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EMPLOYMENT DISCRIMINATION AND THE VISUALLY IMPAIRED

DAVID A. YUCKMAN*

The Civil Rights movement of the 1960's taught American society that it was wrong to discriminate against people in education or employment because of a factor over which they have no control. In the employment area, racial, religious, and ethnic minorities fought effectively to gain the opportunity to compete for better jobs. Women, a numerical majority of the population, also fought against discrimination in the workplace, as have older workers. Nonetheless, a number of other minorities have been fighting against discrimination with less success. They are the visually impaired, the developmentally disabled, the hearing impaired, the people confined to wheelchairs, and all other individuals who are considered handicapped.

This article will focus on a particular class of the handicapped, the visually impaired.¹ For the purpose of this article, the class will be defined broadly: from the totally blind to those whose visual impairments are slight, but who have been or could be the victims of employment discrimination because of these impairments. The visually impaired are not a class apart from other handicapped people. To a great extent, their experience parallels that of other handicapped classes. The general ineffectiveness of federal remedies and the reliance on state law to eliminate discrimination affects all handicapped people. Analysis of the federal and state law, however, will center on the visually impaired and their efforts to gain access to employment.

This article contains three parts. The first deals with federal law as it affects the visually impaired, and the handicapped in general, including an examination of the status of the visually impaired under federal case law. The second part focuses on state law as a means for the visually impaired to gain access to jobs. The third part examines the issues of special concern to petitioners with physical handicaps: the

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¹ A number of commentators have explored the education and underemployment problems of the deaf and the physically disabled. See, e.g., Large, *Special Problems of the Deaf Under the Education for All Handicapped Children Act of 1975*, 58 WASH. U. L.Q. 213 (1980); Comment, *Abroad in the Land: Legal Strategies to Effectuate the Rights of the Physically Disabled*, 61 GEO. L.J. 1501 (1973); Note, *The Forgotten Minority: The Physically Disabled and Improving Their Physical Environment*, 48 CHI-KENT L. REV. 215 (1971); Stahler, *Underemployment*, in *THE DEAF MAN AND THE WORLD* 33 (R. Jones & K. Stevenson eds. 1969).

problem of what constitutes the "reasonable accommodation" which must be made for the handicapped, the lack of organization among the various groups of handicapped persons, and the conflict inherent in the federal legislation itself. The article will conclude with recommendations for statutory changes which should better enable the visually impaired, and the handicapped generally, to compete for better jobs.

I. Federal Law and the Visually Impaired

A. *The Standards for Statutory Disability*

A segment of visually impaired persons may fit statutory definitions of "blind" or "disabled." Statutory provisions regarding the "blind" or "disabled" do not pertain to other visually impaired persons. The emphasis in these provisions is not rehabilitation, but financial aid via government largesse. If an individual meets the statutory definition of blindness, he or she qualifies for a special exemption on the federal income tax.² Likewise, the blind applicant may be eligible for benefits under the Social Security Act.³ To receive Social Security benefits, however, the petitioner must prove that he or she cannot work in any conceivable job in any location, a difficult standard to meet.⁴ While the recent federal rehabilitation legislation had no direct impact on the Social Security disability statute, two recent disability cases concerning visual impairments suggest that the legislation may have had the indirect effect of influencing judges to interpret the statute liberally.⁵

² I.R.C. § 151(d) (1976). See generally Note, *Tax Expenditure Analysis of I.R.C. § 151(d), The Additional Exemption for the Blind: Lack of Legislative Vision?*, 50 TEMPLE L.Q. 1086 (1977) [hereinafter cited as *Lack of Legislative Vision*]. Under I.R.C. § 151(d)(3), "an individual is blind only if his central visual acuity does not exceed 20/200 in the better eye with correcting lenses, or if his visual acuity is greater than 20/200 but is accompanied by a limitation in the fields of vision such that the widest diameter of the visual field subtends an angle no greater than 20 degrees." The exemption was enacted to alleviate the additional expense which the blind incur as a result of their infirmity. See *Lack of Legislative Vision*, *supra*, at 1093-94.

³ See 42 U.S.C. § 1382c (1976). To determine eligibility benefits for the blind, the Social Security Act uses the same "blindness" standard as I.R.C. § 151(d)(3), *supra* note 2, but also provides that an individual may be considered blind "if he is blind as defined under a state plan approved under subchapter X or XVI of this chapter." 42 U.S.C. § 1382c(a)(2) (1976). See generally Liebman, *The Definition of Disability in Social Security and Supplemental Security Income: Drawing the Bounds of Social Welfare Estates*, 89 HARV. L. REV. 833 (1976); tenBroek & Matson, *The Disabled and the Law of Welfare*, 54 CALIF. L. REV. 809 (1966).

⁴ 42 U.S.C. § 423(d)(2)(A) (1976). See, e.g., *McPherson v. Ribicoff*, 209 F. Supp. 341 (D. Md. 1962). In *McPherson*, a 59 year-old installation supervisor with 42 years service with the telephone company was denied disability benefits despite a left hemianopsia which left him with visual and balance problems. *Id.* at 342. The company considered him disabled, but the court denied him Social Security benefits because he had failed to establish that he could not possibly participate in any gainful activity. *Id.* at 343.

⁵ See *Cornett v. Califano*, 590 F.2d 91 (4th Cir. 1978); *Wolfe v. Califano*, 468 F. Supp. 1018 (W.D. Pa. 1979). The plaintiff in *Cornett* was a former technical secretary who fell vic-

Such liberal interpretation expands the class of individuals who meet the Social Security statutory standard, thus broadening the scope of the statute's remedy.

B. *The Basic Structure of The Rehabilitation Act of 1973*

The Rehabilitation Act of 1973 (the Act) represents the most comprehensive federal attempt to address the needs of handicapped citizens. The Act and subsequent amendments have provided new services to the handicapped in general, and in some cases to the blind in particular.⁶ In addition, several provisions of Title V of the Act deal with the problem of employment discrimination.⁷ These provisions are limited to specific

tim to intercranial pressure which causes nystagmus (an involuntary movement of the eye from side to side), presbyopia (inability to focus on nearby objects), and severe swelling of the left eye. 590 F.2d at 92. She originally was turned down for social security disability benefits because she still could perform such work as dictaphone transcription. *Id.* at 93. The *Cornett* court reversed, stating that the ability to work only limited hours or on an intermittent basis does not constitute the ability to perform "substantial gainful activity." *Id.* at 94. The plaintiff in *Wolfe* was blind in one eye from birth and had severe problems with the other, including glaucoma, anterior cleavage syndrome, keratosis, and adhesions of the iris to the cornea. 468 F. Supp. at 1021-22. Her visual acuity measured 20/30 +, but she could see that well only for a very short time and could perform work only by resting her eye at frequent intervals. *Id.* at 1020. She applied for child's disability on her parents' Social Security, was turned down, and filed a complaint to reverse the decision. *Id.* at 1019. Through a procedure involving hearings, reconsiderations, and appeals, the government rejected her application five times. *Id.* The issue in her case was whether the record contained "substantial evidence" to support the Secretary's finding that the plaintiff had failed to sustain her burden of demonstrating that she was disabled. *Id.*; see *Richardson v. Perales*, 402 U.S. 389, 391 (1971) (substantial evidence standard). The magistrate's report stated that the only time a vocational expert who testified at the hearing indicated that the petitioner was able to work was when he was asked to assume that petitioner was not suffering from the conditions that actually afflicted her. 468 F. Supp. at 1022. The magistrate also stated that the court should consider subjective symptoms and concluded that the petitioner could not work. *Id.* at 1022-23. The judge accepted the magistrate's report and ruled in favor of the petitioner. *Id.* at 1024.

⁶ Title III of the Rehabilitation Act of 1973 (the Act) provided grants for special projects that provide vocational rehabilitation services with some promise of improving services to handicapped persons including older blind individuals. Rehabilitation Act of 1973, Pub. L. No. 93-112, § 304, 87 Stat. 381 (1973) (codified at 29 U.S.C. § 774(b) (1976)) (repealed 1978 and replaced with provision to fund personnel training needs of public and private rehabilitation programs, 29 U.S.C. § 774(b) (Supp. II 1978)). Title III also established a National Center for Deaf-Blind Youth and Adults. *Id.* § 305, 87 Stat. 383 (1973) (current version at 29 U.S.C. § 777c (Supp. II 1978)). The 1974 amendments included giving priority to the blind in hiring for vending facilities in federal buildings. Randolph-Sheppard Act Amendments of 1974, Pub. L. No. 93-516, § 202, 88 Stat. 1623 (codified at 20 U.S.C. § 107(b) (1976)). The 1978 amendments to the Act provided for reader services to the blind. Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, § 314, 92 Stat. 2975 (codified at 29 U.S.C. § 777(d) (Supp. III 1979)).

⁷ In marked contrast to Title V of the Rehabilitation Act, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1976), prohibits race and religious discrimination in any sector of the economy involving interstate commerce. As the legislative history of Title VII stated:

The purpose of this title is to eliminate . . . discrimination in employment based on

areas of employment. Section 501 calls for affirmative action in federal employment and requires all departments to submit their plans to the Civil Service Commission (now the Office of Personnel Management).⁸ Section 503 requires affirmative action in federal contracts valued at more than \$2,500 and gives aggrieved parties the right to file a complaint with the Department of Labor.⁹ Section 504 prohibits discrimination against the handicapped in federally funded employment.¹⁰

Sections 503 and 504 protect only "qualified handicapped individuals." Under the Act, a "handicapped individual" was defined as a person who had a physical or mental disability that "substantially impaired" the individual's employability, and who could "reasonably be expected to benefit in terms of employability from vocational rehabilitation services."¹¹ Amended in 1974, the Act now broadly defines "handicapped individual" as a person who "(i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment."¹²

For employers covered by section 503, the regulations define a "qualified" handicapped individual as a handicapped person "who is capable of performing a particular job, with reasonable accommodation to his or her handicap."¹³ Section 504 defines "qualified" similarly in the employment context.¹⁴

race, color, religion, or national origin. . . . Section 701(a) sets forth a congressional declaration that all persons within the jurisdiction of the United States have a right to the opportunity for employment without discrimination on account of race, color, religion, or national origin. It is also declared to be the national policy to protect the rights of such persons to be free from such discrimination.

H.R. REP. NO. 914, 88th Cong., 2d Sess. 26, *reprinted in* [1964] U.S. CODE CONG. & AD. NEWS 2391, 2401. The Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621-634 (1976), provides further evidence that Congress could enact broad antidiscrimination legislation when it chose to do so. The purpose of the ADEA was "to promote the employment of older workers based on their ability. . . . The prohibitions in this bill apply to employers, employment agencies and labor organization." H.R. REP. NO. 805, 90th Cong., 1st Sess. 1, *reprinted in* [1967] U.S. CODE CONG. & AD. NEWS 2213, 2214; *see* 29 U.S.C. § 621(a)(4) (1976).

⁸ 29 U.S.C. § 791(b) (1976).

⁹ *Id.* § 793(b).

¹⁰ *Id.* § 794.

¹¹ Rehabilitation Act of 1973, Pub. L. No. 93-112, § 7(6), 87 Stat. 361 (current version at 29 U.S.C. § 706(7)(B) (Supp. III 1979)); *see* note 12 *infra*.

¹² 29 U.S.C. § 706(7)(B) (Supp. III 1979). The definition of the protected class was thus expanded to include all handicapped persons who might benefit from rehabilitation services, not just those who might become employable through such services. *See* S. REP. NO. 93-1297, 93d Cong., 2d Sess. 37-41, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 6373, 6388-91. The report gave examples of admission to schools, nursing homes, and programs for the severely disabled when the individuals, even with rehabilitative services, still were not likely to become employable. *Id.* at 37-38, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS at 6388-89.

¹³ 41 C.F.R. § 60-741.2 (1981).

¹⁴ 45 C.F.R. § 84.3(k) (1981).

Section 503 regulations compel an employer to make a "reasonable accommodation" to the handicap of an employee unless the employer can demonstrate that the accommodation "would impose an undue hardship on the conduct of the contractor's business."¹⁵ Section 504 also requires that the employer make a "reasonable accommodation" to handicapped applicants and employees and defines the accommodations that the employer must make in terms nearly identical to the terms contained in the section 503 regulations.¹⁶

Section 503 specifies enforcement by the Department of Labor.¹⁷ The Department has the right to terminate the contract and deny the offender future federal contracts.¹⁸ The Labor Department's Office of Federal Contract Compliance Programs (OFCCP) coordinates enforcement programs.¹⁹ Under section 504, on the other hand, each agency which supervises federally funded programs is responsible for compliance. The section is not self-enforcing and does not place in a single agency the authority to promulgate rules for effective enforcement.²⁰

C. Federal Case Law

The reach of the antidiscrimination provisions of the Act are limited in that they apply only to federal employment, federal contracts, and jobs supported by federal money. Since claims under Title VII of the Civil Rights Act of 1964²¹ are not so limited, people discriminated against for reasons other than handicaps stand in a better position than victims of handicap discrimination. In addition, section 504 of the Act generally does not forbid discrimination against the handicapped by recipients of federal assistance.²² The statute instead requires that the discrimination have some direct or indirect effect on the handicapped persons in the activity receiving federal financial assistance.²³ In addition to these

¹⁵ 41 C.F.R. § 60-741.5(d) (1981).

¹⁶ 45 C.F.R. § 84.12 (1981).

¹⁷ 29 U.S.C. § 793(b) (1976).

¹⁸ 41 C.F.R. § 60-741.28(e) (1981).

¹⁹ See 41 C.F.R. § 60-741.1 (1981) (purpose of affirmative action regulations is to assure compliance with § 503 of the Act).

²⁰ See generally, Note, *Enforcing Section 504 Regulations: The Need For a Private Cause of Action to Remedy Discrimination Against the Handicapped*, 27 CATH. U. L. REV. 345 (1977).

²¹ 42 U.S.C. § 2000e (1976); see note 7 *supra*.

²² See, e.g., *Hall v. Board of County Comm'rs*, 509 F. Supp. 841, 849 (D. Md. 1981) (plaintiff without standing to sue under § 504 when federal funds not specifically designed to pay plaintiff's salary). But see *Poole v. South Plainfield Bd. of Educ.*, 490 F. Supp. 948, 951 (D.N.J. 1981) (court refused to ascertain whether federal money actually spent on school's athletic program).

²³ See *Simpson v. Reynolds Metals Co.*, 629 F.2d 1226, 1232 (7th Cir. 1980) (employee of company participating in federally funded on-the-job training and veteran's programs not within reach of § 504 because he was neither participant in on-the-job program or veteran). See also *Brown v. Sibley*, 650 F.2d 760, 769-70 (5th Cir. 1981) (organization chartered to provide work for blind beyond reach of § 504 because federal dollars did not support jobs in question).

general substantive limitations of section 504, courts have interpreted the section so narrowly that it only reaches new programs.²⁴

Courts have further restricted the reach of the antidiscrimination provisions of the Act by interpreting the Act as not conferring any civil rights, such as a private right of action. As originally enacted, sections 503 and 504 of the Act failed to provide express remedies by which individuals could enforce its guarantees. Several 1978 amendments, however, have refueled debate on whether the statutory framework of the Act implies a private right of action. In 1978, Congress added section 505, which permits courts to award attorneys fees to successful litigants under Title V of the Act.²⁵ Since Title V includes section 503, a number of district courts have reasoned that the amendment evinces congressional approval of a section 503 private remedy.²⁶ Several circuit courts of appeals have refused to recognize the private right of action, however, on the grounds that section 505 is too ambiguous to create a private right of action under section 503.²⁷

In addition, Congress amended section 504 in 1978 to extend to individuals the "remedies, procedures and rights" of Title VI of the Civil Rights Act of 1965, a statute that prohibits racial discrimination in federally funded programs.²⁸ The Fourth Circuit in *Trageser v. Libbie Rehabilitation Center*²⁹ recently transformed this amendment into a severe curtailment of section 504's guarantees. The Fourth Circuit concluded that the 1978 amendments withdrew private remedies to redress handicapped based employment discrimination except in a few specified cases.³⁰ The court relied on a provision of Title VI of the Civil Rights Act of 1964 that limits the authority of government agencies to terminate federal financial assistance to programs that discriminate in employment on the basis of race, color, or national origin.³¹ Since the 1978 Amendments extended to the handicapped only those remedies available under Title VI, the *Trageser* court concluded that the Title VI limitation on funding termination precludes private causes of action to enforce employment rights under section 504.³² The *Trageser* holding thus substantially restricts the class of private recipients of federal funds

²⁴ See, e.g., *Philadelphia Council of Neighborhood Orgs. v. Coleman*, 437 F. Supp. 1341, 1359-60 (E.D. Pa. 1977) (tunnel to link commuter rail lines need not comply with § 504 mass transit requirements because new tunnel constituted improvement to existing lines), *aff'd mem.*, 578 F.2d 1375 (3d Cir. 1978).

²⁵ 29 U.S.C. § 794a (Supp. II 1978).

²⁶ See Note, *Implying a Cause of Action Under Section 503 of the Rehabilitation Act of 1973*, 79 MICH. L. REV. 1093, 1094 (1981).

²⁷ *Id.*

²⁸ 29 U.S.C. § 794 (Supp. II 1978).

²⁹ 590 F.2d 87 (4th Cir. 1978), *cert. denied*, 442 U.S. 947 (1979).

³⁰ *Id.* at 88-90.

³¹ *Id.* at 88; see 42 U.S.C. § 2000d (1976).

³² 590 F.2d at 88-90.

against whom handicapped job applicants can bring actions for employment discrimination.³⁵

In accordance with the "otherwise qualified" standard promulgated by the Department of Labor,³⁴ the Supreme Court has defined narrowly the protected class of the Act. In *Southeastern Community College v. Davis*,³⁵ a handicapped applicant to a nursing program in a community college in North Carolina was denied admittance based on her handicap.³⁶ Her hearing was seriously impaired, but she could understand conversation directed toward her by reading lips.³⁷ The Supreme Court denied the plaintiff's discrimination claim, holding that a college could set reasonable requirements for admission to a clinical program.³⁸ The Court stressed the safety hazards, both to the plaintiff and the hospital's patients, inherent in admitting a seriously handicapped person³⁹ and stated that sufficient modification of the program to ensure safety might constitute such a large scale change as to deny the plaintiff the full benefits of the program.⁴⁰ The Court agreed that a handicap alone should not disqualify a person from a job,⁴¹ but that the "otherwise qualified" language of section 504 required a handicapped individual to meet a program's requirements in spite of his handicap.⁴² In addition, the Court interpreted affirmative action for the handicapped narrowly. Although section 503 requires affirmative action for the federal government and federal contractors,⁴³ section 504 does not require educational institutions to modify their standards to accommodate a handicapped person.⁴⁴ Without an affirmative action requirement, a potential employee or trainee must prove that he or she is qualified despite any handicap. In addition, training institutions are permitted to apply the standards set by employers, thus obviating the need for those employers to actually reject the applicant.⁴⁵ It is possible that the handicapped may someday be barred from professions and skills because training institutions could apply criteria im-

³⁵ See Dystel, *The Courts and the Disabled*, 5 EMPLOYEE REL. L.J. 369, 380 (1980).

³⁴ See text accompanying note 42 *infra*.

³⁵ 442 U.S. 397 (1979). See generally Guy, *Accommodation for the Handicapped: What is the Employer's Duty?*, 5 EMPLOYEE REL. L.J. 350 (1980) [hereinafter cited as Guy].

³⁶ 442 U.S. at 402.

³⁷ *Id.* at 401.

³⁸ *Id.* at 405-07.

³⁹ *Id.* at 401-02.

⁴⁰ *Id.*

⁴¹ See *id.* at 405 n.6.

⁴² *Id.* at 406; accord, 45 C.F.R. § 84.3(k)(3) (1981) (qualified handicapped person defined as handicapped person meeting institution's technical and academic standards).

⁴³ See text accompanying note 9 *supra*.

⁴⁴ 442 U.S. at 413 & n.12.

⁴⁵ In *Davis*, the college consulted with the director of the State Board of Nursing, and the Director advised that the plaintiff's handicap would make it unsafe for her to act as a nurse. *Id.*

posed by employer groups which presume that handicapped people could not effectively perform necessary skills.

In addition to not protecting a applicant who is unqualified because of his handicap, section 504 of the Act does not protect a handicapped job applicant who is found unqualified for reason other than handicap. In *Upshur v. Love*,⁴⁶ a blind teacher in San Francisco contested the denial of an administrative position.⁴⁷ The school district had complied with section 504's requirement that a recipient of federal money "make pre-employment inquiry into the applicant's ability to perform job-related functions."⁴⁸ The federal court for the Northern District of California found that Upshur lacked the qualifications to be an effective administrator.⁴⁹ The school district claimed Upshur was rejected not because of his blindness, but because of other factors, including the lack of a plan to deal with his handicap on the job.⁵⁰ The court found no due process violation, since the school district gave Upshur the required hearing and had not imposed a per se limitation on the promotion of handicapped (including blind) teachers within the system.⁵¹ The opinion stated that the rational basis test applied, since physically handicapped persons are not a suspect class for fourteenth amendment purposes.⁵² The court also stated that the defense had shown that the school system would not have promoted Upshur, even in the absence of the alleged constitutional violation.⁵³

The most effective defense against handicapped petitioners is the Bona Fide Occupational Qualification (BFOQ). If the employer can establish that vision at a certain level is a BFOQ, failure to hire or promote a person whose vision falls below that level can meet the test of rationality required by the fourteenth amendment.⁵⁴ In *Coleman v. Dardin*,⁵⁵ for example, a blind law school graduate who had failed the bar examination was not offered a job as a legal research assistant, although the employer offered the position to people with normal vision as a matter of custom.⁵⁶ The government claimed that ability to read legal material was a BFOQ for research assistants and that plaintiff could not

⁴⁶ 474 F. Supp. 332 (N.D. Cal. 1979).

⁴⁷ *Id.* at 333.

⁴⁸ *Id.* at 335, 342; see 45 C.F.R. § 84.14 (1977).

⁴⁹ 474 F. Supp. at 341-42.

⁵⁰ *Id.* at 335.

⁵¹ *Id.* at 338-39.

⁵² *Id.* at 337; see notes 68-69 *infra*.

⁵³ 474 F. Supp. 332, 337 n.13; cf. *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977). In *Mt. Healthy*, a teacher claimed that he was fired for exercising his first amendment right to free speech. 429 U.S. at 287. The *Mt. Healthy* Court remanded the case, ordering the lower court to determine whether the School Board could show by a preponderance of the evidence that it would have dismissed the teacher in the absence of the constitutionally protected conduct. *Id.*

⁵⁴ See text accompanying notes 68-69 *infra*.

⁵⁵ 13 Empl. Prac. Dec. 6788 (D. Colo. 1977), *aff'd*, 595 F.2d 533 (10th Cir.), *cert. denied*, 444 U.S. 927 (1979).

⁵⁶ 13 Empl. Prac. Dec. at 6789.

perform the job without a reader.⁵⁷ The court agreed, ruling that the job-related criteria were reasonable.⁵⁸

As the foregoing cases indicate, the Act has not influenced federal courts to find for handicapped petitioners complaining of job discrimination. In fact, the only visually impaired plaintiff who has succeeded in obtaining relief on her federal discrimination complaint won on a due process claim unrelated to the Act. In *Gurmankin v. Costanzo*,⁵⁹ a blind teacher's aide accused the Philadelphia school system of discrimination.⁶⁰ She had successfully taught in private Hebrew schools and had been a teacher's aide in the public school system, working with handicapped children.⁶¹ She wanted to teach sighted children, but met with the system's irrebuttable presumption that blind teachers could not function effectively with sighted pupils.⁶² She sued the superintendent of the school system, claiming employment discrimination in violation of her Fourteenth Amendment due process rights.⁶³ She also claimed a violation of the Rehabilitation Act, the purpose of which was to "promote and expand employment opportunities in the public and private sectors for handicapped individuals and to place such individuals in employment."⁶⁴ The *Gurmankin* court found for the plaintiff, reasoning that the interviewer who considered her for the position knew very little about blind people and did not try to assess accurately whether she could actually do the job.⁶⁵ The interviewer's action deprived the plaintiff of the right to compete for the position she wanted and, therefore, violated her due process rights.⁶⁶ The court further noted, however, that physically handicapped people are not a suspect class under the equal protection clause of the fourteenth amendment.⁶⁷ Since the plaintiff was not a member of a

⁵⁷ *Id.* A reader may not be paid by the federal government, or receive any federal benefits. 5 U.S.C. § 3102(b). (Supp. IV 1980). The reader may, however, be a volunteer or else be paid by a nonprofit organization, state vocational rehabilitation agency, or the employee himself. *Id.* Additionally, readers may not receive any federal benefits. *Id.* The *Coleman* court did not discuss the possibility of the petitioner paying a reader out of his salary. Due to new technology, it may soon be unnecessary to hire readers for the blind. See text accompanying notes 150-54 *infra*.

⁵⁸ 13 Empl. Prac. Dec. at 6789.

⁵⁹ 411 F. Supp. 982 (E.D. Pa. 1976), *aff'd*, 556 F.2d 184 (3d Cir. 1977), *vacated on other grounds*, 626 F.2d 1115 (1980), *cert. denied*, 450 U.S. 923 (1981).

⁶⁰ *Id.* at 984-88.

⁶¹ *Id.* at 984.

⁶² *Id.* at 990.

⁶³ *Id.* at 993.

⁶⁴ *Id.*; see 29 U.S.C. § 701(8) (1976) (amended 1978).

⁶⁵ 411 F. Supp. at 988.

⁶⁶ *Gurmankin v. Costanzo*, 556 F.2d 184, 186-87 (3d Cir. 1977), *aff'g* 411 F. Supp. 982 (E.D. Pa. 1976); *cf.* *Cleveland Bd. of Educ. v. LeFleur*, 414 U.S. 632 (1974) (striking down irrebuttable presumption that teachers could not perform teaching duties effectively beyond fourth month of pregnancy).

⁶⁷ 411 F. Supp. at 992 n.8. The *Gurmankin* court stated that, "unlike distinctions based on race or religion, classifications based on blindness can often be justified by the different abilities of the blind and the sighted." *Id.*

suspect class,⁶⁸ discrimination on the basis of handicap could be legally defended against under the easier "rational basis" test.⁶⁹ The *Gurmankin* court elected to decide the case on constitutional grounds rather than under the Rehabilitation Act, because the violation occurred three years before passage of the 1973 legislation.⁷⁰

D. *Administrative Remedies Under the Rehabilitation Act*

Slow progress toward rulemaking, lack of a central agency for enforcement of antidiscrimination provisions, and definitional inconsistencies within and between agencies have combined to make it difficult for handicapped petitioners to find an administrative remedy under the Rehabilitation Act. Different agencies are responsible for each of the antidiscrimination provisions within the Act.⁷¹ There were no rules for enforcement of section 504 until 1977, nearly four years after the passage of the Act.⁷² There has not even been complete agreement within the Department of Health, Education and Welfare (HEW) and its successors over language defining the handicapped. Although there may be little or no difference in intent between the phrases "qualified handicapped individual" and "otherwise qualified handicapped individual," the

⁶⁸ *Id.* If the state action involved classifications which were inherently "suspect," such as those based on race or nationality, the state would have to demonstrate that the classification was necessary to promote a "compelling" state interest. See Burgdorf & Burgdorf, *A History of Unequal Treatment: The Qualifications of Handicapped Persons as a "Suspect Class" Under the Equal Protection Clause*, 15 SANTA CLARA LAW. 855, 900-01 (1976) [hereinafter cited as Burgdorf].

⁶⁹ If the class is not suspect, and if the state action did not affect a "fundamental right" either expressly or impliedly guaranteed by the Constitution, a court should apply the "rational basis" test and uphold the classification if it was reasonably related to a legitimate governmental objective. See Burgdorf, *supra* note 68, at 900-01. *But cf.* *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (racially discriminatory effect calls for strict judicial scrutiny).

⁷⁰ 411 F. Supp. at 989.

⁷¹ Section 501 places responsibility for federal employment of handicapped individuals in the Civil Service Commission, now the Office of Personnel Management. 29 U.S.C. § 791 (1976). The Department of Labor enforces § 503. 29 U.S.C. § 793 (1976). Section 504 was enforced by the Department of Health, Education and Welfare (HEW). 29 U.S.C. § 794 (1976). The Department of Education Organization Act transferred HEW's authority to the Department of Education for educational programs, § 301, 20 U.S.C. § 3441 (Supp. III 1979), and to the Department of Health and Human Services (HHS) for other programs. §§ 509-510, 20 U.S.C. §§ 3508-3509 (Supp. III 1979).

⁷² HEW did not promulgate regulations for the protection of the handicapped until the Action League for Physically Handicapped Adults sued to compel such rulemaking. *Cherry v. Matthews*, 419 F. Supp. 922 (D.D.C. 1976). In ordering rulemaking, the *Cherry* court held that it was a purpose of the Act to direct that new rules be written for the protection of the handicapped. *Id.* at 924. The court retained jurisdiction over the case to ensure that such rules were actually established. See 42 Fed. Reg. 22,676 (1977) (codified in 45 C.F.R. § 84 (1981)). The class of people covered by the regulations parallels those covered by Labor Department rules. See 42 Fed. Reg. 28,678 (1977) (codified in 45 C.F.R. § 84.3(k)(1), (3) (1981)).

fact that a single department could use differing terminologies to define the same population indicates a lack of agreement concerning the class to be protected.⁷³ Between departments, the differences in definitional language are even greater.⁷⁴

Although new Labor Department rules apply to Section 504 by agreement with HEW and its successor departments,⁷⁵ this is only part of the coordination needed to ensure efficient enforcement of the Act. Even though the substantive reach of the Act extends only to people who could perform the jobs they seek despite their handicaps, procedural remedies repudiated in *Trageser* may be resurrected by the Department of Labor. In regulations promulgated in October, 1980, the Department initiated procedures for aggrieved parties to file discrimination complaints with the Labor Department, at least within its jurisdiction over federally funded programs.⁷⁶ In its report, the Department rejected the reasoning of *Trageser* and stated that the limitations on conditions stressed in *Trageser* apply only to private actions, not to the government's own enforcement authority.⁷⁷ The Department also stated that the regulations fall within the authority left to the government under the holding in *Davis* on the theory that situations may arise where a refusal to undertake affirmative action on behalf of the handicapped might become unreasonable and discriminatory.⁷⁸ Under the Labor Department's regulations, aggrieved parties might seek relief through the Department instead of the courts where federally funded programs are concerned. Even so, it is unclear whether an administrative agency can broaden its authority to grant relief through administrative pro-

⁷³ In 45 C.F.R. § 84, HEW mentioned "qualified handicapped" applicants without the word "otherwise" to ensure that the applicant could perform the job successfully. The agency used the example of a blind person who could "otherwise" perform the duties of a busdriver, but should not be given the opportunity to drive a bus. 42 Fed. Reg. 29,551 (1977). The same department proposed in 45 C.F.R. § 85: "A recipient shall make reasonable accommodation to the known physical or mental limitations of an *otherwise* qualified handicapped applicant or employee unless the recipient can demonstrate that accommodation would pose an undue hardship on the operation of the program." See 43 Fed. Reg. 2138 (1977) (emphasis added).

⁷⁴ The Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) has suggested a broader definition of the handicapped than that used by HEW or its subagency, the Office for Handicapped Individuals. In its proposal for changes in 41 C.F.R. § 60-741.2, the OFCCP stated: "For purposes of this Part, a handicapped individual is 'substantially limited' if he or she is likely to experience difficulty in securing, retaining or advancing in employment because of a handicap." 41 Fed. Reg. 16,149 (1976).

⁷⁵ 45 Fed. Reg. 66,706 (1980).

⁷⁶ *Id.* at 66,707.

⁷⁷ *Id.* at 66,708.

⁷⁸ *Id.* Chief Justice Burger has questioned the expansion of the scope of the rules enforcing § 504: "The trial court must . . . decide whether the regulations at issue, which go beyond the carefully worded *nondiscrimination* provision of § 504, exceed the powers of the Secretary under § 504. The Secretary has no authority to rewrite the statutory scheme by means of regulation." *University of Texas v. Caminesch*, 451 U.S. 390, 399 (1981) (Burger, C.J., concurring) (emphasis in original).

ceedings, especially after the legislation enabling the agency to act has already been interpreted by the Supreme Court.⁷⁹

II. State Law: Access To Jobs For The Visually Impaired

As the foregoing discussion reveals, only one visually impaired plaintiff has been successful in asserting a claim based on federal law. With imprecise division of administrative authority and narrow court decisions rendering federal legislation ineffective as a means for relief, state law is often the only source of protection for the handicapped.

Visually impaired plaintiffs first brought state cases for injury claims arising under worker's compensation statutes. The worker's compensation statutes of many states provide compensation for work-related injuries.⁸⁰ The statutes establish benefits for a specified number of weeks at a set percentage of regular salary, depending on the type of accident or injury.⁸¹ Prior to the passage of federal rehabilitation legislation, employers and insurance carriers successfully fought to ensure that workers who sustained eye injuries received no compensation at all or the minimum allowable amount.⁸² More recent cases have resulted in awards of compensation for the petitioners.⁸³

⁷⁹ Cf. *General Elec. Co. v. Gilbert*, 429 U.S. 195 (1976) (regulation enacted contemporaneously with statute should be given more weight than more recent regulation).

⁸⁰ See, e.g., 1 A. LARSON, *THE LAW OF WORKMEN'S COMPENSATION* §§ 1.00 & .10 (1980) (purpose and features of typical act).

⁸¹ *Id.*; see, e.g., MISS. CODE ANN. § 71-3-17 (Supp. 1981); VA. CODE § 65.1-54 (1980).

⁸² See, e.g., *Bacetti v. National Tube Co.*, 65 Ohio Abs. 80, 113 N.E.2d 925 (Ct. App. 1952). In *Bacetti*, the court instructed the jury to award compensation only if the jury found that the injury was the proximate cause of the loss of vision and that at least 25% of vision was lost due to the accident. *Id.* at 81, 113 N.E.2d at 926. The jury was not only required to rule on the technical legal question of proximate cause, but also on the technical medical question of the plaintiff's previous level of vision and what constitutes a 25% loss of vision. *Id.* at 82-83, 113 N.E.2d at 926-27.

⁸³ See, e.g., *Herbst v. Independent School Dist. No. 793*, 292 Minn. 466, 194 N.W.2d 273 (1972) (per curiam); *Shannon v. Turissini*, 190 Pa. Super. 522, 154 A.2d 310 (1959); *Aerosol Corp. of the South v. Johnson*, 222 Tenn. 339, 435 S.W.2d 832 (1968). In *Herbst*, the petitioner's uncorrected vision was 20/100 before the accident, but he could read with glasses. 292 Minn. at 466, 194 N.W.2d at 274. After the accident, his vision deteriorated to 20/300, rendering him legally blind. *Id.* at 466, 194 N.W.2d at 274. The Minnesota Supreme Court affirmed the decision of the Workmen's Compensation Commission and awarded him full compensation for loss of sight. *Id.* at 477, 194 N.W.2d at 274-75. In *Shannon*, the plaintiff lost the sight of an eye in an accident. 190 Pa. Super. at 523, 154 A.2d at 310. The defense claimed that the prior removal of a traumatic cataract from the eye mitigated the later loss of vision. *Id.* at 525, 154 A.2d at 311. The Pennsylvania Superior Court affirmed a lower court decision that awarded full compensation for the loss of the already impaired eye. *Id.* at 527, 154 A.2d at 311-12. In *Aerosol Corp.*, the Tennessee Supreme Court upheld a worker's compensation award based on a 40% loss in vision. 222 Tenn. at 342, 435 S.W.2d at 836. The court ruled that there was sufficient evidence to base the award on uncorrected, rather than corrected, vision, although correction could have reduced plaintiff's vision loss to 10%. *Id.* at 341, 435 S.W.2d at 834, 836.

Recently, states have passed legislation providing aid to handicapped employees.⁸⁴ Most state statutes fall into one of three categories. Some states afford the handicapped protection against discrimination with a provision for a BFOQ.⁸⁵ A number of states provide no antidiscrimination rights for the handicapped.⁸⁶ Other states protect the handicapped against discrimination only in public employment or private employment supported to some extent by state funds, similar to the federal Rehabilitation Act.⁸⁷ A few states have adopted unusual provisions relating to the handicapped.⁸⁸

Recently, state courts have begun hearing claims of job discrimination based on visual impairments. The first such case was decided in New York on the issue of school sports participation.⁸⁹ Shortly there-

⁸⁴ See generally Leap, *State Regulation and Fair Employment of the Handicapped*, 5 EMPLOYEE REL. L.J. 382 (1980); Note, *Access to Buildings and Equal Employment Opportunity For the Disabled: Survey of State Statutes*, 50 TEMPLE L.Q. 1067 (1977).

⁸⁵ See, e.g., ALASKA STAT. § 47.80.010 (Supp. 1979); COLO. REV. STAT. § 24-34-402 (Supp. 1980); CONN. GEN. STAT. ANN. § 46a-60 (West Supp. 1981); D.C. CODE ANN. § 6-1705 (1981); FLA. STAT. ANN. § 23.167 (West Supp. 1981); GA. CODE ANN. § 66-504 (Supp. 1981); HAWAII REV. STAT. § 378-2 (Supp. 1979); ILL. ANN. STAT. ch. 68, § 2-105 (Smith-Hurd Supp. 1981); KY. REV. STAT. § 207.150 (1977); LA. REV. STAT. ANN. § 46-2254 (West 1981 Supp.); MICH. COMP. LAWS § 37.1102 (Supp. 1981); MO. ANN. STAT. § 296.020 (Supp. 1981); N.J. STAT. ANN. § 10:5-4.1 (West Supp. 1981); R.I. GEN. LAWS § 28-5-7 (1979); VT. STAT. ANN. tit. 21, § 495 (Supp. 1981); VA. CODE § 40.1-28.7 (1981); WASH. REV. CODE ANN. § 49.60.030 (Supp. 1981); W. VA. CODE § 5-11-9 (Supp. 1981); WIS. STAT. ANN. § 111.31, 32(f) (West Supp. 1981).

⁸⁶ States affording no protection from employment discrimination include Arizona, Arkansas, Delaware, Maine, Massachusetts, Mississippi, Montana, New Hampshire, North Dakota, Ohio, Oklahoma, Pennsylvania, South Dakota, Texas, and Wyoming.

⁸⁷ See, e.g., ALA. CODE § 21-7-8 (1975); CAL. GOVT CODE § 11,135 (West 1980); IDAHO CODE § 56-707 (1976); IOWA CODE ANN. § 601D.2 (1975); KAN. STAT. ANN. § 39-1105 (1975); MINN. STAT. ANN. § 43.15, subd. 6 (West Supp. 1980); NEB. REV. STAT. § 20-131 (1977); NEV. REV. STAT. § 284.012 (Supp. 1981); N.M. STAT. ANN. § 28-7-7 (1978); N.Y. CIV. SERV. LAW § 55-b (McKinney's Supp. 1981); N.C. GEN. STAT. § 168-6 (1976); S.C. CODE § 43-33-60 (1976); TENN. CODE ANN. § 8-50-103 (1980); UTAH CODE ANN. § 26-30-3 (Supp. 1981).

⁸⁸ See IND. CODE ANN. § 22-9-1-13(a) (Barns Supp. 1981); MD. ANN. CODE Art. 100, § 95A (1979); OR. REV. STAT. § 240.392 (1979). While professing to oppose discrimination, Indiana does not allow the promotion of handicapped employees unless they qualify in advance for the job they hope to attain, IND. CODE ANN. § 22-9-1-13(b) (Barns Supp. 1981), nor does it mandate any accommodation for the handicapped. *Id.* § 22-9-1-13(c). While the Maryland statute prohibits medical questions unrelated to ability to perform the job on application forms, MD. ANN. CODE art. 100, § 95A(a) (1979), such provision is limited in its effectiveness in helping a handicapped job applicant if the person's handicap is obvious to the interviewer. Oregon allows the severely handicapped to compete for civil work positions via an appointment, rather than a competitive examination. OR. REV. STAT. § 250.392 (1979).

⁸⁹ See *Spitaleri v. Nyquist*, 74 Misc. 2d 811, 345 N.Y.S.2d 878 (1973). See generally Hermann, *Sports and the Handicapped: Section 504 of the Rehabilitation Act of 1973 and Curricular, Intramural, Club and Intercollegiate Athletic Programs in Postsecondary Educational Institutions*, 5 J. COLL. & U.L. 143 (1979). In *Spitaleri*, a school district would not allow a student who was blind in one eye to play high school football because of the risk of total loss of sight. 74 Misc. 2d at 811, 345 N.Y.S.2d at 879. The New York Supreme Court,

after, a federal district court decided *Neeld v. American Hockey League*.⁹⁰ In *Neeld*, the Nova Scotia Voyagers of the American Hockey League (AHL) turned down a hockey player because of his partial blindness.⁹¹ The plaintiff alleged a violation of his civil rights and asked for an injunction.⁹² The federal court granted the injunction under New York's Human Rights Law, after finding that the plaintiff had shown the possibility of irreparable harm and the probability of success on the merits.⁹³ The court stated that the AHL had not shown that binocular vision was a BFOQ.⁹⁴ The court further stated, "A person who is partially or totally blind has a constitutional right not to be discriminated against by an employer or prevented from participating in a college sports program because of his or her visual impairment."⁹⁵ While this statement reached far beyond the issues of the case and must be considered dictum,⁹⁶ it represents the first time a court made such a sweeping statement about the rights of the visually impaired.

In *Zorick v. Tynes*,⁹⁷ a blind applicant had been offered a position teaching physical education but the school authorities revoked the offer

Albany County, affirmed the decision, on the grounds that the Commissioner of Education's decision was based on standard medical criteria and was not arbitrary. *Id.* at 812, 345 N.Y.S. 2d at 879-80. The New York legislature later enacted N.Y. EDUC. LAW § 4409 (McKinney's 1981), specifically to reverse the holding in *Spitaleri*. The statute provided that a pupil could participate fully in sports on presentation of affidavits from two licensed physicians that participation would be "reasonably safe." *Id.*

In *Kampmeyer v. Harris*, 93 Misc. 2d 1032, 403 N.Y.S.2d 638, *rev'd*, 66 A.D.2d 1014, 411 N.Y.S.2d 744 (1978), a proceeding was brought under the New York statute to enjoin a school district from prohibiting a visually impaired student from participating in an athletic program. The court stated that the student could not be kept out of sports participation unless he was classified as handicapped under the Education for All Handicapped Children Act of 1975, 20 U.S.C. § 1401 *et. seq.* (1976), and N.Y. EDUC. LAW § 4404 (McKinney's 1981), 8 N.Y.C.R.R. § 200.5(b) (1980). 93 Misc. 2d at 1034, 403 N.Y.S.2d at 641. These two statutes give the student and parents notice and a hearing prior to the classification of the student as handicapped. 20 U.S.C. § 1415 (1976); N.Y. EDUC. LAW § 4404. The court, nonetheless, refused to grant the requested injunction because of the school's liability for an injury that plaintiff might suffer as a result of sports participation. 93 Misc. 2d at 1034-35, 403 N.Y.S.2d at 641. The Appellate Division reversed and granted the injunction. 66 A.D.2d 1014, 411 N.Y.S.2d 744 (1978).

⁹⁰ 439 F. Supp. 459 (W.D.N.Y. 1977).

⁹¹ *Id.* at 460-61. Article 13(e) of the AHL's By-Laws provided that a player with only one eye, or whose eyes have a vision of only 3/60ths or under, was ineligible to play on an AHL team. *Id.*

⁹² *Id.*

⁹³ *Id.* at 461-63; see N.Y. EXEC. LAW § 296(1)(a) (McKinney's Supp. 1981).

⁹⁴ 439 F. Supp. at 462. The *Neeld* court noted that the plaintiff, in competing for a position on the team, would demonstrate whether his sight loss reduced his hockey ability so much that the impairment would qualify as a BFOQ. *Id.* at n.2.

⁹⁵ *Id.* at 462. Presumably, the right noted by the *Neeld* court arises under the due process clause of the fourteenth amendment.

⁹⁶ Professional, not college, sports participation was at issue in *Neeld*. See text accompanying notes 90-95 *supra*.

⁹⁷ 372 So. 2d 133 (Fla. Dist. Ct. App. 1979).

when they found out the applicant was blind.⁹⁸ The Florida appellate court examined the plaintiff's claims under section 504 of the Act and took notice of HEW regulations requiring employers to "make reasonable accommodation" unless the employer can show that the accommodation would pose an "undue hardship" on the program's operation.⁹⁹ The court found, however, that federal regulations were not controlling.¹⁰⁰ Nonetheless, the *Zorick* court found for the plaintiff on his state claim. The Florida legislature, in implementing a state constitutional prohibition of discrimination in employment,¹⁰¹ had specifically provided that schools could not refuse employment to the blind without a showing that the disability prevented satisfactory work performance.¹⁰² In other words, Florida statutory law provides for the BFOQ exception but presumes the applicant can do the job.¹⁰³ Since the school authorities had failed to show the plaintiff's inability to perform the job, the court awarded the plaintiff relief.¹⁰⁴ Other state courts have reached similar conclusions, protecting blind teachers' employment rights.¹⁰⁵

The North Carolina Supreme Court narrowly defined a visual handicap for antidiscrimination purposes in *Burgess v. Joseph Schlitz Brewing Co.*¹⁰⁶ In *Burgess*, the plaintiff had glaucoma, but the disease was under control and his corrected vision was 20/20.¹⁰⁷ Schlitz refused to hire the plaintiff because of his glaucoma, and the plaintiff filed an employment discrimination suit. Schlitz defended by asserting that the plaintiff was not a handicapped person, and therefore not a member of the state statute's protected class, because the disease was under control.¹⁰⁸ The state court of appeals held that the remedial nature of the state statute required broad construction to effectuate the legislative purpose of aiding the handicapped.¹⁰⁹ The state supreme court reversed,

⁹⁸ *Id.* at 136.

⁹⁹ *Id.* at 138; see 45 C.F.R. § 84.12(a) (1980).

¹⁰⁰ 372 So. 2d at 138-40. The *Zorick* court offered four reasons that federal regulations were not controlling: (1) § 504 provides no private cause of action; (2) the Florida court could not monitor compliance with § 504's provisions; (3) the plaintiff was not barred from all jobs by irrebuttable presumption; and (4) the School Board's action would pass the rational basis test. *Id.*

¹⁰¹ See FLA. STAT. ANN. CONST. art. I, § 2 (West Supp. 1981) (providing that "no person shall be deprived of any right because of race, religion or physical handicap").

¹⁰² 372 So. 2d at 141; see FLA. STAT. § 413.08(3) (Supp. 1981).

¹⁰³ 372 So. 2d at 141-42.

¹⁰⁴ *Id.*

¹⁰⁵ See, e.g., *Fischer v. Wisconsin Dept. of Indus., Labor and Human Relations*, 19 Empl. Prac. Dec. ¶ 9010 (Wis. Cir. Ct. 1979) (school system ordered to accommodate blind teacher in performance of classroom duties to conform to state law); *Bevan v. New York State Teachers' Retirement Sys.*, 44 A.D.2d 163, 165-66, 355 N.Y.S.2d 185, 187-88 (App. Div. 1974) (involuntary retirement of blind teacher without a hearing violated state law).

¹⁰⁶ 298 N.C. 520, 259 S.E.2d 248 (1979).

¹⁰⁷ *Id.* at 521, 259 S.E.2d at 250.

¹⁰⁸ *Id.* at 523, 259 S.E.2d at 251.

¹⁰⁹ 39 N.C. App. 481, 250 S.E.2d 687 (1979).

holding that control of the disease prevented the application of "handicapped" status for the purpose of the legislation.¹¹⁰ The court did not take notice of the provision of the federal legislation which states that a person is handicapped if he is "regarded as having such an impairment."¹¹¹ It was clear in *Burgess* that the defendant viewed the plaintiff as being under some type of disability, but the court held that he was not entitled to protection against discrimination on the basis of that disability.

Since *Gurmankin*, state courts have applied the rational basis test to determine the existence of a BFOQ.¹¹² The Supreme Court of Nebraska applied the test in *McCrea v. Cunningham*.¹¹³ Plaintiff claimed his visual impairment did not prevent him from performing the duties of a firefighter, despite the Omaha Fire Department's requirement that an applicant's vision meet certain standards.¹¹⁴ The court stated that the municipality had a right to set the rules in question and upheld the vision requirement.¹¹⁵ The court noted the Nebraska statute's BFOQ provision and found that the evidence indicated that the plaintiff's disability prevented the performance of the work involved.¹¹⁶ In effect, the *McCrea* court ruled that the plaintiff had the burden of demonstrating that the fire department's vision standard was not rationally based. While finding the vision requirements were job related, the court did not decide whether the particular standard itself was proper.¹¹⁷

Perhaps the classic case of employment discrimination against the visually impaired, if only for its Pinteresque irony, is *Connecticut Institute for the Blind v. Connecticut Commission on Human Rights and Opportunities*.¹¹⁸ In *Connecticut Institute*, the plaintiff was denied a teaching position at the lower school of the Oak Hill School for the Blind because she did not have 20/20 vision.¹¹⁹ Although she had taught successfully in the same institution's upper school, she fell victim to the school authorities' irrebuttable presumption that a person with less than 20/20 vision was incapable of teaching young children with serious, and possibly multiple, handicaps.¹²⁰ The plaintiff's corrected vision was at the

¹¹⁰ 298 N.C. at 528, 259 S.E.2d at 254.

¹¹¹ See 29 U.S.C. § 706(7)(B)(iii) (Supp. III 1979); note 12 *supra*.

¹¹² See notes 68-69 *supra*; cf. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 314-17 (1976) (*per curiam*) (age not suspect class, so age discrimination subject to rational basis test).

¹¹³ 202 Neb. 638, 277 N.W.2d 52 (1979).

¹¹⁴ *Id.* at 640, 277 N.W.2d at 54. The fire department's regulations required vision of 20/30 uncorrected and 20/20 with glasses. *Id.*

¹¹⁵ *Id.* at 648-49, 277 N.W.2d at 58.

¹¹⁶ 202 Neb. at 651, 277 N.W.2d at 59; see NEB. REV. STAT. § 20-131 (1977).

¹¹⁷ See 202 Neb. at 650, 277 N.W.2d at 54-57.

¹¹⁸ 176 Conn. 88, 405 A.2d 618 (1978).

¹¹⁹ *Id.* at 90, 405 A.2d at 619. Ironically, the plaintiff in *Connecticut Institute* was a sighted person, but visually impaired, trying to teach blind children. Compare *Gurmankin v. Costanzo*, 411 F. Supp. 982 (E.D. Pa. 1976), *aff'd*, 556 F.2d 184 (3d Cir. 1977) (plaintiff was a blind teacher trying to teach sighted children).

¹²⁰ 176 Conn. at 90, 405 A.2d at 619.

20/45 or 20/50 level.¹²¹ In the absence of a determination that the 20/20 requirement was an occupational necessity, the Connecticut Supreme Court found the school's vision requirement to be an unfair employment practice under state law.¹²² The court ordered the teacher hired and remanded the case for a determination of back pay and benefits.¹²³

As shown, the visually impaired have won a number of employment discrimination cases on the basis of state law. In *McCrea*, one of only two cases in which petitioners lost, the court decided the case on the narrow issue of validity of governmental rules, not on the broader discrimination or civil rights issues.¹²⁴ Although the federal Rehabilitation Act was in effect when these cases were brought, all were decided under state law. While the federal legislation may have influenced state judges to apply state antidiscrimination laws liberally, such an hypothesis is not subject to empirical analysis.

Despite the impressive success of some plaintiffs under state law, dependence on state law poses two major problems. The primary difficulty is the lack of a uniform set of standards to protect the handicapped from discrimination. Each state has its own substantive and procedural protections for the handicapped.¹²⁵ Courts differ from state to state in their interpretations of laws protecting the handicapped.¹²⁶ The second problem with this dependence on state law is the lack of legislative history to aid courts in interpreting existing state antidiscrimination legislation.¹²⁷

III. Specific Issues Of Concern

A. "Reasonable Accommodation"

The Supreme Court's narrow interpretation of section 504 in *Davis* requires the handicapped, including the visually impaired, to demonstrate their ability to perform the jobs they seek.¹²⁸ Congress and the courts have not made clear what actions constitute the "reasonable accommodation" mandated under the Act.¹²⁹ The Department of Health and Human Services (HHS) has defined reasonable accommodation for the purpose of enforcing section 504 as follows:

¹²¹ *Id.* at 91, 405 A.2d at 619.

¹²² *Id.* at 95, 405 A.2d at 621; *see* CONN. GEN. STAT. ANN. § 46a-60(a) (West Supp. 1981).

¹²³ 176 Conn. at 96, 405 A.2d at 622.

¹²⁴ *See* text accompanying notes 113-17 *supra*.

¹²⁵ *See* text accompanying notes 84-88 *supra*.

¹²⁶ *See generally* Annot., 90 A.L.R.3d 393 (1979).

¹²⁷ *See, e.g.,* *Dillon v. Great Atlantic & Pacific Tea Co.*, 43 Md. App. 161, 164, 403 A.2d 406, 408-09 (Ct. Spec. App. 1979); *Providence Journal Co. v. Mason*, 116 R.I. 614, 622-25, 359 A.2d 682, 686-87 (1976). In *Dillon* and *Providence Journal*, the Maryland and Rhode Island Supreme Courts interpreted legislation on its face, without reference to any legislative history.

¹²⁸ *See* text accompanying notes 35-45 *supra*.

¹²⁹ *See* text accompanying notes 15-16 *supra*.

Reasonable accommodation may include (1) making facilities used by employees readily accessible and usable by handicapped persons, and (2) job restructuring, part-time and modified work schedules, acquisition or modification of equipment or devices, the provision of readers or interpreters, or other similar actions.¹³⁰

The Supreme Court stated its present position on the "reasonable accommodation" issue in a case involving a claim of religious discrimination. In *Trans World Airlines, Inc. v. Hardison*,¹³¹ a worker who lacked sufficient seniority to bid on a job which did not require working on Saturdays demanded that the airline (TWA) allow him to have that day off for religious observances.¹³² The Supreme Court rejected the worker's request, stating that requiring TWA to bear more than a "de minimis" cost in order to give him Saturdays off would impose undue hardship on the airline.¹³³ The Court found that TWA's offer to find a solution within the existing seniority system constituted sufficient accommodation.¹³⁴ In the absence of clear statutory language or legislative history to the contrary, the Court refused to construe the statute to require the employer to discriminate against some employees so that other employees could observe their Sabbath.¹³⁵ The *Hardison* Court thus appeared to recommend a policy that placed the efficient operation of the organization as a whole above the needs of any individual employee.

Read as a precedent applicable to the Rehabilitation Act, *Hardison* seems to indicate that future courts will not require employers to spend large amounts of money to accommodate visually impaired or other handicapped employees.¹³⁶ Read narrowly, however, *Hardison* can be distinguished from the handicap cases. Two significant factors present in *Hardison* rarely appear in handicap cases. The First Amendment prohibition on the establishment of religion¹³⁷ probably caused the Court to tread carefully in balancing a single worker's religious priorities against those

¹³⁰ 42 Fed. Reg. 22,860 (1977) (codified in 45 C.F.R. § 84.12(b) (1980)).

¹³¹ 432 U.S. 63 (1977).

¹³² *Id.* at 67. In *Hardison*, the employee's church prohibited work on the Sabbath, which ran from sunset Friday to sunset Saturday. *Id.*

¹³³ *Id.* at 84 & n.15.

¹³⁴ *Id.* at 83 n.14. In *Hardison*, a collective bargaining agreement was in effect between Trans World Airlines (TWA) and the International Association of Machinists at the plant where Hardison was employed. *Id.* at 67. TWA made efforts through the company's personnel procedures and the union shop steward to reach an accommodation under the seniority system that would satisfy Hardison. *Id.* at 67-68. No agreement was reached. *Id.* at 68-69. The Court found TWA's efforts to constitute reasonable accommodation. *Id.* at 83 n.14. The Court probably was reluctant to order further accommodation, since any change would undermine the collective bargaining agreement, a result not justified for the benefit of a single employee. See *id.* at 81.

¹³⁵ *Id.* at 83-85.

¹³⁶ For an extended discussion of the *Hardison* standard, see generally Guy, *supra* note 35.

¹³⁷ U.S. CONST. amend. I.

of his colleagues.¹³⁸ In addition, the enforcement of a seniority agreement was central in *Hardison*, but generally is not an issue in handicap cases.¹³⁹ Consequently, the broader HHS regulations concerning reasonable accommodation,¹⁴⁰ not applied in *Hardison*, may continue to apply in handicap discrimination cases.

The "reasonable accommodation" requirement and the *Hardison* standard are particularly important with respect to the visually impaired. First, the visually impaired face a unique access problem. Unlike the wheelchair confined, the visually impaired may move within the workplace with little more difficulty than a person of ordinary sight. Access to the workplace itself, however, is much more difficult. With cut-backs in public transportation, the location of many jobs away from public transportation,¹⁴¹ and the prohibitive cost of taxi service, the inability of a visually impaired individual to obtain a driver's license¹⁴² severely restricts access to the workplace.

The access problem of the visually impaired may be analyzed under the federal rehabilitation legislation. While a visually impaired person with an access problem probably would be an "otherwise qualified individual" within the meaning of section 504, it is unclear whether an employer has a duty to accommodate such a person with transportation to the workplace. The affirmative action provision of section 503 may require federal contractors to accommodate an employee's transportation needs.¹⁴³ There is no private enforcement mechanism, however, and in the current economic climate, it seems unlikely that the Department of Labor will enforce affirmative action. Federally assisted employers under section 504 must abide by nondiscrimination but are not required to practice affirmative action.¹⁴⁴ A refusal to hire individuals who cannot provide their own transportation to the workplace probably would be defensible under the rational basis standard.¹⁴⁵

¹³⁸ Cf. *Yott v. North American Rockwell Corp.*, 501 F.2d 398, 404 (9th Cir. 1974) (religious convictions of single employee against paying union dues held subordinate to strong governmental interest in maintaining union shops).

¹³⁹ See 432 U.S. at 83 n.14. See also Edwards & Kaplan, *Religious Discrimination and the Role of Arbitration Under Title VII*, 69 MICH. L. REV. 599 (1971). For a discussion of the special place held by seniority agreements under Title VII but not under § 504 of the Rehabilitation Act, see Cook, *Nondiscrimination in Employment under the Rehabilitation Act of 1973*, 27 AM. U.L. REV. 31, 61-66 (1977).

¹⁴⁰ See text accompanying note 130 *supra*.

¹⁴¹ See generally Note, *The Handicapped and Mass Transportation: The Effectiveness of Section 504 in Implementing Equal Access*, 9 FORDHAM URB. L.J. 895 (1981).

¹⁴² People are denied the privilege of a driver's license at the 20/40 level of visual acuity. See, e.g., CONN. AGENCIES REGS. §14-44-1(b)(10) (1975). See also Connecticut Institute for the Blind v. Connecticut Comm. on Human Rights and Opportunities, 176 Conn. 88, 91, 405 A.2d 618, 619 (1978).

¹⁴³ See 29 U.S.C. § 793(a) (Supp. II 1978).

¹⁴⁴ See *id.* § 794.

¹⁴⁵ See text accompanying notes 68-69 *supra*.

Application of the *Hardison* standard is also unlikely to require an employer to accommodate a visually impaired nondriver.¹⁴⁶ Because of the potential cost involved, providing transportation for a specific handicapped employee probably exceeds the "de minimus" requirement for accommodation mandated in *Hardison*. There are, however, two accommodations which an employer might be required to make within the *Hardison* standard. The employer could be required to make a good faith effort to form a car pool so a visually impaired employee could travel to work with a co-worker. Such an effort would be directly analogous to TWA's efforts to accommodate *Hardison*'s religious preferences by working within the framework of the existing collective bargaining agreement.¹⁴⁷ An employer also might be required to provide visually impaired employees with transportation directly to the workplace. In itself, such accommodation would be more expensive than the *Hardison* standard requires, but the employee benefitting from such service could reimburse the employer for the out-of-pocket costs for such transportation and still be paying less than he would pay for daily taxi service.

In addition to transportation needs, employer accommodation of the visually impaired may require the employer to provide readers or to modify existing equipment or devices. The 1978 amendments provide grants for reader services to be used as part of accommodation.¹⁴⁸ Nonetheless, the *Coleman* court refused to order a federal agency to provide a reader for a blind employee.¹⁴⁹ Whether the expense of a reader for a visually impaired employee exceeds the *Hardison* "de minimis" standard is unclear. With new technology designed to aid the blind, readers may soon be unnecessary. Devices such as the optacon allow the blind to "read" by transferring printed words to sensations recognizable by touch.¹⁵⁰ A blind person can thus "read" ordinary printed (but not handwritten) words, although at a slow rate.¹⁵¹ Since many blind people own their own optacons, the employer may not need to bear the expense of providing an employee with one for use at work.¹⁵² Another device under development for the blind is a machine that translates printed material to audible speech produced by a voice synthesizer.¹⁵³ Such a device does not allow a blind person to "read" as quickly as a sighted person, but the new machines are capable of reproducing words at rates

¹⁴⁶ See text accompanying notes 131-39 *supra*.

¹⁴⁷ See text accompanying note 134 *supra*.

¹⁴⁸ 29 U.S.C. § 77(d) (1978).

¹⁴⁹ See text accompanying notes 55-58 *supra*.

¹⁵⁰ See generally Gutknecht, *Optacon—A Total for Independence*, 16 AMER. EDUC. 8 (Jan./Feb. 1980).

¹⁵¹ A person with an optacon can "read" about 25 words per minute. *Id.* at 10.

¹⁵² *Id.* at 12. An optacon costs about \$3000. *Id.*

¹⁵³ See Cantarow, *Raymond Kurzweil, Giving "Sight" to the Blind*, 54 SCI. QUEST 21 (Feb. 1981).

comparable to the rate of words produced by human speech.¹⁵⁴ It may ultimately depend on the type of job, however, whether a blind employee who can read print only at a very slow rate would be considered "otherwise qualified" and subject to statutory protection.

Because the degree of visual impairments varies greatly and has such diverse effects, discussion of "reasonable accommodation" in terms of the visually impaired is difficult. Many visually impaired people are otherwise fully qualified and only require an opportunity to prove their merit. Others are totally blind and require the use of special equipment and other accommodation. Still others are fully qualified but cannot get to work because they are not allowed to drive a car. Because of the degree and variety of impairments and their effects, the standard for reasonable accommodation for the visually impaired must be determined case by case.

B. Increased Insurance Rates

One rationale for employment discrimination in the past has been employers' fear that higher insurance rates will result from hiring handicapped employees. An employer may not refuse to hire an individual solely for fear of an increased risk of injury,¹⁵⁵ and consequent higher insurance rates. In *City of Los Angeles Department of Water and Power v. Manhart*,¹⁵⁶ the Supreme Court recently indicated that discrimination on the basis of potentially higher insurance rates is impermissible.¹⁵⁷ In *Manhart*, city workers contributed to their pension plan by an amount deducted from their salaries.¹⁵⁸ Women paid more than men for the same monthly pension coverage, since they generally live longer after retirement.¹⁵⁹ Because the employer based the rate differential solely on gender, the Supreme Court found it to be discriminatory.¹⁶⁰

If forcing women to pay more than men for pension coverage constitutes discrimination, then discrimination against the handicapped on the basis of insurance premiums may also be illegal. So far, this proposition has been tested in only one case, *City of Appleton v. Labor & Industry Review Commission*.¹⁶¹ In *Appleton*, a Wisconsin city refused to hire an applicant for its police force because the city feared that the applicant's

¹⁵⁴ *Id.*

¹⁵⁵ *Dairy Equip. Co. v. Wisconsin Dep't of Indus., Labor and Human Relations*, 15 Empl. Prac. Dec. ¶ 8052, at 7181 (Wis. Cir. Ct. 1977).

¹⁵⁶ 435 U.S. 702 (1978).

¹⁵⁷ *Id.* at 711.

¹⁵⁸ *Id.* at 705.

¹⁵⁹ *Id.* In *Manhart*, female employees paid 14.84% more to the retirement fund than comparable male employees. *Id.*

¹⁶⁰ *Id.* at 711. In *Manhart*, Chief Justice Burger dissented, stating that the differential in rates was not based on sex, but on longevity. *Id.* at 725-28.

¹⁶¹ 20 Empl. Prac. Dec. ¶ 30,138 (Wis. Cir. Ct. 1979).

back problem would increase the risk that the city would have to pay him disability benefits.¹⁶² The court ruled that employee physical condition sufficient to keep insurance rates low was not a BFOQ, and that physical condition to perform police work was the correct standard.¹⁶³

By analogy, an employer may not refuse to hire a partially sighted person on the theory that such person's visual impairment will result in an increase in the employer's insurance rates, unless a certain degree of visual acuity is actually necessary for performance of the job. There is a fine line between vision as a BFOQ and vision sufficient to keep insurance rates down. If a certain level of visual acuity is a BFOQ, an employer who knowingly hires people who do not meet job requirements will be subject to very high insurance rates or cancellation. If the visually impaired are as safe as anyone else on the job, an employer's experience rating will not justify an increase in insurance rates.¹⁶⁴

To be effective, nondiscrimination policies must be accompanied by either statutory or administrative change in insurance laws or regulations. *Manhart* required redistribution of pension costs within the city employment system, but overall costs were not affected. As long as employers do not have to pay higher insurance premiums to hire the handicapped, they will not have any rational basis for refusing to hire. Experience ratings based on an employer's accident records are used to calculate insurance rates.¹⁶⁵ If hiring the handicapped does not increase the accident rate, insurance premiums will not increase. If, instead, handicapped workers create a safety hazard (as the Court feared in *Davis*),¹⁶⁶ insurance coverage will become more expensive for the employer. Accommodating the handicapped by paying higher insurance rates goes beyond the accommodation required in *Hardison* and perhaps also beyond that required by HHS regulations.¹⁶⁷ A statute or regulation prohibiting the use of handicap data instead of accident statistics in the calculation of experience ratings would guarantee that insurance rates will not become a weapon against the handicapped in employment, unless hiring the handicapped actually creates a safety hazard.

C. Organizational Difficulties

Although the threat of increased insurance rates no longer legitimizes the refusal to hire and promote handicapped employees, find-

¹⁶² *Id.* at 11743.

¹⁶³ *Id.* at 11745.

¹⁶⁴ Because an employer's insurance premiums are based on industry hazards and actual accident experience, and because disabled employees generally have equal or better safety records overall than the industry average, an employer who hires the handicapped will not necessarily experience an increase in insurance rates. See Note, *Potluck Protection for Handicapped Discriminates: The Need to Amend Title VII to Prohibit Discrimination on the Basis of Disability*, 8 LOY. CHI. L.J. 814, 820-21 (1977).

¹⁶⁵ See H. SOMERS & A. SOMERS, WORKMEN'S COMPENSATION 106-10 (1954).

¹⁶⁶ See text accompanying note 39 *supra*.

¹⁶⁷ See text accompanying notes 130-35 *supra*.

ing work is still more difficult for the handicapped, including the visually impaired, than it is for others. To a great extent, the handicapped have not made the strides that other groups have made in fighting discrimination because they are not well organized. Blacks, other minorities, and women have fought to gain access to better jobs, but each group's members share a common race, ethnicity, or gender. Organizing, therefore, is much easier for them than for the handicapped. Even senior citizens, who belong to all groups, share a common age. The handicapped are not only less mobile than others because of their impairments,¹⁶⁸ but their problems are so diverse that it is difficult for them to agree on measures that will help them as a class. The visually impaired, the hard-of-hearing, paraplegics, people with cerebral palsy, people missing limbs, and all the other handicapped individuals usually do not understand fully each other's problems.¹⁶⁹ They cannot agree on proposed changes because the problems of different groups sometimes call for opposing solutions. A steep curb represents an almost impregnable barrier to a person in a wheelchair, but it also serves as a warning to the blind using canes. It is unlikely that the handicapped will reach a consensus and organize for effective political action in the near future. In the absence of such organization, however, the visually impaired probably will not achieve any more success than other handicapped groups in their fight against discrimination.

D. *Emphasis Problems Within the Rehabilitation Act*

The structural analysis above indicates that the Rehabilitation Act of 1973 and its subsequent amendments have endorsed the concept of "mainstreaming" and stated that handicapped people are entitled to some protection against discrimination. The theory behind mainstreaming is that not all handicapped people are totally disabled and that a handicap should not prevent a person from working. While the Act may have provided a theoretical justification for allowing the handicapped to enter the occupational mainstream, the Act generally has not been effective in protecting the handicapped against employment discrimination. In large part, this lapse in protection results from the orientation of the Act itself. The Act's principal purposes are providing services for the rehabilitation of the most severely handicapped and coordinating federal and state efforts aimed at rehabilitation.¹⁷⁰ Nondiscrimination provisions are limited to three sections of Title V of the Act. The objectives of rehabilitation and protection against discrimination serve two different populations. The former serves the severely handicapped, who would

¹⁶⁸ See text accompanying notes 141-42 *supra*. The simple act of voting ranges from difficult to impossible for many handicapped voters. See Special Report, *The Voice of the People: Selectively Heard at the Polls*, AMICUS, March 1976, at 12.

¹⁶⁹ See Achtenberg, *Law and the Physically Disabled*, 8 SW. U.L. REV. 847, 886 (1976).

¹⁷⁰ See S. REP. NO. 93-318, 93d Cong., 1st Sess. 52, reprinted in [1973] U.S. CODE CONG. & AD. NEWS 2076, 2125.

probably not be able to enter the workforce unless given rehabilitative services. The latter objective serves a much broader class of handicapped persons: those persons who can perform a job, although some accommodation may be necessary. Employers generally require such persons to show that they can perform the job they seek, and that they are not in need of rehabilitation services. The Act only protects these persons employed in federally funded programs from discrimination.

The Rehabilitation Act mandates that the most severely handicapped people receive the highest priority in the disbursement of funds. Section 101(a)(5) of the Act, for example, requires each state to demonstrate that its methods of selecting individuals for rehabilitation services gives special priority to individuals with the most severe handicaps.¹⁷¹ Emphasizing rehabilitation of the severely handicapped is inconsistent with the expressed purpose of mainstreaming, as articulated in section 2(8) of the Act, to "promote and expand employment opportunities in the public and private sectors for handicapped individuals and to place such individuals in employment."¹⁷²

Despite moral concern for the plight for the severely handicapped, bringing such individuals into the workforce is extremely expensive.¹⁷³ Placing severely handicapped persons in the workforce may, in fact, be impossible because their skills cannot be brought up to employable levels. Since the emphasis of the legislation, however, places most of the money into channels for the rehabilitation of the most serious cases, many slightly impaired people who otherwise easily could be brought into the mainstream lose their chance to become independent. Unfortunately, limited funding makes it impossible to achieve both the rehabilitation of the severely handicapped and the mainstreaming of the slightly handicapped when a fixed amount of funding is available. It appears to this writer that serving a large number of clients who can be easily rehabilitated is a more effective use of available funds, since such expenditures will maximize the number of people who become productive wage-earners and taxpayers.

Recent cuts in federal spending do not diminish the importance of the conflict in emphasis of the Rehabilitation Act. To the contrary, if the size of the federal pie is reduced, the issue of how it will be divided takes on even greater importance. With fewer dollars available for the rehabilitation of the handicapped, it is possible that those few dollars *must* be spent on the people who can be rehabilitated easily and inexpen-

¹⁷¹ 29 U.S.C. § 721(a)(5)(A)-(B) (Supp. II 1978); see S. REP. NO. 93-318, 93d Cong., 1st Sess. 52, reprinted in [1973] U.S. CODE CONG. & AD. NEWS 2076, 2125.

¹⁷² 29 U.S.C. § 701(8) (1976), amended by 29 U.S.C. § 701 (Supp. II 1978).

¹⁷³ *Rehabilitation Act Amendments of 1974: Hearings Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Public Welfare*, 93d Cong., 2d Sess. 62-63 (1974) [hereinafter cited as *1974 Amendments Hearings*] (testimony of Andrew S. Adams). It costs 2-1/2 to 3 times more to rehabilitate a severely handicapped person than one whose disability is less severe. *Id.* at 62.

sively, since there may not be sufficient funds to rehabilitate the most severely handicapped. With such a shortage of money, the decision on how to spend every dollar and the cost-effectiveness of trying to rehabilitate every case takes on paramount importance.

Applying these issues to the visually impaired, it becomes apparent that many could easily be brought into the mainstream and be given the chance to become independent. Rehabilitation statistics gathered by HEW support the efficiency of funding programs for the visually impaired. These statistics show that rehabilitation programs designed to help the visually impaired are highly cost-effective. The mean weekly earnings of participants at the time of referral to the programs in question were \$19.70; at completion, \$73.10.¹⁷⁴ For this increase of \$54.00 per week, the average time spent per recipient in the vocational rehabilitation process was 23.4 months, at a cost of \$1,363.60.¹⁷⁵ The cost of rehabilitation, therefore, was recouped in about six months.¹⁷⁶

Some of the visually impaired could be brought into the workforce by simply providing them with a new pair of glasses.¹⁷⁷ While not all visual impairments can be cured so easily and cheaply, a comparatively small amount of money would allow a large number of slightly impaired to work. If entry of the visually impaired into the mainstream through employment is an actual goal of the Act, the policy of the Act that mandates priority for those whose rehabilitation is most costly works to preclude fulfillment of the Act's other stated purpose.

The inconsistency between the mainstreaming goal of the Act and the Act's emphasis on first rehabilitating the most seriously handicapped has also created confusion over just who the "severely handicapped" really are. The Subcommittee on the Handicapped of the Senate Committee on Labor and Public Welfare defined the severely handicapped as follows:

[They] generally require multiple services over an extended period of time. Intensive and extensive services are usually required. Such severe disability seriously limits functional capacities . . . to the extent that the person is unable, to a substantial degree, to cope with the physical or mental demands of employment.¹⁷⁸

¹⁷⁴ Department of Health, Education and Welfare, ANNUAL REPORT OF FEDERAL ACTIVITIES RELATED TO THE REHABILITATION ACT OF 1973 24 (1978).

¹⁷⁵ *Id.*

¹⁷⁶ This figure is obtained by dividing the average cost, \$1363.60, by the average differential in weekly earnings due to the program, \$54.00. This calculation results in a recoupment time of 25 weeks and 2 days, slightly less than 6 months. Taking the cost of capital expenses and interest into account will lengthen the time slightly.

¹⁷⁷ Programs designed to provide glasses to the visually impaired must include all needy eye patients, and not just those suffering from glaucoma or recovering from cataract surgery. See *White v. Beal*, 555 F.2d 1146 (3d Cir. 1977); accord, *Simpson v. Wilson*, 480 F. Supp. 97, 101-03 (D. Vt. 1979).

Hearings of the House Select Subcommittee on Education and Labor stressed elimination of many of the handicapped from the "severely disabled" category: "While these handicaps represent problems for the client, there is some real question as to whether they are seriously disabling or whether public funds should be used to rehabilitate them."¹⁷⁹ The Subcommittee expressed concern that "persons with minor physical problems which might not be truly disabling were receiving services."¹⁸⁰ In addition, the Subcommittee deplored the emphasis on nonseverely handicapped cases that can be rehabilitated easily and cheaply to build up a high success rate.¹⁸¹

The definition of severe visual impairment is currently too restrictive. It should be broadened to include those who are blind in both eyes, those with no vision in one eye and a defective second eye, and those who are denied a driver's license for visual reasons.¹⁸² Such a definition makes sense. The lack of a driver's license can be as much a barrier to access to the workplace as the stairway is to the "otherwise qualified" person confined to a wheelchair. In this age of the automobile, the lack of a driver's license can severely limit life activity.¹⁸³ Of all the handicapped population in the United States, 2.7% are listed as blind, 2.4% as having one blind eye and the other eye defective (also severely disabling), and 5.5% whose visual impairments are not considered severely disabling.¹⁸⁴

IV. Statutory Recommendations

Effective aid to the handicapped must satisfy two conflicting goals. The severely handicapped who can never be self-sufficient need some type of support.¹⁸⁵ An aid program for the less seriously handicapped, however, should concentrate on rehabilitation to bring handicapped individuals back into the social and economic mainstream.¹⁸⁶

The Rehabilitation Act fails to meet the requirements for effective aid to the handicapped, specifically the visually impaired. Although the

¹⁷⁸ 1974 Amendments Hearings, *supra* note 173, at 494 (special study by Louis Y. Nau).

¹⁷⁹ *Vocational Rehabilitation Services: Oversight Hearings before the Select Subcommittee on Education of House Comm. on Education and Labor*, 93d Cong., 1st Sess. 73 (1973)[hereinafter cited as *Vocational Rehabilitation Services Hearings*].

¹⁸⁰ *Id.* at 78.

¹⁸¹ *Id.*

¹⁸² 1974 Amendments Hearings, *supra* note 173, at 114 (HEW statement).

¹⁸³ See text accompanying notes 141-42 *supra*. If a person cannot pass a vision test and is denied a driver's license for that reason, a court is highly unlikely to hold such denial to be arbitrary and capricious. In *Department of Pub. Safety v. Robertson*, 203 S.W.2d 950 (Tex. Civ. App. 1947), the court upheld the revocation of plaintiff's license, *id.* at 953, even though he had driven for 21 years without an accident. *Id.* at 951-52. The *Robertson* court found that plaintiff could drive safely and considered the hardship under which he would be placed, but allowed the administrative determination to stand. *Id.* at 953.

¹⁸⁴ *Vocational Rehabilitation Services Hearings*, *supra* note 179, at 74.

¹⁸⁵ See text accompanying notes 2-5 *supra*.

¹⁸⁶ See text accompanying notes 170-72 *supra*.

Act appears to have inspired some judges to rule in favor of visually impaired petitioners alleging discrimination, and to have made the general public more conscious of the special problems facing the handicapped, most direct benefits derive from state law. State law, however, fails to provide uniform protection to the handicapped.¹⁸⁷ A strong federal law would guarantee the rights of the handicapped even in states currently affording inadequate protection.

Designing effective legislation requires an understanding of the statute's beneficiaries. The class of "legally blind" people currently aided by the Act excludes a significant portion of the visually impaired.¹⁸⁸ Employers sometimes discriminate against job applicants on the basis of a slight visual impairment. People are denied the mobility of a driver's license at the 20/40 or 20/50 level. It is at that level of vision that employers begin to assume that people could not perform effectively on the job.¹⁸⁹ Legislation should apply to any person subject to discrimination because of impaired vision, not just the legally blind. If necessary to determine or limit eligibility for disability benefits under existing programs, the legislation could distinguish between legally blind persons and those visually impaired persons not now classified as blind.

To protect all visually impaired individuals from discrimination, Congress should amend the Rehabilitation Act to provide broader coverage of an increased class. Title VII of the Civil Rights Act of 1964¹⁹⁰ should serve as the model for the statute herein proposed. Power to enact such legislation arises under the commerce clause of the Constitution¹⁹¹ and would improve the position of the handicapped in four major ways. First, it would extend the Rehabilitation Act's scope beyond federally funded contracts and employment to reach most large employers in the private sector.¹⁹² This would alleviate the problem of victims of discrimination who cannot assert a federal right outside the narrow reach of section 504.¹⁹³ Although the courts would still have to hear individual allegations of discrimination on a case by case basis, the proposed statute would eliminate the Rehabilitation Act's arbitrary distinction between protected employees in federally funded jobs and their unprotected counterparts elsewhere.

Second, a federal statute would guarantee at least a minimum standard of protection to victims of discrimination. Some states currently provide no antidiscrimination rights for the handicapped.¹⁹⁴ Passage of the

¹⁸⁷ See text accompanying notes 125-27 *supra*.

¹⁸⁸ See text accompanying note 184 *supra*.

¹⁸⁹ See text accompanying notes 118-23 *supra*.

¹⁹⁰ See note 7 *supra*.

¹⁹¹ See, e.g., 29 U.S.C. § 621(a)(4), 42 U.S.C. §2000e(h) (1976) (placing authority for the ADEA and Title VII under the commerce clause).

¹⁹² Title VII reaches all employers who employ 15 or more persons on a regular basis. See 42 U.S.C. §2000e(b) (1976).

¹⁹³ See text accompanying notes 22-24 *supra*.

¹⁹⁴ See note 86 *supra*.

statute herein proposed would have the same nationwide impact on rights of the handicapped that Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967 (ADEA) had on their protected classes. Even as late as 1961, only thirty two states prohibited discrimination on account of race or color.¹⁹⁵ Before the passage of the ADEA, only twenty four states prohibited such discrimination.¹⁹⁶ The handicapped are in a similar position today and would benefit both substantively and procedurally from strong antidiscrimination legislation.

The third purpose of the Act would be to provide an administrative framework for processing complaints. Currently, section 503 provides no private right of action.¹⁹⁷ Whether section 504 provides for private enforcement is open to debate.¹⁹⁸ Aggrieved individuals need both an administrative structure and a private right of action to obtain the full benefits of the statute. A private right of action is more effective than an administrative remedy if reduced budgets have restricted the capacity of enforcement agencies or if those agencies lack the volition to prosecute a case fully. Legislation patterned on Title VII would offer a broad private right, because the courts read narrowly restrictions on private suits under Title VII.¹⁹⁹ All possible remedies should remain available to aggrieved persons in both the public and private sectors.

The successful enforcement of any new legislation depends on wise delegation of enforcement powers to the proper administrative agency. Enforcement authority must be centralized in a single agency, which can use its expertise in handling employment discrimination matters. The present structure of enforcement through OFCCP and HHS may be sufficient for federal programs, as presently covered under sections 503 and 504.²⁰⁰ The Equal Employment Opportunity Commission (EEOC) should be enlisted, however, to enforce the sections of the proposed Act which apply to the private sector. The EEOC has long experience in dealing with the employment discrimination situation.²⁰¹ Like the Labor Department, it can resolve discrimination problems through conciliation.²⁰² Con-

¹⁹⁵ S. REP. NO. 872, 88th Cong., 2d Sess. 11, *reprinted in* [1964] U.S. CODE CONG. & AD. NEWS 2355, 2368.

¹⁹⁶ H.R. REP. NO. 805, 90th Cong., 1st Sess. 2, *reprinted in* [1967] U.S. CODE CONG. & AD. NEWS 2213, 2215.

¹⁹⁷ See text accompanying notes 25-27 *supra*.

¹⁹⁸ See text accompanying notes 28-33 *supra*.

¹⁹⁹ See, e.g., *Senter v. General Motors Corp.*, 532 F.2d 511 (6th Cir. 1976), *cert. denied*, 429 U.S. 870 (1977); *Hackett v. McGuire Bros., Inc.*, 445 F.2d 442 (3d Cir. 1971).

²⁰⁰ See note 71 *supra*.

²⁰¹ The EEOC was the original agency founded to deal with problems of employment discrimination. Civil Rights Act of 1964, § 705, *codified at* 42 U.S.C. §2000e(4) (1976).

²⁰² For an example of effective conciliation, see Delury, *Equal Job Opportunity for the Handicapped Means Positive Thinking and Positive Action*, 26 LABOR L.J. 679, 684 (1975).

ciliation can be effective in convincing an employer that an applicant, although handicapped, is "otherwise qualified."

The conciliation process lends itself especially well to helping the visually impaired. While the standards for what constitutes "reasonable accommodation" have not fully been set, the accommodations required by the visually impaired are relatively inexpensive and simple to effect.²⁰³ A conciliator, with the authority of the EEOC behind him, could be very effective in convincing an employer that it is a reasonable accommodation to form a car pool for a visually impaired person. Agency experts are also in a position to understand and explain the new technology available for the visually impaired as part of the employer's duty to accommodate.

Although the federal protection for the handicapped in the employment situation would be increased greatly under the proposed legislation, the federal government should not totally preempt the field. States should have the opportunity to offer to the handicapped greater protection than the proposed federal statute. For instance, states could mandate affirmative action programs for the handicapped in private employment or make protection from discrimination a fundamental state constitutional right.²⁰⁴ States must also regulate the employment practices of their own state and local government sectors and employers so small that they do not meet the size requirements for application of the proposed federal statute.

The supremacy clause of the Constitution would prevent states from setting rules that defeat the purpose of the federal protection.²⁰⁵ Congress also could incorporate similar language directly into the statute to resolve doubt. Effective legislation requires a firm federal hand, but the statute should not prevent states wishing to extend a greater measure of protection to their handicapped residents from doing so.

The handicapped enjoy little protection from employment discrimination under the present system. The visually impaired are often fully qualified to work and need little accommodation in the workplace. They are among the most likely to suffer from discriminatory practices, yet Congress easily could eliminate such practices with the proper administrative enforcement agency and a statute evincing a strong legislative desire to protect the handicapped from employment discrimination.

V. Conclusion

The Rehabilitation Act, at least in theory, changed the legislative mandate from basic maintenance of the handicapped to mainstreaming.

²⁰³ See text accompanying notes 146-54 *supra*.

²⁰⁴ See, e.g., note 101 *supra*.

²⁰⁵ U.S. CONST. art. VI, cl. 2; see *Schoenstein v. Division of Vocational Rehabilitation*, 519 F. Supp. 773, 779 (D.N.J. 1981) (state regulations in conflict with 504).

Despite the statements of the Act, however, its emphasis is directed toward those presently unable to work, rather than potential victims of employment discrimination. State law presently provides the best protection for the visually impaired, at least in states with strong antidiscrimination statutes. More effective federal legislation is needed to ensure that rational standards determine job qualifications. Effective enforcement programs for antidiscrimination laws are also needed to make the Rehabilitation Act truly effective in enabling the visually impaired to find work.

Technology is changing rapidly. New devices which help the blind to read are enabling the severely visually impaired to work in many new areas. Employers can accommodate such people more easily now than ever. The less severely impaired can be accommodated through a car pool, or simply by an offer of a chance to prove themselves. An administrative structure which uses persuasion and conciliation can most effectively convince employers to hire and accommodate the visually impaired.

The diffusion of the new technology is the key to fighting discrimination. If new machines which aid the visually impaired become sufficiently widespread and inexpensive, it will become a relatively easy matter to convince employers that accommodation is cost-effective. While a statutory and regulatory structure is necessary, voluntary compliance and accommodation will help the visually impaired much more than administrative hearings and court suits. This holds true for all the visually impaired, from those whose deficiencies are merely a figment of an employer's imagination, to those who carry white canes.

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