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EMPLOYMENT PROBLEMS OF THE HANDICAPPED: WOULD TITLE VII REMEDIES BE APPROPRIATE AND EFFECTIVE?

Cornelius J. Peck*

Currently, the federal government so favors deregulation that a proposal extending the protection of Title VII of the Civil Rights Act of 1964 ("Title VII") to the handicapped may appear to be fanciful. Indeed, a principal proponent of such legislation, Senator Harrison Williams, resigned from his position in the United States Senate a year ago, and an equally committed successor has not yet appeared. Nevertheless, a bill to add the handicapped to the classes protected by Title VII was recently introduced in Congress.2

In 1979 the Senate Committee on Labor and Human Resources held two days of hearings on a bill1 that would have added the handicapped to the classes protected by Title VII.4 A number of other bills prohibiting discrimination in employment against the handicapped were also introduced before Congress at that time.5 This growing concern for the problems of the handicapped is reflected by the recent designation of 1981 as the International Year of Disabled People.6 The concern, however, is not entirely recent; a substantial body of legal literature

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Eleanor H. Norton, former Chairperson of the Equal Employment Opportunity Commission, stated in her testimony before a subcommittee of the House Committee on Education and Labor that she believed the addition of a prohibition against discrimination in employment against the handicapped would be an appropriate addition to Title VII. Hearings Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor, 96th Cong., 1st Sess., 82 (1979).

evinces the long-standing and pervasive interest in legal solutions to the problems of the handicapped.\(^7\)

In some respects, the protection currently offered to the employment interests of the handicapped can be considered substantial. For example, existing federal law requires contractors employing persons to perform a contract in excess of $2,500 to take affirmative action to employ and advance handicapped persons in employment.\(^8\) Affirmative action programs are also mandated for disabled veterans.\(^9\) Moreover, a majority of the states now protect the handicapped from employment discrimination under various fair employment practices acts.\(^10\)

There is, however, good reason for dissatisfaction with the effectiveness of current laws. A Labor Department survey completed in 1979 revealed that ninety percent of federal contractors were not complying with the requirements of 29 U.S.C. § 793 (1975) and its implementing regulations, 41 C.F.R. § 60-741.3-4 (1982).

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1975), prohibits discrimination against an “otherwise qualified handicapped individual” under any program or activity receiving federal financial assistance or conducted by any executive agency or the Postal Service. Two courts of appeals have determined that the section does not apply to employment discrimination unless the primary objective of the federal financial assistance is to provide employment. Carmi v. Metropolitan St. Louis Sewer Dist., 620 F.2d 672 (8th Cir.), cert. denied, 449 U.S. 892 (1980); Simpson v. Reynolds Metals Co., 629 F.2d 1226 (7th Cir. 1980). A court of appeals has decided that the prohibition against discrimination in employment is not so limited. Le Strange v. Consolidated Rail Corp., 687 F.2d 767 (3rd Cir. 1982).

A special law respecting disabled veterans and veterans of the Vietnam era requires a party holding a contract for $10,000 or more to take similar action for the benefit of such veterans. Veterans Readjustment Act of 1973 § 403, 38 U.S.C. § 2014 (1979) (promoting maximum employment and job opportunity in United States government employment for disabled veterans and veterans of the Vietnam era).


\(^8\) Rehabilitation Act of 1973 § 503, 29 U.S.C. § 793 (1975). Regulations issued by the Office of Federal Contract Compliance Programs extend the obligation to all operations and facilities of a government contractor, subject to a waiver where facilities have been found separate and distinct from activities related to performance of the contract, 41 C.F.R. § 60-741.3-4 (1982). An administrative law judge has concluded that the Department of Labor cannot require a waiver insofar as it lacks jurisdiction in the first instance.

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1975), prohibits discrimination against an “otherwise qualified handicapped individual” under any program or activity receiving federal financial assistance or conducted by any executive agency or the Postal Service. Id. Three courts of appeals have determined that the section does not apply to employment discrimination unless the primary objective of the federal financial assistance is to provide employment. Carmi v. Metropolitan St. Louis Sewer Dist., 620 F.2d 672 (8th Cir.), cert. denied, 449 U.S. 892 (1980); Simpson v. Reynolds Metals Co., 629 F.2d 1226 (7th Cir. 1980); Trageser v. Libbie Rehabilitation Center, Inc., 590 F.2d 87 (4th Cir. 1978), cert. denied, 442 U.S. 947 (1979). More recently a court of appeals has decided that the prohibition against discrimination in employment is not so limited. Le Strange v. Consolidated Rail Corp., 687 F.2d 767 (3rd Cir. 1982).


with the laws concerning the employment of the handicapped, largely because they lacked knowledge of the law's requirements. In addition, mounting backlogs and limited enforcement have hampered implementation of these laws. This sluggish administrative performance has been made even less tolerable by the substantial number of decisions holding that there is no private right of action to enforce the law as applied to contractors. Although constitutionally based claims have provided protection against handicap discrimination by government employers, the protection currently available to handicapped persons generally is not as broad or comprehensive as that provided classes protected by Title VII. Title VII permits enforcement by aggrieved individuals in privately instituted law suits against both public and private employers. Including the handicapped in the groups protected by Title VII would constitute a substantial expansion of regulation applicable to employer decisions concerning job applicants and employees.

The appeal of the handicapped is so great and the humanistic traditions of our culture so deeply engrained that it is only with great reluctance that one questions whether use of Title VII to provide and expand job opportunities for the handicapped is really in the best interest of the handicapped and the interest of society. Yet, sympathy and compassion for the handicapped, regardless how admirable, must not lead us to adopt expensive but ineffective programs. It appears, for example, that eloquent and moving arguments concerning the human dignity of the handicapped and their "right" to participate as equals in society

12. Hearings Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor, 96th Cong., 1st Sess., 25 (1979) (testimony of Weldon Rongeau) (indicating that at the end of the second quarter of 1979 there was a backlog of 1,940 cases).
13. In August, 1979, the Department of Labor had initiated only 23 administrative complaints of handicap discrimination, of which only five had been settled. News and Background Information, LAB. REL. REP. (BNA) 296 (1979).
precipitated the bus and mass transit legislation that now provides inadequate service to the handicapped at enormous public cost.17

Evaluating whether the handicapped should be brought under the protection of Title VII does not imply that the handicapped do not deserve assistance. Rather, it may be that a model of motivated discrimination is not appropriate for dealing with the employment problems of the handicapped. Even the disparate impact test developed under Title VII18 may not be well-suited for dealing with the range of problems that will be encountered in providing and expanding job opportunities for the handicapped.

Many of the problems of the handicapped are individual problems, affected by both the particular physical or mental condition of the handicapped person and the requirements of the position in which employment is sought. Moreover, the number of handicapped persons in the United States is so great that any attempt to provide a comprehensive program of job opportunities for the handicapped could become an inordinately costly undertaking. In 1973, for example, estimates of the number of handicapped ranged from 7.7 million to 31 million.19

This Article argues that the employment problems of the handicapped


17. This new legislation supplies transportation to only seven percent of the severely handicapped at a cost per ride almost five times as great as that of a taxi plan which would serve 26% of the same population. See generally Congressional Budget Office, Urban Transportation For Handicapped Persons: Alternative Federal Approaches (1979). This report indicates that the transit plan developed by the Department of Transportation — requiring wheelchair lifts and "kneeling" mechanisms on buses, elevators for subways, and adaptation for wheelchairs on one car per train — will serve no more than seven percent of the severely disabled persons at a cost of about $38 per trip. Id. at xii-xiii. The taxi plan developed by the Department is no more economical; it would serve 26% of severely disabled persons at an average cost of about $7.62 per trip. Id. at xii-xiv. The Department's auto plan, which would provide assistance for disabled persons to purchase and specially equip their own cars, would make transportation available for 30% of the severely disabled population at a cost of about $7.33 per trip. Total costs after 30 years would be less under either the taxi plan or the auto plan. Id. at xiv-xvi, 64-65. The estimated cost of adapting the mass transit system (in 1979 dollars) over the next 30 years, equals two and one-half times the former annual federal expenditures on all transit programs ($6.8 billion). The total cost during the same period would be only $4.8 billion for a more flexible and adjustable taxi plan or $6.7 billion for the auto plan. Id. at xii, 45.

The Rapid Transit Department of the City of Los Angeles recently reported that although its 1,140 buses will all be equipped with lifts costing $15,000 each, of the 250,000 to 300,000 daily boardings only three to five will be by persons in need of the lifts. Starr, Wheels of Misfortune, 264 Harper's 8, 13 (Jan. 1982).

18. A practice that is neutral on its face and has a disparate impact on members of a class protected by Title VII will be held a violation of the law unless the employer can establish a business necessity for the practice. See Griggs v. Duke Power Co., 401 U.S. 424 (1971).

19. M. Berkowitz, W. Johnson, & E. Murphy, Public Policy Toward Disability 14 (1976) [hereinafter cited as Berkowitz]. See also Note, Potluck Protection for Handicapped Discriminattee: The Need to Amend Title VII to Prohibit Discrimination on the Basis of Disability,
are not well-suited for treatment under a statutory discrimination model. Underlying this argument is the belief that the concept of discrimination is not adaptable to the problems of the handicapped, and efforts to apply it will only worsen existing problems. Part I begins by defining the meaning of discrimination, and then explores the similarities and differences between discrimination against the handicapped, and discrimination based on race, sex, religion, and national origin. The purpose of this discussion is to provide a basic framework for understanding claims that the handicapped should be protected under a discrimination model like Title VII. Parts II, III, and IV examine the multitude of problems that arise when the employment problems of the handicapped are addressed under a statutory discrimination model. Part II focuses on two specific provisions of Title VII — the bona fide occupational qualifications defense and the accommodations requirement — that would prove extremely difficult to apply to the handicapped. Part III discusses general judicial and administrative concerns that make implementation of a remedy like Title VII problematic, while Part IV explores the "disincentives" that would encourage the handicapped not to take advantage of a statutory discrimination remedy, were it to exist. Finally, Part V proposes alternative methods for improving the employment prospects of the handicapped that avoid the problems of a statutory discrimination model.

I. COMPARING THE HANDICAPPED WITH TRADITIONAL TITLE VII PLAINTIFFS

A. The Meanings of Discrimination

Employment discrimination 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. Traditionally, the concept of discrimination has involved the element of motivation. The actor or decision-maker imposes different treatment...
out of a belief that it is right, proper, or just that variant treatment be practiced whenever that factor is noted. Title VII litigation has developed the phrase "disparate treatment" for cases in which motivated discrimination is practiced.\textsuperscript{20} Frequently, motivated discrimination stems from a prejudice that attributes certain supposed characteristics or deficiencies to members of a class without regard for whether the individual involved has those characteristics or suffers from those deficiencies. It is this prejudice, rather than an individual worker's inability to perform in the workplace, that leads to the denial of job opportunities.

The Civil Rights Act of 1964 expanded upon the concept of employment discrimination by proscribing employment practices that, although neutral on their face, have a significant disparate impact upon persons of different races, sex, religion, or national origin. Under the Act, practices not based on a business necessity are deemed unjustified and arbitrary barriers to employment, adversely affecting protected classes. Title VII case law has established that such practices are unlawful employment practices.\textsuperscript{21}

The American public is not committed to the propositions that differences in race should be irrelevant for all employment determinations, and that differences in sex, religion, and national origin almost always should be irrelevant. Variant treatment of employees on these bases is generally considered to be anti-social behavior. There appears to be no equal commitment, however, to the proposition that a physical or mental handicap is always, or almost always, irrelevant to qualification for employment. Variant treatment on the basis of handicaps that impair an employee's ability to work is not likely to be considered anti-social behavior. It does not easily fit within the traditional perjorative concept of discrimination.

\textit{B. Similarities Between Employment Problems of the Handicapped and Discrimination Based on Race, Sex, Religion, and National Origin}

Facially neutral employment practices often impose limitations upon the employment of handicapped in ways that are comparable to practices held unlawful under Title VII's disparate impact standard. Using

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stairs in place of ramps, locating of elevator buttons above a level reachable from a wheelchair, and designing doors that are too narrow to permit passage of a wheelchair are common examples. Except for such practices, handicapped persons would be as qualified and capable of performing some types of work as are non-handicapped persons. Thus, insofar as these practices closely resemble neutral unlawful employment practices prohibited by Title VII, an argument can be made that Title VII should be extended to cover the handicapped.

Persons with epileptic conditions are a classic example of a class against which discrimination has been practiced in much the same manner that motivated discrimination has been practiced against racial minorities, women, and persons of certain national origin. In 1956 seventeen states prohibited marriage of epileptics, and eighteen states provided that epileptics should be sterilized. By 1966 only three states prohibited marriage of epileptics, but thirteen still had sterilization statutes. By 1976 the three states which had prohibited marriage of epileptics had repealed those statutes, and the number of states providing for sterilization of epileptics was reduced to five. Thus, as with racial discrimination, substantial progress for epileptics has been made in recent years. Yet, members of a society that so recently visited repressive measures upon a class of persons are not likely to cease discriminating immediately; epileptics will continue to be discriminated against in other ways.

Enormous progress has been made in recent years in the control of epileptic seizures through medication, with the result that today those with epileptic conditions are able to work safely in occupations that previously involved unreasonable danger to themselves and others. Nevertheless, a significant number of employers flatly refuse to hire epileptics without adequate consideration of the effect the condition will have on safety and job performance. A disqualification barring

23. Id. at 30, 42.
25. As long ago as the late 1960's it was estimated that approximately 85% of patients with recurrent seizures could obtain complete or nearly complete control with medication, 8 Encyclopedia Britannica 695 (1968). See also 5 McGraw-Hill Encyclopedia of Science and Technology 42 (1977). A recent study indicates that those who have experienced a seizure but have been in remission for a period of five years, retain a 65% chance of staying in remission for ten years, and a 76% chance of staying in remission for 20 years. For those not taking anti-convulsant drugs the possibility of remaining in remission was considerably lower. See Annegers, Hauser, & Elveback, Remission of Seizures and Relapse in Patients with Epilepsy, 20 Epilepsia 729, 731 (1979).
epileptics from employment solely because they are epileptics serves no business purpose for many employers. Indeed, this refusal to employ results from an overgeneralization about the disability effects of epilepsy that is remarkably similar to the prejudiced decision of a racially biased employer.

Victims of cancer are subject to similar discriminatory treatment in employment. Like epilepsy, cancer is used by lay persons to describe what is medically not a single disease. It is now recognized that cancer consists of more than a hundred different diseases, each of which has its own characteristics and prognosis. Not all malignancies result in early incapacitation or death, but employers frequently refuse to hire a person with a history of cancer. A study performed in 1972 by the California Division of the American Cancer Society concluded that most corporations and governmental agencies in that state discriminated in hiring against job applicants for an average period of five years after treatment for cancer. The study revealed that this discrimination by employers stemmed from concerns that applicants with cancer, or a history of cancer, might not survive long enough to justify the training, that they might need extended periods of sick leave, and that they would cause increases in the cost of health insurance, workers' compensation, and life insurance. Some employers apparently believed that other employees might object to employees who were cancer victims because of the erroneous belief that cancer is contagious.

This discrimination cannot be justified by failure of performance in the workplace. A study performed in 1972 by The Metropolitan Life Insurance Company of its employees who were known to have had treatments for cancer indicated that their work record was good relative to non-cancer employees of the same age and position and that turnover was average. Their absence record was considered satisfactory and work performance adequate as compared with non-cancer employees. The conclusion was that the selective hiring of persons who have been treated for cancer in positions for which they are physically qualified is a sound industrial practice. A study performed one year later of employees of the Bell Telephone system produced similar conclusions. It thus appears that a substantial proportion of those persons who have had

27. Perlman, Rehabilitation in the 1980's In Serving Persons with Invisible Handicaps Such as Cancer, Heart Disease, Epilepsy, 45 J. OF REHABILITATION, Jan.-Mar. 1979, at 16.
29. Id.
treatment for cancer suffer unjustifiable and discriminatory loss of job opportunities.

It is a wide-spread belief that "a good back" is a requirement for work as a manual laborer and that a spinal deformity increases the exposure to injury. Applicants for employment are frequently required to undergo medical examinations which include the taking of X-rays of the spinal column. Some employers impose such a qualification even though the job does not require strenuous work. This requirement makes as much sense as barring the applicant from manual labor, because white collar workers are afflicted with low back pain as frequently as laborers. Indeed, several studies indicate that there is no difference between the incidence of low back pain in groups with low back abnormalities discoverable by X-ray and groups without such abnormalities. Degenerative changes in intervertebral discs are a common accompaniment of chronic back pain, but they usually do not appear in pre-symptomatic patients. It thus appears that a physical abnormality of the spinal column without symptomatic behavior may provide no more of a rational basis for barring a person from employment than the color of his skin.

Furthermore, tensions from lack of familiarity with handicapped persons create barriers similar to those created by lack of familiarity with persons of other races. Normal or non-handicapped persons alter their behavior in the presence of a person with a physical handicap and evaluate the performance of handicapped persons differently than they evaluate non-handicapped persons. Psychological studies provide specific illustrations. In these studies a non-handicapped person was given the appearance of being handicapped in approximately half of his or her encounters with the subjects tested. Non-handicapped persons frequently reported that they were uncomfortable interacting with the apparently handicapped person. Long-term associations between handicapped and non-handicapped persons are avoided and non-handicapped persons come less physically close to handicapped persons.

32. See, e.g., Smith v. Olin Chem. Corp., 555 F.2d 1283, 1287 (5th Cir. 1977) ("Common knowledge and experience reflect the problems degenerative backs create for employer, employee, and fellow employee alike.").
35. Id. at 207.
37. See Klick, Ono, & Hastdorf, The Effects of Physical Deviance Upon Face-to-Face Interaction, 19 HUM. REL. 425 (1966); See also Richardson, Hastdorf, Goodman & Dornbusch, Cultural Uniformity in Reaction to Physical Disabilities, 26 AM. SOC. REV. 241-47 (1961).
38. See Klick, Ono, & Hastdorf, supra note 37.
than to others. In these experimental studies, non-handicapped persons tended to demonstrate less variability in their behavior when interacting with apparently physically disabled persons; they engaged in less nonverbal behavior such as gestures; they terminated the interaction sooner than with non-handicapped persons; and they expressed opinions that were less representative of their actual beliefs than those expressed when interacting with a nondisabled group. In addition, handicapped persons experience difficulty in being accepted as a whole person and judged on the basis of attributes other than their handicaps. Of particular significance for permanence of employment is the tendency of non-handicapped persons to give an unduly favorable initial appraisal of the performance of assigned tasks by apparently handicapped individuals.

These results are not inconsistent with other studies examining reactions to physical handicaps. It has been found, for instance, that ex-mental patients suffer a stigma in employment interviews equal to that of an ex-convict. Sighted persons are shocked when a blind person dances or enters a barber shop unattended. Waiters ask accompanying family or friends what a blind person wishes to eat. It is assumed that mental patients will act in a bizarre way or are always dangerous.

Moreover, it is commonly believed by employers that the handicapped have a higher accident rate and are generally undesirable employees. Yet, a study conducted a 1975 by E. I. DuPont de Nemours and Company of the work records of 1,452 disabled employees revealed that a great majority of those employees had average or better than average ratings for job performance, safety, and attendance. In 1947, pursuant

40. See Kleck, Ono, & Hastdorf, supra note 37, at 435; Richardson, supra note 39, at 21; Kleck, Physical Stigma and Nonverbal Cues Emitted in Face-to-Face Interaction, 21 Hum. Rel. 19, 20-21, 27 (1968).
41. See Richardson, supra note 39, at 20; Mehr, Mehr, & Ault, Psychological Aspects of Low Vision Rehabilitation, 47 Am. J. Optometry 605, 609 (1970); Lukoff, Attitudes Toward the Blind, in Attitudes Toward Blind Persons 1 (1972).
42. See Farina, Sherman, & Allen, The Role of Physical Abnormalities in Interpersonal Perception and Behavior, 73 J. Abnormal Psych. 590, 591-92 (1968); Richardson, supra note 39, at 21; Kleck, supra note 40, at 27; Kleck, supra note 39, at 58-59.
43. See Brand & Claiborn, Two Studies of Comparative Stigma: Employer Attitudes and Practices Toward Rehabilitated Convicts, Mental and Tuberculosis Patients, 12 Community Mental Health J. 168 (1976).
45. See Mehr, Mehr, & Ault, supra note 41, at 609.
46. See Dickerson, Myths and Misconceptions of Mental Illness, 46 J. Rehabilitation 28 (1980).
48. See Sears, The Able Disabled, 41 J. Rehabilitation 19, 21 table E. (1975); see also Equal Employment Opportunity For the Handicapped Act of 1979, Hearings on S. 446 before the Senate
to a request of the Veterans Administration, the Bureau of Labor Statistics conducted a study of the work records of 17,000 handicapped persons, and it came to a similar conclusion. The fear of employers that the handicapped will have a higher accident rate reflects their concern for workers compensation insurance costs. The DuPont Company, however, experienced no greater costs for its disabled employees.

Like racial minorities and women, a disproportionate share of the handicapped experience poverty and low income. The disproportionate amount of poverty experienced by racial minorities is well-established. Women earn on the average less than sixty percent of the wages or salaries received by men. The Social Security Administration's survey of the disabled indicated that in 1966 27.5% of the unemployed reported themselves being disabled, although disabled persons constituted but 13.4% of the labor force. Studies of disability indicate that blacks are more likely to become disabled than whites, probably because

Comm. on Labor and Human Resources, 96th Cong., 1st Sess. 291-92 (1979) [hereinafter cited as Equal Employment Hearings]. Ninety-six percent of the disabled workers had an average or better safety record than other employees; 79% of the disabled employees rated average or better in their attendance records.

49. See Equal Employment Hearings, supra note 48, at 172 (testimony of Bernard Posner, Executive Director of the President's Committee on the Employment of the Handicapped). The handicapped had a better safety record than nonhandicapped, they lost no more time from work, and they had a better productivity record. See also D.O.L. Bull. No. 234, supra note 47, at 6-9; Note, Potluck Protections for Handicapped Discriminatees: The Need to Amend Title VII To Prohibit Discrimination on the Basis of Disability, 8 Loy. U. Chi. L.J. 814, 818 (1977) (arguing that a handicapped individual develops personality traits that enable him to surpass the safety records of other workers). Similarly, after proper training, the mentally retarded have been found to be steady and reliable employees in industries that generally suffer from a very high turnover. See, e.g., Fanning, Hiring the Mentally Retarded in Foodservices System, 71 J. Am. Dietetic Assoc. 51 (1977).

50. See generally Sears, supra note 48.

51. Only 8.7% of the white population was below the poverty level in 1978, compared to 30.6% of the black population and 21.6% of the hispanic population. U.S. Dep't of Commerce, Statistical Abstract of the United States 1980 446 table No. 774 (1980).

52. Id. at 422 table No. 702.


55. See SSSD Report No. 19 supra note 54, at 3; Berkowitz, supra note 19, at 75.
functional limitations affect physical labor and are more likely to produce disability and lack of employment among blacks than among whites. This reinforces the observation that the handicapped are more likely than others to be poor and members of racial minorities.

As with racial minorities, inadequacies in education play a significant part in reducing the job opportunities for the handicapped. This is due in large part to the inadequacy of the educational opportunities that, until recently, were available to handicapped children. In 1970 more than forty percent of the disabled children awarded benefits under the Social Security Act had never been to school and only twenty percent had completed one or more years of high school. Forty-five percent of those persons receiving worker disability benefits in 1970 had an education of eighth grade or less, and approximately thirty-two percent had completed high school. By comparison, in 1970, only 5.3% of the general population had less than five years of schooling and 55.2% of the general population had four years of high school or more.

Lack of educational experience contributes to lack of work experience, and, as with racial minorities, the under-employment of the handicapped is in part caused by their lack of prior work experience. The considerably higher rate of unemployment of black and other minority youths has an effect upon their income not only during their youth, but subsequently in the jobs they receive as mature adults. Lack of experience leaves them untrained and unprepared for better paying jobs. Lack


59. See STATISTICAL ABSTRACT, supra note 56, at 144 table No. 228.

60. In 1978, 13.5% of white males aged 20 to 24 were unemployed, whereas 34.4% of black males of the same age were unemployed. See STATISTICAL ABSTRACT, supra note 56, at 396 table No. 650. The median weekly earnings of white male workers in 1978 was $279, whereas the median weekly earnings of black and other male workers in 1978 was $218. Id. at 420 table No. 691.

61. Ninety-four percent of all men between the ages of 18 and 64 worked at some time during 1965, but only 80% of all the disabled and only 42% of the severely disabled worked at some point during 1965. See SSSD REPORT No. 19, supra note 54, at 12. Fifty-five percent of all women aged 18 to 64 worked at some time during 1965, but only 41% of all disabled women and 29% of seriously disabled women worked in 1965. Id. at 12. Those who become disabled are less likely to obtain job experience that will qualify them for other work. For example, for those with epilepsy, low occupational status has been associated with an early onset of seizures. See Dikmen & Morgan, Neuropsychological Factors Related to Employability and Occupational Status in Persons with Epilepsy, 168 J. NERVOUS AND MENTAL DISEASES 236, 237 (1980). For the year 1965, about half of the disabled working population was employed at semi-skilled or
of prior work experience of handicapped makes it risky for employers to make those investments necessary to provide accommodations for the handicapped. 62

An older person is more likely to suffer from a handicap than is a younger person. In 1966 the median age of the total non-institutional population aged eighteen to sixty-four was forty, whereas the median age of the disabled was fifty; two-fifths of the non-institutional population were in the eighteen to thirty-four age range, while less than a fifth of the disabled fell in that group. 63 The median age for the onset of disability was thirty-seven, 64 and only one-sixth of the severely disabled adults had first become disabled during childhood. 65 The prevalence of severe disability increased sharply with age, from less than two percent of the adults aged eighteen to thirty-four to sixteen percent of those aged fifty-five to sixty-four, a ratio of approximately ten to one. 66 Thus, those who might be victims of age discrimination in employment include many who might also be victims of handicap discrimination in employment.

The 1966 Social Security Survey of the disabled indicated that there may be a similar overlap of sex and handicap discrimination victims. Although the disability prevalence rates in total were the same for men and women, the proportion of women classified as severely disabled (unable to work at all or to work regularly) was considerably higher for women than it was for men. 67 Moreover, a comparison of men and women by diagnostic classification of disability indicated that, with the exception of nervous system disorders, the effect of a disability on employment was much greater for women than it was for men. 68

62. See 1 EMPLOYMENT STANDARDS ADMINISTRATION, U.S. DEPT' OF LABOR, A STUDY OF ACCOMMODATIONS PROVIDED TO HANDICAPPED EMPLOYEES BY FEDERAL CONTRACTORS, FINAL REPORT, iii (1982).
63. See SSSD REPORT No. 19, supra note 54, at 2.
64. OFFICE OF RESEARCH AND STATISTICS, SOCIAL SECURITY ADMINISTRATION, U.S. DEPT' OF HEALTH, EDUCATION, AND WELFARE, REPORT No. 18, FROM THE SOCIAL SECURITY SURVEY OF THE DISABLED: 1966 2-3 (1968). (Only 4.707% of non-institutionalized men aged 18 to 64 were found to be severely disabled, whereas 7.0% of the women in that age group were severely disabled). See also Berkowitz, supra note 19, at 9.
65. See Office of Research and Statistics, Social Security Administration, U.S. DEPT'
Moreover, like members of a racial minority who are frequently shunted into lower paying jobs because of a tacit assumption by employers and employees that arduous, dirty, and unpleasant jobs should be assigned to minority employees, similar assumptions and the rigidity of employment practices result in the assignment of seriously handicapped people to dead-end, low paying jobs with marginal employers.

Finally, many physical and mental handicaps are, like race and sex, unalterable characteristics of the person. To permit those unalterable characteristics to affect employment opportunities has an oppressive effect in a society in which the job a person has is likely to be taken as the definition of what kind of a person he or she is. Just as Black Pride is an assertion of the human worth of black persons, arguments based on the necessity of mainstreaming handicapped assert the dignity and worth of the handicapped.

C. Differences Between Employment Problems of the Handicapped and Employment Problems Created by Racial, Sex, Religious, and National Origins Discrimination

As originally enacted, Title VII of the Civil Rights Act contained no definitions of race, color, religion, sex, or national origin. This reflected a belief that membership in the protected classes could be established with such certainty that definitional problems would not

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70. Craft, Benecki & Shkop, Who Hires the Seriously Handicapped, 19 INDUS. REL. 94 (1980). On the other hand, the successful handicapped person is subject to a threat of over-exposure and overwork similar to that experienced by successful members of racial minorities. E. Goffman, Stigma 25-27 (1963).
hamper enforcement of the statute. There is no justification for comparable confidence that the meaning of handicapped is well-established or self-evident. To the contrary, it is apparent that definitional problems will complicate enforcement of a statutory prohibition of discrimination against the handicapped to a far greater degree than they have with enforcement of a prohibition of discrimination on the basis of race, sex, or national origins.

A common dictionary definition of "handicap" is "a disadvantage that makes achievement unusually difficult; especially: a physical disability that limits the capacity to work." The original definition of a handicapped individual for the purposes of The Rehabilitation Act of 1973 was: "... any individual who (A) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and (B) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services provided pursuant to the Act." The definition was changed the following year by the addition of the following language: "... such term means any person who (A) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (B) has a record of such an impairment or (C) is regarded as having such an impairment." In 1978 the definition added in 1974 was further modified by an amendment providing that for the purposes of the required affirmative action programs and the prohibition of discrimination in federally financed programs:

... such term does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others.

These changes in the statutory definition give a preliminary but inadequate warning of the definitional problems involved.

73. Partial definitions of religion, 42 U.S.C. § 2000e(j), and sex, 42 U.S.C. § 2000e(k), have since been added to remedy problems concerning the coverage of the Act. In addition, the Supreme Court has clarified the meaning of national origin. See Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1973).
74. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 1027 (1971).
Almost all persons suffer some limitation which could curtail a major life activity. Is a person with an I.Q. of ninety handicapped? Are obese or merely fat people so impaired with respect to major life activities that they are handicapped? Are persons who experience chronic pain with no detectible organic source handicapped? Achondroplastic dwarfs most certainly are handicapped, but are midgets, or proportionate dwarfs, handicapped? If so, how short must a person be to suffer an impairment which constitutes a handicap? Is unusually great height a handicap for persons other than basketball players?

Race, color, sex, and national origins are unalterable characteristics. A physical impairment may substantially limit a major life activity, but not permanently. How long must such an impairment exist to become a handicap deserving protection? Are the residual effects of a "whiplash" neck injury persisting for less than one year after the accident, but requiring the use of a Thomas collar, a handicap deserving protection? If so, is a fractured leg or arm similarly a handicap deserving statutory protection until the bone has mended? Does pregnancy become a physical handicap at the very time when limitations on employment would no longer be considered sex discrimination?

Is a condition which causes greater exposure than normal to incapacitating injury a handicap despite present ability to perform? For example, is a person handicapped by a deformity of the spinal column that does not presently interfere with movement but is believed by many to entail a greater risk than normal of injury in the course of heavy manual labor? A federal district court has concluded that, because of its effect upon employment opportunities, such a condition could constitute a handicap. A Wisconsin court held that a job applicant having acute lymphocytic leukemia, which created a risk of infection from normal or minor injuries, was a handicapped individual entitled to pro-
tection if he could perform the job at the time of application. On
the other hand, the Illinois Appellate court reached the conclusion that
being the recipient of a kidney transplant (and therefore restricted from
heavy lifting) was not a physical condition of the sort to which employ­
ment protection extended under either the Illinois Constitution or an
Illinois statute.

Determination of whether a person is handicapped by a condition
which exposes that person to greater than normal risk in a particular
type of employment involves a question of how substantial a barrier
to the employee the condition must be to constitute a handicap. A
person with a spinal deformity which bars that person from heavy
manual labor might perform many other types of work not involving
heavy exertion. It has been suggested that an individual with acrophobia
is not handicapped because he cannot work for an accounting firm
on the thirty-seventh floor of an office building, and that a person
five feet five inches tall is not handicapped because he cannot perform
as the center of a professional basketball team. But should a person
with an allergy to a particular dust or chemical be considered handi­
capped if that allergen is found only in a few specialized industrial
plants? Are all fertile women handicapped with respect to employment
involving exposure to toxic substances? A person with sight in only
one eye succeeded in placing on the American Hockey League the
burden of proving that its by-law disqualifying a player with vision of
less than three-sixtieths in one eye was a bona fide occupational
qualification. Similar determination to pursue particular occupations
have appeared in the case reports.

This series of examples — demonstrating how an unusual physical
characteristic may limit employment opportunities in particular activities

82. Chrysler Outboard Corp. v. Department of Indus., Labor and Human Relations, 14 Fair
85. Cf. Chicago, M., St. P. & P. R. R. v. Wisconsin Dep't of Indus., Labor and Human
Relations, 62 Wis. 2d 392, 215 N.W.2d 443 (1974) (employee with a history of asthma assigned
to perform cleaning work in a railroad diesel house is a handicapped person entitled to protec­
tion provided there is no showing that the work has hazardous side effects).
87. See Southeastern Community College v. Davis, 442 U.S. 397 (1979) (sustaining a col­
lege's refusal to make major adjustments in its nursing program to permit a student suffering
from a serious hearing disability to participate in a clinical training program); Simon v. St. Louis
County Police Dep't, 14 Fair Empl. Prac. Cas. (BNA) 1363 (E.D. Mo. 1977) (dismissing the
claim of a former police officer who, because of a service-related injury, sought re-employment
with appropriate accommodation for his handicap). Doss v. General Motors, 25 Fair Empl.
Prac.Cas. (BNA) 419 (C.D. Ill. 1980) (inability to wear ear protection because of chronic ear
infections not sufficient to hold employee handicapped within the meaning of an Illinois statute).
But cf. Chicago, M., St. P. & P. R. R. v. Wisconsin Dep't of Indus., Labor and Human Rela­
tions, supra note 85.
— does not justify a conclusion that the problems of the handicapped in employment occur only because of individual job preferences. As mentioned above, in many situations commonly accepted views of the handicapped do produce what closely resembles the bias and prejudice experienced by minorities and women. The examples do, however, establish that employment disabilities of the handicapped are affected by the individual's job preferences in a manner not associated with the comprehensive job bias experienced by racial minorities and women. A consequence is that, by chance, a handicapped applicant for work may place upon an employer the burden of proving that absence of the handicapping condition is a requirement that has a business justification or is a bona fide occupational qualification.

II. APPLYING TITLE VII: THE PROBLEM OF INCONGRUOUS PROVISIONS

A. Bona Fide Occupational Qualifications, Business Necessity, Testing

Section 703(e) of Title VII of the Civil Rights Act\(^\text{88}\) contains an express exception from the prohibition of classification of employees on the basis of religion, sex, or national origin in those instances in which religion, sex, or national origin is "a bona fide occupational qualification [bfoq] reasonably necessary to the normal operation of that particular business or enterprise." The exception permits classification or different treatment of employees on the criteria that would otherwise be prohibited. Thus, it is not illegal to consider only women to play the part of a female in a play or to permit only persons with certain religious convictions to perform religious ceremonies.

The phrase "reasonably necessary to the normal operation" suggests that the bfoq defense should be recognized — even though it bars from employment an individual who might be capable of performing the job — where the expense of testing the applicant's ability to perform would be excessive. This version of the bfoq defense has not gained acceptance in cases arising under Title VII. The Equal Employment Opportunity Commission has issued guidelines stating that the bona fide occupational qualifications defense for sex and national origins should be narrowly construed,\(^\text{89}\) and the courts have generally agreed.\(^\text{90}\) As a result, courts have required proof that substantially all persons barred from employment by a bfoq requirement would be unable to perform the job.\(^\text{91}\)


\(^{91}\) See, e.g., Weeks v. Southern Bell Tel. and Tel. Co., 408 F.2d 228, 235 (5th Cir. 1969) ("[T]o rely on the bona fide occupational qualification exception an employer has the
Otherwise individual testing is required. 92 Problems with bfoq defenses do not frequently arise under Title VII, because such defenses are seldom recognized. Moreover, sex, national origin, and established religions are established constants. Their effect on job performance can be assessed for all persons of the sex, national origin, or religion involved. That assessment usually can be made on the basis of common experience and common sense. Indeed, common experience and common sense strongly suggest that for most jobs sex, national origin, or religion have no job performance significance.

Power tools, power steering, power brakes and the like have eliminated for many jobs the significance greater physical size and strength may once have had. If unusual strength is required for a job, it is probable that not all men will have such strength, and if an employment or on-the-job test is used for male applicants, such tests can be provided for female applicants. The idea that certain work is unsuitable for women because it is dirty, dangerous, or involves strenuous activity reflects a social judgment about the propriety of women's behavior rather than a judgment about whether the applicant is capable of performing the job. 93 An airline's preference for young, unmarried women as flight attendants may increase business by supporting the fantasies of male passengers, but it does not increase the safety or speed of the transportation provided. 94 A narrow construction of the bfoq defenses under Title VII has largely been possible because narrow constructions do not interfere with safe and efficient operation of businesses.

It is significant, however, that where plausible arguments concerning the safety of operations have been presented in Title VII litigation, courts have not insisted upon a narrow construction of bfoq defenses or required a high level of certainty concerning business justification.

92. The concept of business necessity is related to that of bona fide occupational qualification. It applies to those practices of an employer that are neutral on their face but have a disparate disqualifying impact upon members of protected classes. See, e.g., Griggs v. Duke Power Co., 401 U.S. 424 (1971) (holding that a pre-employment aptitude test disqualifying a disproportionate percentage of members of racial minorities cannot be justified on the grounds of business necessity). Even if a test does not explicitly bar an applicant on racial or national origin grounds, the fact that it has a disproportionate impact upon protected groups may render it an unlawful employment practice unless there is a business necessity for its use. That necessity can be established by proof that there is a statistically significant relationship between performance on the test and performance on the job. See Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.14B(5) (1982). Business necessity is required for other employment requirements that have a disparate impact on protected persons. See, e.g., Dothard v. Rawlinson, 433 U.S. 321 (1977) (height and weight limitations); Gregory v. Litton Systems, Inc., 472 F.2d 631 (9th Cir. 1972) (consideration of arrest record).

93. See, e.g., Weeks v. Southern Bell Tel. and Tel. Co., 408 F.2d 228, 236 (5th Cir. 1969).

The United States Supreme Court recognized sex as a valid bfoq for the position of corrections counselor in an all male penitentiary because of the likelihood that inmates, twenty percent of whom were sex offenders, would attack a woman.95 The possibilities of such attacks were thought to pose a threat not only to the woman but to overall control of the penitentiary, its inmates, and other correctional personnel. According to one Court of Appeals, female flight attendants who become pregnant may be required to stop work as soon as the pregnancy becomes known because of safety considerations.96 Another Court of Appeals has held that a bus company may refuse to consider applicants thirty-five years of age or older for positions as intercity bus drivers without violating the Age Discrimination in Employment Act97 because of safety considerations.98

Handicaps vary greatly in nature and severity, and thus differ from the generally irrelevant but established constants of sex, national origin, and religion. They may be relevant with respect to ability to perform the work required and they may also have a greater significance with respect to safety considerations.

In many cases employers do not require absence of a specific handicap as a job qualification. Refusal to employ in many cases will result from a medical examination or completion of a questionnaire which reveals the presence of the condition constituting a handicap. Each determination will be an individual one. The determination in one case is unlikely to turn into a bfoq for subsequent cases.

A few handicaps have been expressly designated by employers as a disqualification from employment: epilepsy, loss or significant impairment of sight or hearing, a history of heart attacks or heart trouble, or presence of deformities of the spinal column. In these cases, the question will more closely approach that of the bona fide occupational qualification defense under Title VII. Even with these conditions, though, it frequently will not be feasible to establish absence of a condition as a bfoq.

Consider, for example, what might initially be thought of as a question permitting a simple and standard answer: is absence of a condition of epilepsy, even though controlled by medication, a bfoq for employment near machinery or employment as the driver of a motor vehicle?

Hazards posed by machinery vary tremendously. Logging operations and paper mills probably present great hazards to epileptics because the machinery used is likely to turn a brief loss of consciousness into a fatality.\(^9\) On the other hand, machinery in the bottling room of a soft drink manufacturer probably poses relatively few dangers of injury to an epileptic. All states license epileptics to drive private automobiles upon proof that their seizures have been under control for a reasonable period of time.\(^{10}\) Is there a crucial increase, however, from the risk of operation of a private automobile to operation of a taxi, a bus, a large truck, an earth moving tractor, or even a fork lift in a warehouse? Do the varying number of other employees and the range of materials which may be stored in warehouses require different answers for lift drivers in different warehouses?

There is an equally wide range in the effects of what is considered an epileptic condition upon individuals.\(^{101}\) It is correct to state as a generalization that epilepsy is a symptom of brain disturbance. Epilepsy appears in so many conditions, however, that the extent to which an individual is incapacitated by his epileptic condition requires careful and informed medical assessment on an individualized basis. The range of hazards in employment and the variation in epileptic conditions of individuals makes it impossible to establish absence of a condition of epilepsy as a qualification for working near all moving machinery or to conclude that a history of control of seizures by medication qualifies a person for all such employment.

Similar questions arise concerning both the medical assessment of and the significance to job performance for persons who have a history of heart trouble, a record of cancer treatment, vision or hearing loss, or a record of abuse of drugs or alcohol. As with epilepsy, the question of qualification of persons with these conditions for a job involves not only determination of their ability efficiently to perform the assigned tasks, but concern for their own safety, the safety of other employees, and risks to the employer's plant and equipment.

There are at present relatively few decisions concerning the validity of bfoq defenses under existing state and federal legislation. The Supreme Court of Washington did recognize that freedom from epilepsy might be a bfoq for the position of laborer in a smelting plant.\(^{102}\) It concluded that the record before it did not permit the making of

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101. See Dreibus, The Nature of Epilepsy in Epilepsy Rehabilitation 8-27 (G. Wright ed. 1975). Indeed, because of the varying effects of epilepsy, it has recently been suggested that the traditional classification of epileptic seizures be abandoned. Gastaut, Clinical and Electroencephalographical Classification of Epileptic Seizures, 11 Epilepsia 102,114 (1970).
that decision, because the evidence in the record related to the condition and ability of the individual plaintiff applicant and not to epilepsy in general. Similarly, the United States Supreme Court held that a rule of the New York Transit Authority barring from employment persons using narcotics (including methadone) was so "job related" that it provided a defense to a Title VII claim based upon the disparate impact of the rule. The Court implied that it would be a valid bfoq defense if the suit was on the theory that a former drug abuser was a handicapped individual. Similarly, the Court of Appeals for the Fifth Circuit held in a Title VII suit that "a good back" is so related to job performance as a laborer that business necessity justified the denial of employment to a black applicant who had a degenerative bone condition of his spinal column caused by sickle cell anemia. Here, too, the court suggested that the requirement of "a good back" would be a bfoq if the suit was based on the theory that the application had been denied because the applicant was handicapped. Many decisions, however, show no such receptivity to bfoq defenses.

Regulations issued by the Department of Labor to implement Section 504 of the Rehabilitation Act of 1973 leave little room for development of bfoq's concerning handicaps. The rules specifically state that the recipient of a federal grant may not inquire as to whether an applicant for employment is a handicapped person, but must instead limit pre-employment inquiries to the applicant's ability to perform job-related

104. See Smith v. Olin Chem. Corp., 555 F.2d 1283 (5th Cir. 1977). The theory underlying the suit was that barring employment based on the existence of a bone degenerative condition caused a disparate impact on blacks because of the higher incidence of sickle cell anemia among the black population than among the white population.
105. See, e.g., supra note 86 and accompanying text; E. E. Black, Ltd. v. Marshall, 497 F. Supp. 1088 (D. Hawaii 1980) (concluding that while a spinal condition threatening future injury might be a basis under the Rehabilitation Act of 1973 for denying employment to a carpenter apprentice, the propriety of that denial must turn upon medical evidence relating to the applicant's back condition); Connecticut Inst. for the Blind v. Commission on Human Rights and Opportunities, 405 A.2d 618 (1978) (rejecting the use of a bona fide occupational qualification defense to justify an requirement that a teacher's aide in a school for the blind have normal visual acuity); Bevan v. Teachers' Retirement System, 355 N.Y.S.2d 185 (1974) (refusing to permit the firing of a teacher who had become blind without a hearing on the issue of whether the teacher was no longer able to perform his work); Gurmankin v. Costanzo, 556 F.2d 184 (3d Cir. 1977) (refusal to permit a blind applicant for a teaching position to take a qualifying test violated the applicant's constitutional rights); Doe v. Syracuse School Dist., 508 F. Supp. 333 (N.D.N.Y. 1981) (asking a job applicant if he had ever experienced a nervous breakdown or undergone psychiatric treatment held violative of section 504 of the Rehabilitation Act of 1973); Bucyrus-Erie Co. v. Department of Indus., Labor and Human Relations, 90 Wis. 2d 408, 280 N.W.2d 142 (1979) (each allegation of handicap discrimination must be individually evaluated both with regard to the possibility of injury to the handicapped applicant an to other employees); Chicago & North Western R.R. v. Labor and Indus. Review Comm'n, 91 Wis. 2d 412, 283 N.W.2d 603 (1979) (before denying an epileptic applicant employment, a railroad employer must demonstrate there is a reasonable probability that as an employee the applicant would have a seizure).
If the employer routinely requires medical examinations as part of the employment selection process, the examinations must be performed by a physician qualified to make a functional assessment of the individual's residual capacity for work or training. The object is to provide the referring officer adequate information concerning the use of limbs and extremities, mobility and posture, endurance, ability to withstand various working conditions and the use of senses and mental capacity to make decisions on job placement or referral to training programs. The determination is thus made on an individual basis, through a collaborative effort of a medically trained person and a person familiar with the requirements of a job or position. It is specifically provided that the examination or inquiries shall not be made for the purpose of determining whether the applicant is a handicapped person or the severity of the handicap. Such inquiry would be pertinent only if absence of a specific handicap were recognized as a bfoq. The Office of Federal Contract Compliance Programs has proposed similar regulations for administration of Section 503 of the Rehabilitation Act of 1973.

In 1979, Eleanor Holmes Norton, then Chairperson of the EEOC, warned a Senate committee that this method of proceeding was likely to produce a battle of experts. Referring to her experience as Chair of the New York City Commission on Human Rights in enforcing a narrowly drafted prohibition of discrimination against the handicapped, she noted that employers often employed experts to show the disabled person could not do the job and that the Commission, with a limited budget, was forced to search for volunteer expert witnesses. In most cases two experts — one medical and one employment specialist — will be required for each applicant who challenges a denial of employment because of a physical or mental condition. Consequently, preparation of such a defense will be a greater problem for small employers than large employers.

The decisions rejecting bfoq defenses under existing handicap discrimination laws suggest that such defenses would not be frequently

106. See Department of Labor Rules, Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving or Benefiting From Federal Financial Assistance, 29 C.F.R. § 32.15(a) (1982).

107. 29 C.F.R. § 32.15(c) (1982).

108. 29 C.F.R. § 32.15(a) (1982).


recognized if discrimination against the handicapped were prohibited by Title VII. If they are not, the result will be an enormous amount of individual testing.

B. Accommodations

The problems of bona fide occupational qualifications, business necessity, and individual testing become even more complicated when consideration is given to the relationship between those concepts and the Title VII requirement that a reasonable accommodation be made for a handicapping condition.111 Because handicapping conditions are so frequently relevant to ability to perform work, expansion of job opportunities for the handicapped will frequently require accommodations by employers. Some experience with an accommodation requirement has accumulated under existing federal and state legislation prohibiting discrimination against the handicapped although it is both limited and discouraging.112

The Title VII accommodation requirement exists only with respect to the prohibition of discrimination on the basis of religion. The requirement was first set out in guidelines published by EEOC in 1967.113 The guidelines stated that the duty not to discriminate on religious grounds includes an obligation on the part of an employer to make such reasonable accommodation to the religious needs of employees as can be made without undue hardship on the conduct of the employer's business. The guidelines put the burden of proof of undue hardship on the employer. In 1972, Congress expressly added to the statute a requirement of accommodation by an amendment of the Civil Rights Act. It did so by changing the definition of religion to include all aspects of religious practice, "... unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."114


Despite this legislative endorsement, the obligation to make reasonable accommodation was greatly limited by the Supreme Court in *Trans World Airlines v. Hardison.*\(^\text{115}\) The Court held that an employer was not obligated to incur more than a de minimus cost to make an accommodation. This construction of the statute may have been dictated by the consideration that imposition of any more substantial obligation presented a possible conflict with the Constitutional prohibition of the establishment of religion. This concern would not, of course, exist with a statute protecting the handicapped from discrimination. Yet, if the case were followed under a statute prohibiting discrimination against the handicapped, the limited accommodation required would leave many handicapped persons with no protection. It is therefore important to determine whether a more meaningful statement of an accommodation requirement can be put in legislative form.

The Rehabilitation Act of 1973 contains no provision expressly establishing or defining a duty to accommodate. Surprisingly few of the proposals made for amendment of Title VII to prohibit discrimination against the handicapped contain provisions relating to the duty to accommodate.\(^\text{116}\) The Committee Report on the 1979 Senate bill to amend Title VII recognized the importance of a duty to accommodate in a handicap discrimination law as well as the adverse effect which the Supreme Court’s decision respecting religious accommodation would have if incorporated in such a law.\(^\text{117}\) Nevertheless, the Committee did not adopt an express accommodation provision. It was instead content to state its belief that prohibition of discrimination alone required reasonable accommodation unless the employer demonstrated significant hardship.\(^\text{118}\) The absence of an accommodation provision was not for

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118. Senator Javits proposed a change in the bill that would have established a defense for employers who could show that a "significant hardship would result from compliance with the no discrimination requirement"; the amendment was not adopted. See *News and Background Information, 101 Lab. Rel. Rep.* (BNA) 279, 280 (1979).

The committee concluded that a requirement of accommodation flows from the prohibition of discrimination. This conclusion, however, is rendered suspect by the Supreme Court's recent decision in *Monroe v. Standard Oil Co.*, 452 U.S. 549 (1981), holding that the prohibition against discrimination found in the Vietnam Era Veterans' Readjustment Allowance Act does not impose a duty of reasonable accommodation upon an employer.
lack of advice about the need to establish a duty of reasonable accommodation. The importance of that requirement for the proposed legislation had been emphasized at the hearing by the former Chair of EEOC.\footnote{119}

Testimony presented at the Senate hearings indicated that accommodation frequently can be provided for the handicapped without great expense. This argument is supported by the relative ease with which careful architectural planning can provide a workplace free of structural barriers for persons in wheelchairs.\footnote{120} Devices such as visual magnifiers, telephone amplifiers, right and left handed typewriters, cassette tape recorders, and even talking calculators are also now available at prices that do not make employment of the handicapped prohibitive.\footnote{121} Additionally, some jobs can be restructured to accommodate employment of handicapped persons at virtually no cost. A recent study conducted for the Department of Labor of accommodations provided to handicapped employees by federal contractors confirms these facts. Over fifty percent of the accommodations in the study cost nothing; an additional thirty percent cost less than $500; only eight percent cost more than $2000.

The Senate report on the 1979 bill to amend Title VII contained a substantial discussion of the possibilities of accommodation,\footnote{123} which makes its failure to propose an accommodation requirement puzzling. It is possible that exposure to the range and variety of accommodations available for various handicaps produced a conclusion that it was impossible to produce a legislative formulation of an accommodation requirement other than that reduced to insignificance in the \textit{Hardison} decision.

Rules\footnote{124} issued by the Department of Labor to implement Section 504 of the Rehabilitation Act of 1973 and proposed rule of the Office of Federal Contract Compliance Procedures to implement Section 503 of that Act\footnote{125} provide a test for whether a meaningful statement of the duty to accommodate can be administratively formulated.\footnote{126} The Department of Labor rules proposed for application to government contractors require, "... reasonable accommodation to the physical

\begin{footnotes}
\footnote{119}{ See supra note 110.}
\footnote{120}{ See Hearings on S. 446, supra note 110, at 175-76, 179, 292.}
\footnote{121}{ See Hearings on S. 446, supra note 110, at 103, 175, 192-93, 197.}
\footnote{122}{ See \textit{Employment Standards Administration, U.S. Dep't of Labor, 1 A Study of Accommodations Provided to Handicapped Employees by Federal Contractors, Final Report, ii, 29 (1982).}
\footnote{123}{ S. Rep. No. 316, 96th Cong., 1st Sess. 7-10 (1979).}
\footnote{124}{ 29 C.F.R. § 32.1-51 (1980).}
\footnote{126}{ See 29 C.F.R. § 32.1-51 (1980).}
\end{footnotes}
and mental limitations of an employee or applicant unless the contractor can demonstrate that such accommodation would impose an undue hardship on the conduct of the contractor's business. 127 Among the factors to be considered in determining whether the requirement would impose an undue hardship are the size of the operation, the number of employees, the type of facilities, financial resources, and the nature and cost of the accommodation needed.

Although the proposed rules provide a framework for analysis of the problem of accommodation, they certainly do not offer reliable guidance to an employer of what must be done to satisfy an accommodation requirement for a particular job. This inadequacy is not likely to be remedied by better drafting. The lack of guidance reflects the difficulty of making a meaningful generalization about a problem involving myriad variations of limitations imposed upon individuals for the performance of jobs which vary so much with respect to the ability, effort, endurance, and understanding required. The degree to which the rules rely on generalization suggests that the problem is not susceptible to management by specific and controlling rules, and that individualized ad hoc determinations will be needed to determine what accommodation is required for each employee. 128

Our legal system does at times rely upon ad hoc determinations of what is required in particular factual situations. For example, reliance upon the negligence principle in tort law requires a jury's determination of what the reasonably prudent person would have done under like circumstances. Concern for the expense of the process suggests the desirability of a rule of general application for recurring cases. Satisfactory rules, however, are not easily formulated. The classic illustration is the rejection of Justice Holmes's attempt to formulate a rule for all railroad grade crossing cases, with the consequence that most cases of that sort are now presented as jury questions. 129

Alternatively, an administrative agency might be assigned the Herculean task of stating the accommodation obligations in detailed rules for each industry and each type of job. The product, however, would probably become even less manageable than the 761 page Occupational Safety and Health Standards which have been promulgated by OSHA. 130

It thus appears that problems of bona fide occupations qualifications, business necessity, testing, and accommodation will be substantially

128. This conclusion was reached after an extensive Department of Labor study was made of accommodations provided to handicapped employees by federal contractors. Employment Standards Administration, U.S. Dep't of Labor, A Study of Accommodations Provided to Handicapped Employees by Federal Contractors, Final Report, vi-vii (1982).
different and much more complicated than those encountered with respect to prohibitions on the basis of race, sex, religion, or national origin. Adoption of a discrimination model will require a lengthy and expensive effort both in developing the governing principles of law and the medical and vocational expertise essential to providing for its satisfactory administration.

III. JUDICIAL AND ADMINISTRATIVE CONCERNS

The enormous diversity of handicap impairments will create administrative problems for the judiciary or administrative agency charged with enforcing the Act that are much more severe than those encountered in the enforcement of Title VII's prohibitions of discrimination on the basis of race, sex, religion, or national origin. The severity of impairment can vary tremendously between individuals and the significance of the impairment for employment depends upon what job is under consideration.

Practices that violate Title VII have not and will not be eliminated solely through litigation. Educational programs for management and the resulting voluntary compliance with the requirements of the law are major means of eliminating the prohibited practices. Although there are variations from industry to industry and business to business, what amounts to discrimination or disparate treatment on the basis of race, sex, religion, or national origin is, compared to the problems of the handicapped, relatively easy to identify. The EEOC staff has accumulated an expertise with respect to recurring problems. Because many of the problems are similar, an employer charged, for example, with sex discrimination may review its treatment of all female employees with a view to making those adjustments and corrections required by the law.

In contrast, review of an employer's treatment of epileptics, for example, will not provide the same insights about how to treat other handicapped persons or, indeed, other epileptics. Nor will EEOC or any other enforcing agency be able to offer guidance with the specificity it has provided in administration of Title VII in its present form. The task would require a staff with medical expertise concerning each type of impairment which gives rise to disability, and vocational expertise concerning the significance of the impairments upon the whole range of employment opportunities.

Obviously, the threat of litigation and the potential liability has made many employers interested in learning what is required by Title VII. The threat has provided the incentive for much of the voluntarily achieved compliance. It is important to realize, however, that even since 1972, when the EEOC became authorized to institute suits to enforce
Title VII, privately initiated lawsuits have been of greater significance in enforcement of the law than EEOC suits.131 The impact of private litigation has been due in large part to the availability of class actions.132 Class actions not only produce a remedy which is broad and comprehensive; they also generate the substantial attorneys' fees essential to private enforcement of the law.133

Class actions probably would play no comparable role in suits to remedy discrimination in employment against the handicapped. They might be useful in granting partial relief against broad disqualifications from employment, such as rules prohibiting the hiring of any person with a condition of epilepsy or a history of heart disease.134 Yet, given the wide range of epileptic conditions and histories of heart disease and the significance of those impairments for the various jobs it seems unlikely that classes would be broadly defined. On the contrary, the diversity of impairments and their significance in employment requires a case by case appraisal of the qualifications of handicapped persons to perform the particular jobs in question, and courts would recognize this when requested to certify a class.135

Efforts to enforce protection of the handicapped through Title VII litigation are likely to encounter additional problems. In current litigation under Title VII a plaintiff can establish a prima facie case with relative ease, thus shifting to the employer the burden of articulating some legitimate, nondiscriminatory reason for denying him employment.136

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131. In the 12 month period ending December 31, 1981 the United States was plaintiff in only 356 employment civil rights cases. During that same period 5,987 private employment civil rights cases were filed. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, FEDERAL JUDICIAL WORKLOAD STATISTICS DURING THE TWELVE MONTH PERIOD ENDING DECEMBER 31, 1981, A-6, table C-2 (1981). Statistics for the preceding year were similar, Id. at A-10, table C-2. Indeed, recent criticisms of EEOC operations reveal that the agency began a program in 1978 under which it made 201 loans totalling $1.2 million to finance private law suits. EEOC Loans to Title VII Advocacy Groups, News and Background Information, 110 LAB. REL. REP. (BNA) 137 (1982).


134. See, e.g., Davis v. Bucher, 451 F. Supp. 791 (E.D. Pa. 1978) (suit to invalidate city's policy of refusing to employ former drug abusers without consideration of their state of rehabilitation properly brought as class action).

135. Considerations of this sort led the National Association of Manufacturers, which had given its general support to the handicap discrimination bill proposed in 1979, to suggest that the bill be amended to include a provision requiring EEOC to investigate and process only individual cases. Equal Employment Opportunity For The Handicapped Act of 1979, Hearings on S. 446 Before The Senate Comm. on Labor and Human Resources, 96th Cong., 1st Sess. 182 (1979) (Statement of David Braithwaite, Chairman, National Association of Manufacturers). The underlying rationale for the proposal was based on experience with the Rehabilitation Act of 1973 over a five year period.

136. A prima facie case of racial discrimination under Title VII is established when the plain-
To establish a prima facie case the plaintiff must be qualified for a job for which the employer is seeking applicants. For many kinds of employment, particularly assembly line or low skill jobs, this proof is easily established. This is often not true in cases involving the handicapped. Almost every case involving a refusal to hire a handicapped individual, requires expert testimony rather than merely the plaintiff's account of his employment history and experience in comparable jobs. Indeed, as mentioned above, lack of experience is a primary reason for the low employment status of the handicapped.

Further, in current litigation under Title VII plaintiffs make frequent use of statistics to establish discrimination in employment. The diversity of impairments and their significance in various jobs makes it unlikely that statistics could be used to establish discrimination with respect to a particular plaintiff. The fact that an employer has hired few handicapped employees does not provide a basis for concluding that the employer denied a plaintiff the requested employment because of his particular handicap.

Finally, a question remains as to whether the handicapped constitute a sufficiently cohesive group to function effectively as lobbyists, supporting the enforcing agency before Congress and monitoring its performance. Under current Title VII law, conflicts have developed between various minority and women's groups. The existence of more than eighty-five separate programs to assist the handicapped with their various problems testifies to both a diversity in their problems and a single-mindedness concerning particular types of problems. The legislative successes of the blind or coal miners with "black lung"
diseases\textsuperscript{144} are not likely to be surrendered for the benefit of all handicapped. There is no reason to believe that organizations which have had success for members handicapped in a particular way will submerge the interests of those members in the general pool of the handicapped.\textsuperscript{145}

IV. DISINCENTIVES OF A STATUTORY DISCRIMINATION MODEL

A. Benefits

Victims of race or sex discrimination in employment have no financial incentive to preserve their employment limitations. The same is not true of the handicapped, many of whom would lose income — and leisure time — if their handicap no longer barred them from employment. Large amounts of money are now expended for the benefit of the handicapped. More than eighty-five separate programs provide benefits and services for the disabled.\textsuperscript{146} In 1973 expenditures under disability programs constituted 6.3\% of the gross national product. Social Security Disability Insurance benefits to the disabled and their dependents alone quadrupled from about three billion dollars in 1970 to twelve billion in 1978, and in that same time the number of recipients doubled.\textsuperscript{147} A substantial proportion of the severely disabled are presently receiving such payments.\textsuperscript{148} Since 1956, Social Security Disability benefits have equaled those that would have been received upon retirement,\textsuperscript{149} and since 1972 these benefits have included adjustments for increases in the cost of living.\textsuperscript{150} In recent years there has been an increase in the ratio of disability benefits to prior earnings. This increase is one reason for the recent rapid expansion of the number of recipients of Social Security Disability Insurance.\textsuperscript{151}

\textsuperscript{143} See supra note 70 and accompanying text.

\textsuperscript{144} See Berkowitz, supra note 19, at 29.


\textsuperscript{146} See Berkowitz, supra note 19, at 25.


\textsuperscript{148} See supra text accompanying notes 19-20.


For the purposes of Social Security Disability Insurance a disability is defined as an "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment." The Social Security Administration has, pursuant to statutory authorization, issued regulations defining "substantial gainful activity" as an occupation producing earnings in excess of $300 per month. Earnings in excess of this amount could lead to the loss of primary insurance payments of as much as $542.80 per month or total family benefits of as much as $949.90 per month.

The 1966 Social Security survey of the disabled produced statistics confirming the theory that receipt of public income maintenance payments discourages the handicapped from returning to employment: severely disabled married men and their spouses who received no public income maintenance benefits had greater total income than Social Security Disability Insurance beneficiaries; the men produced a higher proportion of that income than did beneficiaries. That incentives affect employment is strongly indicated by statistics establishing that in every category of severity of disablement married men had higher median earnings than non-married. Disabled men are less likely to be employed full time if they are not married. Recent data from the Netherlands, where disability insurance benefits are as much as eighty percent of former earnings, show disability rates over three and one half times those in the United States.

Recent federally financed experiments designed to determine the effect of a negative income tax, give a measure of the disincentive effect from receipt of public income benefits. An analysis of the Seattle and Denver Income Maintenance Experiments indicated that a negative income tax support level at the poverty level produces as little as a 6.2% reduction in the hours worked by husbands and as little as a 22.7% reduc-

158. There are, however, indications to the contrary. A 1966 Social Security study of rehabilitation of the disabled indicated that a slightly greater portion of those persons receiving income-maintenance payments were also receiving rehabilitation services. See Office of Research and Statistics, Social Security Administration, U.S. Dep't of Health, Education, and Welfare, Report No. 12, From the Social Security Survey of the Disabled: 1966 9-10 (1970). This may be partially explained by the facts that those receiving wage replacement benefits suffer more serious impairment, and that referrals from the social agencies administering the programs have been routinized. See id. at 5.
159. See Miller, supra note 151, at 31, 43.
tion in the hours worked by wives.\textsuperscript{160} Another study indicated that the long run effect of a negative income tax was a 7.5\% reduction in the hours of work of husbands and 15.4\% reduction in the hours of work of wives.\textsuperscript{161} A third study suggested that a negative income tax would produce a fifty percent reduction in the amount of work performed.\textsuperscript{162} The disagreement lies not in whether there is a disincentive, but in the strength of that disincentive. The disincentive of guaranteed income probably produces different effects upon different portions of the working population. Those persons with physical or mental impairments are more affected by guaranteed income than the general population.

Victims of racial, religious, or national origins discrimination are probably not excused by family members from responsibility for producing income simply because of the discrimination they experience. The same is probably now true of married women who are victims of discrimination. Although marriage is a factor which typically induces disabled men to return to the workforce, it is possible that spouses and children accept a physical or mental impairment as an excuse for not producing income, particularly if the lost earned income is partially replaced by disability insurance.\textsuperscript{163} Indeed, receipt of disability payments may also prove that the recipient is unable to perform chores or provide other services in the household and therefore is entitled to assistance in personal care activities.\textsuperscript{164}

A recent study of public policies toward the disabled suggests that there is a complex relationship between income-maintenance programs and disability, which includes the possibility that impaired persons are induced to leave the labor force and accept "disabled" status.\textsuperscript{165} The


\textsuperscript{161} SRI INTERNATIONAL, A LONGITUDINAL ANALYSIS OF THE LABOR SUPPLY RESPONSE TO A NEGATIVE INCOME TAX PROGRAM: EVIDENCE FROM THE SEATTLE AND DENVER INCOME MAINTENANCE EXPERIMENTS 35, 43 (1978).


\textsuperscript{163} See Berkowitz, supra note 19, at 90-91 (discussing the need for additional studies on the relationship between familial statutes and disability).

\textsuperscript{164} According to a 1966 Social Security Study, 40\% of all disabled women needed help with housework, whereas 70\% of the disability beneficiaries needed help with housework. Of retired beneficiaries only 39\% needed help with housework. Office of Research and Statistics, Social Security Administration, U.S. DEP'T OF HEALTH, EDUCATION, AND WELFARE, REPORT No. 21, FROM THE SOCIAL SECURITY SURVEY OF THE DISABLED: 1966 3, 9 (1972). Family attitudes toward the possibility of rehabilitation are so important that it has been suggested that the entire family be tested as a unit early in a rehabilitation process. See Westin & Reiss, The Family's Role in Rehabilitation: Early Warning System, 45 J. REHABILITATION 26-29 (1979).

\textsuperscript{165} See Berkowitz, supra note 19, at 141-43. See also Robins & Wai, Work Effort, 6 J. INST. SOCIO-ECONOMIC STUDIES 53 (1981).
study suggests that this is most likely to be the case with an older im-
paired person whose prospects of employment are so diminished that
the ratio of disability benefits to prospective wages renders the
"disabled" status acceptable.\textsuperscript{166}

Indeed, the law concerning Social Security Disability Insurance ac-
cepts as a working hypothesis the proposition that receipt of disability
insurance benefits has a disincentive effect upon employment.\textsuperscript{167} In a
series of amendments to the statute regulating Social Security, Congress
has attempted to minimize the disincentive of accepting employment
at a cost of undergoing a new waiting period to re-establish eligibility.
Recent amendments made in 1980 permit a person a trial work period
of twenty-four months, in which benefits are not received while work-
ing during the last twelve months, but during which one becomes eligi-
ble for renewed benefits if no longer engaged in substantial gainful
activity.\textsuperscript{168} The same amendments eliminated the twenty-four month
eligibility waiting period for Medicare for persons who again become
eligible for disability insurance.\textsuperscript{169} The Senate Finance Committee's
report on the amendments reflected a conviction that the prospect of
losing high disability benefits is a disincentive to a return to permanent
self-support work.\textsuperscript{170}

Thus, even though there are disincentives for the handicapped to return
to employment, these disincentives do not necessarily prove that the
discrimination model is an inappropriate way to improve their em-
ployment prospects. Such disincentives do, however, caution against
expectations that laws prohibiting discrimination against the handicapped
will result in productivity increases comparable to those that can be

\begin{itemize}
\item \textsuperscript{166} Medical commentators have also noted the tendency of disability benefits to perpetuate
disability. See Mikkelson, \textit{The Psychology of Disability}, 7 PSYCHIATRIC ANNALS 90/74, at 97/87
(1977); Rivinus, \textit{The Abuse of Social Security Income}, 7 PSYCHIATRIC ANNALS 85/69, 89/73 (1977);
Wallis, \textit{Negative Incentives to Vocational Rehabilitation}, 38 REHABILITATION LIT. 143 (1977);
SSSD REPORT No. 23, supra note 156 at 17, table F (1973).
\item \textsuperscript{167} The law establishing social security disability insurance originally required a six-month
waiting period to establish disability. Social Security Amendments of 1956, Pub. L. 880, § 103,
70 Stat. 807, 815. This discouraged employment that would result in loss of status as a beneficiary
because it would require undergoing another six-month waiting period to re-establish beneficiary
status. In 1960 Congress amended the law to permit a beneficiary to undertake a trial period
of employment for as much as nine months without loss of qualification. Social Security Amend-
in state approved rehabilitation programs were eligible for a trial work period. If the work ex-
perience indicated that the person could engage in substantial gainful activities, entitlement to
benefits would terminate three months after that ability was demonstrated. \textit{Id.} at 967. The same
amendment added a provision making an individual eligible for disability insurance without a
waiting period if substantial gainful activity became impossible within five years after disability
payments terminated. \textit{Id.}
\item \textsuperscript{168} Social Security Disability Amendments of 1980, Pub. L. No. 96-265, § 303(b)(1)(A),
\item \textsuperscript{169} \textit{Id.} § 103. \textit{See also} H. REP. No. 944, 96th Cong., 2d Sess. 47 (1980).
\item \textsuperscript{170} S. REP. No. 408, 96th Cong., 2d Sess. 32-33 (1980).
\end{itemize}
expected from laws prohibiting discrimination on the basis of race, sex, religion, or national origin.

B. Resistance to a Discrimination Model for Improving Employment Opportunities for the Handicapped

Although the matter does not permit precise measurement, consideration of community standards and values suggests that an allegation of discrimination against the handicapped will be viewed as an allegation of conduct even more contemptible than an allegation of discrimination on the basis of race, sex, religion, or national origin. Those charged with the latter types of discrimination frequently may rationalize that their challenged conduct was only an unthinking continuation of practices adopted at a time when society did not find such conduct objectionable. Their discrimination was not intentional and motivated. This rationalization will be available much less frequently with respect to discrimination against the handicapped. Employment opportunities will be denied the handicapped because an impairment has been noted, and the denial based upon the presence of that impairment. The denials will be intentional and motivated by the belief that such conduct was justified.

Being charged with discrimination against the handicapped presents an obvious conflict with the typical and widely held views that Americans are kind, compassionate, and eager to help the unfortunate. One does not “kick a man when he is down,” “steal from a blind man’s cup,” or “rub salt in a wound.” This attitude probably accounts for experimental findings indicating a tendency of non-handicapped persons to give an unduly favorable or less critical initial appraisal to the performance of assigned tasks by apparently handicapped individuals. This general inclination to aid the handicapped could be destroyed by an anti-discrimination law, for one is less likely to be favorably disposed toward an individual whom one is forced to aid by law than an individual upon whom one chooses to voluntarily confer a benefit.

Because physical or mental handicaps are so frequently job-related, improving employment opportunities will depend in large part upon the willingness of employers to make accommodations for the handicapped. Some accommodations can be made, as noted above, at little expense. Others, however, will require expenditures which cannot be dismissed as de minimus. Experience with an accommodation requirement for religious discrimination does not provide a basis for a confi-

171. See supra note 42; see also Farina, Sherman & Allen, Role of Physical Abnormalities in Interpersonal Perception and Behavior, 73 J. Abnormal Psychology 590 (1968).
dent prediction that legally prescribed adjustments will readily be made. Jobs will have to be restructured, work schedules changed, probationary periods extended, and rest periods provided. The experts in how this may be done are the managers of the businesses involved, not judges, lawyers, doctors, or even the handicapped.

Attitudinal factors related to employing the handicapped will probably be of greater significance than they have been with race and sex discrimination. The psychiatric principle of cognitive dissonance may produce in managers charged with discrimination the conviction that the handicapped cannot perform the job satisfactorily or that accommodations cannot be made economically; the same principle could lead managers who have voluntarily hired the handicapped to conclude that they are equally productive as non-handicapped persons. This concern is heightened when consideration is given to psychological experiments demonstrating that there are substantial barriers to frank and accurate communication between handicapped and non-handicapped persons. Of particular significance is a study indicating that non-handicapped persons significantly preferred to work with a handicapped person who acknowledged his handicap than with a person who did not. The person who makes a claim under a law prohibiting discrimination against the handicapped will, of course, acknowledge the existence of the handicap, but he will assert that it is irrelevant to his employment. Thus, it is suggested that because handicaps are frequently job related, the effect of cognitive dissonance and cultural barriers will be much greater and more frequently prevent satisfactory job adjustment of charges

173. Fear of damage to the relations between disabled persons and employers was the primary reason the British Manpower Services Commission did not adopt an anti-discrimination law to replace the unsatisfactory quota system established pursuant to the English Disabled Persons (Employment) Act of 1944. See British Manpower Services Commission, Review of the Quota Scheme for the Employment of Disabled People — A Report 16 (1981). See also infra text accompanying notes 194-96.


175. See Aronson, supra note 172, at 89-139. The principle of cognitive dissonance assumes people try to maintain consistent views, or cognitions, about themselves and the world in which they live. A person experiences dissonance if his view of himself conflicts with the image he wishes to present to others; as a result, the individual will seek to avoid that dissonance either by changing his view of himself or his view of the world. See generally, L. Festinger, A Theory of Cognitive Dissonance (1957). The argument runs that to avoid cognitive dissonance, an employer charged with discrimination by an employee will find it proper to refuse to employ the employee because the employer does not want to believe he is an evil person who would harm the handicapped. Similarly, under a cognitive dissonance theory, an employer will strive to hire a handicapped person voluntarily because it will suggest to others that the employer is a “good” and humane person.

176. See supra text accompanying notes 37-46.

of discrimination against the handicapped than has been the case with other forms of discrimination.

Concerns of this sort led the authors of a study conducted for the Department of Labor to caution that stringent enforcement of Section 503 of the Rehabilitation Act would change the climate of current attitudes, viewed as fairly favorable and sympathetic toward the disabled, and result in loss of good will and willingness to hire the handicapped. 178

C. Cost Considerations

Employer concerns that hiring the handicapped will result in substantially increased costs for workers' compensation are largely misplaced. 179 Handicapped workers have average or better safety records, and tend to be more careful than non-handicapped workers. Moreover, about three out of four employers in the United States have no basis for concern that their workers' compensation costs might be increased because of employment of the physically handicapped — the number of their employees is so small that they do not have premiums set by an experience rating. 180 Larger employers, however, have not been given adequate protection against injury costs related to handicaps because of the narrow coverage of second injury funds. 181

As mentioned above, 182 employers — particularly those with a large number of employees — can accommodate the handicapped at a relatively insignificant cost. Yet, special devices for particular handicaps are expensive. In 1979, a talking calculator for a blind executive cost $300, and a hard copy machine to assist deaf employees in communicating telephonically cost $400 to $700. One corporation is reported to have purchased two high-speed braille computer printers for use by several blind computer programmers at a cost of $12,000 each. 183 Thus, cost frequently will be an important factor in determining the extent to which employers make accommodations for many handicapped employees.

The cost of medical and hospitalization insurance for employees will almost certainly be increased if employers are required to hire handicapped employees. 184 The 1966 Social Security Survey of the Disabled

179. See supra notes 47-50 and accompanying text.
181. Id. at 66-67.
182. See supra notes 20-21, and accompanying text.
revealed that the medical care costs of disabled adults were almost twice as high as for the total adult population, and even fifty percent higher than for the general population aged sixty-five and older.\(^{185}\)

Wisconsin courts have held that the increased costs of providing medical and hospital insurance for the handicapped do not excuse an employer from its obligations under the state's anti-discrimination law.\(^{186}\)

Additionally, the Senate Committee on Labor and Human Resources, in reporting on the proposed handicapped legislation in 1979, recommended that employers be allowed to exclude pre-existing conditions from insurance plans only if they are justified on sound acturarial principles and are of a limited duration.\(^{187}\) The consequence of this exclusion, however, is that the costs of health care for handicapped persons fall upon the particular employer to which a handicapped person applies for work. This would appear, at least to many people, to be an unfair result, and it may be expected to increase resistance to the discrimination model for improving employment opportunities for the handicapped.

V. ALTERNATIVES

The appraisal offered is discouraging with respect to the potential use of a discrimination model to meet the problems of the handicapped in employment. Litigation of individual claims of right to employment will be too complicated, expensive, and time consuming. Indeed, a discrimination model probably would be counter-productive. Investigation of alternatives is required.

It is important to note at the outset, however, that the handicapped include a disproportionate number of the aged, the uneducated or poorly educated, persons lacking training and job experience, racial minorities, and women.\(^{188}\) These handicapped will receive some assistance from the programs designed to improve the employment opportunities of those groups.

In searching for alternatives it should be remembered that constitutional barriers that prohibit favored treatment of racial minorities, women, or persons of certain national origins or religious conviction\(^{189}\)


\(^{188}\) See generally Berkowitz, supra note 19.

do not bar favored treatment of the handicapped. It is therefore possible
to undertake programs to enhance employment opportunities for the
handicapped which utilize incentives for employers to hire the handi­
capped.

These incentives should not consist of relieving employers from their
normal obligations to employees. There are now more than 3,800 "shel­
tered workshops" in which employees need not be paid the federal
minimum wage. Given the lack of alternative programs "sheltered work­
shops" currently perform a useful function. Yet, an overall ap­
praisal leads to the conclusion that the needs of the handicapped are
not well served by providing substandard employment.

To the contrary, employment prospects for the handicapped can be
substantially increased by requiring employers to meet certain basic
minimum standards which experience has shown can be established with­
out significant expense or burden. Since 1968 buildings owned or leased
by the United States or financed in part by a grant or loan made by
the United States have been required by statute to be constructed in
a manner to ensure whenever possible that physically handicapped
persons have ready access to, and use of, the building. The statute
contains a provision for waiver or modification of the standards.
The experience accumulated under the statute with requests for waivers
must by now be substantial, and should make it possible to state with
considerable certainty the circumstances under which buildings can be
constructed free of architectural barriers to the handicapped. This statute
can be extended to the construction of all new buildings or facilities
which will be used in interstate commerce. Alternatively, the re­
quirements could be imposed on all new buildings for use other than
as private residences and on which a depreciation allowance is recognized
for income tax purposes.

Parking facilities for the handicapped are now common, but there
is no reason not to make them mandatory for parking lots associated
with buildings or facilities in which activities affecting interstate
commerce are conducted. Common sense suggests that banks and other

191. The average pay in sheltered workshops is 78% of the federal minimum wage, see id. at 4; employees are substantially underutilized, see id. at 5; clients move into regular employment at a rate of only 12% per year, see id. at 6; and clients do not receive the fringe benefits usually provided to employees in competitive employment, see id. at 8. The most recent study of sheltered workshops indicates that 83% of employees are paid less than half the minimum wage because employees are able to take advantage of special certificates for exemption under the Fair Labor Standards Act. See General Accounting Office, Stronger Federal Efforts Needed for Providing Employment Opportunities and Enforcing Labor Standards in Sheltered Workshops 16 (1981).
commercial institutions could be required to provide platforms or lifts which would permit persons in wheelchairs to work as cashiers or customer service representatives. It also makes sense to require employers of more than a small number of office workers to have desks that are adaptable to persons in wheelchairs.

The list of feasible but inexpensive means of increasing employment opportunities for the handicapped certainly could be lengthened. Employers should be urged to participate in evaluating studies designed to determine which requirements offer the most to the handicapped at the smallest cost. The requirements would not be imposed because a chance application for employment resulted in a denial which produced litigation and a substantial liability for back pay for failure to make accommodation.

There is an alternative to establishing specified requirements to improve employment prospects for the handicapped. The matter of what adaptations are to be made could be left to the employers by imposing a general obligation that each employer of more than a minimum number of employees have in its employment a fixed percentage or quota of handicapped persons. Such a scheme has long been used in Great Britain under the Disabled Persons (Employment) Acts of 1944 and 1958.194 Under that statute, persons who believe themselves to be disabled may apply for registration of such. If registered, their employment is counted toward filling an employer's quota. Employers are subject to fines and penalties if they increase employment without maintaining the quota established, which currently is three percent for almost all businesses.195 Employers are thus free to provide employment to the handicapped in any manner they choose. Great Britain's experience with this statute has not been an unqualified success, primarily because disabled persons have shown a reluctance to register.196 In recent years, however, similar quota systems have been adopted in West Germany, France, Italy, Belgium, and Luxembourg.197

Employer fears that employment of the handicapped will increase costs should also be addressed. Perhaps the law providing Medicare could be amended to provide reimbursement to employers for increased costs of medical and hospitalization insurance incurred from hiring a handicapped person. Second injury funds could be established for

194. 7 & 8 GEO 6, CH. 10., 9 HALSBURY'S STATUTES OF ENGLAND §§ 24-26 (2nd ed. 1949).
195. BRITISH MANPOWER SERVICES, COMMISSION, THE QUOTA SCHEME FOR THE EMPLOYMENT OF DISABLED PEOPLE 7 (1979) [hereinafter cited as QUOTA SCHEME].
196. BRITISH MANPOWER SERVICES COMMISSION, A REVIEW OF THE QUOTA SCHEME FOR THE EMPLOYMENT OF DISABLED PEOPLE — A REPORT 6-8 (1981). In 1961 the rate of compliance among firms subject to the quota was 61.4%. Id. By 1980 compliance had declined to 35.1%. Id. In May, 1981, there were 103,800 unemployed disabled people who had not registered, whereas there were only 72,300 unemployed disabled persons who had registered. Id. at 10.
197. See QUOTA SCHEME, supra note 195, at 28-31.
all workers' compensation systems to limit an employer's liability for injury of a handicapped worker to the loss which would have occurred absent the prior condition. Second injury funds should also be expanded to cover all disabilities, and not merely total disabilities. These funds should protect employers of the handicapped even if the prior condition was not caused by an industrial injury. If state legislatures do not act on their own initiative, the threat of federal pre-emption can be used.

Monetary incentives for employment of the handicapped might also be used. Indeed, they have already been established in a limited way by Section 51 of the Internal Revenue Code. Currently, persons with physical or mental disabilities who are referred to an employer after receiving rehabilitative services are considered members of "targeted groups." Employers are given a tax credit of fifty percent of the first $6,000 of wages paid to such an employee during his first year of employment and twenty-five percent of the first $6,000 paid to an employee of a targeted group during the second year of his employment.

Given the general reluctance of the disabled to make use of rehabilitative services, restricting employment incentives to those who have completed or are receiving rehabilitative services is probably unwise. For reasons previously discussed it would be wise to avoid a system which depended upon individual examinations and appraisals of the disabling effect for particular employments. An employer's self interest should be put to work in discovering how handicapped persons can most efficiently and effectively be employed in a particular business. To establish that an employee qualifies for periodic tax credits, an employer could institute a simple test requiring proof of a designated physical or mental impairment and a fixed period of unemployment after registering with an employment service. Employment of a person currently receiving Social Security Disability benefits could similarly entitle an employer to a periodic tax credit. The credits should be substantial and of a duration to ensure continued employment. As suggested in the Department of Labor study of accommodation provided to handicapped employees by federal contractors, tax credits would also provide an incentive for employers to make those accommoda-

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200. Id.
202. See supra text accompanying notes 99-110.
tions which are expensive. The loss of tax revenue would be justified by a general reduction in welfare and disability benefits.

Changes should be made in the present Social Security Disability Insurance program to remove the disincentives that now discourage beneficiaries from seeking employment. Current regulations provide that earnings in excess of $300 per month indicate that a beneficiary is capable of substantial gainful activity and hence is ineligible for the benefits. Yet, earnings of that amount produce an annual income of $3,600, which is below the poverty level. Currently, a sixty-two year old person who had had average annual earnings of $10,000 is entitled to disability benefits of $535 per month. It would be irrational to give up those benefits for the purpose of returning to employment at $300 per month. The law and regulations should be changed to permit receipt of a declining portion of the disability benefits as earned income increases to an amount which makes it rational to seek employment.

Rehabilitation programs are seldom used by the handicapped. These programs need review and revitalization. As indicated at the hearings on the 1979 proposed handicapped legislation, modern technology has produced many devices that permit handicapped workers to perform jobs for which they previously would not have been qualified: visual magnifiers, hearing equipment for telephones, talking calculators, and light sensitive wands that allow blind persons to serve as telephone receptionists. Government sponsored research to produce additional similar devices would pay for itself by reducing welfare and disability benefit payments or through the tax on income produced by persons who previously were not employed.

Educational and training programs for the handicapped can do much to improve their employment opportunities. As noted above, lack of education and previous job experiences are major causes of the unemployment of handicapped persons. Specific job training programs for the handicapped should be established. Within a few years many


204. 20 C.F.R. § 404.1574(b)(2) (1982).

205. See Bureau of Census, U.S. Dept. of Commerce, Statistical Abstract of the United States, 445 (1980). The poverty level for a single male in 1979 was $3,855. Id. The poverty level for two persons under 65 was $4,878. Id.


207. The 1966 Social Security Survey of the Disabled found that only 17% of the disabled under the age of 45 received rehabilitation services, and that only seven percent of those over the age of 55 received rehabilitation services. See SSSD Report No. 12, supra note 201, at 4.

208. See supra note 183.

209. See supra text accompanying notes 56-59.
of those severely handicapped persons who have received education pursuant to the Education for All Handicapped Children Act of 1975\textsuperscript{210} will become of employable age, and it will be possible to measure the effect of education upon the employment of the severely handicapped.

It is also important to educate the public in general and employers in particular to the employability of handicapped persons. Misinformation and myths concerning the handicapped — such as those concerning epileptics, persons with cancer, or persons with history of heart disease — must be dispelled. The government can profit from undertaking such an educational program.

CONCLUSION

The employment problems facing the handicapped are serious. The alternatives to a statutory discrimination model suggested in this Article are not intended to offer exclusive or comprehensive remedies. Rather, they are designed merely to spark discussion and debate. The search for solutions, however, cannot yield successful results until courts and legislators come to appreciate the type of remedy that the situation calls for. It is clear that a statutory model prohibiting discrimination will not serve the best interests of the handicapped or of society in general. Once advocates of handicap legislation abandon attempts to apply the concept of discrimination to employment problems, reform efforts can be channeled in more profitable directions — ones that will provide positive reinforcement for employment of the handicapped.
