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# Civil Rights--Employment Rights of the Physically Handicapped

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## CIVIL RIGHTS—EMPLOYMENT RIGHTS OF THE PHYSICALLY HANDICAPPED

"I do not choose to be a common man; it is my right to be uncommon—if I can. I seek opportunity—not security. I do not wish to be a kept citizen, humbled and dulled by having the state look after me. I want to take the calculated risk, to dream and to build; to fail and to succeed ”<sup>1</sup>

The physically handicapped<sup>2</sup> citizens of this country have won many battles in the past in their fight to become integrated into the mainstream of American life. The battles, however, have primarily been involved in securing services and assistance from the government.<sup>3</sup> The emphasis has now shifted and the disabled are struggling for equal rights and treatment with regard to access to public buildings, to transportation, to housing, to education, and to employment.<sup>4</sup> One of the most important of these new areas of endeavor is that of equal employment rights for qualified handicapped individuals. The handicapped individual's unemployment or underemployment<sup>5</sup> impairs his ability to support a family and to participate fully in the daily activities of life.

Of the approximately 11.7 million persons in the United States who are severely disabled or have some secondary work limitation, 7.2 million are able to work given the proper matching of their skills to the requirements of the job.<sup>6</sup> However, the disabled

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<sup>1</sup> The credo of the Human Resources Center, a facility for the handicapped on Long Island, New York. *Hearing on H.R. 8395 Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Public Welfare*, 92nd Cong., 2nd Sess. 570-71 (1972) [hereinafter cited as *Handicapped Hearings—Senate*].

<sup>2</sup> "[H]andicapped individual" means "any person who (A) has a physical or mental impairment which substantially limits one or more of such person's major life activities . . ." 29 U.S.C. § 706(6) (Supp. IV, 1974), amending 29 U.S.C. § 706(6) (Supp. III, 1973). (For the purposes of this article, handicapped will only refer to the physically disabled).

<sup>3</sup> See 29 U.S.C. §§ 701-94 (Supp. III, 1973) (vocational rehabilitation and other rehabilitation services); W. VA. CODE ANN. § 18-10A-1 to 12 (1977 Replacement Volume); Note, *Abroad in the Land: Legal Strategies to Effectuate the Rights of the Physically Disabled*, 61 GEO. L.J. 1501, 1502 & n.7 (1973) [hereinafter cited as *Rights of the Physically Disabled*].

<sup>4</sup> *Handicapped Hearings—Senate*, *supra* note 1, at 564.

<sup>5</sup> Underemployment of the handicapped is a result of attitudes that persons with a certain disability are only suited for jobs requiring limited skills. See *Handicapped Hearings—Senate*, *supra* note 1, at 1353.

<sup>6</sup> *Id.* at 265. West Virginia has 131,426 disabled persons between the ages of sixteen and sixty-four. Of this number 59,345 are able to work. *Id.* at 266-67.

in the labor force have the highest unemployment rate of any group in the country,<sup>7</sup> which may partially explain why many handicapped individuals who are able to work have dropped out of the labor force and no longer seek employment.<sup>8</sup>

Like other groups, especially Blacks, facing serious discrimination in hiring, the handicapped have found the most difficult barrier to overcome is that of employer prejudice.<sup>9</sup> The cost of this prejudice against hiring the handicapped and giving them equal advancement opportunities is staggering in terms of economic suffering, lost potential, and wasted lives.<sup>10</sup> Relief from such prejudice, however, now appears to be just over the horizon. New federal legislation,<sup>11</sup> combined with an enlightened judiciary, and an in-

<sup>7</sup> Address by Dr. Andrew S. Adams, U.S. Dept. of HEW, J. REHAB., May-June, 1976, at 18.

<sup>8</sup> Approximately 1.6 million individuals or twenty-two percent of the disabled are in this category. *Handicapped Hearings—Senate*, *supra* note 1, at 265. Approximately twenty-nine percent of West Virginia's disabled population that are able to work are not in the work force. *Id.* at 266-67.

<sup>9</sup> *Rights of the Physically Disabled*, *supra* note 3, at 1513; see *Handicapped Hearings—Senate*, *supra* note 1, at 534-36. In addition to a general prejudice against hiring the handicapped under any circumstances, these barriers include employer fear that the handicapped worker cannot perform his assigned tasks, that the handicapped worker has a higher accident rate than other workers, and that the employer's workmen's compensation rates will increase. These fears are for the most part groundless. For example, one study showed that the handicapped have eight percent fewer accidents than co-workers. *Id.* at 539. Employment of the handicapped does not affect the premium rates for workmen's compensation and forty-six states have enacted second-injury laws which protect the employer if the handicapped employee is reinjured. *Rights of the Physically Disabled*, *supra* note 3, at 1513 & n.86.

<sup>10</sup> Although the human cost cannot be measured, the benefits society can gain from better utilization of this group's skills can be illustrated by looking at the cost-benefit ratio of one of the nation's oldest grant-in-aid programs, Vocational Rehabilitation. This program is a cooperative federal-state program to provide services to handicapped individuals with the final objective of placing them in gainful employment.

Conservative estimates of the ratio of benefits to costs have ranged between eight to one and thirty-five to one. For example, the total earnings of the 291,272 individuals rehabilitated in fiscal year 1971 are estimated to be \$1 billion which represents a net increase of \$750 million in the Gross National Product. These individuals will contribute at a minimum \$58 million to federal, state, and local governments in taxes. This contribution is in addition to the estimated savings in removing clients from the public assistance rolls or by reducing dependency on others. The benefit of the expenditure is multiplied each year the individual remains employed. 118 CONG. REC. 32283 (1972) (remarks of Senator Cranston).

<sup>11</sup> Rehabilitation Act of 1973, 29 U.S.C. §§ 701-94 (Supp. III, 1973).

creased awareness by the handicapped of their rights will provide the vehicle for this relief. As the barriers faced by Blacks and other minority groups have been gradually overcome and jobs have been opened to qualified persons without regard to race, color, religion, sex, or national origin, similar progress can now be expected by the handicapped. Although the law concerning the employment rights of the handicapped<sup>12</sup> was not made a part of the federal civil rights laws,<sup>13</sup> the intention in its passage was to provide a method for progress by the handicapped in achieving equal employment opportunities.<sup>14</sup>

The fact that the handicapped were not included in the provisions of the Civil Rights Act of 1964<sup>15</sup> is not of critical importance. Although certain similarities between race and physical disability exist, such as unalterability, they are basically different.<sup>16</sup> Race is a suspect class<sup>17</sup> and as such cannot be a relevant consideration in any employment related decision;<sup>18</sup> however, physical ability may be a valid occupational qualification.<sup>19</sup> For example, it would be impossible for a blind individual to satisfactorily perform the duties of a position which necessarily required the use of visual skills. For this reason the handicapped complainant will have a greater burden of proof and must always be able to prove that the denial of employment was due to discrimination and not to a lack of proper qualifications. The right of the physically handicapped in the area of employment can thus be expressed as the right not to be excluded from employment solely on the basis of a handicapping condition.

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<sup>12</sup> 29 U.S.C. §§ 793-94 (Supp. III, 1973).

<sup>13</sup> 42 U.S.C. § 2000e (Supp. III, 1973), amending 42 U.S.C. § 2000e (1970); 42 U.S.C. § 1981 (1970).

<sup>14</sup> 118 CONG. REC. 32310 (1972) (statement of Senator Humphrey). Senator Humphrey had previously introduced legislation to amend Title VI & VII of the Civil Rights Act of 1964, to include the handicapped. *Id.*

<sup>15</sup> 42 U.S.C. § 2000e(2) (Supp. III, 1973).

<sup>16</sup> See *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1127 (1969). *Contra*, Kriegel, *Uncle Tom and Tiny Tim: Some Reflections on the cripple as Negro*, 38 AM. SCHOLAR 412 (1969); *Rights of the Physically Disabled*, *supra* note 3, at 1504-05.

<sup>17</sup> *Loving v. Virginia*, 388 U.S. 1, 9 (1966).

<sup>18</sup> 42 U.S.C. § 2000e(2) (Supp. III, 1973).

<sup>19</sup> 29 U.S.C. § 794 (Supp. III, 1973) provides: "No otherwise qualified handicapped individual . . . shall, solely by reason of his handicap . . . be subjected to discrimination . . ." (emphasis added).

Any analysis of this right must begin with a determination of the type of employer charged with discriminating against a handicapped individual. Various theories of recovery are available depending on the employer; therefore, it is vital to properly classify the employer. The rights of the handicapped will be considered in terms of employers in the public sector, which includes federal, state, and local governments, and the private sector, which includes all other employers.

### I. EMPLOYMENT IN THE PUBLIC SECTOR

Federal agencies and departments are prohibited by law from discriminating against an individual solely on the basis of a physical handicap.<sup>20</sup> In the past this provision against discrimination has been meaningless;<sup>21</sup> however, in light of a recent court decision<sup>22</sup> it has become a more potent weapon for handicapped individuals discriminated against by the federal government in its employment practices. In *Smith v. Fletcher*,<sup>23</sup> a paraplegic employed by the National Aeronautics and Space Administration alleged she was denied promotions on a discriminatory basis as a partial result of her physical handicap.<sup>24</sup> The court held that denial to a handicapped employee of a promotion to higher positions in the competitive service because of her handicap subjected her to a legal wrong and an adverse effect within the meaning of section 7153 of title 5 of the *United States Code* and was in violation of the regulations of the Civil Service Commission.<sup>25</sup> This case is significant because it is the first case to construe the antidiscrimination laws and regulations concerning the handicapped as they relate to federal employment.<sup>26</sup> As such, the court shows a willingness to strictly enforce such laws to protect the interests of the physically handicapped even though the courts have in the past

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<sup>20</sup> 5 U.S.C. § 7153 (1970); 5 C.F.R. § 713.401 (1976).

<sup>21</sup> Only one action had been brought under this statute prior to 1975. *Kletzing v. Young*, 210 F.2d 729 (D.C. Cir. 1954) (dismissed as moot since the civil service employment register had expired).

<sup>22</sup> *Smith v. Fletcher*, 393 F. Supp. 1366 (S.D. Tex. 1975).

<sup>23</sup> *Id.*

<sup>24</sup> The complainant was demoted to a GS-5 position and assigned clerical duties while a similarly qualified individual who was not handicapped had been promoted to GS-13. *Id.* at 1367-68.

<sup>25</sup> 5 C.F.R. § 713.401 (1976).

<sup>26</sup> 393 F. Supp. at 1369. The court awarded a retroactive promotion, back pay, and reasonable attorney's fees. *Id.*

generally been reluctant to oversee federal agencies' employment practices.<sup>27</sup>

A handicapped individual is also constitutionally protected from employment discrimination by the federal government. Where discrimination is irrational or unjustifiable, courts have not hesitated to find it in violation of the fifth amendment.<sup>28</sup> A possible limitation on the usefulness of the fifth amendment in this area is a strong judicial tradition of according the executive branch a broad latitude in filling agency positions.<sup>29</sup> Therefore, it may be more effective for a handicapped individual to pursue a cause of action under the statutory pronouncement of congressional policy, as discussed above,<sup>30</sup> rather than under the fifth amendment. Judicial attitudes in giving relief under the statutory prohibition seem more liberal than under the constitutional arguments. This, coupled with the fact that each federal agency and department must take affirmative action to insure the hiring, placement, and advancement of handicapped workers,<sup>31</sup> would seem to make the statutory argument the most viable in opening the door for more equal treatment for the disabled in the area of federal employment.

Doors are also opening in other areas of public employment, perhaps even to a greater extent than in the federal government. Qualified handicapped workers seeking employment with state and local governments enjoy the widest range of protection against discrimination. The United States Supreme Court has consistently recognized that the fourteenth amendment, while granting the states the power to treat classes of people in different ways,<sup>32</sup> does not give them the power to discriminate on the basis of irrelevant criteria.<sup>33</sup> Thus, a person is constitutionally protected from arbitrary employment discrimination by the state. Discrimination

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<sup>27</sup> See Comment, *Racial Discrimination in the Federal Civil Service*, 38 Geo. WASH. L. REV. 265, 280 (1969).

<sup>28</sup> *Shapiro v. Thompson*, 394 U.S. 618, 642 (1969); *Bolling v. Sharpe*, 347 U.S. 497 (1954); *Rights of the Physically Disabled*, *supra* note 3, at 1520 & n.131. See *Steward Mach. Co. v. Davis*, 301 U.S. 548 (1936). In *Steward*, Justice Cardozo pointed out that the lack of an equal protection clause permitted the government to exempt and discriminate, but not arbitrarily. *Id.* at 584.

<sup>29</sup> See *Bailey v. Richardson*, 182 F.2d 46 (D.C. Cir. 1950), *aff'd* 341 U.S. 918 (1951).

<sup>30</sup> 5 U.S.C. § 7153 (1970); see text accompanying note 20 *supra*.

<sup>31</sup> 29 U.S.C. § 791(b) (Supp. III, 1973).

<sup>32</sup> *E.g.*, *Eisenstadt v. Baird*, 405 U.S. 438, 446-47 (1970).

<sup>33</sup> *Keyishian v. Board of Regents*, 385 U.S. 589, 605-06 (1967).

solely on the basis of a physical handicap is an arbitrary employment practice which cannot be engaged in by any state or local government, or by any activity significantly controlled by the state.<sup>34</sup> In *Gurmankin v. Costanzo*,<sup>35</sup> the court held that denial of public employment solely on the basis of a physical handicap is arbitrary employment discrimination and is therefore a denial of an individual's due process rights under the fourteenth amendment. In formulating the decision, the court balanced the plaintiff's interest in obtaining employment against the burden that would be placed on the employer if handicapped individuals were allowed to demonstrate their competence. The court ruled that the policy of refusing to consider handicapped individuals for employment created an irrebuttable presumption that the plaintiff's due process rights had been violated.<sup>36</sup> The *Gurmankin*<sup>37</sup> case is very similar to *Smith v. Fletcher*<sup>38</sup> in that each is a case of first impression in an area of the law which has received little attention in the past, and each employed a similar analysis to the problem to arrive at a just result. Just as the handicapped have become more vocal in asserting their right to equal opportunities, the courts have shown a willingness to assist them in securing this right in these cases of first impression.

In addition to the protection provided by the fourteenth amendment, the handicapped individual may also seek relief against many state and local governments through section 504 of the Rehabilitation Act of 1973.<sup>39</sup> The Rehabilitation Act of 1973 was passed in part to "promote and expand employment opportun-

<sup>34</sup> See *Rights of the Physically Disabled*, note 3 *supra*, at 1521 & n.135.

<sup>35</sup> 411 F. Supp. 982 (E.D. Pa. 1976). The plaintiff in *Gurmankin* was a blind teacher who had applied for employment with the Philadelphia school system as early as 1969. She was refused consideration on the grounds that she had an acute physical defect which prevented her from taking the examination. *Id.* at 985.

<sup>36</sup> *Id.* 991-92. In a similar case involving the right of a handicapped child to attend a regular public class room, the court ruled that the exclusion of a child merely on the basis of a handicap without written notice and accompanying procedural safeguards is contrary to the mandate of due process of law under the fourteenth amendment of the United States Constitution. *Hairston v. Drosick*, No. 75-0691CH (S.D. W. Va., Jan. 14, 1976).

<sup>37</sup> This case marks the first occasion in which a court has considered the constitutional rights of a handicapped individual with regard to public employment. See *King-Smith v. Aaron*, 455 F.2d 378 (3d Cir. 1972), *rev'g* 317 F. Supp. 164 (W.D. Pa. 1970).

<sup>38</sup> 393 F. Supp. 1366 (S.D. Tex. 1975). See text accompanying note 22 *supra*.

<sup>39</sup> 29 U.S.C. § 794 (Supp. III, 1973).

ities in the public and private sectors for handicapped individuals in employment."<sup>40</sup> Section 504 of the Act provides, "No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."<sup>41</sup> Because this act covers any program receiving federal financial assistance, it will provide significantly broader opportunities for relief than will section 7153 of title 5 of the *United States Code*<sup>42</sup> or the due process clause of the fourteenth amendment. Nearly all state and local governmental bodies and entities such as hospitals and transportation systems receive federal financial assistance through grant-in-aid or revenue sharing programs.

Although no court has directly construed the provisions of section 504<sup>43</sup> as they relate to employment, the *Gurmankin* court stated that a refusal to hire an individual solely because of his handicap is the kind of discrimination the Rehabilitation Act was designed to prevent.<sup>44</sup> One possible drawback with the Rehabilitation Act, however, is that it fails to specifically enumerate enforcement or remedial provisions for those individuals injured by non-compliance. At least one court has interpreted the section as a mere statement of national policy which does not create a cause of action.<sup>45</sup> Other courts, however, have granted equitable relief to private plaintiffs with sufficient standing.<sup>46</sup>

<sup>40</sup> 29 U.S.C. § 701(8) (Supp. III, 1973).

<sup>41</sup> 29 U.S.C. § 794 (Supp. III, 1973).

<sup>42</sup> 5 U.S.C. § 7153 (1970). See text accompanying note 20 *supra*.

<sup>43</sup> 29 U.S.C. § 794 (Supp. III, 1973).

<sup>44</sup> 411 F. Supp. at 989 (dictum).

<sup>45</sup> *Lloyd v. Illinois Reg. Trans. Authority*, No. 75C1834 (N.D. Ill., March 16, 1976).

<sup>46</sup> *Hariŕton v. Drosick*, No. 75-0691CH (S.D. W. Va., Jan. 14, 1976) (denial of a handicapped child's access to a classroom without compelling educational justification violates section 504 of the Rehabilitation Act of 1973); *Gurmankin v. Costanzo*, 411 F. Supp. 982 (1976) (dictum) (refusal to consider a blind person as a candidate for a teaching position is a violation of the Rehabilitation Act of 1973); *Bartels v. Biernat*, 405 F. Supp. 1012 (1975) (granted preliminary injunctive relief to mobility handicapped persons to prevent execution of contracts to purchase mass transit vehicles until the needs of the handicapped were given greater consideration). See *Snowden v. Birmingham-Jefferson County Transit Authority*, 407 F. Supp. 394 (1975) (physically handicapped denied relief under section 504 because special efforts had been made to accommodate the handicapped in the mass transit system); *accord*, *United Handicapped Fed'n v. Andre*, 409 F. Supp. 1297 (1976).



In addition to the theory that a private cause of action is implied for the effective enforcement of the statute, an aggrieved person may have a cause of action under a contractual theory. Recipients of federal financial assistance must submit an assurance that each of its programs or activities will be conducted in compliance with all applicable federal laws and regulations.<sup>47</sup> Because such an assurance is, in effect, a contract between the federal government and the recipient, it gives aggrieved persons who are beneficiaries of federally assisted programs or activities the right to seek judicial enforcement of the regulation under the third party beneficiary principle of contract law.<sup>48</sup> Therefore, recipients of federal funds are estopped to deny qualified handicapped individuals equal employment rights based on their contractual agreement. Also, although it is not specifically enumerated in the statute, it would appear that the congressional intent in passage of the non-discrimination provision concerning the handicapped was to provide this group with similar remedial and enforcement provisions as those provided to other minority groups under the civil rights laws.<sup>49</sup> This basic policy statement, plus the contractual remedy should provide adequate theories on which a cause of action may be based. In the few decisions which have dealt with section 504 it would appear that the lack of specific enforcement mechanisms is not a great problem, and judges will decide cases in accordance with the congressional intent. Because of the broad implications and liberal judicial interpretation of section 504, it will provide a key mechanism for advancement of the physically handicapped in the area of employment.

A denial of the right of a qualified handicapped individual to be considered for employment by a state or local official might provide a cause of action under the Civil Rights Act of 1871.<sup>50</sup> Even if governmental immunity exists, the complainer may sue the state or local official who deprived him of his rights in the official's private capacity.<sup>51</sup>

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<sup>47</sup> 41 Fed. Reg. 29652 (1976) (proposed reg. § 84.6).

<sup>48</sup> See *Lemon v. Bossier Parish*, 240 F. Supp. 709, 713 (W.D. La. 1965), *aff'd* 370 F.2d 847 (5th Cir. 1967), *cert. denied*, 388 U.S. 911 (1967).

<sup>49</sup> 42 U.S.C. § 2000e (Supp. III, 1973).

<sup>50</sup> 42 U.S.C. § 1983 (1970). Section 1983 requires that the party be deprived of rights secured by the Constitution and laws of the United States by an individual acting under the color of state law. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970).

<sup>51</sup> *Scheuer v. Rhodes*, 416 U.S. 232, 237 (1974).

Thus, a qualified physically handicapped individual may have a variety of recourses against a federal, state or local employer or an employer receiving federal financial assistance. Each case must be given careful analysis and the appropriate route chosen. Regardless of the chosen action, the complainant must be prepared to prove he was denied employment rights on the basis of his handicap, not on the lack of relevant job skills.

## II. EMPLOYMENT IN THE PRIVATE SECTOR

Available remedies against the private employer who chooses to ignore the handicapped individual's right to equal employment opportunities are more limited than those that exist in the public sector. Although several states have laws which prohibit a private employer from discriminating against a handicapped person solely on the basis of disability,<sup>52</sup> few actions have been brought under these statutes. Limited budgets and small staffs of the state agencies charged with enforcement of these laws considerably lessen their effectiveness. The agency given the responsibility for enforcement of these laws, normally a Human Rights Commission or an Equal Employment Opportunity Commission, usually has expertise in other forms of discrimination and lack the knowledge and experience to comprehend and deal with the problems of the hand-

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<sup>52</sup> ALASKA STAT. § 18.80.220 (1969); CAL. LABOR CODE § 1412 (Deering 1976); CONN. GEN. STAT. REV. § 31-126(a) (Supp. 1977); HAWAII REV. STAT. § 378-2 (Supp. 1975); ILL. ANN. STAT. ch. 38, § 65-21 (Smith-Hurd Supp. 1977); IND. ANN. STAT. § 22-9-1-2 (Supp. 1976); IOWA CODE ANN. § 601A.6 (1975); KAN. STAT. ANN. § 44-1001 (Supp. 1975); KY. REV. STAT. § 207.150 (Supp. 1976); ME. REV. STAT. ANN. tit. 5, § 4552 (Supp. 1976-77); MD. ANN. CODE art. 49B, § 19 (Supp. 1976); MASS. ANN. LAWS. ch. 149, § 24K (1976); MINN. STAT. ANN. § 363.03 (Supp. 1977); MONT. REV. CODES ANN. § 64-306 (Supp. 1976); NEB. REV. STAT. § 48-1101 (1974); NEV. REV. STAT. § 613.330 (1973); N.M. STAT. ANN. § 4-33-7 (Replacement Volume 1966); N.Y. EXEC. § 296 (McKinney Supp. 1975-76); ORE. REV. STAT. § 659.405 (1975); PA. STAT. ANN. tit. 43, § 955 (Supp. 1976-77); R.I. GEN. LAWS ANN. § 28-5-7 (Supp. 1976); VT. STAT. ANN. tit. 21, § 498 (Supp. 1976); VA. CODE ANN. § 40.1-28.7 (Replacement Volume 1976); WASH. REV. CODE ANN. § 49.60.010 (Supp. 1975); WIS. STAT. ANN. § 111.31 (1974).

West Virginia's law covers the blind only. W. VA. CODE ANN. § 5-11-9 (Cum. Supp. 1976). Legislation was introduced and passed in 1973 which would have included all physically handicapped individuals; however, it was vetoed by the Governor. H.R. 785, 61st Leg., (1973). The reason for the veto was officially an overly broad definition of the Handicapped; however, an unarticulated reason may have been that the bill greatly increased the responsibilities of the Human Rights Commission without any increase in its budget.

icapped individual. They often lack the time or inclination to develop such expertise and, therefore, the needs of their handicapped clientele are not fulfilled.

Such laws can be effective, however, given the proper emphasis and enforcement. For example, in a Wisconsin case,<sup>53</sup> the plaintiff had dismissed an employee based on a history of an asthmatic condition. The state agency responsible for enforcement of the anti-discrimination statute found that this constituted unlawful discrimination and ordered the employee reinstated. The court held that once the agency had found the employee was discriminated against on the basis of his handicap, the burden of proof was on the employer to show that the condition rendered the handicapped person physically or otherwise unable to efficiently perform the duties required in the job.<sup>54</sup> This case indicates that state statutes such as the one in Wisconsin can be effective in providing relief from discrimination given proper enforcement. As many state statutes are similar to Wisconsin's,<sup>55</sup> effective relief may be available in many states against private employers given proper enforcement.

Another remedy, more limited in scope, may be available to handicapped individuals suffering employment discrimination in the private sector. An employer having a contract with the federal government in excess of \$2500 is required not to discriminate against any qualified individual on the basis of his handicap.<sup>56</sup> About half of all private employers have contracts in excess of this amount with the federal government.<sup>57</sup> Employers with contracts of \$50,000 or more and having fifty or more employees must take affirmative action to employ the handicapped.<sup>58</sup> The original regulations<sup>59</sup> have been rewritten with less stringent enforcement procedures because they were opposed by several major industries on the ground that it created an undue hardship to comply with the regulations.<sup>60</sup> Considering the weakness of the regulations and uncoop-

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<sup>53</sup> Chicago, Mil., St. P. & Pac. R.R. v. Department of Ind., Lab., & Hum. Rel., 62 Wis. 2d 392, 215 N.W.2d 443 (1974).

<sup>54</sup> *Id.* at 398, 215 N.W.2d at 446.

<sup>55</sup> See note 53 *supra*.

<sup>56</sup> 29 U.S.C. § 793 (Supp. III, 1973); 41 Fed. Reg. 16150 (1976).

<sup>57</sup> AMICUS, Sept. 1976, at 16.

<sup>58</sup> 29 U.S.C. § 793 (Supp. III, 1973); 41 Fed. Reg. 16150 (1976).

<sup>59</sup> 39 Fed. Reg. 20566 (1976).

<sup>60</sup> Wall St. J., Jan. 27, 1976, at 11, col. 2.

erative employers, section 503 of the Rehabilitation Act of 1973<sup>61</sup> does not appear to offer much remedial relief to the aggrieved handicapped individual.

Other legal theories have been suggested to prevent employment discrimination against qualified handicapped individuals by private employers.<sup>62</sup> It appears, however, that discrimination against qualified handicapped individuals in the private sector, as has been the case with many other problems, can only be effectively combatted by a federal law covering all employers.<sup>63</sup> Until a uniform law and adequate enforcement mechanisms are available such as those enjoyed by other minority groups, the handicapped will continue to be relegated to a position that is less than equal in employment opportunities in the private sector.

### III. CONCLUSION

In the public sector, the door to employment opportunities for qualified physically handicapped individuals appears to be open. The door in the private sector, however, if open at all, is only cracked. Therefore it is important that an aggrieved handicapped individual properly identify the employer against whom relief is sought and formulate his case accordingly. Present legislation provides relief in certain situations, particularly in the public sector, even though it is not as aggressive as legislation in the civil rights area. Perhaps this nonaggressive type of legislation will be effective in developing dialogue between employers and handicapped individuals which will make employers aware of the valuable resource they are overlooking. Legislation with coercive power, however, will prove to be more effective in making significant progress in this area.

Federal legislation which effects all employers, public and private, and which includes adequate complaint and enforcement

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<sup>61</sup> 29 U.S.C. § 793 (Supp. III, 1974).

<sup>62</sup> See *Rights of the Physically Disabled*, note 3 *supra*, at 1514-19. The article suggests relief based on the thirteenth amendment and the subsequent Civil Rights Act of 1866 on the grounds that they have been applied to prohibit both racial and non-racial discrimination in the attempt to secure universal freedom and equality. Because of the basic difference in the handicapped and other minority groups, this would not appear to be a viable alternative. See note 16 *supra* and accompanying text.

<sup>63</sup> *Rights of the Physically Disabled*, *supra* note 3, at 1522-23.

mechanisms, similar to, but separate from, the civil rights mechanisms, would appear to be the most far-reaching solution to the problem. Until such legislation is passed, however, the qualified handicapped individual does not have to stay at home, dependent on others, discouraged from seeking employment. Adequate legislation and judicial interpretations exist at the present time to provide opportunities in many areas. All that is needed is more vigorous activity by the handicapped to make their problems known and their abilities appreciated.

*Denver C. Offutt, Jr.*