# DEFINING "HANDICAP" FOR PURPOSES OF EMPLOYMENT DISCRIMINATION

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In 1973, Congress enacted the Rehabilitation Act[1] to provide a comprehensive scheme of protections designed to eliminate discrimination on the basis of handicap in programs and activities receiving federal financial assistance.[2] Since that time, nearly every state has enacted statutory protections for handicapped persons in the workplace.[3] More than in any other area of civil rights litigation, the effectiveness of these protections has turned on the definition given to the protected class—both in the manner in which the legislature has chosen to define "handicap," and in the ways in which the courts have construed and interpreted that definition.[4]

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1. 1 Pub. L. No. 93-112, 87 Stat. 357 (1973), *amended by* Rehabilitation Act Amendments of 1974, Pub. L. No. 93-516, 88 Stat. 1617 (1974), *amended by* Rehabilitation Comprehensive Services, and Developmental Disabilities Act of 1978, Pub. L. No. 95-602, 92 Stat. 2984 (1978) (current version at 29 U.S.C. §§ 701-796 (1976 & Supp. V. 1981)) [hereinafter Rehabilitation Act].

This Note will primarily be concerned with section 504 of the Rehabilitation Act (the Act) as the core equal opportunity provision, although it contains several other important civil rights provisions. *See* Wegner, *The Antidiscrimination Model Reconsidered: Ensuring Equal Opportunities Without Respect to Handicap Under Section 504 of the Rehabilitation Act of 1973*, 69 CORNELL L. REV. 401, 403 n.5 (1984). Section 501, 29 U.S.C. § 791 (Supp. III 1983-86), requires the federal government to take affirmative action to hire handicapped workers. Section 502, 29 U.S.C. § 792 (Supp. III 1983-86), deals with architectural, transportational, and attitudinal barriers to participation by handicapped individuals. Section 503, 29 U.S.C. § 793 (Supp. III 1983-86), requires affirmative steps toward hiring handicapped workers for federal contractors with contracts in excess of $2,500). The definitional issues surrounding the term "handicap" to be discussed here do have implications for these other sections; Mantolete v. Bolger, 767 F.2d 1416 (9th Cir. 1985)(case of first impression dealing with construction and interpretation of "qualified handicapped person" under section 501), as well as for other federal legislation aimed at protecting or assisting handicapped Americans; U.S. Dept. of Education, *Summary of Existing Legislation Relating to the Handicapped, 1980*, PUB. NO. E-80-22014 (1981)(over 60 federal laws containing explicit provisions relating to physical or mental handicaps).

2. Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving or Benefiting from Federal Financial Assistance, 45 C.F.R. § 84.1 (1986)[hereinafter Department of Health and Human Services (HHS) Regulations]. The Act specifically prohibits discrimination against handicapped individuals by recipients of federal funds, the federal government, and federal contractors.

3. *See infra* note 93 and accompanying text.

4. The courts often look to the interpretation given to the particular definition by the relevant regulatory agency. *See, e.g.*, Torres v. Bolger, 781 F.2d 1134, 1136 (5th Cir. 1986)(rejecting left-handed employee's argument that district court improperly relied on regulations to dismiss his claim of "handicap"); *but see* Joyner by Lowry v. Dumpson, 712 F.2d 770, 775 (2d Cir. 1983)("Although an agency's consistent, longstanding interpretation of the statute under which it operates is entitled to considerable deference, . . . 'this deference [to administrative interpretations] is constrained by our obligation to honor the clear meaning of a statute, as revealed by its language, purpose, and history.' ")(quoting International Brotherhood of Teamsters v. Daniel, 439 U.S. 551, 566 n.20 (1979)).

The lack of a uniform definition for a handicapped person has compounded the difficulties in determining the number of Americans who are handicapped[5] and what percentage of those are being discriminated against. The statistical evidence that is available has shown that only a small percentage of capable, handicapped people in this country are actually in the workforce.[6] Moreover, unemployment rates among handicapped individuals are estimated to be between fifty and seventy-five percent.[7]

In order to ensure that federal[8] and state[9] statutory protections that are in place will lead to realizing the policy behind the protections—equal opportunity for all handicapped people who could be working—courts and legislators must face the difficult threshold issue of *who* is intended to be covered by these laws.[10] This Note examines the definition of "handicap" as it has been applied in antidiscrimination law, specifically focusing on the comprehensive definition provided in the Federal Rehabilitation Act and the variety of definitions contained in state statutory provisions. This Note discusses the ways in which courts have interpreted the statutory definitions. It looks in some detail at the Supreme Court decision construing the Rehabilitation Act definition, *School Board of Nassau County, Florida v. Arline*,[11]

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5. U.S. COMMISSION ON CIVIL RIGHTS, PUB. NO. 81, ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES 10-14 (1983). The Commission reports that no single agency is charged with collecting national data on the handicapped population. By piecing together unrelated estimates from a variety of federal agencies, and recognizing that they all use different *definitions* of "handicap," the Commission estimates that between 9% and 13.7% of the population are handicapped persons. *Id.* at 14.

6. *Id.* at 29, *citing* Note, *Abroad in the Land: Legal Strategies to Effectuate the Rights of the Physically Disabled*, 61 GEO. L.J. 1512 (1973). *See also* Gittler, *Fair Employment and the Handicapped: A Legal Perspective*, 27 DE PAUL L. REV. 953, 954 n.3 (1978), *citing* 118 CONG. REC. 3320, 3321 (1972)(of the 22 million adults with physical handicaps, an estimated 800,000 are working, while an estimated 14 million could work; an estimated 33 percent of blind adults are employed).

7. *Id.* at 29 (citing U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, SOCIAL SECURITY ADMINISTRATION, WORK DISABLED IN THE UNITED STATES, A CHARTBOOK (1980)).

8. The text of section 504 of the 1973 Rehabilitation Act reads, in pertinent part, as follows:

> No otherwise qualified handicapped individual in the United States, as defined in Section 706(7), shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . .

29 U.S.C. § 794 (1973).

9. *See, e.g.*, N.C. GEN. STAT. § 168A-2 (1976 & Supp. 1985)("the practice of discrimination based upon a handicapping condition is contrary to the public interest and to the principles of freedom and equality of opportunity"); LA. REV. STAT. ANN. § 46:2251-56 (1982 & Supp. 1987)("opportunity to obtain employment . . . without discrimination on the basis of handicap is a civil right").

10. A number of commentators have identified the need for determining who falls within the statutory definitions of "handicap" as one of the most critical issues facing the federal government, states, and handicapped persons. *See, e.g.*, L. ROTHSTEIN, RIGHTS OF PHYSICALLY HANDICAPPED PERSONS 139 (1984); Leap, *State Regulation and Fair Employment of the Handicapped*, 5 EMPLOYEE REL. L.J. 382, 384 (1979-80). This is also a troubling matter for employers who are attempting to comply with the legislation. *See, e.g.*, Larson, *What Disabilities are Protected Under the Rehabilitation Act of 1973?*, 37 LAB. L.J. 752 (1986)(discussing some of the practical concerns employers have in challenging an individual's claim of being a "handicapped" person). For an argument that assuring equal access to handicapped persons is likely to be substantially more costly than assuring equal opportunity to racial minorities and women (assuming the need for adapted workplaces, specialized machines, training), and that the unequal status accorded handicapped people in employment is substantially less a result of discrimination than that accorded minorities and women, see BURKHAUSER & HAVEMAN, DISABILITY AND WORK: THE ECONOMICS OF AMERICAN POLICY 100-01 (1982).

11. 107 S. Ct. 1123 (1987). *See infra* note 66 and accompanying text for a full discussion of this case.

and reviews a number of recent state court opinions concerning state statutory definitions of "handicap." Finally, this Note scrutinizes the Arizona handicap discrimination statute and its somewhat unusual definition of "handicap."

## WHO ARE "HANDICAPPED" PERSONS?[12]

Much has been written about the controversy surrounding an acceptable, formal definition of "handicap."[13] Webster's Third New International Dictionary (Unabridged) defines "handicap" as "a disadvantage that makes achievement unusually difficult; *esp*: a physical disability that limits the capacity to work."[14] This definition provides some guidance for applying the term handicap, but is limited to the extent it simply interchanges the term "handicap" with "disadvantage" and "disability."[15] Aside from these problems, a particular controversy has arisen over what distinction, if any, should be made between disability (or impairment) and handicap.[16] By and large, legal commentators and legislators have bypassed this controversy. When legislatures and courts discuss "handicapped people," or "the handicapped," they are generally referring to a particular type of "disadvan-

12. This heading is taken from the title of chapter one from an often-cited treatise on handicapped persons' rights, Burgdorf, *Who are 'Handicapped' Persons?*, in THE LEGAL RIGHTS OF HANDICAPPED PERSONS 1 (R. Burgdorf ed. 1980).

For an introduction to the psychological and sociological literature regarding self-perceptions of handicaps and societal attitudes toward handicapped individuals, see, SOCIAL AND PSYCHOLOGICAL ASPECTS OF DISABILITY (J. Stubbins ed. 1977); Feldman, *Wellness and Work*, in PSYCHOSOCIAL STRESS AND CANCER (C. Cooper ed. 1984); Macgregor, *Some Psycho-Social Problems Associated with Facial Deformities*, 16 AM. SOC. REV. 629 (1961). These latter two sources are cited by Justice Brennan in his majority opinion in School Bd. of Nassau County v. Arline, 107 S. Ct. 1123, 1128 n.9, 1129 n.13 (1987), to support his position that Congress was concerned about the effects of an impairment on others as well as on the individual. *See infra* note 66 for a full discussion of the *Arline* opinion.

13. *See, e.g.*, Burgdorf, *supra* note 12, at 3; Haines, E.E. Black, Ltd. v. Marshall: *A Penetrating Interpretation of 'Handicapped Individual' for Sections 503 and 504 of the Rehabilitation Act of 1973 and for Various State Equal Employment Opportunity Statutes*, 16 LOY. L.A.L. REV. 527, 528 (1983); U.S. CIVIL RIGHTS COMMISSION, *supra* note 5, at 5.

14. As used, for example, in State v. Turner, 209 N.E.2d 475 (Ohio App. 1965).

15. *Compare, e.g.*, IND. CODE ANN. § 22-9-1-3(q) (Burns 1986)(a handicap is a physical or mental condition of a person that constitutes a substantial disability).

16. Burgdorf, *supra* note 12, at 4. Disabled individuals often vehemently protest being labelled as handicapped. The now classic statement on this distinction was made by Professor tenBroek (himself a handicapped person):

> The legal and constitutional status of the physically disabled—like their status in society and in the economy—is a reflection of underlying attitudes and assumptions concerning disability and of social policies based upon those attitudes. For the most part it is the *cultural definition* of disability, rather than the scientific or medical definition, which is instrumental in the ascription of capacities and incapacities, roles and rights, status and security. Thus a meaningful distinction may be made between "disability" and "handicap"—that is, between the *physical disability*, measured in objective scientific terms and the *social handicap* imposed upon the disabled by the cultural definition of their estate.

tenBroek & Matson, *The Disabled and the Law of Welfare*, 54 CALIF. L. REV. 809, 814 (1966)(emphasis in original).

One writer has delineated four views on the disability versus handicap controversy: (1) a handicap is the cumulative result of the obstacles posed by an objectively identifiable disability; (2) a handicap is the cumulative result of obstacles posed by our cultural mores; (3) no difference between the two; and, (4) disability alone is used to indicate functional lack of ability. Haines, *supra* note 13, at 528 n.2.

tage"—a mental, physical, or emotional disability or impairment.[17] Thus, legislators, administrators, and judges have attempted, albeit not always successfully, to give the terms their plain meaning in statutory definitions and case law interpretation.

In order to give meaning to the terms in the definition, courts, legislatures, or regulatory agencies can use one of several approaches, or some combination of them.[18] A "handicap" could be defined by listing certain traditionally-recognized handicapping conditions,[19] or a legislature may choose to provide a more comprehensive list of the types of disabilities that will be considered "handicapping conditions" in that state.[20] These approaches are problematic, however, because they can lead to legislation that does not include certain groups of handicapped people simply because the legislature was not aware of a particular handicap.

A definition might also tie directly into the governmental purpose of the particular statute, for example, "handicap" for purposes of employment.[21] While this approach might work for any one given statute, it is limited because it focuses on the needs of the employer rather than on the true condition of the handicapped person. Legislators might also choose to defer to professional determinations.[22] Professionals, however, may differ widely in their professional judgments. Moreover, both employers and handicapped persons would be subject to varying standards depending on which outside expert is being used. Finally, a legislature can actually try to define the con-

17. Burgdorf, *supra* note 12, at 3.

18. The categories discussed draw upon the explanation in Burgdorf, *supra* note 12, at 14. It is useful to keep these approaches in mind when assessing a particular statutory definition as it helps to highlight the difficulties in implementing the "intent" of the legislature in selecting a certain definition. *Compare, e.g.*, IND. CODE ANN. § 22-9-1-3(q) (Burns 1986)(a handicap is a physical or mental condition of a person that constitutes a substantial disability) *with* ME. REV. STAT. ANN. tit. 5, § 4572 (1986)(one of the alternative definitions is "a substantial handicap as determined by a physician or psychologist").

Appendix B, *infra*, presents state "handicap" definitions categorized by the approach taken by the legislatures of each state. Note that numerous states use several definitions either within the statute itself, or by combining the statute and the implementing regulations for that statute.

19. These states generally do not provide any comprehensive definition of "handicap," but instead list several qualifying conditions, such as "physical disability," or "blindness." *See e.g.*, ALA. CODE § 21-7-8 (1975). These states are listed under the category "Conditions" in Appendix B.

20. *See, e.g.*, N.J. STAT. ANN. § 10:5-4.1 (West 1976)(handicap is a disability "which shall include, but not be limited to, any degree of paralysis, amputation, lack of physical coordination, blindness, deafness, speech impediment or physical reliance on . . . remedial device"). These states are listed under the category "Comprehensive List" in Appendix B.

21. For example, under the Arizona statute dealing with discrimination in employment, handicap means a physical impairment that substantially restricts or limits an individual's general ability to secure, retain or advance in employment. ARIZ. REV. STAT. ANN. § 41-1461 to 41-1465 (1985). *See also* the original definition of "handicapped individual" under the Rehabilitation Act of 1973, Section 7(6): "any individual who (A) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and (B) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services . . . ." Rehabilitation Act of 1973, § 7(6), Pub. L. No. 93-112, 87 Stat. 355 (1984) codified as amended at 29 U.S.C. § 706(6) (Supp. III 1983-86). This definition still applies to programs of vocational rehabilitation and to all titles of the Act except Titles IV and V. For a more detailed discussion of the interrelationship of the various titles within the Rehabilitation Act see U.S. COMMISSION ON CIVIL RIGHTS, *supra* note 5, at 47-48. These states are listed under the category "Government Purpose: Work" in Appendix B.

22. *See, e.g.*, ME. REV. STAT. ANN. tit. 5, § 4572 (1986)(one of the alternative definitions is "a substantial handicap as determined by a physician or psychologist"). These states are listed under the category "Expert" in Appendix B.

cept and the relevant subsidiary terms, as Congress has done in the Federal Rehabilitation Act, for example, by explaining that a handicap is an impairment that substantially limits one or more major life functions.[23] While this sort of definition can not answer all of the potential questions, it has the advantage of making it more likely that those individuals who deserve protection under the statutory scheme will at least meet the threshold requirement for having their complaint heard. It may also serve to give the relevant parties more notice about what is a handicapping condition.

Whatever form the definition may take, the courts must then struggle with who will or will not be covered by the particular statute. At that point, social judgments are being made that are not easily determined by consulting a dictionary or even by reading the legislative history of a particular provision.[24] As will be evident from the following analysis, legislatures and courts have been successful to varying degrees in setting the parameters for making such critical social judgments.

## SECTION 504 OF THE REHABILITATION ACT

### *The Statutory Definition*

While the legislative history of section 504 is rather sparse,[25] it is clear that the Act was intended to sweep broadly to bring equal employment opportunities to handicapped individuals in the federal government and in programs and organizations receiving federal funds.[26] Congress evinced its intent to do so by developing a fairly comprehensive definition of "handicap" that takes into account the complexity of the concept and that incorporates the "social realities and social policies" that necessarily underlie employment discrimination against handicapped individuals.[27]

Congress has defined "handicapped individual" as "any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is

23. *See infra* notes 25-44 and accompanying text for a discussion of the Rehabilitation Act definition. The definition is subsequently disentangled, and administrative regulations provide more detailed descriptions of the important terms. HHS Regulations, 45 C.F.R. § 84.1 (1986).

Not all states that attempt to provide a definition for "handicap" follow the section 504 definition. States can be broken down into three categories: those that rely primarily on the section 504 definition; those that modify section 504 in some way, generally by not including a history of impairment or perceived impairment; and, those that attempt to define "handicap" by looking at the cause of the condition or at the loss of functions it causes. These are listed under the category "Definition" in Appendix B.

24. *See* Burgdorf, *supra* note 12, at 10-11 ("And the decision to impose or not to impose the *handicapped* label is ultimately grounded upon perceptions of an individual's role in society. . . . From the broad spectrum of human characteristics and capabilities certain traits have been singled out and called handicaps."); BURKHAUSER & HAVEMAN, *supra* note 10, at 7-8 (definition of handicap is a social judgment).

25. *See, e.g.*, Alexander v. Choate, 105 S. Ct. 712, 717 n.13 (1985)(discussing the lack of debate in either chamber on section 504 as justifying reliance on the intent of the drafters of previously introduced versions of the section).

26. The federal regulations pertaining to section 504 state that its purpose is "to effectuate section 504 . . . which is designed to eliminate discrimination on the basis of handicap in any program or activity receiving federal financial assistance." 45 C.F.R. § 84.1 (1986). It is important to keep in mind that the Act does not apply to all employers; it only applies to the federal government, programs receiving federal assistance, and federal contractors.

27. Haines, *supra* note 13, at 537.

regarded as having such an impairment."[28] The definition has been further refined by Department of Health and Human Services administrative regulations (HHS Regulations) which add separate definition sections for "physical or mental impairment,"[29] "major life activities,"[30] "has a record of such impairment,"[31] and "is regarded as having such an impairment."[32] The Department purposefully refrained from providing a more detailed definition of the important qualifying phrase "substantially limits," believing that a definition of the term was not possible at the time the regulations were promulgated.[33]

While these guidelines are quite thorough, they do not automatically answer the question of who is eligible for the statutory protections. Only two groups have been specifically excluded from the protection of the Act by the language of the Act itself.[34] In the general case, members of those groups would be considered "handicapped" persons within the broad definition of section 504.[35] The subgroup of alcohol or drug abusers that have been specifically *excluded* from the protections of section 504, with limits, are the alcohol or drug abuser "whose current use of alcohol or drugs [either] prevents such individual from performing the duties of the job in question or . . . would constitute a direct threat to property or the safety of

28. 29 U.S.C. § 706(7)(B)(Supp. V 1981). The U.S. Commission on Civil Rights, the organization charged by Congress with jurisdiction over issues of discrimination on the basis of handicap, has called this definition "probably the most comprehensive definition to date." U.S. COMMISSION ON CIVIL RIGHTS, *supra* note 5, at 10.

29. 45 C.F.R. § 84.3(j)(2)(i) (1985) states:

'Physical or mental impairment' means (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one of more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

30. "Major life activities" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. 45 C.F.R. § 84.3(j)(2)(ii) (1985).

31. "Having a record of impairment" means having a history of a mental or physical impairment, or having been misclassified as having one. 45 C.F.R. § 84.3(j)(2)(iii) (1985). The regulations cite persons with histories of mental or emotional illness, heart disease, or cancer, as frequently occurring examples of this category. 45 C.F.R. Part 84, App. A, Subpart A(3)–31.6 Analysis of Final Regulation (1987). This was considered an important addition to the definition because it deals with the realities of the often subtle, societal responses to people who are not currently handicapped, but who have been in the past.

32. 45 C.F.R. § 84.3(j)(2)(iv) (1985) deals with situations where an individual has a physical or mental impairment that does *not* substantially limit major life activities, but that is treated as a limitation; only limits major life activities because of attitudes of others toward the impairment; or, is merely treated as having the impairment. Persons with a limp or with disfiguring scars would fall under this third part of the definition, at least where those persons are treated as having a mental or physical impairment that substantially limited one or more major life activities. 45 C.F.R. Part 84, Subpart A(3) (1987).

33. 45 C.F.R. Part 84, App. A, Subpart A(3) (1987). *But cf.* Haines, *supra* note 13, at 536, *citing* Department of Labor Regulations implementing section 503 of the Rehabilitation Act, 41 C.F.R. § 60-741.2 (1982)("substantially limits" means the degree that the impairment affects employability. A handicapped individual who is likely to experience difficulty in securing, retaining or advancing in employment would be considered substantially limited).

34. Rehabilitation Act, 29 U.S.C. § 706(7)(B)(Supp. III 1983-86)(dealing with a subclass of alcohol and drug abusers); and, 29 U.S.C. § 706(7)(C)(as amended Jan. 28, 1988, at 134 CONG. REC. S257 (daily ed. Jan. 28, 1988))(dealing with a subclass of people with contagious diseases).

35. *See supra* notes 66-86, for a discussion of the recent Supreme Court analysis of whether contagious diseases are "handicaps" for purposes of the Rehabilitation Act.

others."[36] In a recent amendment designed to parallel the language and effect of that earlier amendment, Congress declared that a "handicapped person" does not include an individual "who has a currently contagious disease or infection and who, by reason of such disease or infection, would constitute a direct threat to the health or safety of other individuals or who, by reason of the currently contagious disease or infection, is unable to perform the duties of the job."[37] This language makes it clear that employers are not required by the Act to hire or retain persons who pose such risks. Yet, even in those cases where the employer has been given explicit guidance on these two subgroups, the statutory framework requires that each case be individually determined.[38] Therefore, all potential handicapping conditions must be examined on a case-by-case basis before a conclusion can be reached as to whether they meet the definition.[39] Because of the many mental or physical dysfunctions, societal attitudes and prejudices about past and present conditions, and employers' views about perceived or actual limitations on an individual's usefulness in the workplace, this cumbersome case by case analysis is the most appropriate method for implementing the underlying policy rationale of the Rehabilitation Act.[40]

The need for an individualized approach to applying the statutory defi-

36. Rehabilitation Act, 29 U.S.C. § 706(7)(B)(Supp. III 1983-86). *See* the HHS Regulations for a discussion concerning the decision whether to include alcoholics and drug addicts within the scope of the Act. 45 C.F.R. Part 84, App. A(4) (1987). *See also* Haines, *supra* note 13, at 535 n.38.

37. 134 CONG. REC. S257 (daily ed. Jan. 28, 1988)(Senate agreed to the amendment to the Rehabilitation Act proposed by Senators Humphrey and Harkin). In the colloquy between Senators Humphrey and Harkin discussing this amendment to the Rehabilitation Act, the senators explained that, by this amendment, "Congress wishes to assure employers that they are not required to retain or hire individuals with a contagious disease or infection when such individuals pose a direct threat to the health or safety of other individuals, or cannot perform the essential duties of a job." *Id.* The senators believed the amendment had become necessary to alleviate concern expressed by employers that they would have to hire or retain contagious people who would pose a health and safety risk or who could not perform the essential functions of the job, based on the employers' incorrect interpretation of the Supreme Court decision in School Bd. of Nassau County v. Arline, 107 S. Ct. 1123 (1987). As Congressman Edwards stated in the congressional debate: "[t]he objective of the amendment is to expressly state in the statute the current standards of section 504 so as to reassure employers that they are not required to hire or retain [such] individuals," 134 CONG. REC. H1037-03 (daily ed. Feb. 26, 1988)(statement of Rep. D. Edwards). The amendment was intended to be consistent with *Arline* and with the substantive standards of section 504. *Id.* See *infra* note 79 for a discussion of the implications of this new amendment for persons with the AIDS virus. *See* Note, *The Rehabilitation Act's Otherwise Qualified Requirement and the AIDS Virus: Protecting the Public From AIDS-Related Health and Safety Standards*, 30 ARIZ. L. REV. 571 (1988), for a more complete analysis of the ramifications of this new amendment for the "otherwise qualified" requirement of section 504.

38. Representative Edwards "commended the Members of the Senate" for the drafting of this "contagious disease" amendment so as to continue to require a case-by-case determination of cases involving AIDS, HIV infection, or other communicable conditions. 134 CONG. REC. H565-02 (daily ed. March 2, 1988)(statement by Rep. D. Edwards). Each determination of the degree of risk involved, the risk of transmissibility, and whether a reasonable accommodation by the employer can eliminate the risk are all highly-factual, individual, and necessary determinations under the Section 504 scheme, as highlighted by the new amendment. *Id.*

39. *See* Haines, *supra* note 13, at 538, discussing the broad mandate of section 504 and its necessarily complex application.

40. U.S. COMM. ON CIVIL RIGHTS, *supra* note 5, at 53 ("A case-by-case examination of functional abilities in an identified setting and an analysis of available accommodations to match a particular person to a particular activity is the core of this nondiscrimination] requirement."). *See also* Mantolete v. Bolger, 767 F.2d 1416, 1422-23 (9th Cir. 1985)(in applying the standard for screening out qualified handicapped individuals on the basis of possible future injury, an employer must gather all relevant information regarding the applicant's work history and medical history, and indepen-

nitions of "handicap" is also evident in the statute's qualifying restriction: the Act covers only "otherwise qualified handicapped individuals."[41] The HHS Regulations implementing this limitation describe a "qualified handicapped person" with respect to employment as "a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question."[42] This provision can be thought of as the second step in the analysis of a section 504 claim: (1) is the individual a "handicapped individual?" and, (2) if so, is she a "qualified handicapped individual?"[43] Inherent in the inquiry is an individualized assessment of the handicapping condition as well as a case-by-case assessment of the extent to which a given employer will be required to make accommodations to that condition.[44]

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dently assess both the probability and severity of potential injury—necessarily and properly a case-by-case analysis).

41. 29 U.S.C. § 794 (Supp. III 1983-86). In ascertaining who is qualified for a given position or promotion, two inquiries must be made: (1) does the individual meet the legitimate selection criteria for the position?; and (2) can the individual perform or participate considering the availability of "reasonable accommodation" by the employer? U.S. COMM. ON CIVIL RIGHTS, *supra* note 5, at 114-15. For a more complete discussion of the "otherwise qualified" requirement, particularly as it applies to AIDS cases, see Note, *The Rehabilitation Act's Otherwise Qualified Requirement and the AIDS Virus: Protecting the Public from AIDS-related Health and Safety Hazards*, 30 ARIZ. L. REV. 571 (1988).

42. 45 C.F.R. § 84.3(k)(1)(1987). The concept of "reasonable accommodation" has been used in other areas of civil rights. *See, e.g.*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(j)(1976), addressing the accommodation of religious practices. The employer's duty to accommodate is limited by its ability to demonstrate that accommodation would "impose an undue hardship on the operation of its program." 45 C.F.R. § 84.12(a)(1987).

43. Haines, *supra* note 13, at 536-37 n.47. The "otherwise qualified handicapped individual" and "reasonable accommodation" provisions have received widespread attention from the courts and commentators. *See, e.g., Legal Standards for Reasonable Accommodation*, U.S. COMM. ON CIVIL RIGHTS, *supra* note 5, at ch. 6, for other sources on reasonable accommodation. This attention has been due in large part to the debate over whether and to what extent that statutory language requires affirmative action on the part of employers. Analysis of the parameters of the employer's duty to make reasonable accommodations to an otherwise qualified handicapped individual must begin with Southeastern Community College v. Davis, 442 U.S. 397 (1979)(placing reasonable accommodation squarely within nondiscrimination law, but distinguishing it from affirmative action). In *Southeastern,* the Supreme Court said two factors pertained to the reasonableness of an accommodation to a handicapped individual. An accommodation would be considered unreasonable if: (1) it would necessitate modification of the essential nature of the program; or, (2) it would place undue burdens, such as high costs, on the program receiving the federal funds. *Southeastern*, 442 U.S. at 410, 412. The nature and dimensions of that aspect of section 504 are beyond the scope of this Note. It is important to keep in mind, then, that meeting the statutory definition of a handicapped individual is only the first step in pursuing a successful discrimination claim under Section 504 *and* under most state statutory schemes as well. *See, e.g.*, Strathie v. Department of Transp., 716 F.2d 227 (3d Cir. 1983)(under section 504, a plaintiff must prove that he is a "handicapped individual," that he is "otherwise qualified," that he was excluded solely by reason of his handicap, and that the program or employer falls within the 504 jurisdiction). *See* Larson, *supra* note 10, for a discussion of the social constraints on employers that might prevent them from challenging whether someone is a "handicapped individual," forcing them instead to focus on the "otherwise qualified" prong of the test.

44. The HHS Regulations suggest that reasonable accommodation might include: making facilities accessible, the restructuring of work schedules, acquiring new or modifying old equipment, or providing aids. 45 C.F.R. § 84.12 (1987). In 1979, the U.S. Supreme Court heard its first case involving section 504, Southeastern Community College v. Davis, 442 U.S. 397 (1979). In *Southeastern*, the Court was forced to conduct the sort of individual analysis just described to determine whether a hearing-impaired licensed practical nurse had been discriminated against when she was refused admission to the Southeastern Community College nursing program. The Court concluded that Davis was not an "otherwise qualified handicapped person" because no accommodation existed that would permit her to benefit from the program. *Southeastern*, 442 U.S. at 409-10. Much has been written about this case, and it has in many ways paved the way for subsequent Section 504 litigation. *See especially* U.S. COMM. ON CIVIL RIGHTS, *supra* note 5, at 108-18 (discussing the case

### *Case Law Interpretations of the Section 504 Definitions*

Despite the breadth of the 504 definition just discussed, the critical question remains: Can the type of definition in the Rehabilitation Act adequately protect persons affected by a multitude of health conditions, and provide sufficient guidance to employers so that they can distinguish protected conditions from the unprotected ones?[45] An examination of individual case determinations will show that it does help answer this question.[46]

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as responsible for making reasonable accommodation a part of discrimination law); Wegner, *The Antidiscrimination Model Reconsidered: Ensuring Equal Opportunity without Respect to Handicap Under Section 504 of the Rehabilitation Act of 1973*, 69 CORNELL L. REV. 401, Part III (1984). *See also* Note, *Accommodating the Handicapped: Rehabilitating Section 504 after* Southeastern, 80 COLUM. L. REV. 171 (1980); Guy, *Accommodations for the Handicapped: What is the Employer's Duty?*, 5 EMPLOYEE REL. L.J. 350, 353 (1979-80)(pointing out the important conclusion by the Court that " 'an otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap,' rather than *except* for his handicap").

A discussion of the full ramifications of the *Southeastern* decision is beyond the scope of this Note. It is important to note, however, how well the case illustrates two points. First, it shows the painstaking care with which the courts must apply the statutory definitions in every individual case before a proper determination can be rendered. Second, it demonstrates the interaction between the statutory definitions and the social judgment as to whether discrimination has occurred. As the U.S. Commission on Civil Rights pointed out in its analysis of the case, whether a person is "qualified" under the statutory definition and hence covered by section 504 can only be determined after a court conducts an extensive analysis of essential program functions, a person's abilities, and possible accommodations, all of which are legal considerations that go into the decision about whether discrimination has occurred, and all of which are predicated on a determination that section 504 applies. U.S. COMM. ON CIVIL RIGHTS, *supra* note 5, at 118. The Commission noted that "the decision in such a case may be a determination that the person is not qualified, as opposed to a finding that the person was qualified but was not discriminated against." *Id.*

Many other facets of section 504 litigation remain unresolved. Some examples include: (1) the parameters of a section 504 private cause of action for individual handicapped discriminatees, *see, e.g.*, Morgan v. U.S. Postal Service, 798 F.2d 1162, 1164 and n.2 (8th Cir. 1986)("Courts have implied a private cause of action from § 504," *citing* Consolidated Rail Corp. v. Darrone, 465 U.S. 624, 632-33 (1984), but noting that "[t]he parameters of such actions against the federal government are . . . unclear"); *Strathie v. Department of Transp.*, 716 F.2d 227, 229 n.4 (3d Cir. 1983)(open question whether section 504 creates a private right of action for damages or merely for injunctive and declaratory relief); Wegner, *supra* note 1, at 413-14 & nn.35-38 (discussing this issue in detail and including a tally of circuit court approaches); (2) whether exhaustion of administrative remedies is required, *see Morgan*, 798 F.2d at 1165 (concurring with those courts that have read the Title VII exhaustion of administrative remedies requirement into the private remedy recognized by Section 504). *See also* Comment, *Section 504 of the Rehabilitation Act: Analyzing Employment Discrimination Claims*, 132 U. PA. L. REV. 867, 873 & n.48 (1984)(plaintiffs suing the federal government may need to exhaust their administrative remedies, whereas those suing a federally funded program need not); Wegner, *supra* note 1, at 414; and, (3) whether a section 1983 claim can be made out for violation of section 504. Courts have gone both ways on this issue. Annotation, *Actions, under 42 U.S.C.S. § 1983, for Violations of Federal Statutes Pertaining to Rights of Handicapped Persons*, 63 A.L.R. FED. 215 (1983). *See* Shuttleworth v. Broward County, 639 F. Supp. 654 (S.D. Fla. 1986)(AIDS victim allowed to bring concurrent § 504 and § 1983 actions). The Annotation points out that courts have not yet had sufficient time to deal with the implications of the test put forth in Pennhurst State School and Hospital v. Halderman, 465 U.S. 89 (1984). *Pennhurst* originally contained a section 504 claim, but the viability of that claim was not determined since that claim never went to the Supreme Court.

45. Haines, *supra* note 13, at 540 (citing E. BODENHEIMER, POWER, LAW, AND SOCIETY 133-34).

46. Haines, *supra* note 13, at 541-50, presents a thorough discussion of the ambiguities that remain in the section 504 definition, including the precise meaning of "impairment," the breadth of "major life activities," the ambiguity of "substantially limits" (specifically whether the phrase was meant to deal with a quantitative foreclosure of job opportunities, or a qualitative assessment of limitation with respect to the particular job at hand), and whether a duration requirement was built in to the definition (permanent versus temporary impairments).

a. *Lower Federal Courts*

Although section 504 and its implementing regulations have been in place for a decade, the Supreme Court did not systematically examine the statutory definition of "handicap" until 1987.[47] Lower federal courts have some experience in interpretting the definitions of "handicapped individual" and "impairment."[48] But, many cases involving section 504 (and other sections of the Rehabilitation Act that rely on the 504 definition) focus on other issues and either summarily determine or assume that certain conditions constitute a "physical or mental impairment."[49] Those courts that have examined the definitional issue have generally given the definition a fairly expansive reading.[50]

Courts appear most concerned with permanent conditions, over which the afflicted person cannot exercise control. They have found the following conditions to be covered "impairments": legal blindness,[51] manic depressive syndrome,[52] high blood pressure,[53] nervous and heart conditions,[54] multiple sclerosis,[55] nocturnal epilepsy and dyslexia,[56] and hepatitis.[57] Courts have rejected "impairment" claims for the following conditions: transitory illnesses with no permanent effect on the person's health,[58] lithium addiction,[59] crossed eyes,[60] acrophobia,[61] and body building weight gain.[62]

The lower federal courts have been consistent in recognizing that the

47. School Board of Nassau County, Florida v. Arline, 107 S. Ct. 1123 (1987), discussed *infra* notes 66 through 86 and accompanying text.

48. *See, e.g.*, de la Torres v. Bolger, 781 F.2d 1134, 1137 (5th Cir. 1986)(holding that plaintiff failed to satisfy the first element of the definition of "handicapped individual" by showing that being left-handed is an "impairment").

49. *See, e.g.*, Blackwell v. U.S. Dept. of Treasury, 656 F. Supp. 713 (D.D.C. 1986). The *Blackwell* court declared that, as a matter of statutory analysis, "while homosexuals are not handicapped it is clear that transvestites are, because many experience strong rejection in the work place as a result of their mental ailment made blatantly apparent by their cross-dressing life-style." *Blackwell*, 656 F. Supp. at 715; Strathie v. Dept. of Transp., 716 F.2d 227 (3d Cir. 1983)("It is undisputed that Strathie is a handicapped person [Strathie wore a hearing aid]"). *See* Larson, *supra* note 10, at 754-56, for a discussion of defendants' hesitancy to challenge a claim that the plaintiff is "handicapped" within the meaning of section 504.

50. *See, e.g.*, E.E. Black, Ltd. v. Marshall, 497 F. Supp. 1088, 1099 (1980)(rejecting the Administrative Law Judge conclusion that Congress intended to protect *only* the most "disabling" impairments); Vickers v. Veterans Administration, 549 F. Supp. 85 (D. Wash. 1982)(plaintiff's unusual sensitivity to tobacco smoke does limit at least one of his major life activities, that is, his capacity to work in an environment which is not completely smoke free).

51. Norcross v. Sneed, 755 F.2d 113 (8th Cir. 1985).

52. Gardner v. Morris, 752 F.2d 1271 (8th Cir. 1985).

53. Bey v. Bolger, 540 F. Supp. 910 (E.D. Pa. 1982).

54. Treadwell v. Alexander, 707 F.2d 473 (11th Cir. 1983).

55. Pushkin v. Regents of the University of Colorado, 658 F.2d 1372 (10th Cir. 1981).

56. Fitzgerald v. Green Area Education Agency, 589 F. Supp. 1130 (S.D. Iowa 1984).

57. New York State Ass'n for Retarded Children v. Carey, 612 F.2d 644 (2d Cir. 1979).

58. Stevens v. Stubbs, 576 F. Supp. 1409 (N.D. Ga. 1983).

59. Hart v. Baltimore, 625 F.2d 13 (4th Cir. 1980).

60. Jasany v. U.S. Postal Service, 755 F.2d 1244 (6th Cir. 1984)(whether or not strabismus is a handicap, it does not fall within the definition in section 504 because the condition never affected major life activities beyond plaintiff's inability to perform one particular job).

61. Forrisi v. Bowen, 794 F.2d 931 (4th Cir. 1986)(fear of heights not "perceived" by others as a handicap).

62. Tudyman v. United Airlines, 608 F. Supp. 739 (C.D. Cal. 1984). Much debate has centered on whether people with "voluntary" handicaps, such as obesity or drug and alcohol addiction which are not a present threat to job security, should come within the statutory protections. *See, e.g.*, Note, *Voluntary Handicaps*, 85 DICK. L. REV. 475 (1981); American Bar Association, *Fat Folks' Rights*,

nature of the protection afforded persons under the Rehabilitation Act requires case-by-case determinations.[63] The courts have also dealt with the definitional issue as one of burden. To establish a prima facie case of handicap discrimination, a plaintiff must satisfy the threshold requirement of being a handicapped person within the statutory definition, must demonstrate that the handicap substantially limits one or more major life activities, and must be "otherwise qualified" to perform the job.[64] The burden then shifts to the employer to demonstrate that reasonable accommodation to the condition would be unduly burdensome.[65] Given the requirement of case-by-case determinations and the importance of the issues, the Supreme Court's construction of the definitional requirements in *Arline* should provide much needed guidance to the lower courts.

b. School Board of Nassau County, Florida v. Arline[66]

The issues before the Court in *Arline* were whether a person afflicted with a contagious disease, tuberculosis in this case, could be considered a "handicapped individual" within the meaning of section 504 of the Rehabilitation Act, and if so, is such an individual "otherwise qualified" to teach elementary school.'[67]

The facts in the case were not in dispute.[68] Gene Arline was discharged from teaching elementary school in 1979, after 13 years with the Nassau County school system, when she suffered a third relapse of tuberculosis within a period of two years. Arline's disease was in remission from 1957 (after hospitalization) until 1977. The School Board never disputed that it had fired Arline because of her disease.

The district court recognized that Arline suffered from a handicap, but refused to find that Congress intended to include contagious diseases within the terms of the statute.[69] The Court of Appeals for the Eleventh Circuit reversed holding that Arline's condition "falls . . . neatly within the statutory

60 A.B.A. J. 878 (1982); Note, *Employment Discrimination Against the Overweight*, 15 U. MICH. J.L. REF. 337 (1982).

63. *See, e.g.*, Forrisi v. Bowen, 794 F.2d 931, 933 (4th Cir. 1986)("The definitional task cannot be accomplished merely through abstract lists and categories of impairments. The inquiry is, of necessity, an individualized one—whether the particular impairment constitutes for the particular person a significant barrier to employment.").

64. Jasany v. U.S. Postal Service, 755 F.2d 1244, 1249, nn.5 & 6 (6th Cir. 1985)(noting that the burden of proof issues in handicap discrimination cases are slightly different than in other discrimination contexts because the employment decision is expressly made on the basis of the condition at issue); Reynolds v. Brock, 815 F.2d 571, 574 (9th Cir. 1987)(plaintiff must demonstrate she is an "otherwise qualified handicapped individual" and "that she was terminated because of her handicap").

65. Jasany v. U.S. Postal Service, 755 F.2d 1244, 1250 (6th Cir. 1985)(burden shifts to the employer to show that challenged criteria are job related and required by business necessity, and that reasonable accommodation is not possible).

66. 107 S. Ct. 1123 (1987). The decision was 7-2, with Chief Justice Rehnquist and Justice Scalia dissenting.

67. *Arline*, 107 S. Ct. at 1125.

68. The facts are fully set forth in *Arline*, 107 S. Ct. at 1125-26.

69. *Id.* at 1125. Both sides in the case agree that the legislative history of the section 504 is silent as to contagious diseases. Goldberg, *The Meaning of "Handicapped,"* 73 A.B.A. J. 56, 59 (March 1, 1987). Congress has since enacted an amendment to the Rehabilitation Act to deal with contagious disease at least by confirming the *Arline* decision. 134 CONG. REC. S257 (daily ed. Jan. 28, 1988). *See supra* note 37 for a more complete discussion of this amendment.

and regulatory framework."[70]

The Supreme Court affirmed. In so doing, it accepted Arline's policy argument that she should be considered a "handicapped" person to further the broad remedial purposes of the Rehabilitation Act, emphasizing in particular Congress' concern with archaic, but prevalent, *perceptions* about handicapped people.[71] The Court looked to both the statutory language and the HHS Regulations for the framework within which to construe the definition.[72] It found Arline's condition to satisfy two prongs of the section 504 definition. First, it concluded that acute tuberculosis is a "physical impairment" since it affected Arline's respiratory system, and that the disease "substantially limited" a major life activity since it had required hospitalization in the past.[73] Second, previous hospitalization also established a "record of . . . impairment" within the 504 definition.[74] Therefore, Arline was a handicapped person falling within the section 504 protection.

This analysis is straightforward and seems almost self-evident. Yet, the Court had been criticized in the past for its narrow construction of other aspects of section 504.[75] The School Board argued, nevertheless, that while tuberculosis can be considered a handicap to the extent it leaves a person with diminished physical capabilities, Arline was not discharged because of her own diminished physical capabilities. Instead, the School Board urged, she was dismissed because of the threat her tuberculosis posed to the health of others.[76] The United States, supporting the School Board's position, argued that a person can be capable of spreading a disease without having a "physical impairment," or suffering from any symptoms associated with the disease, and that discrimination solely on the basis of contagiousness could never be discrimination on the basis of handicap.[77] The Court, however, declined to reach this argument, calling it "misplaced" since Arline's tuberculosis gave rise both to a physical impairment under the act *and* to conta-

70. Arline v. School Bd. of Nassau County, 772 F.2d 759, 764 (11th Cir. 1985). The Eleventh Circuit relied both on the statutory language itself and on the administrative regulations to determine the coverage of section 504. The court concluded that a person with tuberculosis is one who, when afflicted with the disease, "has a physical or mental impairment which substantially limits . . . major life activities," while pointing to the statutory language about "effects on the respiratory system" *cited* in 45 C.F.R. § 84.3(j)(2)(i)(A)(1985). Moreover, the court said that even when not affected by the disease, Arline "has a record of such impairment," 45 C.F.R. § 84.3(j)(2)(iii)(1985) and "is regarded as having such an impairment," 45 C.F.R. § 84.4(j)(2)(iv)(1985) by her employer. *Arline*, 772 F.2d at 764.

71. Congress has recently confirmed this view taken by the Supreme Court in its debate over an amendment to the Rehabilitation Act's definition of "handicapped person," as codified at 29 U.S.C. § 706(7)(C)(as amended Jan. 28, 1988), 134 CONG. REC. H1037-03 (daily ed. Feb. 26, 1988)(statement by Rep. D. Edwards).

72. The section 504 definition is set out *supra* at notes 25-44 and accompanying text. Since *Arline*, Congress has amended the Rehabilitation Act by adding a third section to the definitions section of the Act, 29 U.S.C. § 706(7)(C)(as amended Jan. 28, 1988) to deal with persons with contagious disease who pose a health or safety risk or who are unable to perform the job. This section was intended to be consistent with the *Arline* decision, and to educate people, especially employers, about its meaning. 134 Vol. CONG. REC. S1738-02 (daily ed. March 2, 1988)(statement by Sen. Harkin).

73. *Arline*, 107 S. Ct. at 1127 (citing 45 C.F.R. § 84.3(j)(2)(i)(1985)).

74. *Arline*, 107 S. Ct. at 1127 (citing 29 U.S.C. § 706(7)(b)(ii)(Supp. III 1983-1986)).

75. Goldberg, *supra* note 69, at 59 (noting Southeastern Community College v. Davis, 442 U.S. 397 (1979), which refused to read an affirmative action obligation into Section 504).

76. *Arline*, 107 S. Ct. at 1128 n.6 (citing Brief for Petitioners 15-16).

77. *Arline*, 107 S. Ct. at 1128 n.7.

giousness. The Court stated that the contagious effects of a disease cannot be meaningfully distinguished from the physical effects on Arline herself.[78] In a strategic footnote, the Court explicitly declined to reach the question "whether a carrier of a contagious disease such as AIDS could be considered to have a physical impairment, or whether such a person could be considered, solely on the basis of contagiousness, a handicapped person as defined by the Act."[79]

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78. *Arline*, 107 S. Ct. at 1128.

79. *Id.* at 1128 n.7. The AIDS issue was raised directly in the *Arline* case by the many organizations and individuals who filed amicus briefs in the case. The Solicitor General, in his brief and in oral argument for the Department of Justice, argued that employers can fire disabled employees based on a good faith fear of contagiousness, however irrational, without violating the Rehabilitation Act. Brief for Amicus Department of Justice, at 22-23. This Justice Department position was first articulated in a June 1986 memo which stated that, while the disabling effects of AIDS and AIDS related complex (ARC) are handicaps under the Rehabilitation Act, it is not a violation of the act to discriminate against someone on the basis of contagiousness. The discriminatee would have the burden of proving no risk. Opinion of Office of Legal Counsel, Department of Justice, June 23, 1986, *cited in* L. ROTHSTEIN, *supra* note 10, at Supp. 52 (1984 & Supp. 1987). This memo and the subsequent brief caused "much furor" and resulted in the filing of numerous opposing amicus briefs from advocacy groups (including the Employment Law Center of San Francisco, the National Gay Rights Advocates, Bay Area Lawyers for Individual Freedom, and Lambda Legal Defense and Education Fund), attorneys general of six states (California, Maryland, Michigan, Minnesota, New Jersey, New York, and Wisconsin), and 36 U.S. Senators and Representatives. Goldberg, *supra* note 69, at 56. *See also AIDS: Privacy*, 509 INDIVIDUAL EMPLOYMENT RIGHTS MANUAL (BNA) 201, 202 (1987)(opinion conflicting with public health officials' recommendations).

It is clear from the *Arline* opinion that a person who carries the AIDS antibody, *and* suffers physical impairment as a result of the disease, would fall within the statutory definition of "handicapped" under the Rehabilitation Act. But, given the increasingly sophisticated blood testing procedures, many individuals may now test positive for the AIDS virus and be virtually asymptomatic for months or years. Leonard, *Aids and Employment Law Revisited*, in *Law, Social Policy, and Contagious Disease: A Symposium on Acquired Immune Deficiency Syndrome (AIDS)*, 14 HOFSTRA L. REV. 11, 19 (1985). These people would fall squarely in the category left open by the court of discriminated against "solely on the basis of contagiousness."

Two questions remain after *Arline*. First, does a carrier of a contagious disease, such as AIDS, have a physical impairment by virtue of being such a carrier? Second, is a carrier of a contagious disease, by virtue of that fact alone, a handicapped person as defined by the Act?

These questions have sparked much scholarly discussion, and are just beginning to be dealt with in the courts. As to the first question, Leonard, for example, reviewed relevant state and federal statutes, and concluded that AIDS would be considered an impairment and covered by the definitions contained in those statutes, (despite the differences in the types of definitions contained therein), at least as far as administrative interpretation is concerned. Leonard, *Employment Discrimination Against Persons with AIDS*, 10 U. DAYTON L. REV. 681, 689-93 (1985). This would be especially likely with respect to those statutes, like section 504, that define an "impairment" as "any physiological disorder or condition . . . affecting one or more bodily systems." *See, e.g.*, GA. CODE. ANN. § 66-502(3)(1979 & Supp. 1986); R.I. GEN. LAWS § 28-5-7 (1986). *See also* Note, *Aids and Employment Discrimination Under the Federal Rehabilitation Act of 1973 and Virginia's Rights of Persons With Disabilities Act*, 20 U. RICH. L. REV. 425 (1986)(discussing the application of the federal and Virginia handicap anti-discrimination statutes to persons with AIDS prior to any judicial interpretation of the statute).

It has been suggested that Justice Brennan's language in *Arline*—that it would be "unfair to allow an employer to seize upon the distinction between the effects of a disease on others and the effects of a disease on a patient"—will make it more difficult to argue that contagiousness alone is not an impairment. Carey & Arthur, *The Developing Law on AIDS in the Workplace*, 46 MD. L. REV. 284, 293-94 (1987). The broad policy objectives of the Rehabilitation Act, as discussed in *Arline*, also weigh in favor of including those afflicted with AIDS or a related problem within the section 504 definition. Note, *AIDS: Does it Qualify as a "Handicap" under the Rehabilitation Act of 1973?*, 61 NOTRE DAME L. REV. 572 (1986). *See also* Parry, *AIDS as a Handicapping Condition-Part II*, 10 MENTAL AND PHYSICAL DISABILITY L. RPTR. 2, 3 (1986)(statutory analysis of section 504 leads to the conclusion that contagiousness would be covered, especially because Congress did not expressly exclude it, as it did not otherwise qualify alcohol and drug abusers). *See* Note, *Asymptomatic Infection With the AIDS Virus as a Handicap Under the Rehabilitation Act of 1973*, 88

Justice Brennan pressed for vigilance in prohibiting discrimination

COLUM. L. REV. 563 (1988) (a thorough discussion of the issues surrounding asymptomatic AIDS. The author concludes that a symptomatic HIV carriers should be protected by the Act because they are not rendered unqualified for employment by the condition).

Since *Arline*, Congress has amended the Rehabilitation Act definition of "handicapped person" to deal specifically with persons with contagious diseases or infections. Vol. 134 CONG. REC. S257 (daily ed. Jan. 28, 1988)(Senate agreement to amendment). The legislative debate over that amendment suggests strongly that Congress intends people with contagious disease or infection to be covered by the broad reach of the Act, but to be able to benefit from its protections when they are "otherwise qualified" to perform the job. Vol. 134 CONG. REC. S1738-02 (daily ed. March 2, 1988)(statement of Sen. Harkin, one of the co-sponsors of the amendment). While this amendment seems to indicate that contagiousness and infection are intended to be covered under the Act, whether the conditions in any given case meet the definition under the Act must still be determined on a case by case basis. *Id.* In that sense, it is still instructive to look at lower court interpretations of the relevant language.

Several federal district court cases, prior to that amendment, addressed the Act's coverage of AIDS, primarily in preliminary injunction proceedings. In Florida, an AIDS victim won an initial victory before the Florida Commission on Human Relations which ruled that he had shown cause for discrimination by the county and that he came within section 760.10(1)(a) of the Florida Commission on Human Relations Act. This ruling was left undisturbed by a federal district court. Shuttleworth v. Broward County, 639 F. Supp. 654 (S.D. Fla. 1986). Another federal district court in Florida indicated that three hemophiliac boys, who had been excluded from school on the basis of testing positive as AIDS carriers, were likely to prevail on their discrimination claim under the Rehabilitation Act, and thus granted their preliminary injunction request. Ray v. School District of Desoto County, 666 F. Supp. 1524 (M.D. Fla. 1987)(no specific finding of whether AIDS is a covered handicap was made). In Local 1812, American Federation of Government Employees v. U.S. Dept. of State, 662 F. Supp. 50 (D.D.C. 1987), the court concluded that those who carry the HIV virus may be handicapped under the Act in two ways: (1) a known carrier of the virus will be perceived to be handicapped; or, (2) carriers are physically impaired because of measurable deficiencies in their immune systems. Interestingly, the plaintiff in that case, understandably, "vigorously disputed" the latter approach to bringing its members within the section 504 impairment definition because it followed, then, that such carriers would not be "otherwise qualified" under the second part of the section 504 definition, and thus unprotected. *Local 1812*, 662 F. Supp. at 54. See Note, *supra* note 37, for a thorough discussion of the "otherwise qualified" requirement and AIDS.

A New York City judge has addressed the issue of contagiousness under section 504 most directly. In Application of District 27 Community School Bd. v. Board of Educ. 502 N.Y.S.2d 325 (1986), the judge painstakingly analyzed the coverage of section 504 and concluded that Congress had intended to include contagious diseases within it.

One federal circuit court has faced the issue, although its reasoning is not yet known. In Chalk v. U.S. District Court Central Dist. of Calif., 832 F.2d 1158 (9th Cir. 1987), the court concluded that plaintiff was handicapped, under section 504, because of AIDS. The court intends to issue a longer opinion that will, no doubt, explain its reasoning.

States must also decide whether AIDS is a handicap under their respective state discrimination laws. As this Note demonstrates, the state statutes are not uniform, nor have courts had much opportunity to interpret the definitional sections of most statutes. At least two states explicitly exclude coverage for communicable diseases. *See, e.g.*, GA. CODE ANN. § 34-6A-3(b)(1982); N.C. GEN. STAT. § 168A-5(b) (3)(1985).

The National Gay Rights Advocates (NGRA) conducted a survey of state agencies (human rights commissions, health departments, or attorneys general) during the summer of 1987. Thirty-three states and the District of Columbia indicated they have either agreed to accept complaints regarding AIDS-related discrimination, or declared such discrimination to be within their jurisdiction. National Gay Rights Ass'n, *AIDS and Handicap Discrimination: A Survey of the 50 States and the District of Columbia* (1986), *reported in* 123 LAB. REL. REP. (BNA) 96 (1986)(available from NGRA, 540 Castro Street, San Francisco, CA 94114). Several states have released official policy statements that indicate that AIDS, or a condition related to AIDS, will fall within that state's handicap discrimination definition. The District of Columbia Office of Human Rights, for example, declared that

> [i]t is the policy of the Office of Human Rights to accept complaints which allege disparate treatment or adverse impact based on, but not limited to, the fact that an individual has contracted the AIDS virus or AIDS related conditions; or based on the *perception* that an individual has one of the above, or the *perception* that an individual is more likely, than other members of the general population, to contract one of the above due to his or her membership in a protected class identified as being at high risk (i.e., homosexual or bisex-

based on society's irrational fears and prejudices. Congress dealt with this aspect of potential discrimination against handicapped persons by amending section 504 one year after its original passage to include "those who are regarded as having an impairment,"[80] thus emphasizing the law's intolerance for perceived as well as actual handicaps. Contagiousness, the Court reasoned, gives rise to more than its share of societal misapprehension.[81] Interestingly, though, the two examples that Justice Brennan used to buttress his position about the widespread nature of such irrational fears do not

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ual males, hemophiliacs, and Haitians), or due to an individual's familial responsibility for a person in one of the above categories.

D.C. Office of Human Rights, *D.C. AIDS Policy Statement*, [8A FAIR EMPL. PRAC. MANUAL] 453 LAB. REL. REP. (BNA) 1715 (Oct. 9, 1986). The Maine Legislature proposed legislation that would have protected persons with AIDS from discrimination. These provisions were dropped because the counsel for the Maine Human Rights Commission testified that existing Maine antidiscrimination law banned discrimination against persons with AIDS. [8A FAIR EMPL. PRAC. MANUAL] 455 LAB. REL. REP. (BNA) 485 (May 1986). Both Washington and New York have declared AIDS to be a "medical condition considered a disability" under their respective discrimination laws. [8A FAIR EMPL. PRAC. MANUAL] 457 LAB. REL. REP. (BNA) 2997 (July 1986)(Acquired Immune Deficiency Syndrome (AIDS) is a medical condition considered a disability under the Washington State Law Against Discrimination R.C.W. 49.60); [8A FAIR EMPL. PRAC. MANUAL] 455 LAB. REL. REP. (BNA) 3081 (Dec. 1985). Several states and municipalities have avoided the potential problem of the coverage of discrimination laws and have enacted special laws or ordinances. So, for example, the State of Minnesota, and the cities of Los Angeles, San Francisco, and Austin have passed laws prohibiting discrimination against any employee or job applicant because of AIDS. Minn. Executive Order No. 86-14, Sexual Orientation or AIDS Discrimination, EMPL. PRAC. GUIDE (CCH)( ¶ 24,593)(Dec. 23, 1986); Austin, Texas Ordinance Banning Discrimination Against Persons Suffering From the Medical Condition of AIDS or Any Medical Signs or Symptoms Related Thereto, Art. VI, § 7-4-120 to -133, [8A FAIR EMPL. PRAC. MANUAL] 457 LAB. REL. REP. (BNA) 2181-2185 (Dec. 21, 1986); San Francisco, California Municipal Ordinance Prohibiting Discrimination on the Basis of AIDS and Associated Conditions, Art. 38, §§ 3801 to 3816, [8A FAIR EMPL. PRAC. MANUAL] 453 LAB. REL. REP. (BNA) 925 (Dec. 19, 1985); Los Angeles, California Municipal Ordinance Prohibition Against Discrimination Based on a Person Suffering from the Medical Condition AIDS, or any Medical Signs or Symptoms Related Thereto, or any Perception that a Person is Suffering from the Medical Condition AIDS Whether Real or Imaginary, Art. 5.8, §§ 45.80 to .93, [8A FAIR EMPL. PRAC. MANUAL] 453 LAB. REL. REP. (BNA) 929 (Aug. 16, 1985). It is possible that these entities were concerned that AIDS and AIDS-related problems would *not* be covered under existing laws, and thus, felt compelled to institute separate protection.

Although courts are likely to give great weight to the administrative interpretation, they generally engage in more "rights balancing" in employment cases than do civil rights agencies. Leonard, *supra* note 79, at 25. Therefore, it is still an open question how courts will react to whether contagiousness itself is a physical impairment. At the state level, a number of state courts and administrative agencies have concluded that AIDS is a handicap under their statute. In Cronan v. New England Telephone Co., 41 FAIR EMPL. PRAC. CAS. (BNA) 1273 (1986), a Massachusetts superior court permitted a plaintiff's allegations that he was a protected "handicapped" individual by virtue of having AIDS Related Complex (ARC), and subsequently AIDS, to survive a motion to dismiss. The court did not have to decide which aspect of the disease constituted the handicap. The handicap definition at issue in *Cronan* is identical to the section 504 definition.

The answer to the second remaining question, whether a person solely by reason of contagiousness can be a handicapped person within the statutory definitions is even less certain. This determination will involve complex decisions about whether such a person is "otherwise qualified" to do the job, the issue remanded to the district court in *Arline*, which are beyond the scope of this inquiry. *See* Note, *supra* note 41. Note, however, that tuberculosis is spread by airborne contact, while AIDS is transmitted through the exchange of blood or semen, or the use of tainted blood. Leonard, *supra* note 79, at 17 (citing Castro, Hardy & Curran, *The Acquired Immunodeficiency Syndrome: Epidemiology and Risk Factors for Transmission*, 70 MED. CLINICS N. AM. 635, 640-45 (May 1986)). Future cases will have to parse the potential differences in reasonable accommodation that such distinction requires.

80. *Arline*, 107 S. Ct. 1123, 1129 n.10 (1987), *citing* S. Rep. No. 93-1297, p. 50 (1974). Justice Brennan also cited a number of sociological and psychological articles to support his position. *Id.* at 1129 nn.11-13.

81. *Arline*, 107 S. Ct. at 1129.

actually involve contagious diseases; he discusses cancer and epilepsy, neither of which present the real threat of infection that tuberculosis or AIDS presents.[82] Nonetheless, Justice Brennan concluded that, at least for purposes of construing the statutory definition of "handicapped individual," the possibility that some persons who have contagious diseases may pose a health threat does not justify excluding from coverage all persons with actual or perceived contagious diseases.[83] In other words, Arline satisfied the initial burden regarding her eligibility to proceed in a suit under section 504 by demonstrating that she has an impairment that substantially limits one or more major life activities, or has a record of such an impairment, and the Court did not need to reach the contagiousness issue.

The Court then remanded for a more individualized assessment as to whether Arline is "otherwise qualified" for the job of elementary school teacher.[84] The Court did not specifically address the burden of proof as to this element. The lower courts have concluded that the plaintiff must prove that she is "otherwise qualified" for the position.[85] Even if she is not, however, the employer may be required to show that reasonable accommodation by the employer would not overcome the effects of her handicap, or would cause undue hardship.[86]

c. *Summary*

As demonstrated by the *Arline* case, the comprehensive definition in section 504 of the Rehabilitation Act can be construed broadly to bring many handicapped individuals within its reach. Admittedly, this does not answer the ultimate question of whether such individuals have been discriminated against, since inquiry must be made into the potential for reasonable accommodation for their handicaps. But, it is at least consistent with the goal of making initial employment decisions on the basis of an individual's qualifications and not on the basis of fear of or prejudice against handicapped people.

It is nonetheless true that the Rehabilitation Act represents a compromise. Had Congress been fully intent on protecting the civil rights of handicapped people, it could have accepted one of a number of attempts to amend Title VII of the Civil Rights Act of 1964,[87] to include race, color, religion,

82. Chief Justice Rehnquist, joined by Justice Scalia in dissent, is critical of the majority on this point, concluding that "the Court provides no basis for extending the Act's generalized coverage of individuals suffering discrimination as a result of the reactions of others to coverage of individuals with contagious diseases." *Arline*, 107 S. Ct. at 1133 (dissenting opinion). The dissenters point to years of direct regulation by Congress of contagious diseases and significant regulation at the state level as evidence that the Rehabilitation Act cannot be read as expansively as the majority has done.

83. *Arline*, 107 S. Ct. at 1130.

84. *Arline*, 107 S. Ct. at 1132. The Court gave some guidance on this question, agreeing with amicus American Medical Association's suggestion for how to approach the inquiry, and reiterating the standards it set forth in Southeastern Community College v. Davis, discussed *supra* notes 43 and 44.

85. Strathie v. Department of Transp., 716 F.2d 227, 230 (3d Cir. 1983)(undisputed that hearing impaired bus driver was a "handicapped individual," but, burden on bus driver to show that he was "otherwise qualified" to be a bus driver in spite of his handicap).

86. *Arline*, 107 S. Ct. at 1131 n.17.

87. 42 U.S.C. § 2000e (1981 & Supp. 1987).

sex, national origin, *or* handicap.[88] Since it has not done so, federal protection extends only to federal employers or those receiving federal financial assistance.[89] Private employers, then, even those with more than 15 employees who are covered under Title VII, are not prohibited from discriminating against handicapped applicants or employees unless they are specifically covered by a state antidiscrimination statute.[90] Under most state antidiscrimination statutes, private employers, state employers, employment agencies, and labor organizations are generally subject to the statutory proscriptions.[91] Aggrieved handicapped persons pursuing federal remedies often face long delays while administrative remedies are pursued, and may ultimately be given an unsatisfactory remedy even if successful.[92] Therefore, the protections afforded handicapped individuals under state statutes may well be an attractive, and in some cases, necessary alternative to a Section 504 claim.

## STATE HANDICAP DISCRIMINATION PROTECTIONS

Interpretation of the statutory definition of a "handicapped individual" that is used in the federal Rehabilitation Act is highly relevant to an examination of state statutory protections.[93] Nearly half of the states explicitly rely on that definition either in the statute itself, or in the implementing regulations.[94] Oklahoma designed its statute explicitly to implement Title

88. *See, e.g.*, H.R. Rep. No. 3504, 95th Cong., 1st Sess., 123 CONG. REC. H115 (1977); H.R. Rep. No. 448, 95th Cong., 1st Sess., 123 CONG. REC. H193 (1977), *cited in* Gittler, *Fair Employment and the Handicapped: A Legal Perspective*, 27 DEPAUL L. REV. 953, 957 n.7 (1978). Gittler provides an excellent discussion of the failed attempts by handicapped people to gain constitutional protection for discriminatory treatment, either under the suspect class analysis or by having the right to employment declared fundamental. *Id.*, at 954-56 n.5. *See, e.g.*, Washington Square Inst. for Psychotherapy & Mental Health v. New York State Human Rights Appeal Bd., 108 A.D.2d 672, 485 N.Y.S.2d 540 (1985)(Institute had rational basis for dismissal of individual with mild cerebral palsy). Even if a constitutional claim could be made, it would not be available for discrimination by private employers.

89. It is estimated that about half of the businesses in this country are covered by the Act; some three million firms. ROTHSTEIN, KNAPP & LIEBMAN, CASES AND MATERIALS ON EMPLOYMENT LAW 277 (1987).

90. It should be noted that some controversy exists regarding whether an employer should be brought under the Rehabilitation Act rubric. The question relevant to this controversy is whether the financial assistance received from the federal government must have employment as its primary objective. *See, e.g.*, section 604 of Title VI, 42 U.S.C. § 2000d-3 (1982)(limiting enforcement of anti-race provisions to those situations in which a primary objective of federal assistance is to provide employment). Section 504 contains no such "primary objective" language. Therefore, it now seems clear that the "federal financial assistance" jurisdiction of Section 504 will be read broadly so as to reach employers and programs that do receive federal money. *See School Board of Nassau County, Florida v. Arline*, 772 F.2d 759, 762-63 & nn.8, 9 (11th Cir. 1985)(concluding that the federal financial assistance received by the Nassau County School Board general fund brought it within Section 504 jurisdiction), *aff'd*, 107 S. Ct. 1123 (1987). *See also* Myerson v. State of Arizona, 740 F.2d 684, 685 (9th Cir. 1984)(handicapped University professor from Arizona State University could maintain private Rehabilitation Act discrimination suit against the University even if federal financial assistance involved did not have primary objective of providing employment).

91. Leap, *supra* note 10, at 383 (1979-80).

92. L. ROTHSTEIN, *supra* note 10, at 139.

93. *See* Haines, *supra* note 13, at 530, which discusses the wider reach of the ambiguities in the federal statute given the states' reliance upon it, both in their statutory definitions and in their state court interpretations of their respective state definitions.

94. Twenty-four states have adopted a definition that is identical to the section 504 definition, draws substantially from that definition, or incorporates the definition into the rules and regulations

VII and section 504 at the state level.[95] Those that have not explicitly adopted section 504 use a number of other approaches, often relying on terms that are undefined, on lists of handicapping conditions, or on medical expertise.[96] This analysis will draw on a fifty state survey of handicap discrimination laws that focused on the definitions in the current statutory schemes of the states.[97] It will then examine recent state case law to illustrate how these statutory definitions are being applied.

*Statutory Definitions*

By 1980, thirty-eight states and the District of Columbia had enacted legislation that prohibited discrimination, to one degree or another, against persons with physical or mental disabilities.[98] Only a few states, at that time, had attempted to include a comprehensive definition of "handicap" within their statutes.[99] Some states, several of which have not yet changed their approach, did not give handicapped persons a statutory remedy for discrimination, but instead expressed a policy of encouraging handicapped people to participate fully in the economic and social life of the state.[100]

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designed to implement the state's "handicap" provision. These states are: Alaska*, California*, Colorado, Florida, Georgia, Iowa*, Louisiana*, Maryland*, Massachusetts*, Minnesota*, Missouri, New Hampshire*, New Mexico*, North Carolina*, Oklahoma*, Oregon*, Pennsylvania*, Rhode Island*, Utah, Vermont*, Virginia, West Virginia, Wisconsin*, and Wyoming. (*States that have adopted a statutory definition that is identical to the section 504 definition.) This list of states is listed in Appendix B under the category, "Definition." The relevant definitions and statutory citations are included in Appendix A.

95. OKLA. STAT. ANN. tit. 25, § 1301 to 1311 (West 1987).

96. Haines, *supra* note 13, at 550 & n.71 (discussing the uncertainty and confusion in a number of states' definitions of handicapped, which may reflect an uncertain commitment to equal employment opportunities for the handicapped, or the lack of acceptance of the Rehabilitation Act's definition). *See supra* notes 18-22 and accompanying text, for a description of the types of definitions used.

97. The statutory definitions are tabulated in Appendices A and B. Appendix A lists the statutory definitions and the relevant statute citations. Appendix B presents a comparative analysis of the type of definitions used in the state statutes. It should be noted that some states may have unpublished regulations promulgated by state agencies. In addition, the survey does not reflect practice in states as it may have developed independently from the statutory and regulatory scheme. Also, this survey does not distinguish between those state statutes that only cover physical disability and those that deal with both physical and mental disability. Most states now include both. For a listing of these distinctions, current as of 1980 see B. SALES & R. VAN DUIZEND, DEVELOPMENTALLY DISABLED AND THE LAW 151-68 (1984).

98. Leap, *supra* note 10, at 395-405. Leap's survey presents the only other example in the literature of an attempt to examine systematically the definitions of handicap under the state statutes. This author's 50 state survey, current as of February 1988, updated the Leap survey findings on definitions. For a discussion of which employers are covered by the Act and the enforcement mechanisms see B. SALES & R. VAN DUIZEND, *supra* note 97, at 158-62 (reviewing state legislation prohibiting discrimination in the areas of employment, housing, and public accommodations, and including both a tabular summary of whether the physically or mentally disabled are covered and the relevant enforcement mechanisms). Other writers have provided lists of the relevant state statutory provisions without including much in the way of analysis of them. *See, e.g.*, L. ROTHSTEIN, *supra* note 10, at 139.

99. Only two states had enacted a definition that was modelled after section 504 of the Rehabilitation Act. *See* COLO. REV. STAT. § 4-34-801(1974); GA. CODE. ANN. § 66-501 to 502(3) (1979 & Supp. 1986). *See also* OHIO REV. CODE ANN. § 4112.02(A-F) (1980 & Supp. 1987). *And see* Note, *Judicial Identification of the "Handicapped Person" in North Carolina*—Burgess v. Joseph Schlitz Brewing Co., 16 WAKE FOREST L. REV. 836, 846 (1980)("Few states have patterned definitions of "handicapped person" after the broad concept embodied in the Rehabilitation Act.")(citing statutes from Colorado, Illinois, and Maryland).

100. *See, e.g.*, ALA. CODE § 21-7-1 (1975)("It will be the policy of this state to encourage blind

Since 1980, the remaining states have adopted some form of legislative anti-discrimination protection for handicapped persons,[101] and more than a dozen others have made significant revisions in their statutory definition.[102] Most of these states have adopted some form of the section 504 model within the last five years.[103] This trend toward adoption of the section 504 definition is understandable because statutory interpretation at the state level has been slow.[104] As such, even states that do not have a definition that is comparable to the federal statute look to federal case law and administrative interpretations for guidance.[105]

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and otherwise physically disabled persons to participate fully in the social and economic life of the state.").

101. Delaware has prohibited discrimination on the basis of handicap in public employment by Executive Order No. 74 as amended by E.O. Nos. 81, issued January 31, 1980, and 102 issued October 5, 1981, as cited in Employment Law Ctr. of the Legal Aid Society of San Francisco, *AIDS As A Physical Handicap Under State Law* (May 18, 1987). A number of states do not have comprehensive fair employment practices legislation, but do prohibit discrimination against handicapped individuals in public employment as a matter of state policy. *See, e.g.,* ALA. CODE § 21-7-1 (1975); ARK. STAT. ANN. § 82-2901 (1979); Del. EXEC. ORDER No. 74 (as amended by Exec. Order Nos. 81 (Jan. 31, 1980), and 102 (Oct. 5, 1981)); MISS. CODE ANN. § 43-6-15 (Supp. 1981).

102. *See, e.g.,* ALASKA STAT. § 18.80.010 to 80.300 (1987)(civil rights act amended to include physical or mental disability); HAW. REV. STAT. § 378-2 (1985); KAN. STAT. ANN. § 44-1009 (1986); MASS. GEN. LAWS ANN. ch. 151B, § 4(16) (West 1978 & Supp. 1986); MINN. STAT. ANN. § 363.03 (West Supp. 1987); N.M. STAT. ANN. § 28-1-2 (1978 & Supp. 1986); N.Y. [HUMAN RIGHTS] LAW §§ 296 (1, 1a) (McKinney 1982 & Supp. 1987); N.C. GEN. STAT. § 168A (1981 & Supp. 1985); OR. REV. STAT. ANN. § 659.425 (1987); R.I. GEN. LAWS § 28-55-7 (1986 & Supp. 1987); VT. STAT. ANN. tit. 21, § 495 (1978 & Supp. 1986); VA. CODE ANN. § 51.01-1 to .01-46 (1976 & Supp. 1985); W. VA. CODE § 5-11-9 (Supp. 1987).

103. These include Alaska, Massachusetts, Minnesota, New Mexico, North Carolina, Oregon, Rhode Island, Vermont, Virginia, and West Virginia. The statutes are listed in Appendix A. *See* Note, *supra* note 99, at 855, criticizing the earlier North Carolina definition and recommending that North Carolina consider adopting the expansive federal definition contained in section 504.

104. *See, e.g.,* Davis v. Modine Mfgr. Col, 526 F. Supp. 943, 958 (D. Kan. 1981)(refusal to accept pendent jurisdiction of state handicap discrimination claim because scope of Kansas Civil Rights Act is unchartered and state courts have not yet resolved many substantive issues). *See also* L. ROTHSTEIN, *supra* note 10, at 139 ("Inasmuch as many of these [state] statutes are relatively new and have yet to be subject to significant interpretation, no attempt is made to analyze and compare state laws.").

105. *See, e.g.,* Lyons v. Heritage House Restaurants, 432 N.E.2d 270, 272 (Ill. 1982)("Handicapped themselves by this lack of information [in the legislative history of the Equal Opportunities for the Handicapped Act], appellate courts have devised and applied their own definitions based on analogies to other Illinois statutes and administrative rules, Federal law and the law of other States."); Silverstein v. Sisters of Charity, Etc., 614 P.2d 891, 894 (Colo. 1980)(relying on Supreme Court opinion construing section 504 for concluding that individualized consideration of every person was required by Colorado's anti-discrimination statute); Civil Rights Div. of Arizona Dept. of Law v. Superior Court, Pima County, 146 Ariz. 419, 424, 706 P.2d 745 (Ct. App. 1985)(in the absence of Arizona precedent construing Arizona civil rights legislation—prior to inclusion of handicapped persons—court looked to federal cases construing Title VII of the Civil Rights Act since acts were substantially identical). *See* Pa. Human Rel. Comm., 16 PA. CODE § 44.4 (1978)(In the Comment to the implementing regulations for the state 'handicapped discrimination law, the Commission said, "The definition of 'handicapped or disabled person' is adopted verbatim from the definition of the United States Department of H.E.W.'s section 504 regulations in accordance with the recommendations of most commenters. The Commission is satisfied that the Federal definition avoids the ambiguity commonly complained of with respect to its own earlier definition."). *But see* State Div. of Human Rights v. Xerox Corp., 65 N.Y.2d 213, 218, 480 N.E.2d 695, 698 (1985)(In concluding that applicant's obesity can be considered an impairment under the New York Human Rights law, the court rejected the employer's argument that the applicant's condition did not place any restrictions on her physical or mental abilities. It said, "[t]hese arguments might have some force under typical disability or handicap statutes narrowly defining the terms in the ordinary sense to include only physical or mental conditions which limit the ability to perform certain activities [such as the section 504 definition]. However, in New York, the term "disability" is more broadly

It is important to note that, of those state statutes that use the section 504 definition, some have accepted all three parts of the definition,[106] while others have made some modifications. West Virginia and Utah, for example, adopted the definition for physical and mental impairment only, disregarding the second ("having a record of") and the third ("being regarded as having") alternative definitions. Georgia and Virginia permit the first and second alternatives but have omitted the category of handicapped persons that includes those who are regarded as, or perceived as, having a handicap. Finally, Missouri will not permit "having a record" of an impairment to serve as the statutory basis for protection.

Even where the comprehensive federal definition has been accepted, ambiguities in how the states will apply it may cause uncertainty.[107] Additionally, the outright omission of certain portions of that definition has even more serious implications for protection of handicapped individuals. The omitted sections could potentially have covered numerous groups of people who have suffered from such conditions as cancer,[108] disfigurement,[109] or AIDS.[110] Such people who might not fall within the jurisdiction of the federal protections will remain unprotected despite their states' efforts to prohibit discrimination against handicapped people solely on the basis of their disability.

As previously discussed,[111] other approaches to defining "handicap" present even more serious problems of coverage and comprehensibility. Those problems are well-represented among the state statutes identified in this research. Sixteen states, for example, list certain disabling conditions or exemplary impairments, such as "physically disabled," "blind," "hearing

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defined. The statute provides that disabilities are not limited to physical or mental impairments, but may also include "medical" impairments.").

106. The text of the section 504 definition is set out *supra* at note 28 and accompanying text.

107. *See supra* notes 36-40 and accompanying text for a discussion of potential problems with the federal definition. *See also* Quinn v. Southern Pacific Transportation Co., 711 P.2d 139, 145 (Or. Ct. App. 1985), for a discussion of the adoption of the federal definition for "handicapped person" in the definitions section of Oregon's unlawful employment practices statute, OR. REV. STAT. § 659.400(2) (1987), but the failure to carryover this term into the proscriptive section and instead to use the undefined terms "physical or mental impairment." OR. REV. STAT. § 659.425(1)(1987).

108. *See, e.g.*, Lyons v. Heritage House Restaurants, 432 N.E.2d 270 (Ill. 1982)(terminated employee with early uterine cancer not considered handicapped within the meaning of the 1970 Illinois Constitution nor the Equal Opportunities for the Handicapped Act which was later repealed, and thus, the employee was not protected because cancer did not actually impose severe barriers upon her ability to perform). This case demonstrates that, unless the statutory protection addresses employer perceptions directly, employees with such non-contagious diseases as uterine cancer can be terminated for being misperceived as unable to perform the job. *See also* CAL. [GOV'T] CODE § 12926(f) (Deering Supp. 1981)(specifically covering any medical condition related to or associated with a diagnosis of cancer, for which a person has been rehabilitated or cured, in recognition of the inadequacy of the ordinary definition of physical handicap).

109. In his majority opinion in *Arline*, discussed *supra* note 66 and accompanying text, Justice Brennan took great pains to describe the inherent unfairness in discrimination against people whose impairments may not substantially limit their functioning, but could substantially limit their ability to work as a result of negative reactions and unfounded fears by others. *Arline*, 107 S. Ct. at 1129.

110. *See supra* note 79 for a discussion of the likelihood that AIDS victims would fall within the statutory handicapped protection of "perceived handicap." Even if an AIDS carrier, for example, did not yet manifest any signs of physical impairment, an employer might well "perceive" that person to be handicapped. Such a person would be protected under the third prong, "is regarded as having an impairment," of section 504.

111. *See supra* notes 18-22 and accompanying text.

impaired," and "epilepsy."[112] In so doing, they have not provided any more guidance to courts, handicapped persons, or employers than if they had omitted an attempt at defining the terms altogether although some states do combine it with some other form of definition.[113] How will employers in Indiana, for example, know if an applicant might or might not be covered by the anti-discrimination provisions when the statute says only that a "handicap" is a physical or mental condition that constitutes a substantial handicap?[114]

Similarly, a number of states approach the definition by providing a more comprehensive list of examples of protected impairments, such as amputation, loss of coordination, infirmity, malformation, disfigurement caused by injury, birth defect, or illness.[115] While this provides more information than the circular definitions above, it does not actually define the terms, and it carries the additional danger of being construed as an exhaustive list under ordinary rules of construction, thereby excluding from coverage conditions that were not contemplated at the time of passage of the acts.[116]

Another group of states has chosen to define "handicap" with reference to professional medical judgment.[117] All of these states, however, combine this "medically determinable" language with some additional form of definition, usually a non-section 504 definition. Three potential problems arise from such a combined definition. First, an employer could rely on an independent contract arrangement with a physician to give the appearance of objectivity to adverse employment decisions. Second, while medical diagnoses shouldn't differ drastically among doctors, they do to some extent. Cases

112. These states are listed under "Conditions" in Appendix B. The actual definitions used and the relevant statutes are presented in Appendix A.

113. Colorado, Iowa, Kansas, Kentucky, and New Hampshire combine a list of handicapping conditions with another type of definition as shown in Appendix A, *e.g.*, Iowa incorporates the section 504 definition by regulation.

114. IND. CODE ANN. § 22-9-1-3(q) (Burns 1986).

115. California, District of Columbia, Maryland, Montana, Nebraska, New Jersey, and West Virginia. The relevant statutes are listed in Appendix A.

116. The former Rhode Island Fair Employment Practices Act, for example, included a non-section 504 definition in the Act, but was qualified by a "list" of the type being discussed here. That statute defined "handicap" as "any physical disability, infirmity, malformation, or disfigurement which is caused by bodily injury, birth defect, or illness . . . which shall include, but not be limited to, any degree of paralysis, amputation, lack of physical coordination . . . speech impediment, or physical reliance on a . . . remedial appliance." R.I. GEN. LAWS § 28-5-6(H)(1986 & Supp. 1987). In Providence Journal Co. v. Mason, 359 A.2d 682 (R.I. 1976), the plaintiff had suffered a "whiplash injury" which required the wearing of a surgical collar and produced some pain and discomfort. She was thereafter terminated from her employment. In concluding that plaintiff did not suffer from a "physical handicap" within the meaning of the Act, the supreme court reasoned that the first section of the definition (above) is "immediately limited by an enumeration of specific injuries, infirmities, or malformations . . . ." This list, the court said, can not be extended to include other injuries or infirmities which are different in kind from those enumerated unless the Legislature intended that the language be immune from such limitation. *Mason*, 359 A.2d at 686. The court added that the phrase "include, but not be limited to," does not prevent the application of this principle, especially in the antidiscrimination context where such a phrase is generally construed as an enlargement, not a limitation. *Mason*, 359 A.2d at 687.

117. These states are: District of Columbia, Hawaii, Illinois, Kentucky, Maine, Michigan, Nebraska, New Jersey, New York, Ohio, South Carolina, and South Dakota. References to the relevant statutes appear in Appendix A. The language in the Illinois statute is "a determinable physical or mental characteristic." It does not explicitly say determinable "by a medical professional," so other ways to construe that language may be possible.

of discrimination could then turn on the credibility of a given physician rather than on an independent assessment of whether discrimination has occurred under the statute.[118] Finally, whether an applicant or employee falls within the statutory rubric of a given antidiscrimination statute turns largely on legislative and judicial construction of the plain language of statutes. A medical professional is in no better position to make this determination than the enforcement agency or court with jurisdiction over the matter without additional guidance as to the meaning of the statute. So, for example, in Hawaii, by what criteria is a physician to "verify" whether a "substantial physical impairment is a handicap"?[119] The final type of definition, used in Arizona, and to some extent by five other states,[120] establishes a test for discrimination that links the definition of disability with employability.[121] The Arizona statute defines "handicap" as "a physical impairment that substantially restricts or limits an individual's general ability to secure, retain or advance in employment."[122] That definition parallels the definition origi-

118. *See, e.g.*, Unified School Dist. v. Kansas Commission on Civil Rights, 640 P.2d 1291 (Kan. 1982)(independent contractor physician relied on correspondence from applicant's personal physician to conclude applicant could not perform heavy lifting, when applicant's personal physician had concluded that applicant could perform job).

119. HAW. REV. STAT. § 378-2 (1985)(A "handicap" is a "substantial physical impairment where such handicap is verified by medical finding . . . .").

120. ARIZ. REV. STAT. ANN. § 41-1404 (1985). The other five states are Florida, Pennsylvania, Vermont, Washington, and Wisconsin. The relevant statutes are listed in Appendix A. Both Vermont and Wisconsin use a similar definition. Vermont uses it in combination with the Section 504 definition (defining "substantially limits" as relating to the degree the impairment affects an individual's ability to secure, retain, or advance in employment). VT. STAT. ANN. tit. 21, § 495 (Supp. 1986). Wisconsin gives the plaintiff two approaches to proving "handicap": either the claimant must show that the real or perceived impairment makes achievement unusually difficult, *or* that the real or perceived impairment limits the capacity to work. WISC. STAT. ANN. § 111.32(8)(a) (West 1987). *See also* LaCrosse Police and Fire Com'n v. LIRC, 407 N.W.2d 510, 518 (Wis. 1987). In addition, Wisconsin incorporates the section 504 definition via its state implementing regulations. Washington also uses a work-oriented definition, but combines it, in its implementing Regulations, with a hybrid definition that includes the terms "medically cognizable" impairment, having a record of an impairment, is perceived to have an impairment, and further elaboration of the degree of impairment needed. WASH. ADMIN. CODE § 162-22-030, -040 (1987).

121. *See* Appendix B, Government Purpose-Work Section III. Although the Wisconsin statute defines "handicap" as a "physical or mental impairment which makes achievement unusually difficult or limits the capacity to work," WISC. STAT. ANN. § 111.32(8) (West 1974 & Supp. 1986), it, unlike the others in this category, also includes within its protection those with a "record of such impairment" and those "perceived as having such impairment."

122. ARIZ. REV. STAT. § 41-1461(4) (1985). This statute was enacted on April 18, 1985. The statute includes a provision for "reasonable accommodation" by employers, such that a "qualified handicapped individual" is a "person with a handicap who with reasonable accommodation is capable of performing the essential functions of the particular job in question within the normal operation of the employer's business in terms of physical requirements, education, skill and experience." ARIZ. REV. STAT. § 41-1461(7) (1985). The Arizona statute seems to impose less burden on employers with respect to accommodation than do statutes from other states or the federal Rehabilitation Act. In Arizona, "reasonable accommodation" means:

> an accommodation which does not: (a) Unduly disrupt or interfere with the employer's normal operations; (b) Threaten the health or safety of the handicapped individual or others; (c) Contradict a business necessity of the employer; (d) Impose undue hardship on the employer, based on the size of the employer's business, the type of business, the financial resources of the employer and the estimated cost and extent of the accommodation.

ARIZ. REV. STAT. § 41-1461(8) (1985).

The Federal Rehabilitation Act, and those states which follow it, generally require that an employer make a reasonable accommodation as long as it does not impose undue hardship, 45 C.F.R. § 84.12(b)(c) (1987). "Undue disruption or interference" with an employer's normal operation, as allowed in (a) above, would not be sufficient.

nally enacted by Congress in the first version of section 504.[123] The original section 504 definition was rejected by Congress within a year of enactment because it too narrowly construed the protections intended to be accorded handicapped persons under the Act.[124]

It is easy to see why concerns about this narrowness caused such immediate action by Congress. First, the Arizona statute makes no provision for the important groups Justice Brennan talked about protecting in *Arline*, those with a history of an impairment or regarded as having an impairment.[125] Nor does it acknowledge that an impairment can have some functional significance to an individual that is unrelated to employment, such as is taken into account by the section 504 definition linking impairment to "major life functions, including employment." Second, the plain language of the statutory definition might automatically preclude someone like Gene Arline from establishing a prima facie case of "handicap." The tuberculosis in no way affected Arline's ability to teach.[126] If the Arizona courts were to follow the statutory definition strictly, the burden would never shift to the employer to show that a "reasonable accommodation" would cause an undue hardship. Finally, these stringent requirements for a successful claim in the Arizona Act when read with the narrowly drawn definition of "reasonable accommodation"[127] may be a significant hurdle for an aggrieved handicapped person.[128] Since no reported cases in Arizona have yet been brought under section 41-1461, it is too soon to determine whether this result will occur.[129] A brief examination of case law from other states, construing the various types of definitions discussed here may shed light on this issue.

### *Case Law Interpretation of State Definitions of "Handicap"*

Few state courts have had the opportunity to construct a detailed interpretation of their state's definition of handicap.[130] Many of the statutes discussed in the preceding section are so new, or so recently revised, that cases

123. Rehabilitation Act of 1973, § 7(6), Pub. L. No. 93-112, 87 Stat. 355 (1984)(codified as amended at 29 U.S.C. § 706(6) (Supp. III 1983-86)).

124. *See, e.g.*, S. REP. NO. 1297, 93d Cong., 2d Sess. 16 (1974), *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 6373, 6388.

125. *See supra* note 80 and accompanying text for a discussion of Justice Brennan's emphasis in this regard.

126. *See supra* note 68 for a discussion of the facts of *Arline*.

127. *See supra* notes 43 and 44 setting forth the definition of "reasonable accommodation."

128. Other language in the statute also suggests a narrow purpose. The first sentence of the statute reads, "Nothing contained in this article shall be interpreted to require that the less qualified be preferred over the better qualified simply because of race, color, religion, sex, age, handicap, or national origin." ARIZ. REV. STAT. ANN. § 41-1463(A) (1985). This language does not appear as the first sentence of any of the other 49 statutes reviewed for this Note. The Arizona courts, however, have been willing to give deference to Title VII intent and interpretations where no Arizona precedent yet existed, *see supra* note 105. In practice, then, the administrative agencies and courts may give a broad reading to the definition of "handicap" in deference to the Rehabilitation Act, at least until Arizona case law determines otherwise.

129. A 1987 Wisconsin case construed that state's statutory language regarding "limits the capacity to work." La Crosse Police and Fire Comm'n v. LIRC, 407 N.W.2d 510 (Wis. 1987). The *La Crosse* court concluded that the phrase refers to the particular job in question, i.e., did the impairment actually limit the capacity to work, or did the employer perceive that it did so. *La Crosse*, 407 N.W.2d at 518.

130. In La Crosse Police and Fire Comm'n v. LIRC, 407 N.W.2d 510, 518 (Wis. 1987), for example, the court recognized that confusion about the state's definition still existed, saying that

currently in the state courts have been brought under previous statutes and, therefore, under out-dated statutory definitions. While many of the state cases to date have not dealt with whether the litigated condition is a "handicap" within the meaning of the Act,[131] those that have illustrate several emergent issues.

First, state courts are making threshold determinations about whether their legislatures intended the relevant statute to be broadly or narrowly construed. The first reported case construing a handicap discrimination statute, *Chicago, Milwaukee, St. Paul & Pacific Railroad Company v. Department of Industry, Labor and Human Relations*,[132] concluded that to effectuate the broad remedial purpose of the statutorily proscribed discrimination, the statute should be liberally construed.[133] Other state courts have given a more narrow reading to the definitions.[134]

A second theme prevalent in recent state court case law is the sparse legislative history accompanying the passage of these acts. Many of the statutes were passed as amendments to existing antidiscrimination or fair employment practices acts,[135] and seemed to have passed without much ado.[136] One Pennsylvania court remarked that, while the legislative history was sparse indeed, it understood that the need for the legislation had been dramatized when some legislators performed their legislative duties while in

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"[t]his court, since 1979, has been called upon five times to interpret the definition of 'handicapped individual' now found in [the statute]."

131. *See, e.g.*, Fisher v. Superior Court (Alpha Therapeutic), 177 Cal. App. 3d 781, 223 Cal. Rptr. 203 (1986)(dealing with the issue of reasonable accommodation to an employee recovering from cancer); Maine Human Rts. Comm. v. Canadian Pacific Ltd., 458 A.2d 1225 (Me. 1983)(thorough discussion of defenses to a handicap discrimination claim, including concerns for safety of others and bona fide occupational qualifications); Kraft v. Bechtel Power Corp., 483 So.2d 56 (Fla. Ct. App. 1986)(court assumed "arguendo" that the plaintiff's diabetes was a "handicap" under Florida's Human Rights statute).

132. 215 N.W.2d 443 (Wisc. 1974).

133. *Id.* at 445-46. *See also* Anderson v. Exxon, 446 A.2d 486 (N.J. 1982)(rejecting narrow interpretation of statutes by other states wherein a disability must pose a "severe barrier" to major life functions); Salt Lake City Corp. v. Confer, 674 P.2d 632 (Utah 1983)(deferring to administrative agency's broad construction of the discrimination statute).

134. *See, e.g.*, Lyons v. Heritage House Restaurants, 432 N.E.2d 270 (Ill. 1982)(requiring that impairment impose severe barrier on victim's ability to perform major life functions); Providence Journal Co. v. Mason, 359 A.2d 682 (R.I. 1976)(requiring handicap to be a serious injury or impairment of more than a temporary nature).

135. *See* Appendix A which lists the type of statute found in each state. *See, e.g.*, Salt Lake City Corp. v. Confer, 674 P.2d 632, 634 (Utah 1983)("A prohibition against employment discrimination on the basis of 'handicap' poses difficult conceptual and definitional problems, especially where, as here, the prohibition is simply inserted into a law drafted to forbid discrimination on other bases that are qualitatively different from 'handicap.' ").

136. This author sent for the legislative history for the 1985 Arizona legislation. No committee reports were prepared on the legislation. Four witnesses testified in favor of the bill at a meeting of the Committee on Government Operations, (Minutes of Meeting, April 2, 1985): a representative from the Chamber of Commerce, stressing that this bill covered the problems for employers of "second injuries" of handicapped employees; Senator Mawhinney stated this bill extended civil rights opportunities to the handicapped and protects the employee and the employer; the Arizona Council for the Deaf stressed the importance of employment for the handicapped; and a lawyer from the Arizona Center for Law in the Public Interest testified that this bill was very necessary to protect the rights of the handicapped.

One court discussed the potential conflicting lower court opinions that result without adequate legislative history. Lyons v. Heritage House Restaurants, 432 N.E.2d 270, 272 (Ill. 1982)("Unfortunately, and owing to the courts' lack of access to the lawmakers' actual intent, these efforts have not always been in complete harmony.").

wheelchairs.[137] This lack of legislative history is, of course, aggravated by the incorporation into the acts of what can best be described as circular definitions.[138]

Third, state courts have demonstrated some confusion about what definition is contained in the relevant statute. The statute in Kansas, for example, does not really include a definition.[139] Since the court did not find guidance there, it decided to rely on medical testimony about whether a handicap existed.[140] Yet, the legislature surely could have incorporated reliance on medical testimony had it chosen to use that as the gauge for handicapping conditions.

Finally, even in those states where the section 504 definition has not served as the model for the precise statutory language chosen for the statute, both courts[141] and administrative agencies[142] have relied on that language for guidance in interpreting their own statutes. A Kansas court went so far as to conclude that, "although phrased differently in the federal and state legislation, the basic concept is similar."[143] If this is true, then, more legislatures or regulatory agencies may either move toward incorporating the section 504 definition, or state courts and administrative agencies might interpret whatever the legislature adopts to operate as the section 504 definition by construction and interpretation.

## CONCLUSION

This Note has described how legislatures and courts have defined "handicap" for purposes of antidiscrimination protections. It has pointed out the benefits and problems with a number of these approaches. While no one solution appears likely, or necessary, states ought to consider providing a comprehensive definition, such as the one provided by Congress in the Rehabilitation Act of 1973. Such a definition allows room for detailed interpretative regulations that can be designed to provide guidance to the courts,

137. Philadelphia Elec. v. Pa. Human Rel. Comm., 448 A.2d 701, 703 (Pa. Commw. Ct. 1982).

138. *Philadelphia Elec.*, 448 A.2d at 703 ("Since the definition uses the terms it purports to define, it is of little help in a resolution of one of the critical issues in this case, to wit, is obesity or morbid obesity a handicap or disability?"); *see also* discussion *supra* notes 112-14 and accompanying text.

139. KAN. STAT. ANN. § 44-1009 (1986).

140. Unified School Dist. v. Kansas Comm'n on Civil Rights, 7 Kan. App. 2d 319, 321-22, 640 P.2d 1291, 1294 (1982).

141. Consolidated Freight v. Cedar Rapids Civil Rights Comm'n, 366 N.W.2d 522, 527 (Iowa 1985)(statutory definition interpretation based on language in the Rehabilitation Act, about limitations on major life activities). Iowa does not use the section 504 definition in its statutory definition. *See* Appendix A and Appendix B.

142. Massachusetts Transit v. Commission on Human Relations, 68 Md. 703, 716, 515 A.2d 781, 787 (1986)(acknowledging that the administrative guidelines prepared by the state agency were modeled after the Rehabilitation Act section 504 definitions, and therefore looking to federal court decisions construing the federal statute for guidance in interpreting the Maryland act). Maryland does not use the section 504 definition in its statutory definition, but incorporates it into its administrative regulations, "Handicap Discrimination Guidelines," MD. REGS. CODE tit. 14, subtit. 03, § .01-.08, (1979). *See* Appendix A and Appendix B.

143. Padilla v. City of Topeka, 238 Kan. 218, 708 P.2d 543, 551 (1985)(equating "a substantial disability unrelated to the ability to engage in the particular job or activity," as found in KAN. STAT. ANN. § 44-1002[j] (1986), with "substantially limits one or more of such person's major life activities," found in 29 U.S.C. § 706(7)(B)(i) (Supp. III 1983-86).

but at the same time does not overly constrain courts with formalistic boundaries. It also brings within its coverage people with physical or mental conditions that have traditionally been subjected to invidious employment discrimination. An employer is still given the opportunity to show that a handicapped person does not have to be hired or retained because he or she cannot be reasonably accomodated within the employer's workplace. But, the breadth of the definition's coverage places the burden squarely on the employer to make such a showing, rather than on the traditionally discriminated-against class.

For now, substantial variety in definitional schemes exists. One commentator has observed, "For individuals who have engaged in a lifelong struggle to avoid being labeld 'crippled,' 'mentally retarded,' or the like, the requirement of proving that one is indeed 'handicapped' may be quite distasteful."[144] The distress associated with such a task could certainly be aggravated given the complex web of statutory definitions and court constructions in the federal and state systems that confront an aggrieved handicapped person who attempts to assert rights under the appropriate statutory protections. Even if many of the cases end up with similar results under the various types of statutory definitions, that variety in statutory schemes itself creates confusion for potential claimants under those schemes. Additionally, the uncertainty affects employers who are trying to design employment practices and to make decisions that comport with the law.

To accomplish the important goal underlying these statutes of equal employment opportunities for handicapped persons, both employee and employer concerns must be addressed. Those states that have developed statutory definitions of "handicap" that comport with the federal section 504 definition and its detailed implementing regulations have made progress toward achieving this goal. If the states and the federal government begin their analysis of a handicapped discrimination claim from a uniform starting point, then legislatures and courts may be well on the way to providing sound, practical guidance on how best to ensure equal opportunity for handicapped persons.

144. Burgdorf, *supra* note 12, at 19 n.2.

## APPENDIX A

### STATE HANDICAP EMPLOYMENT ANTI-DISCRIMINATION STATUTES*

| State | Statute | Definition of Handicap |
|---|---|---|
| Alabama | ALA. CODE § 21-7-8 | Physically disabled (nonambulatory, semiambulatory, sight and hearing impaired, aging). |
| Alaska | ALASKA STAT. § 18.80.220 | Section 504 definition; or a condition that may require use of prosthesis or special equipment. Physical or mental impairment is a physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more bodily systems. |
| Arizona | ARIZ. REV. STAT. ANN. § 41-1461(4) | Physical impairment that substantially restricts or limits an individual's general ability to secure, retain, or advance in employment, except caused by recent use of alcohol or drugs. |
| Arkansas | ARK. STAT. ANN. § 82-2901 | Visually handicapped, hearing impaired, and other physical handicaps. |
| California | CAL. [GOV'T] CODE § 12940 | Physical handicap-impairment of sight, hearing, or speech, or impairment of physical ability because of amputation or loss of function or coordination, or any other health impairment which requires special services; Medical condition - health impairment related to or associated with cancer, for which person has been rehabilitated or cured. |
| | CAL. ADMIN. CODE § 7293.6 | By Regulation, incorporates the section 504 definition verbatim, and excludes mental retardation, mental illness, alcoholism, and drug addiction. |
| Colorado | COLO. REV. STAT. ANN. § 24-34-301(4) | Section 504 definition. |

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| Connecticut | CONN. GEN. STAT. § 46a-51 | Mental disorder, mental retardation, and physical disability (blind or chronic physical handicap, infirmity or impairment, whether congenital or from injury or illness, including epilepsy, deafness, reliance on remedial device). |
| Delaware | | None |
| D.C. | D.C. CODE ANN. § 1-2501(23) | Physical handicap is a bodily or mental disablement which may be the result of injury, illness, or congenital condition for which reasonable accommodation can be made. |
| | D.C. OFFICE OF HUMAN RIGHTS, Emp. Disc. Guidelines, § 599.1 (as cited in [8A Fair Employment Practices Manual] 453 LAB. REL. REP. (BNA) 1710 (9/86)) | The Regulations say "disablement" is any physiological disorder or condition, disfigurement, anatomical loss affecting major body system, or a mental or psychological disorder, specifically including epilepsy, cancer, heart disease, diabetes, and AIDS. |
| Florida | | No definition in Employment Act. |
| | FLA. STAT. tit. 44, § 760.22(5) | Handicap is defined in the Fair Housing Act as (a) section 504 definition; (b) significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior, or developmentally disabled. |

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| Georgia | GA. CODE ANN. § 66-502 | Any condition or characteristic that renders a person a handicapped individual, excluding drug or alcohol addiction and contagious disease carried by or afflicting the applicant, where such individual is any person who has a physical or mental impairment which substantially limits one or more of such person's major life activities and who has a record of such impairment. "Physical or mental impairment" is defined by reference to bodily system disorders or losses. "Substantially limits" means creates a likelihood that such person will experience difficulty in employment. |
| Hawaii | HAW. REV. STAT. § 378-2 | A substantial physical impairment where such handicap is verified by medical finding and appears reasonably certain to continue throughout the lifetime of the individual without substantial improvement. |
| Idaho | IDAHO CODE § 56-707 | Blind, visually handicapped, the hearing impaired, and the otherwise physically handicapped. |
| Illinois | ILL. REV. STAT. Ch. 68 para. 1-108 | A determinable (recognizable by clinical or lab diagnoses) physical or mental characteristic of a person, including, but not limited to, a characteristic which necessitates the use of a guide, hearing or support dog, the history of such characteristic, or the perception of such characteristic by the person complained against, which may result from disease, injury, congenital condition of birth or functional disorder and which is . . .unrelated to the person's ability to perform the duties of a particular job. |
| | ILL. ADMIN. CODE § 2500.20(c) | The Regulations exclude obesity, alcoholism, transitory and insubstantial conditions, and debilitating or disfiguring conditions. |

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| Indiana | IND. CODE ANN. § 22-9-1-3 | Physical or mental condition of a person that constitutes a substantial disability. In reference to employment, it means one that is unrelated to person's ability to engage in a particular occupation. |
| Iowa | IOWA CODE ANN. § 601.6 | Physical or mental condition which constitutes a substantial handicap but is unrelated to ability to engage in a particular occupation. |
| | IOWA ADMIN. CODE § 8.26(1) | By Regulation, the section 504 definition is incorporated. |
| Kansas | KAN. STAT. ANN. § 44-1009 | Physical condition of a person, whether congenital or acquired by accident, injury, or disease which constitutes a substantial disability, but is unrelated to such person's ability to engage in the particular job or occupation. |
| Kentucky | KY. REV. STAT. ANN. § 207.130 | Physical condition whether congenital or acquired which constitutes a substantial disability and is demonstrable by medically accepted clinical or lab diagnostic techniques, unless the handicap restricts the ability to engage in the job. |
| Louisiana | LA. REV. STAT. ANN. § 46:2253 | Section 504 definition. Impairment is retardation, any physical or physiological disorder or prior mental condition, but at the discretion of employer, *not* to include chronic alcoholism or drug addiction; or, cosmetic disfigurement; or, anatomical loss of body system. |
| Maine | ME. REV. STAT. ANN. tit.5, § 4572 | Any disability, infirmity, malformation, disfigurement, congenital defect or mental condition caused by bodily injury, accident, disease, birth defect, environmental condition or illness; also, a substantial handicap as determined by a physician or, for a mental condition, psychiatrist or psychologist, or any other health or sensory impairment needing special education, vocational rehabilitation, or related services. |

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| Maryland | MD. ANN. CODE art. 49B | Infirmity, malformation, or disfigurement definition for physical handicap; any mental impairment or deficiency, as but not limited to, retardation or such other which may have necessitated remedial or special education and services. |
| | MD. REGS. CODE tit. 14, § .03 | Regulations incorporate the section 504 definition. |
| Massachusetts | MASS. GEN. L. ch. 151B | Section 504 definition. |
| Michigan | MICH. COMP. LAWS § 3.550(101) | A determinable physical or mental characteristic or the history of such characteristic which may result from disease, injury, congenital condition of birth or functional disorder. . .unrelated to individual's ability to perform duties of job; mental condition is limited to mental retardation and to a mentally ill restored condition. |
| Minnesota | MINN. STAT. § 363.03 | Section 504 definition. |
| Mississippi | MISS. CODE ANN. § 43-6-15 | Blindness, visual handicap, deafness, or other physical handicap, unless such disability shall materially affect performance of work required by the job. |
| Missouri | MO. REV. STAT. § 213.010A | A physical or mental impairment which substantially limits one or more major life activities, or a condition perceived as such which with or without reasonable accommodation does not interfere with performing the job. |
| | MO. CODE REGS. tit. 8, § 60-3.060 | The Regulations exclude minor temporary illnesses, such as broken bones, sprains, and colds; and, they define "major life activities" as those which affect employability, such as communication, ambulation, self care, socialization, education, vocational training, and transportation. |

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| Montana | MONT. CODE ANN. § 49-2-101 | Mental disability resulting in subaverage intellectual functioning or impaired social competence; infirmity, malformation, or disfigurement definition for physical handicap. (Note - the Veterans and Handicapped Persons Preference Act uses the 504 definition to define "handicapped.") |
| Nebraska | NEB. REV. STAT. § 48-1107 | Disability caused by bodily injury, birth defect, or illness, including epilepsy and any degree of paralysis, amputation, blindness, speech impediment, or physical reliance on remedial appliances; also, a condition which constitutes a substantial handicap as determined by a physician, but is unrelated to such person's ability to engage in particular occupation. |
| Nevada | NEV. REV. STAT. § 613.330 | Physical, aural, or visual handicap. |
| New Hampshire | NEW HAMPSHIRE REV. STAT. ANN. § 334-A:8 | Physical or mental handicap, other than illness, unrelated to a person's ability to perform a particular job or occupation. . .so long as the individual will not present a hazard to himself or other employees. |
| | N.H. CODE ADMIN. R. [HUM] 405.06 | The Regulations defines "handicap" as a permanent, long-term, or chronic physical or mental impairment which meets the 504 definition. |
| New Jersey | N.J. REV. STAT. § 10:5-12 | Infirmity, malformation, or disfigurement definition for physical handicap. Mental disability means mental, psychological or developmental disability resulting from anatomical, psychological, physiological, or neurological conditions which prevent normal exercise of any bodily or mental functions or is demonstrable, medically or psychologically, by clinical or lab techniques. |

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| New Mexico | N.M. STAT. ANN. § 28-1-2 | Section 504 definition. Also, a "medical condition" is any health impairment related to or associated with diagnosis of cancer based on competent medical evidence. |
| New York | N.Y. [EXEC] LAW § 290-301 | Physical, mental, or medical impairment resulting from anatomical, physiological, or neurological conditions which prevents the exercise of normal bodily functions or is demonstrable by medically accepted clinical or lab diagnostic techniques; a record of such impairment; or, a condition regarded by others as such an impairment, provided that for employment, term shall be limited to disabilities which do not prevent performance in a reasonable manner of activities involved in job or occupation sought or held. |
| N. Carolina | N.C. GEN. STAT. § 168-A3 | Section 504 definition (working is not listed as a major life activity). The subsidiary definitions follow the federal 504 implementing regulations exactly. It excludes sexual preference, alcohol or drug addiction or abuse, any disorder condition or disfigurement which is temporary in nature leaving no residual impairment, and communicable diseases which would disqualify a non-handicapped person from similar employment. |
| N. Dakota | N.D. CENT. CODE § 14-02.4-01 | Mental or physical disability, unless bona fide occupational qualification. |

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| Ohio | OHIO REV. CODE ANN. § 4112.02 | Medically diagnosable, abnormal condition which is expected to continue for a considerable length of time, whether correctable or uncorrectable by good medical practice, which can reasonably be expected to limit the person's functional ability (including, but not limited to, seeing, thinking, ambulating, grasping), or any limitation due to weakness and significantly decreased endurance, so that he cannot perform his everyday routine living and working without significantly increased hardship and vulnerability to what are considered the everyday obstacles and hazards encountered by the nonhandicapped. |
| Oklahoma | OKLA. STAT. tit. 25 § 1301 | Section 504 definition. |
| Oregon | OR. REV. STAT. § 659.425 | Section 504 definition. A physical or mental impairment is an apparent or medically detectable physical or mental condition which substantially limits one or more major life activities, but does not include temporary impairments that leave no residual disability, conditions mutable only upon longterm treatment, or conditions which are controllable by diet or drug therapy. |
| Pennsylvania | 43 PA. CONS. STAT. § 955 | Non-job-related handicap or disability which does not substantially interfere with the ability to perform the essential functions of employment. |
| | 16 PA. CODE § 44.4 | The implementing Regulations read the 504 definition into the term "handicap." |
| Rhode Island | R.I. GEN. LAWS § 28-5-7 | Section 504 definition. The subsidiary definitions follow the definitions found in the 504 regulations. |

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| S. Carolina | S.C. CODE ANN. § 43-33-560 | Substantial physical or mental impairment, whether congenital or acquired by accident, injury, or disease, where the impairment is verified by medical findings and appears reasonably certain to continue throughout the lifetime of the individual without substantial improvements, but, with respect to employment, which is unrelated to the individual's ability to engage in a particular job. Excluded are alcohol and drug abuse, perceived handicaps, and mental illness. |
| | S.C. CODE REGS. 65-71 | The Regulations provide detailed definitions of all of the terms in the statutory definition. |
| S. Dakota | S.D. CODIFIED LAWS ANN. § 20-13-10 | Any determinable physical or mental characteristic (mental retardation and mentally ill restored condition), or history of the characteristic which may result from disease, injury, congenital condition of birth or functional disorder which is unrelated to ability to perform the duties of a particular job or to an individual's qualifications for employment. (Includes a special section for blind persons). |
| Tennessee | TENN. CODE ANN. § 8-50-103 | Physical, mental, or visual handicap, unless handicap to some degree prevents the applicant from performing duties required or impairs performance of the work involved. It shall not include any disease or condition which is infectious, contagious, or similarly transmittable to other persons. |

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| Texas | TEX. [LAB.] CODE ANN. § 2.01 | Mental or physical handicap, including mental retardation, hardness of hearing, deafness, speech impairment, visual handicap, being crippled, or any other health impairment that requires special ambulatory devices or services, excluding addiction to any drug, illegal substance, or alcohol, if such condition does not impair an individual's ability to reasonably perform a job. |
| Utah | UTAH CODE ANN. § 34-35-6 | Physical or mental impairment which substantially limits one or more major life activities. |
| Vermont | VT. STAT. ANN. tit. 21 § 495 | Section 504 definition. The subsidiary definitions follow the 504 regulation definitions. It defines "substantially limits" as the degree that impairment affects an individual's employability, such that one is likely to experience difficulty in securing, retaining, or advancing in employment. |

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| Virginia | VA. CODE ANN. § 51.01-3 | A physical or mental impairment which substantially limits one or more major life activities or a record of such impairment, and is unrelated to ability to perform the duties of a particular job, or to qualifications for employment. "Physical impairment" means any physical condition, anatomic loss, or cosmetic disfigurement which is caused by bodily injury, birth defect, or illness. "Mental impairment" means (i) suffering from a disability attributable to mental retardation, autism, or any other neurologically handicapping condition closely related to mental retardation; or (ii) an organic or mental impairment that has substantial adverse effects on an individual's cognitive or volitional functions, excluding alcoholism or drug addiction and a disease or defect that has been successfully asserted by an individual as a defense to a criminal charge. |
| Washington | WASH. REV. CODE § 49.60.200 | Any sensory, mental, or physical handicap unless a bona fide occupational qualification, provided disability does not prevent proper performance of worker. Physical, mental, or sensory impairment (medically cognizable, exists as a record, or is perceived to exist) that would impede that individual in obtaining and maintaining permanent employment and promotional opportunities. Impairments must be material rather than slight; static and permanent, seldom fully corrected by medical replacement, therapy, or surgery. For enforcement purposes, a person will be considered handicapped by such an impairment if he or she is discriminated against because of the condition and the condition is abnormal. |

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| W. Virginia | W. VA. CODE § 5-11-9 | Physical or mental impairment which substantially limits one or more major life activities. Subsidiary definitions track the 504 definitions. |
| | West Virginia Human Rights Act, Handicap Disc. Rules, § 2 [8A Fair Emp. Prac. Manual] 457 LAB. REL. REP. (BNA) 3068f (4/85) | The Regulations add that a "physical or mental impairment" includes but is not limited to: diseases and conditions, such as orthopedic, visual, epilepsy, multiple 3068f sclerosis, muscular dystrophy, cancer, diabetes, heart disease, obesity, drug/tobacco addiction, and alcohol addiction. |
| Wisconsin | WIS. STAT. § 111.32 | Physical or mental impairment which makes achievement unusually difficult or limits capacity to work; has a record of such impairment; or, is perceived as having such. |
| Wyoming | WYO. STAT. § 27-9-105 | "Qualified handicapped person" is a handicapped person who is capable of performing a particular job, or would be with reasonable accommodation. |
| | WYO. EMP. COMM. Rules of Practice and Procedure Concerning Handicap Discrimination Complaints, § 3, as cited in [8A Fair Emp. Prac. Manual] 457 LAB. REL. REP. (BNA) 3512 (9/87) | The regulations incorporate the 504 definition. |

* The information contained in this Appendix was gathered through a 50 state survey of state legislation addressing discrimination against handicapped persons. It also draws on previous surveys, primarily, Leap, *State Regulation and Fair Employment of the Handicapped*, 5 EMPLOYEE REL. L.J. 382, Appendix (1979-80); L. ROTHSTEIN, RIGHTS OF PHYSICALLY HANDICAPPED PERSONS, (1984 & Supp. 1987); B. SALES & R. VANDUIZEND, DEVELOPMENTALLY DISABLED AND THE LAW 151-68 (1980).

† Section 504 definition: Physical or mental impairment that substantially limits one or more major life activity; or, a history of having such an impairment; or, is perceived as having such impairment.

†† Infirmity, malformation, or disfigurement definition: disability caused by bodily injury, birth defect, or illness, including epilepsy and including any degree of paralysis, amputation, blindness, speech impediment, or physical reliance on remedial appliances.

## APPENDIX B

## COMPARATIVE ANALYSIS OF STATE STATUTORY DEFINITIONS OF "HANDICAP"

### *Conditions*

States that provide no definition of "handicap," but instead either list conditions that would qualify, such as "physcially disabled," "blindness," "deafness;" or, state that a "handicap" is a type of disability:

Alabama, Arkansas, Colorado, Connecticut, Idaho, Indiana, Iowa, Kansas, Kentucky, Mississippi, Nevada, New Hampshire, North Dakota, Tennessee, Texas, Washington.

### *Comprehensive List*

States that provide a comprehensive list of potentially handicapping conditions beyond the conditions listed above:

California, District of Columbia, Maryland, Montana, Nebraska, New Jersey, West Virginia.

### *Government Purpose-Work*

States that specifically link the impairment to the ability to work:
Arizona, Florida, Pennsylvania, Vermont, Washington, Wisconsin.

### *Expert*

States that rely on a medical, psychiatric or psychological determination that a "handicap" exists:

District of Columbia, Hawaii, Illinois, Kentucky, Maine, Michigan, Nebraska, New Jersey, New York, Ohio, South Carolina, South Dakota.

### *Definition*

States that rely primarily on Section 504 definition (in the statutory definition or in the implementing regulations):

Alaska, California, Colorado, Iowa, Louisiana, Maryland, Massachusetts, Minnesota, New Hampshire, New Mexico, North Carolina, Oklahoma, Oregon, Pennsylvania, Rhode Island, Vermont, Wisconsin, Wyoming.

States that draw from the Section 504 definition, but omit one prong, usually either "perceived handicap" or "record of handicap":

Florida (in the Vocational Rehabilitation Act), Georgia, Missouri, Utah, Virginia, West Virginia.

States that use an alternative definition of "handicap":

District of Columbia, Illinois, Maine, Maryland, Michigan, Nebraska, New Jersey, New York, Ohio, South Carolina, South Dakota, Virginia.

### *No Definition Provided*

Delaware, Florida (except in Vocational Rehabilitation Act), Wyoming (provided in Regulation *only*).