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I. INTRODUCTION

Establishing legal mechanisms to ensure fair opportunity for handicapped citizens to obtain employment is a comparatively new goal of American jurisprudence. Not until 1948, when Congress amended the Civil Service Act to prohibit civil service agencies from unfairly discriminating against the handicapped,[1] was there any statutory law addressing such employment discrimination.[2] Since that time, significant progress has been made, evidenced by the passage of the Rehabilitation Act of 1973,[3] as

1. *See* 5 U.S.C. § 7153 (1982) (1948 amendment to Civil Service Act).

2. *See* Bayh, *Foreword to the Symposium Issue on Employment Rights of the Handicapped,* 27 DE PAUL L. REV. 943, 943 (1978).

3. Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355-94 (codified as amended at 29 U.S.C. §§ 791, 793, 794 (1982)). Title V of the Act, of which the key sections are 501, 503, and 504, sets forth the proscribed discriminatory practices. *See id.* §§ 501, 503, 504, 87 Stat. at 390-94 (codified as amended at 29 U.S.C. §§ 791, 793, 794 (1982)). Section 501 requires affirmative action on the part of federal agencies to employ and advance handi-

well as numerous state statutes aimed at ensuring fair employment of the handicapped.[4]

There may be as many as fifty million handicapped Americans, depending on how "handicap" is defined.[5] While traditional definitions confine the class to those with such disabilities as blindness, deafness, and ambulatory handicaps, broader definitions tend to include persons suffering from mental retardation, heart conditions, diabetes, and even drug and alcohol addiction.[6] Discrimination, like handicap, is a concept that eludes easy definition. Employment discrimination against handicapped persons sometimes takes the form of intentional, invidious discrimination based on social bias.[7] But more often, handicapped persons are denied employment

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capped persons. *See id.* § 501, 87 Stat. at 390-91 (codified as amended at 29 U.S.C. § 791 (1982)). Section 503 requires federal contractors to engage in affirmative measures to promote hiring of the handicapped. *See id.* § 503, 87 Stat. at 393-94 (codified as amended at 29 U.S.C. § 793 (1982)). Section 504 of the Title mandates that recipients of federal funding refrain from discriminating against the handicapped. *See id.* § 504, 87 Stat. at 394 (codified as amended at 29 U.S.C. § 794 (1982)).

4. *See, e.g.,* CAL. GOV'T CODE § 12940 (Deering Supp. 1984) (proscribing unfair employment discrimination based on "physical handicap"); ILL. ANN. STAT. ch. 68, §§ 1-101 to 2-105 (Smith-Hurd Supp. 1984-1985) (Illinois Human Rights Act prohibiting employment discrimination against the handicapped); WIS. STAT. ANN. §§ 111.31-.395 (West Supp. 1983-1984) (Wisconsin Fair Employment Act proscribing handicap employment discrimination). While most states have enacted some guidelines, commentators have long been calling for omnibus civil rights acts for the handicapped. *See* ten Broek, *The Right to Live in the World: The Disabled in the Law of Torts,* 54 CALIF. L. REV. 841, 843 (1966) (advocating more comprehensive laws that facilitate complete integration of handicapped into society); Note, *Abroad in the Land: Legal Strategies to Effectuate the Rights of the Physically Disabled,* 61 GEO. L.J. 1501, 1522 (1973) (calling for broad legislation ensuring rights of handicapped).

5. *See* S. REP. NO. 1297, 93d Cong., 2d Sess. 34, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 6373, 6400 (number of handicapped Americans range from estimates of 28 to 50 million persons).

6. *See* Doe v. Region 13 Mental Health-Mental Retardation Comm'n, 704 F.2d 1402, 1408 (5th Cir. 1983) (mental disability clearly handicap under Rehabilitation Act); Smithberg v. Merico, Inc., 575 F. Supp. 80, 83 (C.D. Cal. 1983) (heart condition "physical handicap" within meaning of California employment discrimination statute); Fraser Shipyards, Inc. v. Department of Indus., Labor & Human Relations, 13 Fair Empl. Prac. Cas. (BNA) 1809, 1810 (Wis. Cir. Ct. 1976) (diabetic is handicapped under Wisconsin law); Comment, *Hidden Handicaps: Protection of Alcoholics, Drug Addicts, and the Mentally Ill Against Employment Discrimination Under the Rehabilitation Act of 1973 and the Wisconsin Fair Employment Act,* 1983 WIS. L. REV. 725, 725 (defining alcoholism and drug abuse as "hidden handicaps" not readily apparent); *see also* Bayh, *Foreword to the Symposium Issue on Employment Rights of the Handicapped,* 27 DE PAUL L. REV. 943, 945 (1978) (legislative history and administrative regulations reflect Congress' intent that definition of handicap be construed broadly).

7. *See* Prewitt v. United States Postal Serv., 662 F.2d 292, 305 n.19 (5th Cir. 1981) (intentional social bias discrimination victimizes handicapped as it does racial, sexual, and religious minorities); *accord* Bayh, *Foreword to the Symposium Issue on Employment Rights*

because of unfair job qualifications they cannot meet,[8] or because of fair qualifications they would be able to meet if employers would make some reasonable accommodations.[9] Each form of discrimination is threatening and must be addressed carefully by legislators and judges.

In Texas, the Commission on Human Rights Act went into effect in September of 1983.[10] This legislation establishes a comprehensive scheme for both administrative[11] and judicial[12] enforcement of the rights guaranteed

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of the Handicapped, 27 DE PAUL L. REV. 943, 944 (1978) (recounting 1975 New York Times report of employer's refusal to hire man as truck driver because he stuttered).

8. *See* Prewitt v. United States Postal Serv., 662 F.2d 292, 305 (5th Cir. 1981) (describing this form of discrimination as "disparate impact" discrimination). The *Prewitt* court explained that if a handicapped job applicant could have satisfactorily performed the job without any workplace accommodation by the employer, but was turned down because his handicap rendered him unable to satisfy neutral hiring standards, then he is entitled to relief. *See id.* at 305. Neutral hiring standards are standards not intended to have disparate impact, but in fact do. The court further recognized that commentators have identified discrimination resulting from "neutral standards with disparate impact" as a barrier commonly confronted by handicapped applicants. *See id.* at 305 n.19. The notion of disparate impact discrimination, as applied in *Prewitt,* is derived from cases involving other types of discrimination. *See, e.g.,* Dothard v. Rawlinson, 433 U.S. 321, 328-31 (1977) (job qualification requiring that employees weigh 120 pounds violates Title VII of Civil Rights Act of 1964 if women are disproportionately excluded and requirement not necessary for job performance); Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (employer requiring written tests and high school diploma violated Title VII since criteria, disproportionately excluding blacks, not job related); New York State Ass'n for Retarded Children v. Carey, 612 F.2d 644, 649-50 (2d Cir. 1979) (holding unlawful public school policy of excluding handicapped children from regular classes absent showing of necessity).

9. *See, e.g.,* Prewitt v. United States Postal Serv., 662 F.2d 292, 305 (5th Cir. 1981) (evidence that plaintiff could have satisfactorily performed job had employer simply lowered shelf legs); Nelson v. Thornburgh, 567 F. Supp. 369, 380 (E.D. Pa. 1983) (blind employee could satisfactorily perform job if provided reader or certain electronic devices); Crane v. Lewis, 551 F. Supp. 27, 31 (D.D.C. 1982) (air traffic controller may have performed well with accommodation of hearing aid or telephone amplification device). Such discrimination is referred to as "surmountable barrier" discrimination. *See* Prewitt v. United States Postal Serv., 662 F.2d 292, 305 (5th Cir. 1981) (surmountable barrier discrimination exists when handicapped employee could perform job satisfactorily if employer would make reasonable accommodations).

10. *See* TEX. REV. CIV. STAT. ANN. art. 5221k (Vernon Pamph. Supp. 1984). The new act replaces a prior statute pertaining to employment rights of the handicapped which was far less comprehensive than the new one. *See id.* art. 5221k, § 10.03 (provision in new act authorizing repeal of prior statutes); *see also* Act of May 29, 1975, ch. 352, § 2, 1975 Tex. Gen. Laws 939 (codified at TEX. HUM. RES. CODE ANN. § 121.003(f) (Vernon 1980)), *repealed by* Act of July 7, 1983, ch.7, § 10.03(c), 1983 Tex. Gen. Laws, Gen. & Spec. 37, 57 (codified as Commission on Human Rights Act, TEX. REV. CIV. STAT. ANN. art. 5221k, § 10.03(c) (Vernon Pamph. Supp. 1984)).

11. *See* TEX. REV. CIV. STAT. ANN. art. 5221k, § 6.01 (Vernon Pamph. Supp. 1984).

12. *See id.* § 7.01.

by the Act.[13] Its aim is to prohibit employment discrimination based not only upon handicap, but upon race, color, religion, sex, age, and national origin as well.[14] This comment discusses various aspects of the Act as it pertains exclusively to discrimination based on handicap. Particular attention is focused on determining who is an "otherwise qualified" handicapped individual and on the duty of employers to provide "reasonable accommodation." Federal constitutional and statutory protections of the handicapped person's right to fair employment are examined first. An overview of the new Texas act is then presented, followed by an analysis of the Texas statute in light of the federal law.

II. FEDERAL LAW

A. *Constitutional*

Constitutional challenges to handicap discrimination ordinarily fail because the handicapped generally do not constitute a "suspect class" as defined by opinions construing the fourteenth amendment's equal protection clause.[15] Moreover, courts recognize that since the passage of Title V of

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13. *See id.* §§ 5.01-.10.

14. *See id.* §§ 5.01-.10; *see also id.* § 1.02(1) (explaining general purpose of Act as executing policies of federal Civil Rights Act of 1964). The Civil Rights Act of 1964 prohibits unfair discrimination against all classes covered by Texas' new act, except age and handicap. *See* 42 U.S.C. § 2000e-2 (1982) (prohibiting employment discrimination based on race, color, religion, sex, or national origin). Federal proscriptions of employment discrimination against the handicapped, to the extent they exist, are contained in the Rehabilitation Act of 1973. *See* 29 U.S.C. §§ 791, 793, 794 (1982) (federal agencies, contractors, and recipients of funding prohibited from discriminating unfairly against the handicapped).

15. *See, e.g.,* Brown v. Sibley, 650 F.2d 760, 766 (5th Cir. 1981) (handicapped persons do not constitute suspect class); Massachusetts Coalition of Citizens with Disabilities v. Civil Defense Agency, 649 F.2d 71, 76-77 (1st Cir. 1981) (handicapped not suspect class); Carmi v. Metropolitan St. Louis Sewer Dist., 620 F.2d 672, 676 n.9 (8th Cir.) (handicapped not suspect class for equal protection purposes), *cert. denied,* 449 U.S. 892 (1980); *see also* Upshur v. Love, 474 F. Supp. 332, 336-38 (N.D. Cal. 1979) (handicapped not suspect class). *But see, e.g.,* Panitch v. Wisconsin, 444 F. Supp. 320, 322 (E.D. Wis. 1977) (equal protection clause guarantees handicapped school children right to public education); Fialkowski v. Shapp, 405 F. Supp. 946, 958-59 (E.D. Pa. 1975) (dictum that handicapped persons are suspect class for equal protection purposes); Special Educ. Div. v. G.H., 218 N.W.2d 441, 447 (N.D. 1974) (handicapped constitute suspect class in terms of equal protection); *see also* Gurmankin v. Costanzo, 556 F.2d 184, 186-88 (3rd Cir. 1977) (discrimination based on handicap violates due process clause under "irrebutable presumptions" theory). *See generally* Burgdorf & Burgdorf, *A History of Unequal Treatment: The Qualifications of Handicapped Persons as a "Suspect Class" Under the Equal Protection Clause,* 15 SANTA CLARA L. REV. 855, 905-08 (1975) (urging that handicap status meets all elements required of suspect class). The equal protection clause of the fourteenth amendment mandates "[n]o state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. In arguing that a law or practice classifies and

the Rehabilitation Act of 1973,[16] statutory law has provided better protection for the rights of the handicapped in most instances.[17]

B. *Statutory: The Rehabilitation Act of 1973*

Under Title V, Congress created a three-part program to prohibit handicap discrimination.[18] First, section 501 (later codified at 29 U.S.C. § 791) prohibits the federal government from engaging in unfair employment discrimination against the handicapped[19] and requires affirmative action toward the advancement of handicap employment in federal agencies.[20] Next, section 503 (codified at 29 U.S.C. § 793) proscribes handicap employment discrimination by parties engaging in government contracts and requires the inclusion of an affirmative action clause in the contract itself.[21] Finally, section 504 (codified at 29 U.S.C. § 794), which is closely

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discriminates against a group of persons based on handicap, gender, race, or other factors violates the equal protection clause, a plaintiff must first contend that this classification has been, or should be, deemed consitutionally suspect and thus demanding of strict judicial scrutiny. *See, e.g.,* Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (gender inherently suspect class demanding strict judicial scrutiny); Graham v. Richardson, 403 U.S. 365, 372 (1971) (classification based on alienage inherently suspect; demands "close judicial scrutiny"); Korematsu v. United States, 323 U.S. 214, 216 (1944) (classification based on race "immediately suspect"; subject to rigid scrutiny). *See generally,* Dittfurth, *A Theory of Equal Protection,* 14 ST. MARY'S L.J. 829, 831-37 (1983) (discussing evolution of suspect class analysis in equal protection litigation).

16. 29 U.S.C. §§ 791, 793, 794 (1982) (prohibiting federal agencies, contractors, and recipients of federal funds from engaging in employment discrimination against handicapped).

17. *See* Kruse v. Campbell, 431 F. Supp. 180, 188 (E.D. Va.), *vacated and remanded,* 434 U.S. 808 (1977) (district court's holding that handicap discrimination was violative of equal protection clause vacated on appeal; remanded to decide on statutory grounds). In addition to Title V, most states provide statutory guidelines proscribing employment discrimination against the handicapped. *See* Gittler, *Fair Employment and the Handicapped: A Legal Perspective,* 27 DE PAUL L. REV. 953, 954-57 (1978) (because constitutional remedies unsuccessful, handicapped rely on statutory remedies — federal and state).

18. *See* 29 U.S.C. §§ 791, 793, 794 (1982) (codification of §§ 501, 503, 504 of the Rehabilitation Act of 1973).

19. *See id.* § 791 (1982) (§ 501 of Rehabilitation Act of 1973).

20. *See id.* § 791(b) (requiring executive agencies to maintain written affirmative action plans for "hiring, placement, and advancement of handicapped individuals"). It was the intent of Congress, in drafting § 501, that the federal government's obligation toward the handicapped be great, so as to set an example for the private sector. *See Rehabilitation of the Handicapped Programs, 1976: Hearings Before the Subcomm. on Labor and Public Welfare,* 94th Cong., 2d Sess. 1502 (1976), *quoted in* Linn, *Uncle Sam Doesn't Want You: Entering the Federal Stronghold of Employment Discrimination Against Handicapped Individuals,* 27 DE PAUL L. REV. 1047, 1060 (1978) (statement by Senator Williams that legislative intent was that federal government would "act as the model employer of the handicapped").

21. *See* 29 U.S.C. § 793 (1982). Government contractors include companies selling supplies and equipment to the federal government, defense contractors, construction compa-

patterned after Title VI of the Civil Rights Act of 1964,[22] prohibits recipients of federal funding from engaging in discrimination against the handicapped.[23] Various federal agencies are vested with the responsibility of

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nies, and space program contractors. *See* Bayh, *Foreword to the Symposium Issue on Employment Rights of the Handicapped,* 27 DE PAUL L. REV. 943, 946 (1978). The provision is applicable only to those contractors and subcontractors engaging in contracts valued in excess of $2,500. *See* 29 U.S.C. § 793(a) (1982). Where a contractor employs at least 50 people or engages in government contracts valued in excess of $50,000, that contractor must establish and maintain a written, ongoing program of affirmative action. *See* 41 C.F.R. § 60-741.5(a) (1984). Violation of § 503 by a government contractor could result in a partial or complete termination of the contract. *See id.* § 60-741.28(d).

22. 42 U.S.C. § 2000d (1982) (§ 601 of Title VI of Civil Rights Act of 1964). Section 601 does not expressly protect the handicapped, but merely provides: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." *See id.* Furthermore, Title VII of the Civil Rights Act which, in contrast to Title VI, deals with employment discrimination specifically, has not been interpreted as protecting the handicapped employee. *See* Comment, *Hidden Handicaps: Protection of Alcoholics, Drug Addicts, and the Mentally Ill Against Employment Discrimination Under the Rehabilitation Act of 1973 and the Wisconsin Fair Employment Act,* 1983 WIS. L. REV. 725, 725 (1983); *see also* Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (1982) (§ 703 of Title VII). The Rehabilitation Act of 1973, therefore, manifests Congress' intent to extend to the handicapped similar rights as had already existed for other minorities. *See* Bayh, *Foreword to the Symposium Issue on Employment Rights of the Handicapped,* 27 DE PAUL L. REV. 943, 949-50 (1978). Senator Bayh quoted from a report on the Rehabilitation Act by the Senate Committee on Labor and Public Welfare, which said that § 504 was patterned after § 601 not only to provide the same substantive rights, but also to provide similar implementation by creating an identical compliance program. *See id.* at 950; *see also* S. REP. NO. 1139, 93d Cong., 2d Sess. 24 (1973). Consequently, § 504 regulations were drafted to incorporate by reference the procedural requirements of Title VI regulations. *See* 45 C.F.R. § 84.61 (1984); *see also* Cook & Butler, *Coverage of Employment Discrimination Pursuant to Section 504 of the Rehabilitation Act of 1973,* 19 WAKE FOREST L. REV. 581, 582 (1983) (HEW's regulations enforcing § 504 identical to those implementing Title VI because HEW recognized that § 504 "tracks Title VI almost verbatim"). In terms of government contractors, the obligations as to the handicapped imposed by § 503 parallel the obligations already in place as to other minorities. *See* Bayh, *Foreword to the Symposium Issue on Employment Rights of the Handicapped,* 27 DE PAUL L. REV. 943, 950 (1978) (just as contractors may not satisfy Title VI by hiring from only one ethnic group, § 503 cannot be satisfied by selectively hiring only the marginally handicapped).

23. *See* 29 U.S.C. § 794 (1982) (§ 504 of Rehabilitation Act). Section 504 of the Rehabilitation Act provides: "No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall solely by reason of 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 . . . ." *Id.* Unlike §§ 501 and 503, this provision is not limited to employment discrimination, but extends to any unfair discrimination against the handicapped. *See id.; cf.* Southeastern Community College v. Davis, 442 U.S. 397, 400 (1979) (involving application of § 504 in context of educational opportunities for handicapped). In contrast to §§ 501 and 503, § 504 does not require affirmative action. *Compare* 29 U.S.C. § 791(b) (1982) (§ 501, requiring employers

enforcing Title V[24] and have, therefore, issued administrative regulations.[25] These regulations expand on the key substantive rights afforded

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to submit affirmative action program plan) *and id.* § 793(a) (§ 503, requiring insertion of clause in government contracts whereby contractor agrees to "take affirmative action to employ" handicapped) *with id.* § 794 (§ 504, no requirement of affirmative action).

24. *See* 29 U.S.C. §§ 791, 793(b), 794 (1982) (§§ 501, 503(b), and 504 of Rehabilitation Act). The Civil Service Commission was originally vested with administrative jurisdiction over § 501. *See id.* § 791. In 1978, pursuant to a reorganization plan, all powers vested by § 501 in the Civil Service Commission were transferred to the Equal Employment Opportunity Commission (EEOC). *See* Reorg. Plan No. 1 of 1978, 3 C.F.R. 321 (1978), *reprinted in* 5 U.S.C. app. at 1155 (1982). Administrative authority over § 503 is vested in the Department of Labor. *See* 29 U.S.C. § 793(b) (1982) (§ 503(b), stating that complaints against federal contractors may be filed with Department of Labor). Because § 504 addresses discrimination by employers who are recipients of financial assistance through programs conducted by federal agencies, each administrative agency must promulgate regulations implementing § 504. *See* 29 U.S.C. § 794 (1982) (§ 504, requiring head of each agency to promulgate enforcement regulations). In 1976, President Ford authorized the Department of Health, Education and Welfare's Office for Civil Rights to take charge of enforcing § 504. *See* Exec. Order No. 11,914, 3 C.F.R. 117 (1977) (authorizing HEW to coordinate implementation of § 504), *revoked by* Exec. Order No. 12,250, 3 C.F.R. 298 (1981), *reprinted in* 42 U.S.C. § 2000d-1 app. at 23-24 (1982). HEW thus issued the first regulations implementing § 504. *See* 45 C.F.R. §§ 84.1-.60 (1977). Most other administrative agencies, in drafting regulations implementing § 504, patterned their regulations after those promulgated by HEW. *See* Cook & Butler, *Coverage of Employment Discrimination Pursuant to Section 504 of the Rehabilitation Act of 1973,* 19 WAKE FOREST L. REV. 581, 584 (1983). HEW was split into two agencies in 1980, the Department of Education and the Department of Health and Human Services. *See* Department of Education Organization Act, 20 U.S.C. §§ 3401-3510 (1982). The Department of Health and Human Services adopted the regulations drafted by HEW. *See* 45 C.F.R. §§ 84.1-.61 (1984). In a move to consolidate enforcement of all non-discrimination laws, President Carter, in 1980, ordered that responsibility for coordinating § 504's enforcement shift from the Department of Health and Human Services to the Attorney General. *See* Exec. Qrder No. 12,250, 3 C.F.R. 298 (1981), *reprinted in* 42 U.S.C. § 2000d-1 app. at 23-24 (1982). The order, however, specifically excludes enforcement of § 504's proscription of employment discrimination from the Attorney General's jurisdiction, thus implicitly reserving this to the Department of Health and Human Services. *See id.* at 300, *reprinted in* 42 U.S.C. § 2000d-1 app. at 24 (1982) (§ 1-503 of order); *cf.* Exec. Order No. 11,914, 3 C.F.R. 117 (1977) (order originally vesting coordinating authority in HEW), *revoked by* Exec. Order No. 12,250, 3 C.F.R. 298 (1981), *reprinted in* 42 U.S.C. § 2000d-1 app. at 23-24 (1982). Consequently, the Department of Health and Human Services regulations are the most important of all agency regulations implementing § 504, because not only are they directly descended from the original HEW regulations, but also because the department is primarily responsible for administrative enforcement of § 504 as it pertains to employment discrimination. *See* 45 C.F.R. §§ 84.1-.61 (1984).

25. *See* 29 C.F.R. §§ 1613.701-.806 (1984) (EEOC regulations enforcing § 501's proscription of discrimination by federal government; applicable to all governmental agencies within scope of § 501). Section 503 is implemented generally by the Department of Labor. *See* 41 C.F.R. §§ 60-741.1 to -741.54 (1984) (Office of Federal Contract Compliance Programs of the Department of Labor); *see also* 41 C.F.R. § 16-7.502-7 (1984) (Department of Labor's Office of Personnel Management; mandating insurance carriers contracting with government include clause stipulating compliance with § 503). Additionally, individual

handicapped persons under Title V: (1) the right of otherwise qualified handicapped persons to equal opportunity,[26] and (2) the right to "reasonable accommodation," such as job restructuring[27] and workplace accommodation.[28]

1. Prohibiting Discrimination Against "Qualified Handicapped Individuals"

Section 504 states that "[n]o otherwise qualified handicapped individual" shall be subject to discrimination by a recipient of federal funding.[29] Requiring employers to hire "otherwise qualified" persons does not impose a duty on employers to hire handicapped persons who are unable to

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governmental agencies that engage in contracts with private employers promulgate intra-agency directives implementing § 503. *See* 41 C.F.R., ch. 18, 12.801 (1984) (NASA procurement regulation directive mandating insertion of affirmative action clause in agreements between NASA and contractors covered by § 503). Section 504 is implemented by regulations issued by each administrative agency that conducts financial assistance programs. *See* 7 C.F.R. §§ 156.1-.42 (1984) (Department of Agriculture); 10 C.F.R. §§ 1040.61-.74 (1984) (Department of Energy); 14 C.F.R. §§ 1251.100-.400 (1984) (NASA); 15 C.F.R. §§ 8b.1-.26 (1984) (Department of Commerce); 18 C.F.R. §§ 1307.1-.13 (1984) (Tennessee Valley Authority); 22 C.F.R. §§ 142.1-.70 (1984) (State Department); 22 C.F.R. §§ 217.1-.61 (1984) (Agency for International Development); 28 C.F.R. §§ 42.501-.540 (1984) (Department of Justice); 29 C.F.R. §§ 32.1-.51 (1984) (Department of Labor); 31 C.F.R. § 51.55 (1984) (Office of Revenue Sharing); 32 C.F.R. §§ 56.1-.10 (1984) (Department of Defense); 34 C.F.R. §§ 104.1-.61 (1984) (Department of Education); 38 C.F.R. §§ 18.401-.461 (1984) (Veterans Administration); 41 C.F.R. §§ 29-70.100 to -70.217a (1984) (Department of Labor, specifically, agency funding of quasi-public and private non-profit organizations); 41 C.F.R. §§ 101-8.300 to -8.313 (1984) (General Services Administration); 43 C.F.R. §§ 17.200-.280 (1984) (Department of the Interior); 45 C.F.R. §§ 84.1-.61 (1984) (Department of Health and Human Services); 45 C.F.R. §§ 1151.1-.44 (1984) (National Endowment for the Arts); 45 C.F.R. §§ 1170.1-.55 (1984) (National Endowment for the Humanities); 45 C.F.R. §§ 1232.1-.16 (1984) (Action); 45 C.F.R. §§ 1624.1-.8 (1984) (Legal Services Corporation). These administrative regulations are patterned after those promulgated in 1977 by the Department of Health, Education, and Welfare (HEW). When discussing administrative regulations dealing with § 504, this comment will, for the sake of simplicity, cite only to the Department of Health and Human Services' regulations, since most agencies patterned their regulations after these.

26. *See* 45 C.F.R. § 84.11(a) (1984) (prohibiting employment discrimination against *qualified* handicapped persons).

27. *See id.* § 84.12 (requiring employer to make accommodations for employee's handicap unless result is "undue hardship" on employer).

28. *See id.* §§ 84.21-.23 (requiring recipients of federal funds to maintain facilities such that handicapped persons not denied fair accessibility).

29. *See* 29 U.S.C. § 794 (1982); *see also* 45 C.F.R. § 84.4(a) (1984) ("[n]o qualified handicapped person shall, on the basis of handicap" be discriminated against by recipients of federal funding); *id.* § 84.11(a)(1) ("[n]o qualified handicapped person shall" be subject to employment discrimination by recipient of federal funds).

perform the job.[30] Rather, discrimination is prohibited when based solely on handicap where handicap would not preclude satisfactory job performance.[31]

The only United States Supreme Court case interpreting section 504 is *Southeastern Community College v. Davis.*[32] In *Southeastern,* an applicant for nursing school was denied admission because she suffered a serious hearing disability.[33] According to the school, her disability would prevent her from sufficiently functioning in the program and, ultimately, preclude her from safely practicing as a nurse.[34] The applicant sued the college, in federal court, alleging a violation of section 504, in that she was discriminated against by a federally funded program solely by reason of her handicap.[35] The district court held for the college, reasoning that the plaintiff was not an "otherwise qualified handicapped individual" protected from discrimination under section 504 since her handicap would prevent her from performing sufficiently in the nursing program.[36] On appeal, the de-

30. *See, e.g.,* Walker v. Attorney General of the United States, 572 F. Supp. 100, 102 (D.D.C. 1983) (FBI did not violate § 504 by firing employee suffering from "disqualifying ailment" rendering him incapable of job performance); Simon v. St. Louis Co., 563 F. Supp. 76, 81 (E.D. Mo. 1983) (police department did not violate § 504 by not reinstating paraplegic officer who could not reasonably perform job in question); Carmi v. Metropolitan St. Louis Sewer Dist., 471 F. Supp. 119, 122 (E.D. Mo. 1979) (applicant disabled by progressive peroneal atrophy not illegally discriminated against when refused employment on basis of inability to do significant lifting required by job), *aff'd,* 620 F.2d 672, 676 (8th Cir.), *cert. denied,* 499 U.S. 892 (1980).

31. *See* Southeastern Community College v. Davis, 442 U.S. 397, 406 (1979) ("An otherwise qualified person is one who is able to meet all . . . requirements in spite of his handicap.").

32. 442 U.S. 397 (1979). Although *Southeastern* involved handicap discrimination by an educational institution rather than by an employer, the distinction is irrelevant because § 504 is equally applicable to any recipient of federal funds covered by the statute. *See* 29 U.S.C. § 794 (1982) (§ 504 prohibits any recipient of federal funds from unfairly discriminating against handicapped in any way).

33. *See* Southeastern Community College v. Davis, 442 U.S. 397, 400-01 (1979). Even with use of a hearing aid, the plaintiff could only comprehend speech if spoken directly to her so she could lipread. If a speaker could not first get her attention, the plaintiff would be unaware someone was speaking to her. *See id.* at 401.

34. *See id.* at 401.

35. *See* Davis v. Southeastern Community College, 424 F. Supp. 1341, 1342 (E.D.N.C. 1976), *rev'd,* 574 F.2d 1158 (4th Cir. 1978), *rev'd,* 442 U.S. 397 (1979). In addition, the plaintiff alleged a denial of equal protection and due process. *See id.* at 1342. The district court dismissed that claim, the court of appeals affirmed that portion of the order, and it was not appealed to the Supreme Court. *See* Southeastern Community College v. Davis, 442 U.S. 397, 404 n.3 (1979).

36. *See* Southeastern Community College v. Davis, 442 U.S. 397, 403 (1979). The district court defined an "otherwise qualified handicapped individual" as one who is "otherwise able to function sufficiently in the position sought in spite of the handicap, if proper training and facilities are suitable and available." *See id.* at 403.

cision was reversed by the Court of Appeals for the Fourth Circuit, which held that federal regulations implementing section 504 mandate plaintiff's qualifications be judged by the college without regard to her disability.[37]

The Supreme Court unanimously agreed with the district court and reversed the decision of the court of appeals.[38] Justice Powell reasoned that section 504 did not prohibit the college from requiring reasonable physical qualifications.[39] Disagreeing with the appellate court's holding that the plaintiff was "otherwise qualified" because she had satisfactory academic and technical qualifications,[40] the Supreme Court ruled that "[a]n otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap."[41] Under *Southeastern,* therefore, an employer who discriminates based on a handicap does not violate section 504 so long as the physical qualifications upon which the decision to dis-

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37. *See* Davis v. Southeastern Community College, 574 F.2d 1158, 1160 (4th Cir. 1978), *rev'd,* 442 U.S. 397 (1979). In holding that the college should not have taken plaintiff's handicap into account, the court of appeals reasoned that the plaintiff would be an "otherwise qualified" handicapped person if her academic and technical qualifications were up to standard. *See id.* at 1161. The appellate court derived its reasoning from regulations promulgated in 1977 by the Department of Health, Education and Welfare. *See id.* at 1161; *see also* 45 C.F.R. §§ 84.1-.61(1984).

38. *See* Southeastern Community College v. Davis, 442 U.S. 397, 414 (1979).

39. *See id.* at 405. Discrimination resulting from reasonable qualifications does not violate § 504. *See id.* at 405. Rather, the Court reasoned, the statute proscribes discrimination based on the mere existence of handicap. *See id.* at 405.

40. *See* Davis v. Southeastern Community College, 574 F.2d 1158, 1161 (4th Cir. 1978) (holding plaintiff "otherwise qualified" because qualified except for handicap), *rev'd.,* 442 U.S. 397 (1979).

41. Southeastern Community College v. Davis, 442 U.S. 397, 406 (1979). The operative phrase in the Court's definition is "in spite of" handicap. Plaintiff was not an "otherwise qualified" handicapped individual because she could not succeed in the program *in spite of* her handicap. *See id.* at 406. The Court states that the statute is intended to protect those persons who either suffer impairment yet display no actual incapacity, or suffer partial impairment yet possess other abilities which allow them to fulfill the program's requirements. *See id.* at 405 n.6. The Supreme Court's reversal of the appellate court therefore hinged on the different meanings of "otherwise qualified." *Compare id.* at 405 n.6. (plaintiff not "otherwise qualified" because could not succeed in spite of her handicap) *with* Davis v. Southeastern Community College, 574 F.2d 1158, 1161 (4th Cir. 1978) (plaintiff "otherwise qualified" because qualified except for her handicap), *rev'd,* 442 U.S. 397 (1979). Citing the regulations promulgated by HEW in 1978, the Court noted that under the appellate court's definition of "otherwise qualified," a blind person who was qualified to drive a bus except for his blindness would be "otherwise qualified" and the victim of discrimination under § 504 if he were refused employment. *See* Southeastern Community College v. Davis, 442 U.S. 397, 407 n.7 (1979); *see also* 45 C.F.R. §§ 84.1-.61, app. A at 304 (1984) (Congress intended "otherwise qualified" to mean qualified in spite of handicap—not qualified except for; consequently regulations drop "otherwise" and just refer to "qualified handicapped individuals").

criminate is based are reasonable.[42] What constitutes reasonable physical job qualifications inevitably turns on the facts of each individual case of discrimination.[43]

Physical job qualifications usually appear in one of two ways: (1) employers promulgate specific job qualifications that appear neutral on their face, but in practice exclude the handicapped in disproportionate numbers,[44] or, (2) employers adopt a policy that absolutely excludes an entire class of handicapped persons from a particular job on the basis that lack of such handicap is a bona fide occupational qualification.[45] In both instances, there must be a showing that the qualifications are reasonable.[46]

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42. *See* Southeastern Community College v. Davis, 442 U.S. 397, 414 (1979) (§ 504 does not prohibit requiring "reasonable physical qualifications").

43. *See* Lang, *Protecting the Handicapped from Employment Discrimination: The Job-Relatedness and Bona Fide Occupational Qualification Doctrines,* 27 DE PAUL L. REV. 989, 994-95 (1978) (acknowledging decisions made on case-by-case basis and calling for stricter guidelines for judges to follow).

44. See id. at 989-90. The Fifth Circuit has labeled this practice "disparate impact discrimination." *See* Prewitt v. United States Postal Serv., 662 F.2d 292, 306 (5th Cir. 1981). When a job qualification having disparate impact against a class protected by Title VII of the Civil Rights Act is challenged, the employer must show the qualification to be sufficiently job-related in order for it to be considered reasonable. *See* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (employer's requiring high school diploma held violative of Title VII because disproportionately excluded blacks while not being sufficiently job-related).

45. *See* Lang, *Protecting the Handicapped from Employment Discrimination: The Job-Relatedness and Bona Fide Occupational Qualifications Doctrines,* 27 DE PAUL L. REV. 989, 989-90 (1978). The term "bona fide occupational qualification" is derived from cases involving the Civil Rights Act—it is not found in the language of the Rehabilitation Act. *See* 29 U.S.C. §§ 791, 793, 794 (1982). Obvious BFOQ's would be, for example, the requirements that an actress or a wet-nurse be female. *See* Rosenfield v. Southern Pac. Co., 444 F.2d 1219, 1224 (9th Cir. 1971); *see also* 29 C.F.R. § 1604.2(a)(2) (1984) (sex is BFOQ when needed for authenticity or genuineness). A BFOQ involving a handicap may be, for example, the blanket exclusion of all blind people from a job as a bus driver. *See* Southeastern Community College v. Davis, 442 U.S. 397, 407 n.7 (1979) (theorizing that Congress did not intend to disallow such job requirements when it enacted the Rehabilitation Act). In the context of gender-based discrimination, the courts have narrowly construed the BFOQ defense of employers so that it is only available when sex is absolutely essential to the job (e.g., actress must be female). *See* Rosenfield v. Southern Pac. Co., 444 F.2d 1219, 1224-25 (9th Cir. 1971). It is not available when the exclusion is based on traits (such as strength), even though such traits are more strongly identified with one sex than the other. *See id.* at 1225; Lang, *Protecting the Handicapped from Employment Discrimination: The Job-Relatedness and Bona Fide Occupational Qualifications Doctrine,* 27 DE PAUL L. REV. 989, 1005-06 (1978).

46. *See* Southeastern Community College v. Davis, 442 U.S. 397, 414 (1979) (reasonable physical qualifications allowed under § 504).

2. The Duty of Reasonable Accommodation

Implicit in any finding that a person is not an otherwise qualified handicapped individual is the assumption that this person would not have become otherwise qualified had the employer simply made reasonable accommodations.[47] While section 504 does not expressly impose a duty of reasonable accommodation,[48] it is well settled that one is implied.[49] Federal regulations illustrate two kinds of accommodation that must be implemented: first, the making of employee facilities accessible to the handicapped[50] and, second, the modification or restructuring of the specific job itself.[51] However, where such accommodations would not be reasonable, that is, where they would impose an "undue hardship" on the employer, then they need not be made, even if the result would mean dis-

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47. *See* Davis v. Southeastern Community College, 424 F. Supp. 1341, 1345 (E.D.N.C. 1976), *rev'd,* 574 F.2d 1158 (4th Cir. 1978), *rev'd,* 442 U.S. 397 (1979). In *Southeastern,* the district court said "[o]therwise qualified, can only be read to mean otherwise able to function sufficiently in the position sought in spite of handicap, *if proper training and facilities are suitable and available." Id.* at 1345 (emphasis added). The Department of Health and Human Services defines a qualified handicapped person as one who, "*with reasonable accommodation,* can perform the essential functions of the job in question." *See* 45 C.F.R. § 84.3(k)(1) (1984) (emphasis added).

48. *See* 29 U.S.C. § 794 (1982) (words "reasonable accommodation" or similar words absent from statute).

49. *See, e.g.,* Majors v. Housing Auth., 652 F.2d 454, 457-58 (5th Cir. 1981) (§ 504 requires reasonable accommodation); Tatro v. Texas, 625 F.2d 557, 564 (5th Cir. 1980) (reasonable accommodation mandated by § 504), *on remand,* 516 F. Supp. 968 (N.D. Tex. 1981), *aff'd,* 703 F.2d 823 (5th Cir. 1983), *aff'd in part, rev'd in part,* __ U.S. __, 104 S. Ct. 3371, 82 L. Ed. 2d 664 (1984); Camenisch v. University of Texas, 616 F.2d 127, 132-33 (5th Cir. 1980), (§ 504 requires reasonable accommodation of the handicapped; providing sign language interpreters may be reasonable requirement), *vacated on other grounds,* 451 U.S. 390 (1981); *see also* Prewitt v. United States Postal Serv., 662 F.2d 292, 307 n.21 (5th Cir. 1981) (§ 504, like § 501, mandates reasonable accommodation).

50. *See* 45 C.F.R. § 84.12(b)(1) (1984). The Department of Health and Human Services states that "[r]easonable accommodation may include: (1) making facilities used by employees readily accessible to and usable by handicapped persons . . . ." *Id.* According to the Department's official analysis of the regulations, such accommodation may include "physical modifications or relocation of particular offices" so they are in accessible facilities. *See id.* §§ 84.1-.61, app. A at 308 (1984). Such "access accommodation" may include the installation of ramps, rearrangement of furniture, or the installation of special equipment. *See* Gittler, *Fair Employment and the Handicapped: A Legal Perspective,* 27 DE PAUL L. REV. 953, 960 n.21 (1978).

51. *See* 45 C.F.R. § 84.12(b)(2) (1984). Accommodation to the job itself (as opposed to access accommodation) may include "job restructuring, part-time or modified work schedules, acquisitions or modification of equipment or devices, the provision of readers or interpreters, and other similar actions." *Id.* An important example of job restructuring is the shifting of non-essential duties to other employees. *See id.* §§ 84.1-.61, app. A at 308 (1984) (analysis of § 84.12).

crimination against a handicapped person.[52] Such a person, by definition, would not be an otherwise qualified handicapped individual.[53]

A leading Fifth Circuit case discussing reasonable accommodation is *Prewitt v. United States Postal Service.*[54] In *Prewitt,* a partially disabled job applicant was denied employment as a distribution clerk by the Postal Service because medical reports indicated he would be unable to perform the "arduous physical exertion" the job demanded.[55] The applicant sued the Postal Service under section 501 of the Rehabilitation Act of 1973, arguing he had been illegally discriminated against.[56] The Fifth Circuit held that

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52. *See* Southeastern Community College v. Davis, 442 U.S. 397, 405 (1979) (§ 504 does not mandate "substantial modifications . . . to allow disabled person to participate"). In *Southeastern,* the Supreme Court rejected plaintiff's argument that reasonable accommodation should include such things as substantial individual supervision and the total dispensation of requirements plaintiff could not meet. *See id.* at 407. Federal regulations set forth factors to be considered in determining whether accommodations are reasonable, such as: "(1) [t]he overall size of the recipient's program with respect to number of employees, number and type of facilities, and size of budget; (2) [t]he type of the recipient's operation, including the composition and structure of the recipient's work force; and (3) [t]he nature and cost of the accommodation needed." *See* 45 C.F.R. § 84.12(c) (1984). Furthermore, the regulations make it clear that, in and of itself, the need to make reasonable accommodation does not constitute an undue hardship on an employer. *See id.* § 84.12(d) (1984). In contrast to these regulations, some state statutes excuse employers from accommodations that cause mere "hardship," rather than "undue hardship," which can be interpreted to mean employers would not be required to make accommodations resulting in cost expenditures. *See* Comment, *Hidden Handicaps: Protection of Alcoholics, Drug Addicts, and the Mentally Ill Against Employment Discrimination Under the Rehabilitation Act of 1973 and the Wisconsin Fair Employment Act,* 1983 WIS. L. REV. 725, 744 n.112.

53. *See* 45 C.F.R. § 84.3(k)(1) (1984) (qualified handicapped person is one "who, with *reasonable* accommodation, can perform the essential functions of the job") (emphasis added).

54. 662 F.2d 292 (5th Cir. 1981).

55. *See id.* at 297-98. Plaintiff was a disabled Vietnam veteran who suffered limited mobility of his left arm and shoulder due to gunshot wounds. *See id.* at 297. He passed the standard written examination with a score placing him second on the list of eligible applicants. *See id.* at 298. However, testimony indicated the job required "stooping, bending, squatting, lifting up to seventy pounds, standing for long periods, stretching arms in all directions, reaching above and below the shoulder, and some twisting of the back." *See id.* at 298. A postal medical officer who examined plaintiff's medical reports concluded plaintiff would be unable to fully perform his job. *See id.* at 299.

56. *See* Prewitt v. United States Postal Serv., 662 F.2d 292, 300 (5th Cir. 1981) (citing 29 U.S.C. § 791 (1982) (prohibiting federal government from engaging in employment discrimination against qualified handicapped persons)). Plaintiff had earlier filed a complaint with the Equal Employment Office of the Postal Service, which concluded no discrimination had occurred, relying partly on the fact that the same post office had recently hired other handicapped persons. *See id.* at 300. In response to plaintiff's petition, the Postal Service contended plaintiff was rejected for valid medical reasons and that reevaluation of his claim was precluded by plaintiff's refusal to obtain an additional medical examination. *See id.* at 300.

section 501 requires employers to provide handicapped job applicants reasonable accommodation and remanded for a determination whether this duty was met by the Postal Service.[57]

In light of the Supreme Court's prior holding in *Southeastern,* the *Prewitt* court acknowledged that an employer is not obligated to make accommodation for a handicapped person who would remain unqualified even with accommodation.[58] The court denoted such a person as one confronting "insurmountable barrier discrimination."[59] An employer is, however, obligated to reasonably accommodate victims of "surmountable barrier discrimination," that is, employers may not reject applicants who *could* perform the job if provided reasonable accommodation.[60] The *Prewitt* court cited administrative regulations of the Equal Employment Opportunity Commission (EEOC) which explain what reasonable accommodation includes.[61] Noting that the employer may avoid the duty to accommodate if it would cause undue hardship, the court recognized that the employer bears the burden of proving such hardship.[62]

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57. *See id.* at 297. While the Postal Service argued a major reason for rejecting plaintiff was his inability to lift his arm above his shoulder, the court weighed heavily the admission of one defense witness that this disability would become moot if the post office accommodated by simply lowering the shelves where plaintiff would work. *See id.* at 297.

58. *See id.* at 307. (Rehabilitation Act does not mandate redress of "insurmountable barrier" discrimination). The court derived this rule from the Supreme Court's holding in *Southeastern* that, in the context of an educational institution's denying admission based on handicap, § 504 only prohibits discrimination against persons who can rise to the level of "otherwise qualified" with *reasonable* accommodation. *See* Southeastern Community College v. Davis, 442 U.S. 397, 406 (1979), *cited in* Prewitt v. United States Postal Service, 662 F.2d 292, 307 (5th Cir. 1981). A handicapped person who requires unreasonable accommodation, or who with reasonable accommodation would remain unable to meet the requirements, is not otherwise qualified and is subject to "insurmountable barrier handicap discrimination." *See* Prewitt v. United States Postal Serv., 662 F.2d 292, 307 (5th Cir. 1981). The *Prewitt* court expressly stated that the difference between the educational opportunity discrimination in *Southeastern* under § 504 and the employment discrimination in the instant case under § 501 is immaterial. *See id.* at 307.

59. *See* Prewitt v. United States Postal Serv., 662 F.2d 292, 307 (5th Cir. 1981).

60. *See id.* at 305. The court stated: "even if Prewitt cannot so perform, he might still be entitled to relief if he was a victim of 'surmountable barrier' discrimination, *i.e.,* if he was rejected even though he could have performed the essentials of the job if afforded reasonable accommodation." *Id.* at 305.

61. *See id.* at 308 (quoting 29 C.F.R. § 1613.704 (1984)). The EEOC guidelines contain provisions for both access accommodation and specific job accommodation, such as "job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices . . . and other similar actions." *See* 29 C.F.R. § 1613.704(b) (1984). These regulations also allow employers the defense of undue hardship. *See id.* § 1613.704(a).

62. *See* Prewitt v. United States Postal Serv., 662 F.2d 292, 308 (5th Cir. 1981). The burden is justifiably on the employer because the plaintiff would ordinarily not be in as good a position to know the essentials of the job. *See id.* at 308. Also, the employer can look to the experiences of itself or other employers in determining how reasonable such accommo-

III. THE TEXAS COMMISSION ON HUMAN RIGHTS ACT

Augmenting the federal Rehabilitation Act of 1973 is the Texas Commission on Human Rights Act.[63] Passed in 1983 by a special session of the Texas Legislature, the statute creates a commission which is charged with enforcing the prohibition of certain kinds of discriminatory employment practices.[64] The most notable difference between this act and the federal Rehabilitation Act is that the Texas law applies to a much broader class of employers. The federal statute applies only to federal agencies, federal contractors, and recipients of federal funding.[65] Under the Texas act however, any employer who employs at least fifteen persons on a regular basis is covered.[66] Furthermore, the Act forbids discrimination by employment agencies and labor unions.[67]

A. *Administrative Review of Complaints*

The Texas statute creates a six member Commission on Human Rights (the Commission),[68] which is empowered to hear complaints brought directly to it or referred by the federal Equal Employment Opportunity Commission.[69] The Act also empowers local governments to create local commissions which may receive direct complaints, have complaints referred to them by the state Commission, and refer cases to the state Commission.[70]

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dation would be; plaintiff would not be in a position to do this. *See id.* at 308. In addition, employers are often made aware of ways to accommodate by private and government sources. *See id.* at 308; Note, *Accommodating the Handicapped: Rehabilitating Section 504 After "Southeastern,"* 80 COLUM. L. REV. 171, 187-88 (1980).

63. *See* TEX. REV. CIV. STAT. ANN. art. 5221k (Vernon Pamph. Supp. 1984).

64. *See id.* § 1.02(2) (general purposes of Act); *id.* §§ 5.01-.10 (article 5 of Act, containing substantive provisions proscribing discrimination in employment).

65. *See* 29 U.S.C. §§ 791, 793, 794 (1982) (Title V of Rehabilitation Act of 1973, prohibiting federal governmental agencies, federal contractors, and recipients of federal funds from engaging in discrimination, including employment discrimination, against handicapped).

66. *See* TEX. REV. CIV. STAT. ANN. art. 5221k, § 2.01(5) (Vernon Pamph. Supp. 1984). The Act defines "employer" as "a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year and any agent of that person." *Id.* A "person" in the above definition is defined broadly to include such entities as corporations, associations, and the state. *See id.* § 2.01(11).

67. *See id.* §§ 5.02-.03.

68. *See id.* § 3.01(a).

69. *See id.* § 3.02(4) (power of Commission to "cooperate or contract with" federal governmental agencies); *see also* HOUSE COMM. ON STATE AFFAIRS, BILL ANALYSIS, Tex. H.B. 14, 68th Leg. (1983) (purpose of Commission to receive complaints referred by federal EEOC, pursuant to Title VII of Civil Rights Act of 1964).

70. *See* TEX. REV. CIV. STAT. ANN. art. 5221k, §§ 4.02-.04 (Vernon Pamph. Supp.

Article 6 of the Act sets forth the procedure for review of discrimination complaints by the Commission.[71] An aggrieved party must first file a written complaint within six months of the alleged violations; the Commission must then notify the employer of the complaint within ten days and must attempt to bring about voluntary resolution of the dispute.[72] If that fails, the Commission will investigate the complaint to determine whether there is reasonable cause to suspect a violation has occurred.[73] If so, the Commission must first attempt to remedy the situation through "conference, conciliation, and persuasion" before seeking judicial action.[74]

B. *Judicial Action*

Article 7 of the Texas statute provides for judicial enforcement of substantive rights.[75] In the event that the Commission was unable to remedy a bona fide complaint, it may bring suit against the employer in district court, and the complainant may intervene.[76] If, on the other hand, the Commission either dismissed the complaint or failed to timely act on it, the complainant may bring suit, and the court may allow the Commission to intervene.[77] In either case, trial is de novo and findings of the Commisssion are not binding on the court.[78] The Act enumerates several remedies available to the complainant, including hiring, reinstatement or promotion, back pay, court costs, and attorneys' fees.[79]

C. *Substantive Rights*

Discriminatory practices prohibited by the Texas act are contained in article 5.[80] Employers are prohibited from refusing to hire, discharging, or otherwise discriminating against a person regarding terms, conditions, or privileges of employment based on handicap, race, color, religion, sex, national origin, or age.[81] Segregation or classification of employees or applicants based on one of the classes is prohibited if it would have an adverse

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1984) (political subdivisions may create local commissions with similar powers to state Commission).

71. *See id.* § 6.01.
72. *See id.* § 6.01(a).
73. *See id.* § 6.01(a).
74. *See id.* § 6.01(c).
75. *See id.* § 7.01.
76. *See id.* § 7.01(a).
77. *See id.* § 7.01(a).
78. *See id.* § 7.01(h).
79. *See id.* § 7.01(d) (court not limited to remedies listed in statute).
80. *See id.* §§ 5.01-.10.
81. *See id.* § 5.01(1).

affect.[82] Likewise, employment agencies and labor organizations are prohibited from engaging in such practices.[83] There is a provision prohibiting discrimination which excludes such persons from training programs and apprenticeships; this provision, however, is made conspicuously inapplicable to handicapped employees.[84]

Two provisions of article 5 provide employers with a viable defense to charges of employment discrimination. One provision allows discrimination which results from an employer's use of "a bona fide occupational qualification reasonably necessary to the normal operation of the particular business . . . ."[85] Another provision permits employers to engage in otherwise illegal discrimination so long as "the employer establishes that the practice is not intentionally devised or operated to contravene the prohibition of this Act and is justified by business necessity."[86] As in other jurisdictions, litigation will undoubtedly arise in Texas over the "business necessity clause"[87] and the "bona fide occupational qualification (BFOQ) clause."[88]

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82. *See id.* § 5.01(2).

83. *See id.* §§ 5.02-.03.

84. *See id.* § 5.04 ("Training Programs"). This provision states that "it is an unlawful employment practice . . . to discriminate against an individual because of race, color, religion, sex, or national origin in admission to or participation in a program established to provide apprenticeship, on-the-job, or other training or retraining opportunities." *Id.* § 5.04.

85. *See id.* § 5.07(a)(1).

86. *See id.* § 5.07(a)(7).

87. *See, e.g.,* Davis v. Southeastern Community College, 574 F.2d 1158, 1162 (4th Cir. 1978) (litigating whether § 504 requires employer provide certain accommodations "even when such modifications become expensive"), *rev'd,* 442 U.S. 397 (1979); E.E. Black, Ltd. v. Marshall, 497 F. Supp. 1088, 1104 (D. Hawaii 1980) (litigating whether exclusion of handicapped applicant because of risk of future injury is legitimate business necessity); Advocates for the Handicapped v. Sears, Roebuck & Co., 385 N.E.2d 39, 42 (Ill. App. 1978) (litigating whether handicapped applicant, uninsurable under employer's self-insured plan, can be rejected out of business necessity), *cert. denied,* 444 U.S. 981 (1979); *see also* TEX. REV. CIV. STAT. ANN. art. 5221k, § 5.07(a)(7) (Vernon Pamph. Supp. 1984) (business necessity exception in Texas act).

88. *See, e.g.,* Houghton v. McDonnell Douglas Corp., 553 F.2d 561, 563-64 (8th Cir. 1977) (litigating whether age is legitimate BFOQ for job as test pilot); Neeld v. American Hockey League, 439 F. Supp. 459, 462 (C.D. Cal. 1977) (litigating whether being fully sighted is legitimate BFOQ for employment as professional hockey player); Fraser Shipyards, Inc. v. Department of Indus., Labor & Human Relations, 13 Fair Empl. Prac. Cas. (BNA) 1809, 1810 (Wis. Cir. Ct. 1976) (litigating whether policy excluding diabetic from job as welder is legitimate BFOQ); *see also* TEX. REV. CIV. STAT. ANN. art. 5221k, § 5.07(a)(1) (Vernon Pamph. Supp. 1984) (BFOQ provision of Texas statute).

IV. Analysis of the Commission on Human Rights Act in Light of the Federal Rehabilitation Act of 1973

The Commission on Human Rights Act will significantly impact the law of handicap employment discrimination in at least two ways. First, it provides state and local forums for administrative disposition of complaints,[89] whereas its predecessor contained no provision establishing an administrative commission, but merely set forth substantive rights.[90] While the federal law does provide for administrative adjudication in some instances,[91] the statute only applies to a limited class of employers,[92] and it is somewhat unclear as to whether a private right of action inures to the complainant.[93] Second, because the Texas statute applies to a significantly broader

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89. *See* TEX. REV. CIV. STAT. ANN. art. 5221k, §§ 3.01-.02 (Vernon Pamph. Supp. 1984) (creation and powers of Commission).

90. *See* Act of May 29, 1975, ch. 352, § 2, 1975 Tex. Gen. Laws 939 (codified at TEX. HUM. RES. CODE ANN. § 121.003(f) (Vernon 1980)), *repealed by* Act of July 7, 1983, ch. 7, § 10.03(c), 1983 Tex. Gen. Laws, Gen. & Spec. 37, 57 (codified as Commission on Human Rights Act, at TEX. REV. CIV. STAT. ANN. art. 5221k, § 10.03(c) (Vernon Pamph. Supp. 1984)). The prior law stated:

> An employer who conducts business in this state may not discriminate in his or her employment practices against a handicapped person on the basis of the handicap if the person's ability to perform the task required by a job is not impaired by the handicap and the person is otherwise qualified for the job.

Id. While the new statute repealed the above provision, it left standing another provision concerning employment of the handicapped. It states:

> It is the policy of the state that the blind, the visually handicapped and the otherwise physically disabled be employed by the state, by political subdivisions of the state, in the public schools, and in all other employment supported in whole or in part by public funds on the same terms and conditions as the able-bodied, unless it is shown that the particular disability prevents the performance of the work involved.

TEX. HUM. RES. CODE ANN. § 121.003(g) (Vernon 1980). There is obvious overlap between this provision and the new statute. *Compare id.* § 121.003(g) (applicable to state, its political subdivisions, public schools, and recipients of state funding) *with* TEX. REV. CIV. STAT. ANN. art. 5221k, § 2.01(5) (Vernon Pamph. Supp. 1984) (Commission on Human Rights Act applicable to employers, including political subdivisions, state agencies, and public institutions of higher learning). The older provision conceivably might apply to a narrow class of employers not within the scope of the Commission on Human Rights Act, namely state instrumentalities and recipients of state funding that do not employ 15 persons on a regular basis. *See* TEX. REV. CIV. STAT. ANN. art. 5221k, § 2.01(5) (Vernon Pamph. Supp. 1984) (Commission on Human Rights Act applicable only to employers having 15 or more employees).

91. *See* 29 U.S.C. § 794a(a)(1), (2) (1982) (provision in Rehabilitation Act of 1973 incorporating administrative remedies available under Civil Rights Act of 1964); *see also* 42 U.S.C. § 2000e-16 (1982) (provision of Civil Rights Act of 1964 setting forth administrative remedies; appeal to EEOC).

92. *See* 29 U.S.C. §§ 791, 793, 794 (1982) (Title V of Rehabilitation Act applies only to government agencies, federal government contractors, and recipients of federal funds).

93. *See id.* §§ 793-794 (§§ 503 and 504 are silent as to whether statute creates private

range of employers, substantially greater numbers of handicapped people will be brought within statutory protection.[94] The statute may be unable to fully effectuate its purpose unless the courts cautiously apply the two major exceptions to the general proscription of discrimination.[95] Of even greater significance is the absence from the statute of any provision expressly mandating that employers provide reasonable accommodation for handicapped employees.[96]

A. *Exceptions: Bona Fide Occupational Qualifications and the Business Necessity Defense*

The Texas act expressly allows employers to discriminate against a handicapped person where the absence of such a handicap is a bona fide occupational qualification (BFOQ).[97] Generally, a BFOQ is a job require-

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right of action). Since federal courts are of limited jurisdiction, plaintiff must show that Congress intended the statute forming the basis of the suit to create a private remedy. *See* Rogers v. Frito-Lay, Inc., 611 F.2d 1074, 1078 (5th Cir. 1980), *cert. denied,* 449 U.S. 889 (1980). Absent a private right of action, proper adjudication under §§ 503 and 504 would reside solely in the administrative forums, with available remedial action limited to dissolution of the government contract or discontinuance of federal funds, respectively. *See id.* at 1080; *see also* 29 U.S.C. §§ 793-794 (1982) (§§ 503 and 504 of Rehabilitation Act). Most courts and commentators, however, have noted an implied private right of action. *See* Camenisch v. University of Texas, 616 F.2d 127, 135-36 (5th Cir. 1980) (Rehabilitation Act does not mandate exhaustion of administrative remedies prior to suit), *remanded without reaching issue,* 451 U.S. 390 (1981); Doe v. Colautti, 592 F.2d 704, 708 (3d Cir. 1979) (private right of action exists under § 504); United Handicapped Fed'n v. Andre, 558 F.2d 413, 415 (8th Cir. 1977) (private right of action implied); Lloyd v. Regional Transp. Auth., 548 F.2d 1277, 1285 (7th Cir. 1977) (Congress intended private right of action). *See generally* Note, *Private Rights of Action for Handicapped Persons Under Section 503 of the Rehabilitation Act,* 13 VAL. U.L. REV. 453, 468-96 (1979) (discussing forms of private judicial action under § 503; mandamus proceedings, judicial review of administrative proceedings, and direct judicial action).

94. *See* TEX. REV. CIV. STAT. ANN. art. 5221k, § 2.01(5) (Vernon Pamph. Supp. 1984) (Commission on Human Rights Act applicable to all employers having 15 employees on regular basis).

95. *See id.* § 5.07(1) (exception for bona fide occupational qualification); *id.* § 5.07(7) (defense of "business necessity").

96. *See id.* §§ 5.01-.10 (article 5, containing Act's substantive law on discrimination, contains no mention of reasonable accommodation); *see also id.* § 1.04(b) (proscription of discrimination "on basis of handicap" does not include implicit requirement of reasonable accommodation).

97. *See id.* § 5.07(a)(1). The provision states:

> Notwithstanding any other provision of this article, *it is not an unlawful employment practice*:
>
> (1) *for an employer to hire* and to employ employees, for an employment agency to classify or refer for employment an individual, for a labor organization to classify its members or to classify or refer for employment an individual, or for an employer, labor organization, or joint labor-management committee controlling an apprenticeship, on-

ment expressly excluding an entire class of persons, such as a requirement that one "must be a female" or "must be under the age of 40."[98] Similarly, under the Texas act an employer would probably be able to categorically exclude an entire class of handicapped persons by use of a BFOQ, since the statute defines a BFOQ as excluding a "group," rather than individuals.[99]

Advocates of employment rights for the handicapped greet BFOQ's with apprehension because often there may be individual members of the excluded class who, in spite of their handicap, could satisfactorily perform the job.[100] In contrast to Texas, Wisconsin, for example, recognized the potential unfairness of BFOQ's and did not include a provision permitting their use in the Wisconsin Fair Employment Act.[101] The net effect of the BFOQ provision in Texas will depend on whether the courts require strict

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the-job, or other training or retraining program to admit or employ an individual in its program, *on the basis of handicap,* religion, sex, national origin, or age, *if handicap,* religion, sex, national origin, or age *is a bona fide occupational qualification* reasonably necessary to the normal operation of the particular business or enterprise.

Id. § 5.07(a)(1) (emphasis added).

98. *See, e.g.,* Hodgson v. Greyhound Lines, Inc., 499 F.2d 859, 862 (7th Cir. 1974) (employer had blanket policy refusing to employ bus drivers over age 40), *cert. denied,* 419 U.S. 1122 (1975); Weeks v. Southwestern Bell Tel. & Tel., 408 F.2d 228, 235 (5th Cir. 1969) (BFOQ excluding all women unacceptable unless can prove substantially all women unable to efficiently perform job); Fraser Shipyards, Inc. v. Department of Indus., Labor & Human Relations, 13 Fair Empl. Prac. Cas. (BNA) 1809, 1810 (Wis. Cir. Ct. 1976) (employer categorically excluded diabetics from employment as welders).

99. *See* TEX. REV. CIV. STAT. ANN. art. 5221k, § 2.01(1)(B) (Vernon Pamph. Supp. 1984). The provision states: "In this Act . . . 'Bona fide occupational qualification' means a qualification . . . for which there is a factual basis for believing that a person of the *excluded group* would be unable to perform satisfactorily the duties of the job with safety or efficiency." *Id.* (emphasis added).

100. *See* Gittler, *Fair Employment and the Handicapped: A Legal Perspective,* 27 DE PAUL L. REV. 953, 977-81 (1978).

101. *Compare* TEX. REV. CIV. STAT. ANN. art. 5221k, § 5.07(a)(1) (Vernon Pamph. Supp. 1984) (BFOQ provision in Texas Commission on Human Rights Act) *with* WIS. STAT. ANN. § 111.34(b), (c) (West Supp. 1983-1984) (provision of Wisconsin Fair Employment Act discussing exceptions to proscription against handicap employment discrimination; evaluation must be on individual basis; general, categorical exclusions not permitted as to certain exceptions). Even before the enactment of the cited Wisconsin provision, the Wisconsin Fair Employment Code was construed liberally to effectuate its purpose of fostering full employment of the handicapped. *See* Fraser Shipyards, Inc. v. Department of Indus., Labor & Human Relations, 13 Fair Empl. Prac. Cas. (BNA) 1809, 1810 (Wis. Cir. Ct. 1976). In *Fraser,* an employer's policy of refusing to hire diabetics as welders, because many diabetics are prone to blacking out, was held violative of the state's fair employment statute. *See id.* at 1810. The policy was challenged by two welders who had never blacked out. *See id.* at 1810. The court ruled that the law should be liberally construed to the advantage of the protected class, and that an overbroad job qualification such as this was precisely what the law discouraged. *See id.* at 1810.

proof of both job relatedness and the factual basis for inferring that substantially all of the members of the class to which an individual plaintiff belongs would be unable to perform the job.[102]

In addition to allowing discrimination based on BFOQ's, the Act also permits an employer to engage in otherwise prohibited discrimination if exercising good faith and "justified by business necessity."[103] While many actions might arguably be justified by business necessity, under federal law the "business necessity" defense is only allowable as against the duty to provide reasonable accommodation.[104] However, no mention of a duty of reasonable accommodation is made in article 5 of the Texas act;[105] the business necessity clause is not made specifically referable to a duty of reasonable accommodation.[106] Instead, the provision allows an employer, based on a showing of business necessity, to engage in "*any* practice" having discriminatory effect.[107] The significance of this business necessity defense will be determined by how courts will define business necessity. In the context of reasonable accommodation under federal law, "business necessity" has been equated with factors causing "undue hardship" on an

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102. *Cf.* Houghton v. McDonnell Douglas Corp., 553 F.2d 561, 563-64 (8th Cir. 1977) (involving employers use of age as BFOQ for employment as test pilot). In *Houghton,* an opinion written by retired U.S. Supreme Court Justice Clark, the BFOQ was held invalid because medical testimony and statistical studies indicated there was not a sufficient factual basis for believing that a 52 year old man could not perform the job safely and efficiently. *See id.* at 563-64. The court emphasized it was the employer's burden to prove that such a factual basis existed. *See id.* at 564.

103. *See* TEX. REV. CIV. STAT. ANN. art. 5221k, § 5.07(a)(7). The provision provides:

> (a) Nothwithstanding any other provision of this article, it is not unlawful employment practice . . .
>
> (7) for an employer to engage in *any practice* that has a discriminatory effect and that would otherwise be prohibited by this Act if the employer establishes that the practice is not intentionally devised or operated to contravene the prohibitions of this Act and is justified by *business necessity.*

Id. (emphasis added). This provision was probably the result of a compromise, as it did not appear in the bill as originally proposed in the House. *See* HOUSE COMM. ON STATE AFFAIRS, BILL ANALYSIS, Tex. H.B. 14, 68th Leg. (1983) (§ 5.07(a)(7) did not appear in original bill).

104. *See* 41 C.F.R. § 60.741.6(d) (1984) (Department of Labor regulations absolving employers of duty to reasonably accommodate if can show hardship arising from "business necessity").

105. *See* TEX. REV. CIV. STAT. ANN. art. 5221k, §§ 5.01-.10 (Vernon Pamph. Supp. 1984) (article does not create duty of reasonable accommodation).

106. *See id.* § 5.07(a)(7). Rather, the term "business necessity" does not only refer to the one "practice" of refusing reasonable accommodation. *See id.* § 5.07(a)(7).

107. *See id.* § 5.07(a)(7). Indeed, one may draw a tenable inference that an employer may, by showing some business necessity, refuse to hire a handicapped person who does not even need accommodation. *Cf. id.* § 5.07(a)(7) (depending on how "business necessity" defined, provision allows *any* discriminatory practice justified by business necessity).

employer,[108] such as the size of the business or enterprise, its budget, and the number of employees.[109]

B. *Reasonable Accommodation*

In contrast to federal law, the Commission on Human Rights Act does not expressly mandate that employers provide reasonable accommodation for the handicapped employee.[110] Under federal law, a handicapped person may be qualified for a job, and thus protected from discrimination, even though he requires reasonable accommodation by the employer.[111] Unlike the federal law, however, the Texas statute does not construe a qualified handicapped individual to be one who might need reasonable accommodation.[112] Furthermore, article 5 of the Act, which contains the

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108. *See* 45 C.F.R. §§ 84.1-.61, app. A at 308 (1984) (official analysis of 45 C.F.R. § 84.12(c)). The term "business necessity" is used by other agencies to denote the same factors this agency lists in § 84.12(c) to illustrate "undue hardship." *See id.*

109. *See id.* § 84.12(c) (factors to be considered in determining whether duty of reasonable accommodation causes undue hardship). Undue hardship varies from case to case; what is reasonable for a large corporation may not be reasonable for a small grocery store. *See id.* §§ 84.1-.61, app. A at 303. *But see* Note, *Affirmative Action Toward Hiring Qualified Handicapped Individuals,* 49 S. CAL. L. REV. 785, 814-15 (1976) (arguing reasonableness should be defined on societal basis, rather than by measuring capabilities of individual employers).

110. *Compare* TEX. REV. CIV. STAT. ANN. art. 5221k, §§ 5.01-.10 (Vernon Pamph. Supp. 1984) (article of new Texas act containing substantive discrimination law does not require reasonable accommodation) *with* Prewitt v. United States Postal Serv., 662 F.2d 292, 307 n. 21 (5th Cir. 1981) (§ 504 mandates reasonable accommodation).

111. *See* Southeastern Community College v. Davis, 442 U.S. 397, 403 (1979). The Supreme Court held that an otherwise qualified handicapped individual is one "able to function sufficiently in the position sought in spite of the handicap if *proper training and facilities are suitable and available.*" *Id.* at 403 (emphasis added); *see also* 45 C.F.R. § 84.3(k)(1) (1984). The Department of Health and Human Services makes reference to reasonable accommodation in its definition of "qualified handicapped person": "[w]ith respect to employment, a handicapped person who, *with reasonable accommodation,* can perform the essential functions of the job in question." *Id.* (emphasis added).

112. *Compare* 45 C.F.R. § 84.3(k)(1) (1984) (employer must provide reasonable accommodation before can judge whether handicapped employee qualified) *with* TEX. REV. CIV. STAT. ANN. art. 5221k, § 1.04(b) (Vernon Pamph. Supp. 1984) (construing use of term "because of handicap" in article 5; does not require reasonable accommodation before judging whether handicapped employee qualified). The Texas provision reads: "In Article 5, 'because of handicap' or 'on the basis of handicap' refers to discrimination because of or on the basis of a physical or mental condition that does not impair an individual's ability to reasonably perform a job." TEX. REV. CIV. STAT. ANN. art. 5221k, § 1.04(b) (Vernon Pamph. Supp. 1984). Had the legislature intended to expressly create a right to reasonable accommodation, as exists in federal law, the provision might have been drafted as such: In article 5, "because of handicap" or "on the basis of handicap" refers to discrimination because of or on the basis of a physical or mental condition that, *with reasonable accommodation,* does not impair an individual's ability to reasonably perform a job. *Cf.* 45 C.F.R. § 84.3(k)(1) (1984)

substantive provisions on discrimination, makes no mention of a duty of reasonable accommodation.[113]

A plaintiff could reasonably argue, however, that the Texas act implies a duty of reasonable accommodation by virtue of two provisions pertaining to procedural aspects of the Act.[114] Under article 6, the Act says that the Commission "must take into account the reasonableness of the cost of any work place accommodation."[115] A similar provision is contained in article 7 pertaining to judicial, rather than administrative, action.[116] Common sense dictates that an employer would have no need to defend his objection to accommodation if he were not under a duty to provide it. Moreover, a commonly applied rule of statutory construction states that remedial legislation, such as the Texas act, should be construed most favorably to the class it seeks to protect.[117]

Nevertheless, an employer could counter the above argument by pointing out that procedures set forth in articles 6 and 7 apply not only to complaints based on the substantive rights created by the Act, but also to complaints arising out of federal substantive law, referred to the Commission by the EEOC.[118] Consequently, the references to the duty of reasonable accommodation made in these two provisions would only be applicable where the duty had already been created: in complaints arising out of the Rehabilitation Act, referred to the Commission by the EEOC,

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(federal provision construing a qualified person to be one who might need reasonable accommodation).

113. *See* TEX. REV. CIV. STAT. ANN. art. 5221k, §§ 5.01-.10 (Vernon Pamph. Supp. 1984).

114. *See id.* § 6.01(d) (permitting defense of undue hardship in administrative review of discrimination complaint); *id.* § 7.01(f) (permitting defense of undue hardship at judicial review of complaint).

115. *See id.* § 6.01(d).

116. *See id.* § 7.01(f). This provision reads: "In the case of handicapped employees or applicants, the court must take into account the undue hardship defense, including the *reasonableness* of the cost of any necessary work place *accommodation* and the availability of alternatives or other appropriate relief." *Id.* § 7.01(f) (emphasis added).

117. *See* Texas Employment Comm'n v. Ryan, 481 S.W.2d 172, 176 (Tex. Civ. App—Texarkana 1972, writ ref'd n.r.e.) ("It is a familiar rule that social and remedial legislation will be construed liberally to effectuate its purpose."); *see also* Lang, *Protecting the Handicapped from Employment Discrimination: The Job-Relatedness and Bona Fide Occupational Qualification Doctrines,* 27 DE PAUL L. REV. 989, 1010 (1978) (remedial legislation should be construed more favorably to protected class).

118. *See* TEX. REV. CIV. STAT. ANN. art. 5221k, § 3.02(4) (Vernon Pamph. Supp. 1984) (authorizing Commission to accept complaints referred by federal agencies); *see also* HOUSE COMM. ON STATE AFFAIRS, BILL ANALYSIS, Tex. H.B. 14, 68th Leg. (1983) (explaining background of Act). According to the Bill Analysis, one reason for creating the Human Rights Commission was to provide a state enforcement mechanism to receive handicap discrimination complaints based on *federal* statutes that were originally brought to the EEOC. *See id.*

and not in complaints arising out of the Human Rights Act, where the duty had not been created. The fact that the legislature could have, but did not, expressly create a duty of reasonable accommodation anywhere in the Commission on Human Rights Act may be dispositive.[119]

V. CONCLUSION

The enactment, in 1973, of the federal Rehabilitation Act heralded the beginning of significant advances toward the goal of fair employment of the "physically challenged." The enactment, ten years later, of the Texas Commission on Human Rights Act may allow many more people the opportunity to prove "handicap" is indeed a misnomer. Yet, in attempting to formulate an equitable balance between the potentially adverse interests of employers and the handicapped, the Texas Legislature may have underestimated the ability of bona fide occupational qualifications and the "business necessity defense" to thwart the overall purpose of the Act. Moreover, unless a duty of reasonable accommodation is read into the Texas statute, many who would otherwise succeed at a job may be unable to gain employment.

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119. *Cf.* TEX. REV. CIV. STAT. ANN. art. 5221k, §§ 5.01-.10 (Vernon Pamph. Supp. 1984) (legislature did not create duty of reasonable accommodation); Allen Sales & Servicenter v. Ryan, 525 S.W.2d 863, 866 (Tex. 1975) (legislature presumed to have acted with "full knowledge of existing condition of law"). *But see* Holland v. Boeing Co., 583 P.2d 621, 622-23 (Wash. 1978) (though state statute does not expressly impose duty of reasonable accommodation, duty must be implied to effectuate purposes of statute).