment decisions based on these criteria unfair. Such decisions are perceived as unfair because: (1) the criteria themselves do not accurately predict productivity; and (2) they involve characteristics that are beyond the individual's control.

73. 1 Senate Journal, supra note 3, at 590. This language is also quoted in Carr v. General Motors Corp., 425 Mich. 313, 319, 389 N.W.2d 686, 688 (1986).
74. To be more precise, they may have been thinking of the predecessor to Elliott-Larsen, because Elliott-Larsen was itself still proposed legislation. Elliott-Larsen was intended to extend prior fair employment and housing laws to public accommodations and education. See Michigan House Civil Rights Comm., Analysis Section, H.B. 4055, at 1 (Apr. 9, 1978). The MHCRA also extended its protection beyond employment rights to other areas protected under the Civil Rights Act of 1964. Compare Mich. Comp. Laws Ann. §§ 37.1301-.1303 (West 1985) with 42 U.S.C. §§ 2000a to 2000a-2 (1982). For the present purpose of analyzing employment discrimination, Elliott-Larsen and Title VII are appropriate references for the rights guaranteed to all. See also supra note 71 and accompanying text.
75. Peck, Employment Problems of the Handicapped: Would Title VII Remedies Be Appropriate and Effective?, 16 U. Mich. J.L. Rev. 343, 347 (1983). Individuals of a given race, color, religion, sex, or national origin have been treated differently on the basis of that characteristic alone which is itself irrelevant to their value as employees. Americans are committed to the idea that these factors should almost always be irrelevant for employment determinations. Id. at 345.
76. Id. at 348.
77. Fiss, A Theory of Fair Employment Laws, 38 U. Chi. L. Rev. 235, 241 (1971) ("A choice made on the basis of an improper criterion—classified by the law as 'invidious' or 'arbitrary'—is viewed as a particularized wrong. The rejected individual is not being treated fairly.").
78. Id. Professor Fiss talks largely in terms of classes; this Note does not. This Note focuses on the idea of distinguishing characteristics, acknowledging that it is difficult to define handicappers as a class. See generally Peck, supra note 75, at 356-57 (discussing definitional problems associated with enforcing an antidiscrimination statute designed to protect the handicapped). Avoiding class definition is consistent with traditional civil
Laws prohibiting discrimination thus reflect both a commitment to the principle that choices between individuals should be based on merit, and a desire to evaluate an individual on the basis of criteria that she can control. 79

"The litany of 'race, color, religion, sex, or national origin' as unlawful bases for employment discrimination reverberates in the conscience of the American public." 80 Title VII prohibits the use of these characteristics or traits as criteria for making employment decisions. 81 Historically, discriminatory conduct has been based upon these attributes; consequently they serve as the focus of antidiscrimination laws. 82 According to the theory just described, the use of these criteria in employment decisions is unfair—they are poor predictors of performance because they are irrelevant to an individual's capabilities, 83 and they are beyond an individual's control because they are determined at birth. 84

Criteria other than the characteristics enumerated in Title VII may be functionally equivalent to the prohibited criteria. 85 Functional equivalence represents the idea that an employment decision based on a facially neutral criterion may be thought of as a decision based on a prohibited characteristic. 86 Establishing functional equivalence involves two steps: (1) determining that the innocent criterion disproportionately excludes individuals

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79. Fiss, supra note 77, at 241.
82. For example, Professor Fiss comments that the enactment of prohibitions against racial discrimination "was largely a response to patterns of discrimination against Negroes." Fiss, supra note 77, at 236.
83. See supra note 75 and accompanying text. This analysis rejects any views of innate inferiority. See Fiss, supra note 77, at 241.
84. Some people perceive religion as a matter of choice within a person's control. Although it may be true that one is not bound to adopt the religious beliefs of one's parents and that religion need not be determined at birth, children often are encouraged to and do adopt their parents' beliefs. In any case, a sincerely held religious belief, whether or not passed down through the believer's family, may in itself put altering that belief beyond the believer's ability to control.
85. See Fiss, supra note 77, at 299. Professor Fiss speaks only of functional equivalents of race. His more general concern, however, was with the "common regulatory device, the antidiscrimination prohibition." Id. at 235. Applying his theory of functional equivalence to other characteristics subject to antidiscrimination laws is not therefore an unreasonable extension.
86. Id. at 299. "Judging the individual on the basis of this criterion is the equivalent, or near equivalent, of judging him on the basis of [one of the forbidden criteria]." Id.
who manifest an enumerated characteristic; and (2) demonstrating that the innocent criterion is unrelated to productivity and beyond individual control.\footnote{Id.} If an apparently innocent criterion satisfies these conditions, then its use as a basis for employment decisions is unfair and equivalent to the use of an enumerated characteristic.

Employers must choose between potential employees and make other employment decisions. Not every individual who is denied employment is a victim of unlawful discrimination. Only discrimination based on distinguishing characteristics that are recognized as irrelevant is unlawful.\footnote{Title VII provides: (a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .

42 U.S.C. § 2000e-2(a) (1982) (emphasis added). The "because of" language here and in Elliott-Larsen, Mich. Comp. Laws § 37.2202 (1979), indicates that an employment decision adversely affecting an individual is prohibited only if it is based on the enumerated criteria.} To implement laws prohibiting discrimination, one must be able to identify employers who are in fact basing decisions on irrelevant criteria. Two primary analytic approaches have developed for proving unlawful discrimination: disparate treatment\footnote{Disparate treatment is the most easily understood theory of discrimination. B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 15 (1976). This theory seeks to identify violations of Title VII by determining whether individuals who possess a particular characteristic or trait are treated differently from others who are otherwise similarly situated. Id. at 16; see also infra notes 94-100 and accompanying text.} and disparate impact.\footnote{Disparate impact theory seeks to identify Title VII violations that are fair in form, but discriminatory in operation. The theory acknowledges that employment practices that disproportionately exclude individuals with particular characteristics but are unrelated to the business needs of the employer are prohibited. See Griggs v. Duke Power Co., 401 U.S. 424 (1971); see also infra notes 101-16 and accompanying text.}

1. Disparate treatment— Disparate treatment analysis establishes a framework for proving intentional discrimination by an employer. The analysis presumes that employers have reasons for their employment decisions. If an employer treats one individual less favorably than others, and if the only trait that distinguishes the individual is one of the prohibited criteria, then it is inferred that the difference in treatment is based on that criterion. The employer is therefore guilty of unlawful discrimination.

In a disparate treatment case the plaintiff must show that: (1) he is distinguishable on the basis of one of the prohibited criteria; (2) he sought and was denied an available job for which he met the employer's qualifications; and (3) after his rejection, the employer continued efforts to fill the position.94 Satisfying these requirements gives rise to the inference of intentional discrimi-


94. This is a restatement of the United States Supreme Court's description of the plaintiff's initial burden, articulated in McDonnell Douglas Corp. v. Green. A prima facie case of racial discrimination may be established 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.

411 U.S. at 802.

Although the McDonnell Douglas case speaks in terms of "belonging to a racial minority," the Supreme Court subsequently held that Title VII prohibits racial discrimination against whites on the same standards as discrimination against blacks. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976). Hence, this aspect of the prima facie case is indicated in the text as being "distinguishable on the basis of one of the prohibited criteria."

Plaintiff can meet his burden of showing that he was qualified merely by showing that he fulfills the basic requirements and need not prove that he was the most qualified applicant. Cf. Flowers v. Crouch-Walker Corp., 552 F.2d 1277 (7th Cir. 1977). That case discusses the analogous burden of proving adequate performance in an action challenging the employee's discharge as discriminatory. Part of the plaintiff's prima facie case in the discharge situation was to show that he satisfied normal work requirements. The plaintiff met this burden by showing that his work was accepted by the employer. The court, however, allowed the defendant to rebut the prima facie case by introducing evidence that the plaintiff's layoff was part of a work slowdown and that the plaintiff's work was inferior to that of his coworkers who were not discharged.

These elements of the plaintiff's prima facie case are not exclusive; "[t]he facts necessarily will vary in Title VII cases, and [this specification] of the prima facie proof . . . is not necessarily applicable in every respect to differing factual situations." McDonnell Douglas, 411 U.S. at 802 n.13. One case has suggested that the final element of the McDonnell Douglas analysis—that the employer continued to seek applicants—will not be an absolute requirement. Peters v. Jefferson Chem. Co., 516 F.2d 447, 449-50 (5th Cir. 1975).
nation, shifting the burden to the employer to advance a nondiscriminatory reason for her action and to produce some evidence demonstrating the existence of that reason. The plaintiff retains the burden of persuasion on the issue of intent, and may argue that the employer's stated reason was a mere pretext for unlawful discrimination.

For some prohibited criteria an employer may respond to an allegation of intentional discrimination by admitting the use of the criteria, but claiming the statutory defense of bona fide occupational qualification (BFOQ). The BFOQ affirmative defense is a narrow exception to the general rule that prohibited criteria may not be used in employment decisions. The employer carries the burden of persuasion to show that the "essence of the business operation would be undermined" if the criteria were not used as a basis for selection.

95. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978) (explaining that the inference is raised because, if the elements are present and otherwise unexplained, it is more likely that the employment actions taken are "based on the consideration of impermissible factors").

96. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (stating that the burden will shift to the employer "to articulate some legitimate, nondiscriminatory reason" for the complainant's rejection). The burden that shifts to the defendant is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254-55 (1981).

97. Burdine, 450 U.S. at 256 (stating that the plaintiff "must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision"); see also McDonnell Douglas, 411 U.S. at 804.

98. 42 U.S.C. § 2000e-2(e) (1982) (allowing the BFOQ, defense to claims of discrimination on the basis of religion, sex, or national origin); see also Mich. Comp. Laws § 37.2208 (1979) (allowing the defense in the case of religion, national origin, sex, age or marital status, height, and weight).


100. Diaz, 442 F.2d at 388 (emphasis in original); see also Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224, 236 (5th Cir. 1976) (use of the criteria must be "reasonably necessary to the essence" of the business operation (emphasis in original)). For example, to rely on a given age standard as a BFOQ the employer must prove that he has reasonable cause to believe that all or substantially all persons not meeting the age criteria would be unable to perform safely and efficiently the duties of the job involved, or that it must be impracticable to determine which individuals not meeting the age criteria are incapable of performing safely and efficiently. Tamiami Trail Tours, 531 F.2d at 227-28. There is some indication that the obligation on the employer is conjunctive, not disjunctive; it may not be enough to show that substantially all persons not meeting the age criteria are unable to perform if a neutral performance standard can determine which of those individuals are able to perform. See Phillips, 400 U.S. at 544-47 (Marshall, J., concurring) (dealing with gender as a BFOQ).
2. Disparate impact—Unlike disparate treatment, disparate impact analysis does not focus on intent, but rather on the consequences of employment practices.\textsuperscript{101} Incorporating the concept of functional equivalence,\textsuperscript{102} the analysis relies on the premise that the law prohibits not only intentional discrimination but also "practices that are fair in form, but discriminatory in operation."\textsuperscript{103} Because Congress enacted Title VII to provide equal employment opportunities, the law requires the removal of "artificial, arbitrary, and unnecessary barriers" that disproportionately exclude individuals with particular characteristics.\textsuperscript{104} Not every practice that has a disproportionate effect will be unlawful discrimination.\textsuperscript{105} It is the arbitrary and unnecessary nature of the employment criteria that renders them discriminatory. If an individual can trace failure to satisfy a criterion to a prohibited characteristic, and the employer supplies no overriding business justification for the use of the criterion,\textsuperscript{106} then making employment decisions based on that criterion is unlawful.\textsuperscript{107} Disparate impact theory thus enforces the legislature's intent to require employers to "measure the person for the job and not the person in the abstract."\textsuperscript{108}

To make out a prima facie case under disparate impact analysis, the plaintiff must establish the same elements as under disparate treatment, except that she need only demonstrate that but for the challenged neutral criterion she would be qualified

\textsuperscript{101} See Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971) ("[G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups . . . . Congress directed the thrust of the act to the consequences of employment practices, not simply the motivation." (emphasis in original)).


\textsuperscript{103} Griggs, 401 U.S. at 431.

\textsuperscript{104} Id.

\textsuperscript{105} "The classic example of an acceptable practice is an employer's policy, in filling secretarial positions, of hiring only applicants who can type even though, especially in a limited geographical area it may be much more difficult for Negroes than for whites to obtain the necessary training and experience." Robinson, 444 F.2d at 797; see also Griggs, 401 U.S. at 430 ("Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications.").

\textsuperscript{106} That is, the criterion is not predictive of performance or productivity.

\textsuperscript{107} See generally Robinson v. Lorillard Corp., 444 F.2d 791, 797-98 (4th Cir. 1971).

for a position.\footnote{Comment, \textit{Handicapped Workers: Who Should Bear the Burden of Proving Job Qualifications?}, 38 Me. L. Rev. 135, 140 (1986).} In addition, the plaintiff must show that the challenged criterion has a discriminatory effect.\footnote{The plaintiff must show that an otherwise neutral job criterion disproportionately disqualifies individuals who share with her a particular characteristic. For example, in the case of race discrimination, the Supreme Court said the plaintiff must establish that the facially innocent criteria select applicants "in a racial pattern significantly different from that of the pool of applicants." \textit{Albemarle Paper Co. v. Moody}, 422 U.S. 405, 425 (1975).} Once the plaintiff establishes this, the burden shifts to the employer to demonstrate that the use of the criterion is justified by "business necessity."\footnote{The Supreme Court first articulated the business necessity requirement in \textit{Griggs v. Duke Power Co.}, 401 U.S. 424 (1971). Concerning the burden of proof, the Court said, "Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question." \textit{Id.} at 432. In actual practice, the employer's burden is one of production, and the complainant retains the burden of persuasion as to the existence of unlawful discrimination. \textit{See} Comment, \textit{supra} note 109, at 140.} If the employer meets this burden, the complaining party may still win by showing that other criteria, without the disparate impact, could satisfy the business needs of the employer.\footnote{\textit{Albemarle Paper}, 422 U.S. at 425.}

The "business necessity" test is often thought of in terms of "job-relatedness."\footnote{\textit{See} B. Schlei & P. Grossman, \textit{supra} note 89, at 132-33.} The mere existence of a legitimate business purpose is insufficient to justify the use of a criterion that has a disparate impact;\footnote{\textit{See} Robinson v. Lorillard Corp., 444 F.2d 791, 796-800 (4th Cir. 1971) (distinguishing between "business purpose" and "business necessity").} rather, the criterion must "bear a demonstrable relationship to successful performance of the jobs for which it [is] used."\footnote{\textit{Griggs}, 401 U.S. at 431.} For a particular neutral criterion to be a business necessity, its use must serve an overriding interest and be the least restrictive alternative available to accommodate that interest.\footnote{\textit{Robinson}, 444 F.2d at 798; \textit{see also} Harriss v. Pan Am. World Airways, 649 F.2d 670, 673 (9th Cir. 1980) (discussing the least restrictive alternative requirement in a gender discrimination case).}
Handicappers experience pervasive discrimination\(^{117}\) in much the same way as individuals protected under Title VII.\(^{118}\) Because the MHCRA and Title VII both address the problem of employment rights in the same manner,\(^{119}\) the analytic approaches developed under Title VII—disparate treatment and disparate impact—should also apply to handicappers.\(^{120}\)

The public may not perceive handicaps as irrelevant to job performance, although it does so regard Title VII characteristics.\(^{121}\) This perception should not, however, bar handicappers from participating in the job market. Unfortunately, those who determine the structure of jobs—access to facilities, design of equipment, and distribution of tasks—assume that all members of the labor pool have “normal” abilities.\(^{122}\) Because of this assumption, job structures disproportionately exclude handicappers.\(^{123}\) If a particular aspect of a job excludes individuals with a

\(^{117}\) “[D]iscrimination against the handicapped, particularly in the area of employment is pervasive and thoroughly entrenched in our society.” Gittler, supra note 12, at 953-54. “[E]mployers continue to discriminate against handicapped job applicants because of stereotypes, prejudices, and misconceptions.” Burgdorf & Burgdorf, supra note 15, at 864. “Handicapped individuals have faced and continue to face discriminatory treatment in almost every facet of life.” Id. at 909. “It is almost impossible to know how many people are affected by discrimination against the disabled.” Achtenberg, “Crips” Unite to Enforce Symbolic Laws: Legal Aid for the Disabled: An Overview, 4 SAN FERN. V.L. REV. 161, 164 (1975).

\(^{118}\) There is a “close analogy between discriminatory practices against the disabled and those against other minorities.” Note, Equal Employment and the Disabled: A Proposal, 10 COLUM. J.L. & SOC. PROBS. 457, 459 (1974) [hereinafter Equal Employment and the Disabled]. “[T]he handicapped and disabled continue to suffer disproportionately from chronic unemployment, even though . . . , when given the opportunity, they are capable of holding a variety of competitive jobs and can perform as well as or better than the non-handicapped.” Lang, Employment Rights of the Handicapped, 11 CLEARING-HOUSE REV. 703, 703 (1977) (footnotes omitted).

\(^{119}\) See supra notes 89-93 and accompanying text.

\(^{120}\) See generally Equal Employment and the Disabled, supra note 118; Note, supra note 31. Contra Peck, supra note 75, at 346-47 (“[T]he employment problems of the handicapped are not well-suited for treatment under a statutory discrimination model.”).

\(^{121}\) Peck, supra note 75, at 348.

\(^{122}\) Average architects and engineers build and design for the “average” person. Achtenberg, supra note 117, at 164. It follows that the normal employer designs job structures towards “normal” abilities.

\(^{123}\) Whether the original motivation was paternalistic, or reflected the societal attitude of “out of sight, out of mind,” see id., the fact remains that handicappers have been largely excluded from the group of people to whom employers look to provide services. Such a situation may be self-perpetuating because once job structures are oriented to a particular concept or “normal” individual, individuals not meeting that standard may
particular handicap and cannot be justified by business necessity, it is discriminatory under disparate impact theory. To equate "job-relatedness" with business necessity in this context is inappropriate; if this is done, the handicapper will always lose. 124 Job-relatedness suffices as an analogue for business necessity in the Title VII context because, given a population of "normal" individuals, the law assumes that there is no inherent unfairness in the job structure: nothing inherent in an individual's race, color, sex, religion, or national origin makes her less likely to be able to perform particular job functions. 125 The assumptions made in that context cannot be made in the handicapped context. There may, in fact, be something inherent in the individual's handicap that prevents her from performing a particular job function. Therefore, a different standard of business necessity is required. 126

Establishing an adequate standard of business necessity involves determining when an employer's job requirements impose artificial, arbitrary, and unnecessary barriers to handicapper employment. 127 The accommodation requirement set forth in the MHCRA 128 suggests a business necessity test: the employer discriminates if he does not accommodate a handicapper unless he demonstrates that the accommodation would impose an undue hardship. 129 If the employer cannot demonstrate that it would be too burdensome to accommodate the handicapper, then the employment criterion that excludes the handicapper is unnecessary and fails to meet the business necessity standard. 130

not easily be integrated into the system. "Non-normal" individuals will be disproportionately excluded when the employer seeks to fill positions within the structure. This situation is particularly discriminatory in the case in which the structure would have developed much differently had handicappers initially been included in the labor pool. 124 In addition, the equation is theoretically unsound. See generally infra notes 140-45, 151 and accompanying text.

125. The BFOQ defense to disparate treatment analysis takes into account that narrow set of situations where it is thought that something inherent in an individual's sex, religion, or national origin makes the individual less satisfactory with respect to a particular job. See supra note 98 and accompanying text.

126. Although the terms "job-related" and "business necessity" are often used interchangeably by lower courts, authorities view "job-relatedness" as merely one means of proving business necessity. B. SCHLEI & P. GROSSMAN, supra note 89, at 133.

127. See supra note 104 and accompanying text.

128. MICH. COMP. LAWS ANN. § 37.1102(2) (West 1985); see supra note 36 and accompanying text.

129. See supra note 128.

130. This statement of the business necessity standard is incomplete without some definition of "undue hardship." Under the Title VII duty to accommodate in cases of religious discrimination, a "de minimis cost" test applies. See Trans World Airlines v. Hardison, 432 U.S. 63 (1977). A Michigan Court of Appeals panel, however, has rejected this standard with respect to the handicapped. Wardlow v. Great Lakes Express Co., 128
Given the appropriateness of applying disparate impact and disparate treatment analysis to discrimination against handicappers, and assuming that differences between handicaps and other prohibited characteristics will sometimes require a business necessity standard other than job-relatedness, it is important to test the analyses in situations faced by employers and handicappers. Some situations that employers and handicappers encounter are more clearly analogous to cases involving Title VII characteristics than others. To give handicappers the same rights as others, legislation must apply nondiscrimination theory consistently to both the easy and the hard cases. The theories adapted from Title VII analysis are applied here to four hypothetical situations in order to establish a benchmark against which the outcome of existing legislation may be compared.

1. Case 1: The completely qualified and fully capable individual—If a handicapper seeking a job met all the employer's stated qualifications, were capable of performing all job duties, had no difficulty gaining access to the work place, yet was denied employment while the employer continued to try to fill the position, she would fit squarely within disparate treatment analysis as it has developed under Title VII. The handicapper would be able to make out a prima facie case by showing that she was treated differently from people without her handicap. The defendant would have an opportunity to show a nondiscriminatory reason for his decision; likewise, the handicapper would have an opportunity to show pretext. The protection provided to the handicapper would be equivalent to that provided others.

Mich. App. 54, 339 N.W.2d 670 (1983); see also Ettinger, supra note 37, at 832. Cases interpreting the MHCRA fail to provide an alternative definition. Id. at 833. The case law suggests that whether a burden is undue is a jury question. Id. If leaving this question to the jury is acceptable under the current law, there is no reason why it would not be equally acceptable under an analysis that makes the undue hardship issue part of the employer's business necessity defense.

On the other hand, a workable definition of undue hardship may be devised from the reasons for rejecting "job-relatedness" as the business necessity standard in some cases of handicapper discrimination. See supra notes 124-26 and accompanying text. If it is unfair to use the job-relatedness standard because jobs are designed based on a labor pool containing exclusively individuals with normal capabilities, then perhaps it is fair to use a standard that asks whether a job structure might have developed differently in the absence of prejudicial attitudes. If so, it should not cause undue hardship for employers to reorient their job structures retroactively to include the handicappers. If, as a practical matter, a job criterion that excludes handicappers cannot be separated from the current profitability of the employer's business, then the criterion is truly a business necessity, and the employer may continue to use it in employment decisions.

131. See supra notes 89, 94-100 and accompanying text.
2. **Case 2: The problem of employer qualifications**— If a handicapper were capable of performing all job duties and had no difficulty gaining access to the workplace, but did not meet all the stated job qualifications and was denied employment, he would fit squarely within the Title VII disparate impact analysis.\(^\text{132}\) He could not make out a prima facie case of disparate treatment because he would not be “qualified.” He could, however, challenge the use of the qualification that he failed to meet. If the qualification served to exclude individuals with his handicap disproportionately, he could establish a prima facie case of disparate impact.\(^\text{133}\) The employer would then have to justify the use of the criterion by demonstrating that it was a business necessity. This case is analogous to the way in which disparate impact analysis is applied to the Title VII characteristics. In this instance, the handicap itself would not limit the handicapper’s ability to perform the job. Therefore, the job-relatedness standard of business necessity would be adequate to evaluate the challenged criterion. The protection would be equivalent to that provided others.

3. **Case 3: The problem of access**— A case that is rarely encountered in the Title VII context would arise if the handicapper met all qualifications and were capable of performing job duties, but because of architectural or other barriers could not gain access to the workplace and so was denied employment.\(^\text{134}\) The handicapper could not easily show intentional discrimination in this situation, because the employer could either claim that access to the workplace was a prerequisite to employment or that inability to enter the building was a sufficient nondiscriminatory reason for denying employment. The protection would be equivalent to that provided others.

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132. See supra notes 90, 101-16 and accompanying text.

133. The kinds of qualification likely to be challenged in this context are employment tests or educational requirements that may disproportionately exclude handicappers because of the limited educational opportunities available to them. See Peck, supra note 75, at 354; Note, supra note 31, at 816. This case assumes that the handicapper could nevertheless perform the duties of the job, and, therefore, the use of the “qualification” is unfair. This is exactly the result reached under Title VII if an employment criterion unrelated to the job disproportionately excludes a particular race. Griggs v. Duke Power Co., 401 U.S. 424 (1971); see generally supra notes 101-16 and accompanying text.

134. The most analogous Title VII situation is the case in which the place of employment lacks facilities for women. Where the employer could not prove that he would have to endure unreasonable expense to install them, lack of comfort facilities for females has been rejected as a ground for refusal to hire qualified female employees. 1973 EEOC Decisions (CCH) ¶ 6137 (Feb. 19, 1970). To provide equivalent protection to the handicapper who is denied access, to jobs because of architectural barriers, the law must obligate the employer to remove the barriers to access unless it would cause unreasonable expense—i.e., undue hardship.
stance, the handicapper would fail to make out her prima facie case. In the second instance, the plaintiff could argue that the access requirement was a mere pretext for discrimination against handicappers. Unless the employer had deliberately built or acquired an inaccessible facility, however, the plaintiff would have difficulty prevailing on the issue of intent.

Alternatively, the handicapper could apply disparate impact analysis. She could make out a prima facie case by showing that her inability to gain access to the employer's facility was related to her handicap. This would satisfy the requirement of showing adverse impact on individuals with her distinguishing characteristic. The employer would then have to show business necessity to justify the requirement that the handicapper be able to enter the workplace. In one sense, the ability to gain access to the workplace is job-related—one cannot perform a job without getting to it. In another sense, however, it is not job-related—if barriers to access are removed the individual is capable of performing. In this situation, the Title VII job-relatedness approximation of business necessity would be inadequate to protect the handicapper. Applying the alternative business necessity standard, the employer would have to show that making the necessary accommodations to enable the handicapper to gain access to the workplace would cause undue hardship. Otherwise, not providing the accommodation would constitute actionable discrimination. Although the job-relatedness standard would provide handicappers identical treatment to that provided others, only the accommodation without undue hardship standard

135. Often in cases of handicapper discrimination, statistical disproportionalities will be difficult to prove due to the small sample of handicapped applicants for a particular job. Lang, Protecting the Handicapped From Employment Discrimination: The Job-Relatedness and Bona Fide Occupational Qualifications Doctrines, 27 DePaul L. Rev. 989, 1001 (1978); see also Peck, supra note 75, at 372. Instead, when some aspect of the handicap bears a demonstrable relationship to the handicapper's inability to gain access to the workplace, it may be inferred that some aspect of the workplace disproportionately excludes individuals with that handicap—if more people with the handicap had applied, they too would have been excluded. Even in the absence of a statistically significant sampling of individuals with a particular handicap, one can assume that statistics, if they existed, would show a disparate impact on individuals with that handicap. This logic applies as well to criteria other than access requirements such as the adaptive aids and peripheral duties discussed infra at notes 142-45 and accompanying text.

136. See supra notes 111-16 and accompanying text.

137. See supra notes 129-30 and accompanying text.
would protect handicappers against arbitrary architectural barriers to employment.\textsuperscript{139}

4. 

**Case 4: The problem of job duties**— Traditional analyses are most difficult to apply in the remaining situation: an individual who could gain access to the workplace but who was denied employment because his handicap prevented him, at least initially, from performing one or more of the duties of a particular job. This individual could not make out a prima facie case of disparate treatment because he would not be qualified for the job. The requirement that he be able to perform all the duties of a particular job would, however, have a disparate impact on those with his handicap.\textsuperscript{140} The employer, then, would bear the burden of demonstrating that business necessity required that the handicapped applicant be able to perform all job duties. The employer could clearly meet this burden if the standard is job-relatedness. But if this standard were strictly applied, handicapped persons again would be left with inferior protection.\textsuperscript{141} Two examples demonstrate that the job-relatedness standard can leave obvious victims of discrimination unprotected.

\textit{a. Enabling devices or aids}— For some individuals whose handicaps prevent performance of job duties, an adaptive device or aid could enable them to perform a particular job. The requirement that the job be performed without such a device would have a disparate impact on the handicapper.\textsuperscript{142} If the individual himself possessed such a device, no business justification would exist for forbidding its use.\textsuperscript{143} If the individual did

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\textsuperscript{138} In this context, architectural barriers are arbitrary when they could be avoided without an unreasonable effort or expense.

\textsuperscript{139} In regard to the inadequacy of identical treatment, the following statement of the Washington Supreme Court is often quoted: "Identical treatment may be a source of discrimination in the case of the handicapped, whereas different treatment may eliminate discrimination against the handicapped and open the door to employment opportunities." Holland v. Boeing Co., 90 Wash. 2d 384, 388, 583 P.2d 621, 623 (1978); see Wardlow v. Great Lakes Express Co., 128 Mich. App. 54, 64, 339 N.W.2d 670, 674 (1983).

\textsuperscript{140} See supra note 135.

\textsuperscript{141} Accepting that a job-related criterion is not arbitrary with respect to normal individuals of different races, colors, sexes, religions, or national origins, the same criterion may well arbitrarily exclude individuals with specific handicaps. See, e.g., supra notes 122-23 and accompanying text.

\textsuperscript{142} The fact that the device would enable performance is evidence that the use of the device is reasonably related to performance. It must therefore be inferred that handicapped individuals who could perform the job with the device will be disproportionately excluded by a requirement that they perform without the use of the device. See supra note 135.

\textsuperscript{143} In this situation, the employer is discriminating against the handicapper because of his use of an adaptive device. See the example discussed supra note 65. The requirement is either a pretext for intentional discrimination on the basis of handicap or an
not possess the device, the employer’s failure to provide it would need to be justified by business necessity. The requirement that an individual perform a job without an enabling device is necessarily job-related; therefore, the job-related standard of business necessity would always work against the handicapper. To avoid this result, the employer ought to be required to provide the device—i.e., to accommodate the handicapper—unless this would impose an undue hardship. As in Case 3, only the latter standard of business necessity would adequately protect the handicapper and allow him to utilize his capabilities.

b. Peripheral duties—Typically a job includes a number of duties, some more essential than others. If an individual were capable of performing the major duties of a job, but his handicap interfered with performance of a peripheral duty, the requirement that the individual perform all duties would disproportionately exclude individuals with the handicap. This effect would have to be justified by business necessity. Job-relatedness again would be an inadequate measure of business necessity, because it would permit the exclusion of all individuals with that handicap—the requirement is the functional equivalent of using the handicap itself as the basis for the employment decision. The requirement would be justified by business necessity only if filling the position with someone not capable of performing all the duties—i.e., having to reassign duties—would cause the employer an undue hardship. Accommodation without undue hardship again would be the standard necessary to ensure that employers do not discriminate against the handicapped through arbitrary and unnecessary employment criteria.

III. MAKING THE MHCRA FIT THE ANTIDISCRIMINATION MODEL

The theoretical framework just presented and the position taken by the Michigan Supreme Court differ in approach. The theory considers the employment decision and seeks to determine whether it was made on the basis of a criterion that serves as an arbitrary barrier to employment that appears to lack even a business purpose and cannot possibly be a business necessity.

144. For example, a secretary’s primary responsibilities may include typing (or word-processing), filing, and taking dictation, but she may also be charged with maintaining adequate office supplies, answering phones, and picking up the mail; a factory worker may be primarily responsible for machining parts, but as a side matter, he may be asked to pick up stock necessary in the machining process.

145. “Functional equivalence” is discussed supra notes 85-87 and accompanying text. See also supra notes 101-02 and accompanying text.
as an arbitrary and unnecessary barrier to employment of handicapped.\footnote{146}{An employment action based on the handicap itself, without regard to the individual's capabilities, is prohibited under disparate treatment analysis. Employment decisions based on factors that are functionally equivalent to the handicap are precluded under disparate impact theory.} The court's approach considers the handicapper and seeks to determine whether she is an individual whom the law was intended to protect, as if the law commands that some individuals are to be hired because they are handicapped.\footnote{147}{Carr v. General Motors Corp., 425 Mich. 313, 389 N.W.2d 686 (1986) (determining that the plaintiff was not handicapped within the meaning of the MHCRA and, as a consequence, not further examining the employer's behavior).} The United States Supreme Court specifically rejected the latter approach with respect to Title VII, stating that "[d]iscriminatory preference for any group, minority or majority, is precisely and only what [Congress] has proscribed."\footnote{148}{Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).} The difference between the two approaches is particularly evident in a comparison between the theory and the way the Michigan Supreme Court would treat the hypothetical cases. The comparison demonstrates the need to change the law and suggests ways of doing so.

A. Theory vs. MHCRA: A Direct Comparison

The Michigan Supreme Court would protect the handicapper in Case 1 because she is treated differently for no other reason than her handicap. The court's reasoning and the theoretical analysis coincide. Similarly, the court would hold that the handicapper in Case 2 is protected; this result is necessary if handicappers are to be treated like all others, because if the same qualification disproportionately excludes individuals on the basis of race or sex, then its use as the basis of an employment decision would be prohibited under Elliott-Larsen.

The court's reasoning and the theoretical analysis arrive at the same result in Case 3, but for different reasons. Although the theory mandates accommodation because requiring access without accommodation discriminates against the handicapper, the court would require accommodation for architectural barriers because it is specifically mandated by the Act. Similarly, in Case 4a, the court would require accommodation by the use of adaptive devices only because it cannot read the MHCRA to say otherwise.\footnote{149}{See supra note 63.}
The most important difference between the two approaches, and the most serious effect of the current law, arises in the case of peripheral duties: Case 4b. *Carr v. General Motors Corp.* in essence held that the MHCRA does not protect the handicapper in this situation, whereas the theory indicates that the handicapper is a victim of discrimination.

**B. Amending the MHCRA**

Inserting the following provision into the MHCRA would overcome the specific holding in *Carr*: If duties may be reassigned without undue hardship, thereby enabling the individual to perform the essential requirements of the job, discriminatory actions are prohibited. Such a correction would not, however, overcome all of the deficiencies of the law. To do this would require more fundamental changes in the MHCRA.

1. *Disposing of the job-relatedness requirement*— A first step in doing away with the discriminatory effect of the MHCRA is to remove all references to job-relatedness in the definition and the prohibition. Although it is likely that these references originally were placed in the Act as an attempt to define discrimination as it pertains to handicappers, in practice they have provided unforeseen obstacles. Deleting job-relatedness from the definition will probably raise objections that the definition of handicap is too broad,

150. 425 Mich. 313, 389 N.W.2d 686 (discussed *supra* notes 54-64 and accompanying text). The dissenting opinion of Justice Levin, however, would permit the reassignment of peripheral duties. *Id.* at 330-32, 389 N.W.2d at 691 (Levin, J., dissenting).

Concerning the theoretical result, see *supra* note 145 and accompanying text.

151. The provisions were not in the MHCRA as first introduced in the Michigan Senate but were added during the debate. *See Carr,* 425 Mich. at 320 n.1, 389 N.W.2d at 689 n.1. Job-relatedness perhaps was adopted to appease employers who were concerned that the legislation would require them to hire unproductive and incapable individuals merely because they possess handicaps. Such a serious concern might account for the redundancy resulting from the job-relatedness notion’s inclusion in both the definition of handicap and the prohibition of discrimination. *See supra* note 33.


153. It is likely that the breadth of the definition led to the inclusion of the job-relatedness limitation. *See supra* note 151. The broad language seems to have aroused concern that too many people would be included within the protection of this civil rights law. This concern is inappropriate in light of the all-inclusive terms like race, color, sex,
but this criticism of the new definition would overlook its subtle merit. The MHCRA definition neatly parallels the criteria in Elliott-Larsen. Unlike the federal definition, which seems to identify a distinct protected group, the MHCRA allows that any individual may be a handicapper in some context, just as every individual is of some race or sex. The law was intended to enhance employment opportunities of disabled individuals just as early fair employment laws were intended to enhance opportunities of blacks. To accomplish this goal, the legislature chose to eliminate any preference in employment decisions. When the focus of the legislation is seen as precluding discrimination on the basis of unfair criteria, rather than as protecting a particular group, the propriety of an inclusive definition is apparent.

2. Removing the specific affirmative provisions—By specifically excluding certain practices, the MHCRA implies that absent these specific provisions the prohibited practices would be acceptable. By requiring employer action, it implies that such action would not be demanded by a mere prohibition against discrimination. Because antidiscrimination theory itself would (1) prohibit the use of physical or mental exams unrelated to job duties, (2) prohibit discrimination when the use of adaptive aids or devices would enable job performance, and (3) require accommodation when it would not cause undue hardship, specific provisions detailing these points may and should be removed from the law.

3. Satisfying the need for certainty—Following the proposed theoretical analysis, the MHCRA, stripped of the restrictive portions of the definition and the unnecessary affirmative

religion, and national origin, which appear in Title VII, and the additional characteristics of age, height, weight, and marital status in Elliott-Larsen. The breadth of the definition should not be significant; nobody objects that the law protects individuals of all races. There is no reason not to protect all individuals who manifest some determinable, unalterable physical or mental characteristic. Nevertheless, because the definition has been criticized as too broad in its present form, see Bill Analysis, supra note 2, at 3, removing the job-related provision of the definition will revive criticism.

155. See Mich. Comp. Laws § 37.1202 (d)-(g) (1979), supra note 32.
156. Mich. Comp. Laws Ann. § 37.1102(2) (West 1985); see supra note 36.
157. Testing that is unrelated to job duties is prohibited under the nondiscrimination theory of disparate treatment analysis, see supra notes 132-33 and accompanying text. Discrimination against individuals when enabling aids are available is likewise prohibited by antidiscrimination theory. See supra notes 142-43 and accompanying text. Finally, accommodation is required when it will not impose undue hardship because this is the standard of business necessity necessary to make disparate impact theory work for handicappers. See supra notes 138-39, 145 and accompanying text. The specific provisions are thus unnecessary and tend to be a source of confusion. They should therefore be repealed.
provisions, is adequate to protect handicappers' civil rights.\textsuperscript{158} Two facts, however, prompt some additional explanation of the way in which antidiscrimination theory applies to handicappers. First, the Michigan Supreme Court is likely to interpret such modifications of the MHCRA as reducing the rights of handicappers.\textsuperscript{159} Second, it is unlikely that such a pared-down version of the law would pass the legislature.\textsuperscript{160} Dealing with these political realities forces some retreat from the effort to avoid further defining "handicapper" and "discrimination." Perhaps the least intrusive way to clarify when discrimination occurs—and to reassure employers who reject unqualified individuals that they need not fear legal action—is to define a "qualified individual."

Defining a "qualified individual" as an "individual who, with reasonable accommodation, can perform the essential functions of the job in question,"\textsuperscript{161} and inserting this term into the remaining portions of the prohibition,\textsuperscript{162} should solve the problem

158. In this form, the statute merely requires that employers not discriminate—the same requirement put on employers with respect to other distinguishing characteristics. Nondiscrimination theory precludes the use of arbitrary and unnecessary employment criteria that act as barriers to employment. If a facially neutral job criterion disproportionately excludes individuals with a particular handicap, the employer, to overcome an inference of unlawful discrimination, must demonstrate that the criterion is required by the needs of his business. If the handicap is unrelated to the job, then the use of the criterion will be considered a business necessity if the criterion is job-related. If the handicap is related to the job, the use of the criterion will be considered a business necessity only if requiring the employer not to use the criterion would impose an undue hardship. Eliminating the job-relatedness provisions from the statute removes a limitation on the protection of the handicapped. Affirmative provisions are not needed to create a duty to accommodate because that duty is inseparable from the duty not to discriminate.

159. In Carr, the court exhibited a definite leaning toward employer interests. The court initially interpreted the Act so as not to apply the adaptive devices or aids provisions unless the handicap in question is unrelated to job duties. See supra note 63. The court in Carr seemed intent on limiting any affirmative duty placed on employers. See generally Carr v. General Motors Corp., 425 Mich. 313, 389 N.W.2d 686 (1986). This result in part may have been due to the filing of a brief amicus curiae by the Michigan State Chamber of Commerce in support of General Motors. See id. at 315, 321, 389 N.W.2d at 687, 689. Unlike the Chamber of Commerce, the Department of Civil Rights was not even aware that the Court of Appeals decision in Carr was coming up for review, and failed to file any briefs. Interview with Arthur Stine, supra note 71. For whatever reason, the court appears inclined to interpret handicapper rights narrowly. Consequently, the mere removal of the affirmative obligations might be read by the Court as a signal that even the limited accommodation requirement it would allow under the present MHCRA need not be imposed on employers.

160. See Carr, 425 Mich. at 320 n.1, 389 N.W.2d at 689 n.1. Attitudes may not have changed enough to allow passage of legislation without some limitation that protects employers from a perceived obligation to hire individuals who cannot contribute to the profitability of their businesses. See supra note 153.

161. See B. Sales, supra note 16, at 176.

162. The revised statute would read:

Sec. 202 (1) An employer shall not
of uncertainty. If “reasonable accommodation” is taken to mean accommodation that would not impose an undue hardship on the person required to provide it, then the statute provides all the protection suggested by the theory. Employers would be put on notice that they must consider the capabilities of a handicapper and not exclude an individual based on a compensable disability. At the same time, employers would realize that when the individual cannot with reasonable accommodation perform essential job functions, there would not be any liability for an adverse employment decision.

CONCLUSION

The Michigan Handicappers’ Civil Rights Act, as interpreted by the Michigan Supreme Court, does not adequately protect handicappers. Because the law precludes accommodation for job-related handicaps, handicappers are disproportionately excluded from the workplace. A proper adaptation of traditional antidiscrimination theory to the handicapper allows for such a disproportionate effect only when it is justified by business necessity—that is, only when accommodating the handicapper would cause the employer undue hardship. If handicappers are to be given the opportunity to succeed without discrimination, the MHCRA must be changed.

The MHCRA should be amended to remove the “job-relatedness” language from the definition of handicap and the prohibition against discrimination. Further, specific affirmative provisions should be deleted because they are redundant. Finally, the definition of a “qualified individual” should be introduced into

(a) Fail or refuse to hire, recruit, or promote a qualified individual because of a handicap.

(b) Discharge or otherwise discriminate against a qualified individual with respect to compensation or the terms, conditions, or privileges of employment, because of a handicap.

(c) Limit, segregate, or classify an employee or applicant for employment in a way which deprives or tends to deprive an individual of employment opportunities or otherwise adversely affects the status of an employee.

Compare the revised text with Mich. Comp. Laws § 37.1202 (1979); see supra note 32. The change both simplifies the statute and makes it more nearly parallel to the comparable provisions in Elliott-Larsen. See Mich. Comp. Laws § 37.2202(a)-(b) (1979).
the statute to resolve the problem of uncertainty in interpretation.

—Aldebaran Bouse Enloe