Prohibiting Employment Discrimination on the Basis of Disability: The Need to Expand California Law

Disabled employees have proven to be competent and productive members of the work force. Unfortunately, they are still subjected to employer prejudice which decreases their employment opportunities. This comment examines the limitations in California's statutes which prohibit discrimination against disabled workers and suggests reforms which will provide comprehensive protection from discrimination in the work place.

INTRODUCTION

There are more than 1.5 million disabled persons of working age in California.[1] Sixty-five percent of these people are either

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[1] CAL. DEP'T OF REHABILITATION, THE CALIFORNIA DISABILITY SURVEY at Table ES-1 (1980) [hereinafter cited as DISABILITY SURVEY] (copy on file at U.C. Davis Law Review office). The DISABILITY SURVEY counted only those persons between the ages of 16 and 64 within California's civilian household population with one or more disabling conditions which limited their performance in work. Thus, the survey did not include those in institutions or those with a disabling condition which did not affect their ability to work.

The disabling conditions listed in the survey and the number of persons who had each as a primary disabling condition are as follows:

	Disabling Condition	Number of People with Primary Condition	
1.	visual impairments	34,250	(including 12,500 blind)
2.	hearing impairments	25,500	(including 10,750 deaf)
3.	speech impairments	8,000	
4.	musculoskeletal conditions (orthopedically handicapped, including amputees, arthritics, and those with deformities)	621,750	
5.	circulatory conditions	243,000	
6.	respiratory conditions	100,750	
7.	digestive conditions	50,500	
8.	mental retardation	72,750	

unemployed or have never entered the labor force.[2] Yet only twenty-six percent of unemployed disabled persons are incapable of working.[3]

These unfortunate statistics result from several factors,[4] the most pervasive being a mistaken[5] and slowly changing resis-

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9.	alcohol or drug problems	74,500	
10.	emotional problems	104,500	
11.	neurological conditions	98,500	
12.	other medical disorders	205,750	(including 19,750 cancer patients)
		1,567,500	total

Id. at Table ES-3.

The above figures reflect the number of persons who have each condition as a *primary* disability only. Since many disabled persons have more than one disabling condition, the number of people who actually have any one condition is actually much higher. Thus, the total number of persons with each disabling condition is as follows:

	Disabling Condition	Total Number of Persons with Condition
1.	visual impairments	117,500
2.	hearing impairments	157,500
3.	speech impairments	82,500
4.	musculoskeletal conditions	980,500
5.	circulatory conditions	414,500
6.	respiratory conditions	135,750
7.	digestive conditions	173,250
8.	mental retardation	116,500
9.	alcohol or drug problems	248,750
10.	emotional problems	246,000
11.	neurological conditions	146,250
12.	other medical disorders	381,750

Id.

[2] *Id.* at Table ES-9. In contrast to the 65.1% of the disabled population who are unemployed or not in the labor force, the survey revealed that only 28.4% of the nondisabled population fall into the same category. *Id.*

[3] *Id.* at Table ES-10.

[4] *See, e.g.*, Reed, *Equal Access to Mass Transportation for the Handicapped*, 9 TRANSP. L.J. 167, 167 (1977) ("The transit needs of these groups [the handicapped and elderly] are unique because the physical obstacles commonly encountered in transportation can serve as complete barriers to travel, to education, to employment and to social contact."); Farber, *The Handicapped Plead for Entrance—Will Anyone Answer?*, 64 KY. L.J. 99, 100 (1975) ("Architectural barriers confront the physically disabled at their places of residence, at recreational and entertainment facilities, and, not least, at their places of potential employment.").

[5] The E.I. duPont de Nemours and Company undertook a study which examined the job performance, safety records and attendance of 1,452 employees whose physical condition may have prevented them from doing what non-impaired workers could do. The study revealed that the nature of the handicap

tance[6] to employing disabled persons.[7] To combat this prejudice, the law must guarantee qualified[8] disabled workers[9] the same employment benefits[10] and opportunities as nonhandicapped employees.[11]

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had no bearing on the level of safety, attendance or performance of workers. In fact, it found a direct correlation between the job performance of the handicapped workers and the severity of their impairment. Amputees, blind persons, paraplegics and epileptics had the highest job performance ratings. Wolfe, *Disability is No Handicap for duPont*, THE ALLIANCE REV. 13 (Winter 1973-74) (copy on file at the U.C. Davis Law Review office).

Reasons that employers give for not hiring disabled individuals are unwarranted. For example, duPont had no increase in compensation insurance costs as a result of hiring handicapped workers. *Id.* A study by the U.S. Chamber of Commerce and the National Association of Manufacturers showed that 90% of the 279 companies surveyed reported no effect on insurance costs as a result of hiring disabled employees. *Id.* In addition, most disabled employees at duPont required no special modifications of the workplace. Those that were necessary were minimal, such as lowered work benches or an entrance ramp. *Id. See also* notes 137-140 and accompanying text *infra*. Furthermore, duPont's safety records were not jeopardized. Wolfe, *supra* this note; *see* note 16 and accompanying text *infra*. Finally, according to the duPont study, other employees were not antagonistic towards the disabled. "The disabled person wants to be treated as a normal employee. Fellow employees do not consider a parking spot near the plant entrance for a paraplegic in a wheel chair to be a misuse of executive privilege. They wouldn't trade places and don't expect the same treatment." Wolfe, *supra* this note.

[6] Reports from as early as 1947 indicate that the resistance to employing disabled persons is uncalled for, since the performance of properly placed disabled employees matches or exceeds that of nondisabled employees. Lavos, *The Work Efficiency of the Disabled: An Analysis of the Available Reports on the Job Efficiency of Physically Disabled Workers in Industry*, 13 J. OF REHAB. 3 (Apr. 1947). *See also* American Mutual Insurance Alliance, Hiring the Handicapped: Facts and Myths (copy on file at the U.C. Davis Law Review office).

[7] *See, e.g.*, ten Broek & Matson, *The Disabled and the Law of Welfare*, 54 CALIF. L. REV. 809 (1966); Note, *Equal Employment and the Disabled: A Proposal*, 10 COLUM. J. LAW & SOC. PROB. 457 (1974); Note, *Abroad in the Land, Legal Strategies to Effectuate the Rights of the Physically Disabled*, 61 GEO. L. REV. 1501 (1973).

[8] *See* note 134 and accompanying text *infra*.

[9] For the purpose of this comment, "disabled worker" or "disabled employee" will refer to both present employees and job applicants unless otherwise indicated.

[10] For the purpose of this comment, employment benefits include salary, scheduled advancements, paid health insurance and any other benefit a worker may derive from employment.

[11] *See* Bayh, *Foreword to the Symposium Issue on Employment Rights of*

There are sound economic reasons for requiring equal employment opportunities for qualified disabled workers.[12] The cost of rehabilitating a disabled person is only one-tenth that of supporting the same person through public aid.[13] Furthermore, employed disabled individuals contribute to society through their increased buying power and tax payments.[14] Perhaps most importantly, handicapped employees are often more productive,[15] have fewer accidents[16] and maintain better attendance records[17] than their nondisabled peers.

Although statutory protections for disabled workers exist at

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the Handicapped, 27 DE PAUL L. REV. 943, 943 (1978).

[12] California pays approximately $200 each month directly to every unemployed disabled individual receiving Supplementary Security Income payments. Monthly grant levels July 1, 1980, to December 31, 1980, for individuals receiving SSI/SSP payments were as follows:

	Total	SSI*	SSP**
Independent, aged or disabled	$420.00	$238.00	$182.00
Restaurant meals, aged or disabled only	464.00	238.00	226.00
Independent, blind	471.00	238.00	233.00
Household of another, aged or disabled	340.67	158.67	182.00
Household of another, blind	391.67	158.67	233.00
Nonmedical Out-of-Home care	465.00	238.00	163.33

*Supplemental Security Income payments (SSI) (Federal)
**Supplemental Security Payments (SSP) (State)

CAL. DEP'T OF SOCIAL SERVICES, STATISTICAL SERVICES BRANCH, PUBLIC ASSISTANCE FACTS AND FIGURES (Dec. 12, 1980).

In September 1980, 398,309 disabled individuals (including the blind) received SSP payments in California. 44 SOC. SEC. BULL. 47, Table M-21. Thus, California pays aproximately $72.5 million per month in SSP payments to the disabled.

[13] INA Corp., The Economics of Rehabilitation (copy on file at the U.C. Davis Law Review office).

[14] The disabled employee, when placed in the right job, will return $10 in taxes for every dollar spent on his or her rehabilitation. PRESIDENT'S COMMITTEE ON EMPLOYMENT OF THE HANDICAPPED, GUIDE TO JOB PLACEMENT OF THE MENTALLY RETARDED 4 (1964) (copy on file at the U.C. Davis Law Review office).

[15] Ninety-one percent of duPont Company's disabled workers rated average-or-better in performance when compared with the employee population in general. Wolfe, *supra* note 6.

[16] The safety records of the handicapped employees at duPont revealed that only four percent had a higher accident rate than nondisabled employees. More than half of the disabled employees had better-than-average safety records. *Id.*

[17] Attendance records of the disabled workers surveyed in the duPont study showed that 79% rated average-or-better than the total work force. *Id.*

both the federal[18] and state[19] levels, these protections generally have proven inadequate.[20] This comment first examines limita-

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[18] *See* note 28 *infra* for a listing of federal statutes.

[19] Thirty-nine states and the District of Columbia presently have laws which prohibit employment discrimination against the disabled to some extent. These include Alaska, ALASKA STAT. § 18.80.220 (Supp. 1979); California, CAL. GOV'T CODE § 12940(a) (West 1980); *id.* § 11135; Colorado, COLO. REV. STAT. § 24-34-402 (Supp. 1979); Connecticut, CONN. GEN. STAT. § 31-126(a)-(e) (Supp. 1980); District of Columbia, D.C. CODE ANN. § 211 (Supp. 1980); Florida, FLA. STAT. ANN. § 413.08(3) (West Supp. 1980); Georgia, GA. CODE ANN. §§ 89-1701 (g), (h), -1703 (Supp. 1980); Hawaii, HAW. REV. STAT. ANN. §§ 378-1(7), -(2) (Supp. 1979); Illinois, ILL. ANN. STAT. ch. 38, §§ 65-22, -23 (Smith-Hurd Supp. 1980); Indiana, IND. CODE ANN. §§ 22-9-1-2(a)(b), -3(q), -13 (Burns Supp. 1979); Iowa, IOWA CODE ANN. §§ 601A.2(11), .6(1) (West Supp. 1980); Kansas, KAN. STAT. §§ 44-1002(j), 1009 (Supp. 1979); Kentucky, KY. REV. STAT. §§ 207.230(2), .150 (Supp. 1980); Maine, ME. REV. STAT. ANN. tit. 5, §§ 4553(7-A), 4572 (West 1979); Maryland, MD. ANN. CODE art. 49B, §§ 14, 15(g)(.16) (1979); Massachusetts, MASS. GEN. LAWS ANN., ch. 149, § 24(k) (West Supp. 1980); Michigan, MICH. STAT. ANN. §§ 3.550(103)(b), (202) (1978); Minnesota, MINN. STAT. ANN. § 363.03(1) (West Supp. 1980); Mississippi, MISS. CODE ANN. § 43-6-15 (Supp. 1978); Montana, MONT. CODE ANN. §§ 64-304, -305(13), -306, -307(1) (1979); Nebraska, NEB. REV. STAT. §§ 48-11-2(8), -1104, -1108(1) (1978); Nevada, NEV. REV. STAT. §§ 613.330, .350(1), (2) (1975); New Hampshire, N.H. REV. STAT. ANN. §§ 354-A:3(13), -A:8(I), (II) (Supp. 1979); New Jersey, N.J. STAT. ANN. §§ 10:5-4.1, -5(q), -12(a), -(e) (West Supp. 1980-81); New Mexico, N.M. STAT. ANN. §§ 28-1-7.(A)-(H) (1978); New York, N.Y. EXEC. LAW §§ 292(21), 296(1) (McKinney Supp. 1980); North Carolina, N.C. GEN. STAT. § 128-15.3 (Supp. 1979); Ohio, OHIO REV. CODE ANN. §§ 4112.01(13), -.02 (Page 1980); Oregon, OR. REV. STAT. §§ 659.400(2), .425 (1979); Pennsylvania, PA. STAT. ANN. tit. 43, §§ 954(p), 955 (Purdon Supp. 1980-81); Rhode Island, R.I. GEN. LAWS §§ 38-5-6(H), -7 (1979); South Dakota, S.D. COMPILED LAWS § 3-6A-15 (Supp. 1980); Tennessee, TENN. CODE ANN. § 8-50-103 (1980); Texas, HUM. RES. CODE ANN. § 121.003(f), (g) (1980); Vermont, VT. STAT. ANN. tit. 21, § 498 (1978); Virginia, VA. CODE § 40.1-28.7 (1976); Washington, WASH. REV. CODE ANN. § 49.60.180 (West Supp. 1980-81); West Virginia, W. VA. CODE §§ 5-11-3(s), -11-9 (1979); Wisconsin, WIS. STAT. ANN. § 111.32(5)(a), (f) (West Supp. 1980-81).

[20] Federal law is limited both in terms of the number of employers it covers, *see* notes 35 & 50 and accompanying text *infra*, and the extent to which an employer must accommodate the disabilities of a particular worker. *See* notes 52-54 and accompanying text *infra*.

Moreover, many states offer no protection to the disabled worker. Such states include Alabama, Arizona, Arkansas, Delaware, Idaho, Louisiana, Missouri, North Dakota, South Carolina, Utah and Wyoming. Other states offer only limited protection. For example, Colorado, COLO. REV. STAT. § 24-34-801(b) (Supp. 1979), Georgia, GA. CODE ANN. § 89-1701(e) (Supp. 1980), and Mississippi, MISS. CODE ANN. § 43-6-15 (Supp. 1978), prohibit discrimination against the handicapped by public or public-supported employers only. Alaska,

tions in the federal statutory scheme which point to a need for effective state legislation.[21] It then discusses two California employment discrimination provisions, Government Code sections 12940[22] and 11135.[23] While California's statutes provide relatively comprehensive protection,[24] they do not cover all disabilities[25] or employers,[26] nor do they adequately require reasonable accommodation[27] for disabled employees. In response to these limitations, this comment suggests revisions in California law which will ensure equal employment opportunities to all disabled workers.

I. Federal Provisions

The majority of federal statutes prohibiting employment discrimination against the disabled do not provide comprehensive protection.[28] While sections 503[29] and 504[30] of the Rehabilitation

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Alaska Stat. § 18.80.22 (Supp. 1979), Colorado, Colo. Rev. Stat. § 24-34-801(b) (Supp. 1979), Hawaii, Haw. Rev. Stat. § 378-2(1) (Supp. 1979), Kansas, Kan. Stat. § 44-1001 (Supp. 1980), Massachusettes, Mass. Gen. Laws Ann. ch. 149 § 24(k) (West. Supp. 1980), Mississippi, Miss. Code Ann. § 42-6-15 (Supp. 1978), Rhode Island, R.I. Gen. Law § 28-5-7(A) (1979), South Dakota, S.D. Compiled Laws Ann. § 3-6A-15 (Supp. 1980), Vermont, Vt. Stat. Ann. tit. 21, § 498 (1978), and Virginia, Va. Code § 40.1-28.7 (1976), protect only the physically handicapped. California, Cal. Gov't Code § 12940(a) (West 1980), protects only physically and medically handicapped, *see* notes 69-71 and accompanying text *infra*, other than in instances of discrimination by government contractors, where protection extends to the mentally handicapped as well. Cal. Gov't Code § 11135 (West 1980); *see* notes 115-117 and accompanying text *infra*. Finally, Michigan, Mich. Stat. Ann. § 3.550(103)(b) (1978) and Texas, Tex. Hum. Res. Code Ann. § 121.003(f) (1980), protect only the retarded.

[21] *See* note 55 *infra*.

[22] Cal. Gov't Code § 12940 (West 1980); *see* notes 66-112 and accompanying text *infra*.

[23] Cal. Gov't Code § 11135 (West 1980); *see* notes 113-127 and accompanying text *infra*.

[24] Compare the state statutes cited in note 20 *supra* with the California statutes described in notes 56-58 and accompanying text *infra*.

[25] *See* notes 66-71 and accompanying text *infra*.

[26] *See* notes 100-101 and accompanying text *infra* and 118-120 *infra*.

[27] Reasonable accommodation refers to making modifications which will allow a disabled person to perform a particular task or take part in a particular program. *See* notes 129-134 and accompanying text *infra*.

[28] *See* 5 U.S.C. § 7153 (1976) (prohibits employment discrimination on the basis of physical handicap by an executive agency or by the civil service); 38 U.S.C. § 2012 (1976) (requires government contractors to use affirmative action

Act of 1973[31] are available to a large number of disabled employ-

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in hiring disabled Vietnam veterans); 29 U.S.C. § 791 (1976) (requires executive agencies to adopt affirmative action plans for the hiring and advancement of the handicapped); 29 U.S.C. § 793 (1976) (requires all federal contractors with contracts in excess of $2,500 to use affirmative action in the hiring of handicapped employees); 29 U.S.C. § 794 (1976) (prohibits discrimination by reason of handicap by any program or activity receiving federal financial assistance); 31 U.S.C. § 1242 (1976) (prohibits discrimination on the basis of handicap by any state or local government receiving revenue-sharing funds).

In addition to federal statutes, constitutional provisions have been of some use in preventing employment discrimination against the disabled. The due process clauses of the 5th and 14th amendments have been the basis for successful discrimination suits by disabled employees. *E.g.,* Gurmankin v. Costanzo, 556 F.2d 184 (3d Cir. 1977) (blind teacher denied the right to apply for a position in an elementary school); Davis v. Bucher, 451 F. Supp. 791 (E.D. Pa. 1978) (former drug user denied employment with the city of Philadelphia).

In *Gurmankin* and *Davis,* the plaintiffs argued that blanket refusals to consider disabled job applicants subjected them to an irrebuttable presumption of incompetence. Thus, they felt that the procedure violated their due process right to offer evidence in their own behalf.

The equal protection clause of the 14th amendment may also prove useful in some instances. *See* Burgdorf & Burgdorf, *A History of Unequal Treatment: The Qualifications of Handicapped Persons as a "Suspect Class" Under the Equal Protection Clause,* 15 SANTA CLARA L. REV. 855 (1975). *But see* Upsur v. Love, 474 F. Supp. 332, 336 (N.D. Cal. 1979), in which the court refused to consider a disabled employee to be a member of a suspect class. *See also* Gurmankin v. Costanzo 556 F.2d 184, 188 (3d Cir. 1977), where an equal protection claim was similarly refused. The courts' analysis in these cases does not allow for broad use of the equal protection clause. The courts have required employment selection criteria to be reasonably related to the employment in question. *Id.* at 187-88. For the most part, however, they have yet to recognize the disabled as a suspect class. Note, *Potluck Protection for Handicapped Discriminatees: The Need to Amend Title VII to Prohibit Discrimination on the Basis of Disability,* 8 LOY. CHI. L. REV. 814, 827 (1976). Thus, the plaintiff's burden of proof is very high.

[29] Section 503, 29 U.S.C. § 793(a) (1976), provides in pertinent part:

> Any contract in excess of $2,500 entered into by any Federal department or agency for the procurement of personal property and nonpersonal services (including construction) for the United States shall contain a provision requiring that, in employing persons to carry out such contract the party contracting with the United States shall take affirmative action to employ and advance in employment qualified handicapped individuals . . . . The provisions of this section shall apply to any subcontract in excess of $2,500 entered into by a prime contractor in carrying out any contract . . . .

[30] Section 504, 29 U.S.C. § 794 (1976), provides:

> No otherwise qualified handicapped individual in the United

ees, even these statutes contain provisions which severely limit their protection of handicapped workers.

Section 503 contains two limitations. It requires only employers holding federal contracts[32] in excess of $2,500 to take affirmative action[33] in employing handicapped individuals.[34] As a result, section 503 protects less than one-third of the national work force.[35] Moreover, section 503 fails to provide a private

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> States, as defined in section 7(7) (29 U.S.C.S. § 706(7)), shall solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service . . . .

[31] Pub. L. No. 93-112, 87 Stat. 355 (1973) (codified at 29 U.S.C. §§ 701-794 (1976)).

[32] Federal regulations indicate that the term contractor includes subcontractors. 41 C.F.R. § 60-741.2 (1980).

[33] *See* note 29 *supra*. The § 503 regulations provide:

> A contractor must make a reasonable accommodation to the physical and mental limitations of an employee or applicant unless the contractor can demonstrate that such an accommodation would impose an undue hardship on the conduct of the contractor's business. In determining the extent of a contractor's accommodation obligations, the following factors among others may be considered: (1) Business necessity and (2) financial cost and expenses.

41 C.F.R. § 60-741.6(d) (1980).

The courts have yet to determine what constitutes reasonable accommodation in the context of § 503.

[34] Section 503 itself requires affirmative action towards only those employees necessary to carry out the particular federal contract in question. *See* note 29 *supra*. The regulations, however, indicate that coverage extends to all aspects of a federal contractor's business. 41 C.F.R. § 60.741.5 (1980). As no court has passed upon this apparent discrepancy, the question of whether all handicapped workers in a facility are covered or only those actually performing federal contract work remains open.

[35] Lublin, *Lowering Barriers*, Wall St. J., Jan. 27, 1976, at 1, col. 1, *cited in* Note, *Lowering the Barriers to Employment of the Handicapped: Affirmative Action Obligations Imposed on Federal Contractors*, 81 DICKINSON L. REV. 174, 175 (1976-77); AMICUS, Sept. 1976, at 16 (estimating that one-half of all U.S. corporations are affected by the Rehabilitation Act). These figures refer to the percentage of employers covered by the *entire* act. Thus, the percentage of employers covered by § 503 alone would be less. This comment assumes that a similar percentage of California workers will be covered by the Rehabilitation Act. *See also Equal Employment Opportunity for the Handicapped Act of 1979: Hearing on S. 446 before the Comm. on Labor and Human Resources*, 96th Cong., 1st Sess. 119 (1979) [hereinafter cited as *Senate Hearings*] (250,000 federal contractors are covered by section 503, while Title VII of the

right of action for handicapped employees.[36] This factor greatly restricts a handicapped worker's ability to overcome discriminatory employment practices.[37]

Because section 503 lacks a private right of action, only the Office of Federal Contract Compliance Programs (OFCCP) can enforce the statute and its regulations.[38] In resolving employer-employee disputes, the OFCCP must first attempt conciliation and persuasion.[39] If these measures are unsuccessful, it may[40] initiate formal administrative hearings.[41] Even if the OFCCP institutes a hearing and finds that a contractor has violated section 503, the only administrative sanction expressly available is to refuse further access to federal funds.[42]

1964 Rehabilitation Act covers approximately 909,000).

[36] *See* 81 DICKINSON L. REV., *supra* note 35, at 189-90. In addition to there being no express private right of action in § 503, the courts have been unwilling to imply such a right. *E.g.*, Rogers v. Frito-Lay, Inc., 611 F.2d 1074 (5th Cir. 1980); Hoopes v. Equifax, Inc., 611 F.2d 134 (6th Cir. 1979); Anderson v. Erie R.R., 468 F. Supp. 934 (D. Ohio 1979); Wood v. Diamond State Tel. Co., 440 F. Supp. 1003 (D. Del. 1977). *But see* Hart v. County of Alameda, 485 F. Supp. 66 (N.D. Cal. 1979); Duran v. City of Tampa, 430 F. Supp. 75 (M.D. Fla. 1977); Drennon v. Philadelphia Gen. Hosp., 428 F. Supp. 809 (E.D. Pa. 1977).

[37] The right to bring direct legal action against those denying individual rights is a threshold concern of every civil rights movement. American Bar Ass'n, Comm. on the Mentally Disabled, *Summary & Analysis*, 4 MENTAL DISAB. L. RPTR. 71, 71 (1980). *See also* Seng, *Private Rights of Action*, 27 DE PAUL L. REV. 1117, 1117 (1978); Comment, *Private Rights of Action Under Title IX*, 13 HARV. C.R.-C.L. L. REV. 425, 430 (1978).

[38] 41 C.F.R. § 60-741.25 (1980).

[39] *Id.* § 60-741.28(a).

[40] A complainant is not guaranteed a hearing. The decision to grant a hearing is completely at the discretion of the Director of the OFCCP. *Id.* § 60-741.26(g).

[41] *Id.* § 60-741.29(a) provides: "An opportunity for a formal hearing shall be afforded to a prime contractor or a subcontractor . . . [if] (1) An apparent violation of the affirmative action clause by the contractor or subcontractor, as shown by the investigation, is not resolved by informal means . . . .

[42] *Id.* § 60-741.28(c), (d), (e).

Although withdrawal of federal funds is the only administrative sanction expressly provided for, back-pay awards have been awarded through conciliation agreements. Note, *Protecting the Handicapped from Employment Discrimination in Private Sector Employment: A Critical Analysis of Section 503 of the Rehabilitation Act of 1973*, 54 TUL. L. REV. 717, 741 n.123 (1980). In addition, the Secretary of Labor has awarded back pay in an administrative hearing. OFCCP v. E.E. Black, Ltd., 19 Fair Empl. Prac. Cas. 1624, 1635 (1979).

If administrative procedures fail, the OFCCP has the power to resort to the courts and request injunctive or other appropriate relief. 41 C.F.R. § 60-

The OFCCP's lack of resources to provide adequate representation compounds the problems of the section 503 complainant.[43] At the end of fiscal year 1980, the OFCCP had a backlog of over 2,000 section 503 complaints.[44] Additionally, the agency allotted only seven percent of its staff time to complaint investigation.[45] Such inadequate enforcement prevents section 503 from being an effective means of eliminating discrimination against disabled employees.[46]

Section 504 of the 1973 Rehabilitation Act, while providing a private right of action,[47] only prohibits discrimination by em-

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741.28(b) (1980). To date only one case has been appealed to federal district court, and that was by the defendant federal contractor, in E.E. Black, Ltd. v. Marshall, No. 79-0132 (D.C. Haw. Sept. 5, 1980).

[43] Several studies have determined that the Department of Labor lacks the resources and commitment to enforce § 503 adequately. Linn, *Enforcing the Rehabilitation Act: Great Expectations in the Midst of Hard Times*, 3 AMICUS, Sept. 1978, at 24, 26. As Linn points out, the OFCCP has come under criticism for being far too willing to settle a case instead of pressing for a back-pay award to make whole those with meritorious complaints. *Id.* In fiscal year 1977, 2,000 complaints were filed with the OFCCP, yet only 86 disabled employees received back-pay settlements. The record was little better in fiscal 1978. Out of 2,700 complaints, only 120 disabled employees received back-pay settlements. 54 TUL. L. REV., *supra* note 42, at 742 n.129; *cf.*, Note, *Civil Rights, Employment Rights of the Physically Disabled*, 79 W. VA. L. REV. 398, 407-08 (1976-77) ("Considering the weakness of the regulations and uncooperative employers, § 503 of the Rehabilitation Act of 1973 does not appear to offer much remedial relief to the aggrieved handicapped individual.").

[44] Zuckerman, *Handicapper's Rights: Section 503: A Special Kind of Leverage*, 17 TRIAL 30, 33 (1981); Kemp & Young, *Handicapped Employment Discrimination Litigation: Meeting The Challenge*, 17 TRIAL 36, 38 (1981).

[45] Zuckerman, *supra* note 44, at 33.

[46] A review of 300 federal contractors revealed that 90% of them were in violation of § 503 regulations. *Senate Hearings, supra* note 35, at 97 (statement of Weldon Rougeau, Director of the OFCCP).

[47] Lloyd v. Regional Transp. Auth. 548 F.2d 1277 (7th Cir. 1977). In *Lloyd*, the court considered the factors established by the U.S. Supreme Court in Cort v. Ash, 422 U.S. 66, 78 (1975), to imply a private right of action from § 504:

> 1) Is the plaintiff one of the class for whose especial benefit the statute was enacted?
> 2) Is there any indication of legislative intent, explicit or implicit, either to create such a remedy or deny one?
> 3) Is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?
> 4) Is the cause of action one traditionally relegated to state law, in an area basically the concern of the States?

548 F.2d at 1284-85; *accord, e.g.*, Kling v. County of Los Angeles, 633 F.2d 876

ployers[48] who receive federal financial assistance.[49] This includes such businesses as hospitals, colleges and universities, day care centers, nursing homes and school districts. Thus, as with section 503, only a minority of disabled employees who suffer discrimination in the workplace can qualify for protection under section 504.[50]

In *Southeastern Community College v. Davis*,[51] the Supreme

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(9th Cir. 1980); NAACP v. Medical Center, Inc., 599 F.2d 1247, 1258 (3d Cir. 1979); Davis v. Southeastern Community College, 574 F.2d 1158, (4th Cir. 1979), *rev'd on other grounds*, 442 U.S. 397 (1979); Leary v. Crapsey, 566 F.2d 863, 865 (2d Cir. 1977); Kampmeier v. Nyquist, 553 F.2d 296, 299 (2d Cir. 1977); United Handicapped Fed'n v. Andre, 558 F.2d 413, 415 (8th Cir. 1977).

In Trageser v. Libbie Rehabilitation Center, 590 F.2d 87 (4th Cir. 1978), *cert. denied*, 442 U.S. 947 (1979), the court relied on § 505(1), (2) of the Rehabilitation Comprehensive Services and Developmental Disabilities Amendments of 1978, 29 U.S.C. § 794a (Supp. III 1979), in finding that a private suit could be brought under § 504. The court limited this private right of action, however, only allowing suits against those employers who received federal financial assistance which was given with the primary objective of providing employment. This conclusion is erroneous due to the court's misreading of prior legislative and administrative interpretations of § 504. *See* Comment, *Employment Discrimination Against the Handicapped: Can Trageser Repeal the Private Right of Action*, 54 N.Y.U. L. REV. 1173, 1198 (1979).

[48] Federal regulations, 45 C.F.R. §§ 84.11-.14 (1980), outline the application of § 504 to employment discrimination. Section 84.11(a)(1) provides: "No qualified handicapped person shall, on the basis of handicap, be subjected to discrimination in employment under any program or activity to which this part applies." Subsection (a)(4) continues:

> A recipient may not participate in a contractual or other relationship that has the effect of subjecting qualified handicapped applicants or employees to discrimination prohibited by this subpart. The relationships referred to in this subparagraph include relationships with employment and referral agencies, with labor unions, with organizations providing training and apprenticeship programs.

In addition to prohibiting employment discrimination, the enabling regulations clearly make § 504 applicable to discrimination in preschool, elementary and secondary education, *id.* §§ 84.31-.39; post-secondary education, *id.* §§ 84.41-.47; program accessibility, *id.* §§ 84.21-.23; and health, welfare and social services, *id.* § 84.51-.54.

[49] *See* note 30 *supra*.

[50] *See* note 35 *supra*.

[51] 442 U.S. 397 (1979). The plaintiff in *Davis* suffered from a severe hearing disability. Because of this, Southeastern Community College denied her admission to its nurse-training program. Ms. Davis alleged that the denial was discriminatory and prohibited by § 504. *Id.* at 402. In response, the College argued that the plaintiff's hearing loss would prohibit successful completion of the educational program as well as performance as a registered nurse.

Court narrowed section 504 even further. The Court determined that section 504 protects only those disabled individuals "qualified" to meet all of a program's requirements "in spite of" their handicap.[52] The Court went on to hold that recipients of federal funds have a minimal obligation to make modifications which would allow a disabled person to perform the essential functions of a particular program.[53] Consequently, those disabled employ-

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Several commentators have discussed the *Davis* decision at length. *See, e.g.*, Orleans, *Memorandum: First Thoughts on* Southeastern Community College v. Davis, 6 J. C. & U. L. 263 (1979); Orleans, *Supreme Court Discovers Handicapped Discrimination*, 6 J. C. & U. L. 113 (1979); Note, *Discrimination on the Basis of Handicap: The Status of Section 504 of the Rehabilitation Act of 1973*, 65 IOWA L. REV. 446 (1980); Note, *Rehabilitation Act of 1974 Does Not Require Affirmative Action*, 13 CREIGHTON L. REV. 607 (1979); Note, *Defining the Rights of the Handicapped under Section 504 of the Rehabilitation Act of 1973:* Southeastern Community College v. Davis, 24 ST. LOUIS L. REV. 159 (1979).

At least one commentator suggests that *Davis* should be confined to the area of higher education. Hull, *A Major Supreme Court Indecision*, 9 HUMAN RIGHTS 35, 54 (1980). Few opportunities have arisen since *Davis* for application of its holding to areas other than higher education. However, the court in Upshur v. Love, 474 F. Supp. 332, 342 (N.D. Cal. 1979), explicitly followed *Davis* in an employment discrimination case.

[52] 442 U.S. 397, 406 (1979). In determining that an "otherwise qualified handicapped individual" must be able to meet all of a program's requirements, the Court reasoned that § 504 does not compel recipients of federal financial assistance to disregard the disabilities of handicapped individuals. The Court limited the term "qualified handicapped individual" to those who meet the academic and technical standards of a program. Southeastern Community College v. Davis, 442 U.S. 396, 406 (1979) (citing 45 C.F.R. § 84.3(K)(3) (1978)).

The *Davis* Court said that regulations requiring substantial adjustments in existing programs are unauthorized extensions of § 504. 442 U.S. at 410. It indicated that situations may arise where refusal to modify an existing program will become unreasonable and discriminatory but failed to provide examples of such instances. *Id.* at 413. Because other portions of the 1973 Rehabilitation Act include express affirmative action requirements, the Court reasoned that Congress intentionally omitted such a mandate from § 504. *Id.* at 411.

The regulations do require that reasonable accommodation be made "to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the recipient [employer] can demonstrate that the accommodation would impose an undue hardship on the operation of its program." 45 C.F.R. § 84.12 (1980). Given the Court's finding that § 504 itself does not support a requirement of affirmative action, the validity of this section of the regulations is questionable.

[53] Southeastern Community College v. Davis, 442 U.S. 396, 411 (1979). The Court did not give clear guidance regarding the extent to which modifications may be required of employers. It stated that "Section 504 imposes no require-

ees who require reasonable accommodation before they can perform job tasks[54] cannot utilize section 504 to remedy employment discrimination.

In sum, federal law leaves many disabled employees unprotected from employment discrimination. Full protection of the employment rights of the disabled, therefore, depends on the development of comprehensive state legislation.[55]

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ment . . . to lower or to effect substantial modifications of standards to accommodate a handicapped person." *Id.* at 413. Yet the court also noted:

> We do not suggest that the line between a lawful refusal to extend affirmative action and illegal discrimination against handicapped persons always will be clear. It is possible to envision situations where an insistence on continuining past requirements and practices might arbitrarily deprive genuinely qualified handicapped persons of the opportunity to participate in a covered program. Technological advances can be expected to enhance opportunities to rehabilitate the handicapped or otherwise to qualify them for some useful employment. Such advances also may enable attainment of these goals without imposing undue financial and administrative burdens upon a state. Thus, situations may arise where a refusal to modify an existing program might become unreasonable and discriminatory.

Id. at 412-13.

Clarification of *Davis* may be shortly forthcoming, as the Supreme Court has recently granted certiorari in Camenisch v. University of Texas, 616 F.2d 127 (5th Cir. 1980), *cert. granted*, 101 S. Ct. 352 (1980). In *Camenisch*, the Fifth Circuit approved the granting of injunctive relief which required the University of Texas to provide a sign language interpreter for a deaf graduate student. 616 F.2d at 136. The plaintiff's completion of a master's degree was a prerequisite to maintaining his employment. The *Camenisch* court felt that *Davis* "says only that section 504 does not require a school to provide services to a handicapped individual for a program for which the individual's handicap precludes him from *ever* realizing the principal benefits of the training." *Id.* at 133 (emphasis added).

One commentator suggests that *Davis* determined only that a handicapped individual is not "otherwise qualified" within the meaning of section 504 when no statutorily authorized accommodations can insure the individual's safe and effective participation in the education program. Note, *Accommodating the Handicapped: Rehabilitating Section 504 after Southeastern*, 80 COLUM. L. REV. 171, 185 (1980).

[54] For an argument that the duty to make reasonable accommodation is implied within a requirement not to discriminate on the basis of handicap, see Gittler, *Fair Employment and the Handicapped: A Legal Perspective*, 27 DE PAUL L. REV. 953, 965-66 (1978). *See also* notes 129-134 & 148 and accompanying text *infra*.

[55] Several commentators have argued that the Rehabilitation Act of 1973 does not provide a sufficiently comprehensive means of combatting discrimina-

II. California Provisions

In the past decade, the California Legislature has enacted several statutes which prohibit discrimination against the disabled.[56] Of these, only Government Code sections 12940[57] and

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tion against the disabled. The alternative most often suggested is to extend Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination on the basis of race, color, sex or national origin, to cover disabled workers as well. Title VII reaches nearly all employers and also provides a private cause of action. *See, e.g.*, Wright, *Equal Treatment of the Handicapped by Federal Contractors*, 26 Emory L.J. 65 (1977); 10 Colum. J. Law & Soc. Prob., *supra* note 8; 8 Loy. Chi. L.J., *supra* note 28; Note, *Access to Buildings and Equal Treatment for the Disabled, Survey of State Statutes*, 50 Temple L.Q. 1067, 1079 (1977); 79 W. Va. L. Rev., *supra* note 43, at 406. There have been several legislative proposals to include the disabled within Title VII, all of which have been unsuccessful. S. 446, 96th Cong., 2d Sess. (1979) (not acted upon); H.R. 1107, 95th Cong., 1st Sess., 123 Cong. Rec. H209 (1977); H.R. 461, 95th Cong., 1st Sess., 123 Cong. Rec. H193 (1977); H.R. 12, 654, 93d Cong., 2d Sess., 120 Cong., Rec. 2442 (1974); H.R. 13,199, 93d Cong., 2d Sess., 120 Cong. Rec. 4967 (1974); H.R. 10,962, 90th Cong., 1st Sess., 117 Cong. Rec. 33, 884 (1971). As Congress appears unwilling to extend the necessary protection to disabled workers, effective state legislation must be adopted as an alternative.

[56] *See* Cal. Gov't Code §§ 12940-12948 (West 1980) (prohibiting discrimination by private employers or labor unions); *id.* §§ 54, 54.1 (guaranteeing access to public transportation, public accommodations and rented housing); *id.* §§ 4450-4457 (requiring handicapped access to buildings and facilities constructed with public funds); *id.* § 4500 (guaranteeing access to public recreational trails); *id.* § 11135 (prohibiting discrimination against the handicapped by state-funded programs); *id.* § 19230 (requiring affirmative action programs for handicapped employed by state agencies); *id.* § 19230(a) (establishing state policy to encourage and enable disabled persons to participate fully in the social and economic life of the state, and to engage in remunerative employment); Cal. Lab. Code § 1735 (West Supp. 1981) (prohibiting discrimination in employment on public works projects); Cal. Welf. & Inst. Code § 19000 (West 1980) (declaring public policy of rehabilitating the disabled for employment); Cal. Health & Safety Code §§ 19955-19959 (West Supp. 1980) (guaranteeing access to private buildings open to the general public); Cal. Pub. Res. Code § 5070.5(c) (West Supp. 1980) (guaranteeing access to public recreational trails); Cal. Veh. Code §§ 22511.5-22511.8 (West Supp. 1980) (providing special parking privileges for handicapped drivers); Cal. Bus. & Prof. Code § 125.6 (West Supp. 1981) (barring discrimination by the holders of professional licenses); Cal. Code Civ. Proc. §§ 198(2), 205(b) (West Supp. 1980) (declaring that the handicapped are competent to serve as jurors).

[57] Cal. Gov't Code § 12940 (West 1980) provides in pertinent part:

> It shall be an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California: (a) For an employer, because of the race,

11135[58] can aid the majority of disabled persons who have experienced discrimination in the workplace.[59] Both statutes provide the disabled victim of employment discrimination with access to the courts through a private cause of action.[60] Nevertheless, sec-

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religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, or sex of any person, to refuse to hire or employ him or to refuse to select him for a training program leading to employment, or to bar or to discharge such person from employment or from a training program leading to employment, or to discriminate against such person in compensation or in terms, conditions or privileges of employment. . . .

[58] CAL. GOV'T CODE § 11135 (West 1980) provides:

No person in the State of California, shall, on the basis of ethnic group identification, religion, age, sex, color or physical or mental disability, be unlawfully denied the benefits of, or be unlawfully subjected to discrimination under, any program or activity that is funded directly by the state or receives any financial assistance from the state.

[59] Most of California's statutes may be used by only a narrow group of disabled employees. *See, e.g.*, CAL. LAB. CODE § 1735 (West Supp. 1981) (prohibiting discrimination by employers involved in public works projects); CAL. GOV'T CODE § 19230 (West 1980) (requiring state agencies to develop affirmative action programs for handicapped employees); *id.* §§ 4450-4457 (requiring buildings and facilities constructed with public funds to be accessible to the handicapped); CAL. HEALTH & SAFETY CODE §§ 19955-19955.7 (West Supp. 1980) (buildings open to the general public must guarantee access to the handicapped).

[60] California employment discrimination statutes provide for initial administrative review of complaints alleging unlawful employment discrimination. Complaints charging violation of § 12940 are filed with the Department of Fair Employment and Housing. CAL. GOV'T CODE § 12960 (West 1980). State agencies that suspect discriminatory practices by one of their contractors or grantees in violation of § 11135 are responsible for initiating an investigation and administrative hearing if necessary. *Id.* § 11136. This administrative action must be exhausted before a complaint can be filed in state court. Bennett v. Borden, 56 Cal. App. 3d 706, 709, 128 Cal. Rptr. 627, 628 (3d Dist. 1976).

A private right of action is available under both sections 12940 and 11135, however, should administrative remedies fail. Once a § 12940 complaint is filed with the Department of Fair Employment and Housing, a private right of action accrues within 150 days if the Department does not act, or sooner if it decides not to issue a formal accusation. CAL. GOV'T CODE § 12965(b) (West 1980). Moreover, a state agency enforcing § 11135 must complete its review of all relevant evidence within 180 days after filing of a complaint or the aggrieved party gains a private right of action. CAL. ADMIN. CODE, tit. 22, §§ 98003, 98364 (1980).

Thus, expanding California's statutory protection to cover all disabled employees will allow vindication of employment rights through the courts when-

tions 12940 and 11135 also contain significant limitations. Section 12940 protects only the physically handicapped[61] and cancer patients.[62] Section 11135 protects a wider range of disabled individuals[63] but reaches fewer employers.[64] Furthermore, California Government Code section 12994 limits section 12940 by restricting an employer's duty to make reasonable accommodation.[65] Thus, the California statutes will require amendment if they are to fill the gaps in federal law.

A. California Government Code section 12940

1. Employees Protected

Government Code section 12940 is the central employment statute of California's Fair Employment and Housing Act.[66] Under section 12940, an employer[67] or labor union[68] may not discriminate in hiring, employing or compensating an individual because of a "physical handicap"[69] or "medical condition."[70]

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ever necessary. Direct court action is an important right not guaranteed by § 503 of the 1973 Rehabilitation Act. *See* notes 35-41 and accompanying text *supra*. The availability of a private right of action in California when administrative action fails is a further reason to include all disabled employees within the scope of CAL. GOV'T CODE § 12940 (West 1980); *see* notes 81-87 and accompanying text *infra*.

[61] *See* note 69 and accompanying text *infra*.

[62] *See* note 70 and accompanying text *infra*.

[63] *See* notes 116 & 117 and accompanying text *infra*.

[64] *See* notes 118-120 and accompanying text *infra*.

[65] *See* notes 149-151 and accompanying text *infra*.

[66] CAL. GOV'T CODE §§ 12900-12996 (West 1980).

[67] *Id.* § 12940(a).

[68] *Id.* § 12940(b).

[69] Physical handicap is defined as "an impairment of sight, hearing or speech, or impairment of physical ability because of amputation or loss of function or coordination, or any other health impairment which requires special education or related services." *Id.* § 12926(h). In addition, the Fair Employment and Housing Commission (FEHC) has issued regulations, as amended May 21, 1980, Division 4 Ch. 2, Subch. 9 [hereinafter cited as FEHC REGS.], which have not yet been added to the California Administrative Code. FEHC REGS. § 7293.6 provides:

> (a) "Physical Handicap" includes:
>
> (1) Impairment of sight, hearing or speech; or
>
> (2) Impairment of physical ability because of:
>
> (A) Amputation, or
>
> (B) Loss of function, or
>
> (C) Loss of coordination; or

Even so, section 12940 does not protect many of California's disabled employees, including the mentally ill, the mentally retarded and those suffering from alcohol and drug abuse.[71]

There is no reason for the legislature to protect some segments of the disabled population while denying protection to others.[72] An individual's particular disability indicates little about his or her employment potential[73] as the abilities and needs of those within each handicap group vary greatly.[74] The present focus of section 12940 upon particular disability classifi-

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(3) Any other health impairment which requires special education or related services. . . .

FEHC REGS. § 7293.6(j) also extends the definition of handicapped individual to any person who "has a record of such physical handicap, or is regarded as having such physical handicap."

[70] CAL. GOV'T CODE § 1296(f) (West 1980) provides that a medical condition is confined to "a health impairment related to or associated with a diagnosis of cancer, for which a person has been rehabilitated or cured based on competent medical evidence."

[71] "Physical handicap does not include the following conditions: mental illness, mental retardation, alcoholism, or narcotics addiction." FEHC REGS. *supra* note 69, § 7293.6(4). It is impossible to determine the number of people who are thus excluded from § 12940 protection. The DISABILITY SURVEY, *supra* note 1, however, estimates that of the 1,567,500 disabled persons within the state, 116,500 are mentally retarded, 246,000 have emotional problems, and 248,750 have alcohol or drug problems. Consequently, 611,250 people, 39% of the disabled population, are subject to discrimination without having any recourse under § 12940.

[72] Employers have exhibited the greatest resistance to including those groups presently unprotected within the scope of § 12940. The amendment which extended § 12940 protection to the physically disabled was introduced by Assemblyman Dunlap as A.B. 1126 in 1973. Cal. Leg. Counsel's Digest (1973-74 reg. sess.) (amending CAL. LAB. CODE § 1420, later changed to CAL. GOV'T CODE § 12940, ch. 992, § 4, 1980 Cal. Stats. (2)). Mr. Dunlap has stated that the mentally retarded and mentally ill were excluded from coverage because of a "necessary and pragmatic decision." Telephone conversation with John Dunlap (Oct. 23, 1980). It was apparent that the primary opposition to protecting the disabled from employment discrimination centered upon extending protection to the retarded and mentally ill. Consequently, in order to ensure passage of the bill in some form, these people were excluded. *Id.*

[73] *See* notes 78-86 and accompanying text *infra*. *See also* Selwyn, *Handicapper's Rights: Emphasizing Individual Needs*, 17 TRIAL 47, 49 (1981).

[74] "Characterization as 'disabled' is often the only factor which unifies the disabled victims of employment discrimination. Disabled employees often have more in common with their able-bodied peers than with other handicapped workers." Gleidman, *The Wheel Chair Rebellion*, PSYCHOL. TODAY, Aug. 1979, at 59, 63.

cations compromises the established legislative policy of guaranteeing all persons the right to seek, obtain and hold employment without discrimination.[75] Fair employment laws which force the employer to evaluate the capacity of an individual to do the job regardless of that individual's handicap promote this policy.[76] The legislature should amend section 12940 to protect all persons who have a handicap which affects their ability to perform a job.[77]

Protecting those disabled workers presently excluded from section 12940[78] will benefit their employers and society as well. The mentally retarded, for example, have proven themselves to be competent and dependable in a variety of job settings.[79] Men-

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[75] CAL. GOV'T CODE § 12920 (West 1980).

[76] The Wisconsin Supreme Court has recognized the folly of making distinctions between disabled persons in an arbitrary fashion. In a case of first impression, the court stated:

> If this court were to adopt the very constricted interpretation of the appellant, an impractical result would occur. If an individual were paraplegic and were able to efficiently perform the duties of the job, then he would be protected . . . . But if an individual were asthmatic or suffered from migraine headaches, though able to efficiently perform the duties of the job, no protection against discrimination would be found under the statute. The legislative policy of encouraging the employment of all properly qualified persons would not be served under such a statutory construction.

Chicago, Milwaukee, St. Paul & Pac. R.R. v. State Dep't of Indus. Lab. & Human Relations, 62 Wis. 2d 392, 215 N.W.2d 443, 445 (1974).

[77] California should extend § 12940 protection to any individual who has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment. This would cover any person who has a physical or mental impairment which substantially limits one or more of such person's major life activities. This is the definition of handicapped individual found in the 1973 Rehabilitation Act. 29 U.S.C. § 706(6) (1976). California has already adopted the approach in regulations issued persuant to CAL. GOV'T CODE Art. 9.5 (West 1980); CAL. ADMIN. CODE, tit. 22, § 98250(a) (1980).

[78] *See* note 71 and accompanying text *supra*.

[79] The President's Committee on Employment of the Handicapped has listed the following as occupations which the retarded have competently performed:

Type of occupation	Percentage*
service workers	30.0
unskilled workers	21.2
semi-skilled workers	19.3
clerical, sales, kindred	12.0
family workers, homemakers	6.2

tally retarded workers are particularly well suited for certain repetitive but important tasks.[80] Once properly placed, they are often more reliable than nonretarded employees.[81] Studies indicate that as many as ninety-five percent of the retarded have the potential to be economic assets to their communities.[82]

A second group of disabled employees excluded from section 12940 are those with a history of mental illness. While employers may be reluctant to hire such workers,[83] many types of mental illness do not interfere with job performance at all.[84] In fact, seventy percent of employed former mental patients work in skilled or managerial jobs.[85] If the employer ignores the stereotypes of mental illness and looks at the individual mentally disabled worker instead, they are apt to find the ex-mental patient's job credentials and performance acceptable.[86]

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agricultural workers	5.9
skilled employees	5.4

* Percentage of total mentally retarded workers surveyed performing each occupation. (Based on 2,942 retarded persons vocationally rehabilitated through federal-state programs, 1954-57.) PRESIDENT'S COMMITTEE ON EMPLOYMENT OF THE HANDICAPPED, GUIDE TO JOB PLACEMENT OF MENTALLY RETARDED WORKERS 5 (1964). *See also* U.S. DEP'T OF HEALTH, EDUCATION & WELFARE, REPORT TO THE PRESIDENT, MENTAL RETARDATION: THE LEADING EDGE, SERVICE PROGRAMS THAT WORK 47 (1979). "Today, many mentally retarded persons are working side by side with non-handicapped employees. Management is learning that, far from being merely a sympathetic gesture, the employment of mentally retarded persons can be a sound business strategy."

[80] P. FRIEDMAN, THE RIGHTS OF MENTALLY RETARDED PERSONS 127 (1976).

[81] *Id.* at 127-28.

[82] PRACTICING LAW INSTITUTE, THE MENTAL HEALTH PROJECT, LEGAL RIGHTS OF THE MENTALLY HANDICAPPED 20 (1974).

[83] Thirty-two percent of the employers questioned in one study expressed a reluctance towards hiring ex-mental patients. Brand & Claiborn, *Two Studies of Comparative Stigma: Employer Attitudes and Practices toward Rehabilitated Convicts, Mental and Tuberculosis Patients*, 12 COM. MENTAL HEALTH J. 168, 173-74 (1976). *See also* Huffine & Clausen, *Madness and Work: Short and Long-Term Effects of Mental Illness on Occupational Careers*, 57 SOC. FORCES 1049, 1050 (1979) (the "mental illness" label is the overriding factor which determines how employers will react).

[84] Turner, *Jobs & Schizophrenia*, 8 SOC. POL. 32, 32 (1977).

[85] *Id.*

[86] Huffine & Clausen, *supra* note 83, at 1050. The employee with a history of mental illness also benefits from increased job opportunities as the work environment often proves to be therapeutic. Robbins, Kaminer, Schussler & Pomper, *The Psychiatric Patient at Work*, 66 AM. J. PUB. HEALTH 655, 655 (1976).

A third group of disabled persons needing section 12940 protection are recovered[87] or recovering alcoholics and drug abusers.[88] These employees are usually the object of the greatest employer prejudice.[89] The employer should not be able to deny employment to an individual on the assumption that past or present use of drugs or alcohol renders that person incapable of performing a job.[90] The employee's ability to perform safely and adequately the required work tasks should be the employer's major concern.[91] While there is little doubt that substance-abusing employees are costly to their employers,[92] it is less expensive

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[87] The FEHC REGS., *supra* note 69, § 7293.6(j), currently protect persons *regarded* as having a physical or mental handicap. Thus, if § 12940 is expanded to protect alcohol and drug abusers, recovered abusers will be protected from employer discrimination directed at past acts.

[88] Authorities in both the medical and legal communities agree that alcoholism and drug addiction are disabilities. *See, e.g.*, Robinson v. California, 370 U.S. 660 (1962); Easter v. District of Columbia, 361 F.2d 50 (D.C. Cir. 1966); ALCOHOLISM, PROGRESS IN RESEARCH AND TREATMENT 1-8 (P. Bourne & R. Fox eds. 1973). The U.S. Attorney General has held that there was no congressional intent to exclude such persons from the coverage of the 1973 Rehabilitation Act. 43 Op. Att'y Gen. No. 12 (Apr. 12, 1977).

Substance-abuse-related disabilities are the most prevalent within the typical business. NATIONAL INDUSTRIAL CONFERENCE BOARD, STUDIES IN PERSONNEL POLICY No. 218, COMPANY CONTROLS FOR DRINKING PROBLEMS 7 (1970) [hereinafter cited as STUDIES IN PERSONELL POLICY]. Alcoholism affects at least 3-5% of the average company's work force. *Id.* Other estimates have placed the number of alcoholics in the average employee population as high as 10%. Spencer, *Employer's Responsibility for Alcoholics*, 53 ST. JOHN'S L. REV. 659, 662 n.6 (1979). Drug abusing employees total 2-3.5% of the average work force. J. SCHER, DRUG ABUSE IN INDUSTRY 144 (1973).

[89] One indication of employer reluctance to extend equal employment opportunities to substance-abusing employees can be found in 45 C.F.R. § 84, App. A, Analysis of Final Regulations, n.4 (1980) which states:

> The issue of whether to include drug addicts and alcoholics within the definition of handicapped person was of major concern to many commenters . . ., as was the preference of commenters for exclusion of this group of persons.

[90] Midwest Tel. Co., 66 Lab. Arb. Rep. (BNA) 311, 316-17 (1976). Before dismissing an employee because of substance abuse, the employer should be required to prove that the abusing employee's behavior (1) harms the company's reputation or product, (2) renders the employee unable to perform his duties, and (3) leads to the refusal, reluctance or inability of other employees to work with him. W.E. Caldwell Co., 28 Lab. Arb. Rep. (BNA) 434, 436-37 (1957).

[91] Spencer, *supra* note 88, at 676-77.

[92] One study estimated the average annual cost of the alcoholic employee to

for a business to make reasonable accommodation[93] to the needs of such employees than to train replacements.[94] Moreover, the rate of successful rehabilitation is high.[95] Consequently, both the employer and employee can benefit from such programs.

Broadening section 12940 to include all disabled workers would not affect employers adversely. The employer need not grant employment benefits to an individual whose particular disability prevents successful job performance or increases safety risks.[96] Extending protection to retarded, mentally ill or substance-abusing employees will only require that employers judge them by their qualifications rather than by assumptions and misconceptions.

2. Employers Covered

Even though few disabilities come within the scope of section 12940, the range of employers who must comply with its requirements is quite broad. Section 12940 applies to any employer who regularly employs five or more persons,[97] including the state and

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be $31,402, as compared with $16,481 for the "problem free" employee. The figures were arrived at by considering four general factors: (1) cost of impaired productivity, (2) cost of interpersonal friction, (3) cost of absenteeism, and (4) cost of health and accident problems. P. Bourne & R. Fox, *supra* note 88, at 363-64. More general estimates have placed the national cost at $2-3 billion per year, STUDIES IN PERSONNEL POLICY, *supra* note 88, at 19, and some as high as $20 billion. Spencer, *supra* note 88, at 663.

[93] Reasonable accommodation for substance-abusing employees may include flexible scheduling to allow attendance at rehabilitation programs, transfer to a less stressful position or possibly developing substance-abuse programs.

[94] The Pratt & Whitney Aircraft Corporation claimed a 350% return on its investment during the first year of its alcohol rehabilitation program and 500% the second year. Illinois Bell's program saved the company $10 for every $1 invested. The U.S. Postal Service, which began its program in 1969, estimates a cost-avoidance ratio of five dollars for every dollar spent. Spencer, *supra* note 88, at 665 n.13.

[95] A recovery rate of 60% is not unusual in most alcohol rehabilitation programs. *Id.* at 665 n.14.

[96] The disabled employee alleging employment discrimination must prove that he or she was qualified to perform the job. *See In re* El Dorado County Sheriff's Dep't, FEP77-78 E4-0295ph 79-06, at 4 (1979). *See also* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). In addition, the employee's inability to perform a job safely is a valid employer defense. *See* note 112 and accompanying text *infra*.

[97] CAL. GOV'T CODE § 12926(c) (West 1980); FEHC REGS, *supra* note 69, § 7286.5(a).

local governments.[98] But while section 12940 reaches more California employers than comparable federal legislation,[99] it excludes small employers[100] from its nondiscrimination mandate.[101]

Including small employers within section 12940, would not require these employers to make expensive modifications to ac-

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[98] CAL. GOV'T CODE § 12926(c) (West 1980).

[99] Section 503 of the Rehabilitation Act of 1973 extends only to those employers who contract with the federal government, *see* notes 29 & 35 and accompanying text *supra,* while § 504 extends only to those who receive federal funds, *see* notes 30 & 35 and accompanying text *supra.*

[100] CAL. GOV'T CODE § 12926(c) (West 1980). Sheltered workshops are also partially exempted from § 12940. *Id.* § 12926(b). Sheltered workshops are typically nonprofit corporations that provide work experience and rehabilitation services for disabled adults. They generally bid competitively for light production contracts, paying their employee/clients on a piece-rate basis. The term "employee/client" is used here to distinguish those diabled persons who are receiving rehabilitation services from the workshop from those disabled persons who may be on the workshop staff. Sheltered workshops are exempted from § 12940 with respect to their disabled workers employed under a special license as employee/clients. *Id.* The special license allows a sheltered workshop to pay sub-minimum wages to disabled employee/clients. Issued by the U.S. Department of Labor pursuant to 29 U.S.C. § 214(C)(1), (2), (3) (1976), or by the California Division of Labor Standards Enforcement under CAL. LAB. CODE § 1191.5 (West Supp. 1981), these licenses theoretically guarantee a disabled employee/client payment commensurate with his or her abilities. They do nothing, however, to guarantee nondiscriminatory treatment in initial employee selection or promotion and transfer to more desirable positions. In fact, there is evidence that these businesses, whose purpose is to provide employment and rehabilitation services, have discriminated against the disabled. *See, e.g.,* Wall St. J., Oct. 17, 1979, at 1, col. 6; Sacramento Bee, June 18, 1980, at B1, col. 1.

[101] California should require all employers, no matter how small, to treat their employees in a nondiscriminatory manner. Several states do so now. Maine's Human Rights Act, for example, prohibits discrimination by any employer. " 'Employer' includes any person in this State employing any number of employees, whatever the place of employment of such employees, and any person outside this state employing any number of employees whose usual place of employment is in this state . . . ." ME. REV. STAT. § 4553(4) (1979). Other states with similar provisions include Alaska, ALASKA STAT. § 18.80.220 (Supp. 1979); Colorado, COLO. REV. STAT. § 24-34-401(3) (Supp. 1979); District of Columbia, D.C. CODE § 102(j) (Supp. 1980); Hawaii, HAW. REV. STAT. § 378-31(3) (Supp. 1979); Iowa, IOWA CODE ANN. § 601A.2(5) (West Supp. 1980); Minnesota, MINN. STAT. ANN. § 363.01(15) (West Supp. 1980); Montana, MONT. CODE ANN. § 64-305(5) (1979); New Jersey, N.J. STAT. ANN. § 10:5-5(e) (West Supp. 1980-81); Texas, TEX. HUM. RES. CODE ANN. § 121.003(f); Vermont, VT. STAT. ANN. tit. 21, § 495(1) (1978); Virginia, VA. CODE § 40.1-28.7 (1976).

commodate disabled employees.[102] The majority of disabled employees can perform their jobs with little or no workplace modification.[103] Even where modification is necessary, the business is protected from excessive costs by a requirement that only reasonable accommodation need be made.[104] Such a requirement balances the needs of the disabled employee with the financial resources of the particular employer,[105] protecting the interests of both.

3. The Safety Defense

California, like only a few other states,[106] has a statutory "safety defense" available solely to employers who allegedly discriminate against disabled workers. Contained within section 12940,[107] the defense allows an employer to refuse employment benefits to disabled persons who presently[108] cannot perform their employment duties safely.

The safety defense should be eliminated from California legislation. It is based on the mistaken notion that disabled employees present a greater safety risk than their nondisabled peers[109] and provides no trial period in which disabled employees can prove their ability to perform the job safely.[110] It is thus a further example of the legislature's failure to require employers to

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[102] *See* notes 141-143 and accompanying text *infra.*

[103] *See* note 137 and accompanying text *infra.*

[104] *See* notes 141-143 and accompanying text *infra.*

[105] *Id.*

[106] Five states other than California have legislated a "safety defense" directed solely at disabled workers. These include Indiana, IND. CODE ANN. § 22-9-1-13(a) (Burns Supp. 1979); Maine, ME. REV. STAT. § 4573(4) (1979); Montana, MONT. CODE ANN. § 64-304 (1979); New Hampshire, N.H. REV. STAT. ANN. § 354-A:3(13) (Supp. 1979); Ohio, OHIO REV. CODE ANN. § 4112.02(L) (Page 1980).

[107] CAL. GOV'T CODE § 12940(a)(1), (2) (West 1980); *see* FEHC REGS., *supra* note 69, § 7293.8(b), (c).

[108] The safety defense is limited to an assessment of the disabled employee's present ability to perform the job safely. Proof that the employee's handicap constitutes a future risk is insufficient. FEHC REGS., *supra* note 69, § 7293.8(d); *In re* American Nat'l Ins., 2 Emp. Prac. Guide (CCH) § 5077 (1978).

[109] Disabled employees generally have safety records equal to or better than their nondisabled peers. *See* note 16 *supra.*

[110] CAL. GOV'T CODE § 12940(a)(1),(2) (West 1980); *see, e.g.,* Lang, *Employment Rights of the Handicapped,* 11 CLEARING HOUSE REV. 703, 710 (1977).

make individual assessments of disabled workers.[111] More significantly, the other existing employer defenses allow the employer to exclude an unsafe worker from the work force without being subject to a discrimination suit.[112]

B. California Government Code Section 11135

Government Code section 11135[113] is a significant step toward guaranteeing equal employment opportunities to all of California's disabled citizens. It ensures that programs funded by the state do not discriminate in their hiring practices or in providing services.[114] More importantly, section 11135 forbids discrimination on the basis of mental as well as physical disability.[115]

For the purposes of section 11135, a disabled person is "any person who has a physical or mental impairment which substantially limits one or more major life activities."[116] The regulations

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[111] *See* note 76 and accompanying text *supra*.

[112] The business necessity defense specifically recognizes that an employer practice which is facially neutral, but excludes a disproportionate number of any class (such as the disabled), is acceptable if the employer proves the practice "necessary to the safe and efficient operation of the business." FEHC REGS., *supra* note 69, § 7286.7(b). The bona fide occupational qualification defense may be based upon an employer's proof that the class of individuals excluded is unable to perform the job in question safely. *Id.* § 7286.7(a). Finally, a testing device which has an adverse impact upon the disabled will be held valid through the job relatedness defense if the employer shows that it accurately measures an essential function of the job in question. *Id.* § 7287.4(e). The ability to perform a job safely is one of its essential functions. Chicago, Milwaukee, St. Paul & Pac. R.R. v. Washington State Human Rights Comm'n, 11 Fair Empl. Prac. Cas. 854, 855-56 (Wash. Super. Ct. 1975).

[113] Section 11135 is contained within Government Code Art. 9.5. CAL. GOV'T CODE §§ 11135-11139.5 (West 1980); *see* note 58 *supra*.

[114] CAL. GOV'T CODE § 11135 (West 1980) prohibits discrimination by any program which is funded directly by the state. "Program," for the purposes of the statute, includes the provision of employment as well as services, CAL. ADMIN. CODE tit. 22, § 98010 (1980). In addition, the regulations provide that "recipients of financial assistance" include not only those who are the object of the state's bounty through a grant in aid but also holders of procurement contracts through which the state simply obtains goods or services in return for funds. *Id.* The term "financial assistance" encompasses the granting of personal property and grants of funds. *Id.* The term "contractor" also includes subcontractor. *Id.*

[115] CAL. GOV'T CODE § 11135 (West 1980).

[116] *Id.*; CAL. ADMIN. CODE tit. 22, § 98250(a) (1980). Major life activities include functions such as caring for oneself, performing manual tasks, washing, hearing, speaking, breathing, learning and working. *Id.* § 98250(b)(3).

clearly state that such mental or psychological disorders as mental retardation, emotional or mental illness, specific learning disabilities, drug addiction and alcoholism are protected by section 11135.[117] These groups, excluded from Government Code section 12940, finally have some protection under California law.

The major shortcoming of section 11135 is that it fails to reach many employers. Section 11135 covers only those employers[118] who contract with the state for over $10,000 per year or $1,000 per transaction.[119] In addition, the statute only covers contractors while they receive state support.[120] An action under section 11135 is therefore unavailable to many disabled employees.

Section 11135 also has an inadequate enforcement mechanism. Each state agency must enforce section 11135 among its contractors and grantees.[121] There is no assurance that each agency will do so effectively[122] or that it will discontinue further dealings

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[117] *Id.* § 98250. Also protected are those who "have a record of such impairment." *Id.* § 98250(b)(4). However, the regulations exclude from the term qualified disabled person

> any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such person from performing the duties of the job in question whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others.

Id. § 98250(d)(1).

[118] The term "employer" is limited to those who employ five or more persons on a regular basis. *Id.* § 90010(2). Coverage of the statute should not be so restricted. *See* notes 102-105 and accompanying text *supra*.

[119] CAL. ADMIN. CODE tit. 22, § 98010(2) (1980). There is no accurate information indicating the number of employers covered by § 11135. In a letter to the author (Oct. 20, 1980) (copy on file at the U.C. Davis Law Review office), John S. Babich, Chief of Procurement for the State Department of General Services, Office of Procurement, estimated that the state enters into between 12,000 and 13,000 contracts in excess of $1,000 each year. It is not possible, however, to determine the number of employers who were party to more than one contract. The Office of Procurement could only indicate that most state contractors have many contracts of this size.

[120] CAL. ADMIN. CODE tit. 22, § 98008 (1980).

[121] Complaints under § 11135 must be initiated by the particular state agency which has entered into the contract or grant agreement. CAL. GOV'T CODE § 11136 (West 1980).

[122] Recognizing and responding to instances of employment discrimination among their grantees may prove difficult for state agencies involved in only a few such cases each year. The Department of Fair Employment & Housing (DFEH) is given responsibility to investigate § 11135 labor discrimination

with a particular contractor until discriminatory practices cease.[123] Since the only remedy provided by statute is to withdraw state funding from the offending contractor,[124] there is no means of making whole the disabled victim of employment discrimination. Vesting all enforcement powers in a single agency and granting a full range of administrative sanctions would greatly increase section 11135's effectiveness.[125]

While section 11135 attempts to make needed changes in California law, it is not a comprehensive approach to combatting discrimination against disabled workers. It thus remains necessary to bring all disabled workers within the scope of Government Code section 12940 in order to guarantee their right to equal employment benefits.[126]

C. Reasonable Accommodation in California

A reasonable accommodation requirement is necessary to eliminate employment discrimination on the basis of disability.[127] While the antidiscrimination provisions of sections 12940

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complaints under the direction of each state agency. CAL. ADMIN. CODE tit. 22, § 92410 (1980). However, the DFEH's jurisdiction is purely investigative. The state agency which initiates the complaint ultimately decides whether such violation has occurred and the extent of funding curtailment that will be imposed. *Id. See also* CAL. HEALTH & WELF. DEP'T EXPLANATORY COMMENTS TO STANDARDS AND GUIDELINES IMPLEMENTING GOV'T CODE SECTIONS 11135-11139.5, at 6 (copy on file at the U.C. Davis Law Review office). Thus, there is still considerable potential for erratic enforcement.

[123] An agency may be unwilling to damage its relationship with a contractor upon whom it continually relies by requiring compliance with § 11135.

[124] CAL. GOV'T CODE § 12970(a) (West 1980).

[125] *See* notes 121-124 and accompanying text *supra*. An additional problem with the enforcement mechanism of § 11135 is a discrepancy between the regulatory language and that of § 11136. While the statute requires state agencies to file a complaint upon discovering a prohibited discriminatory act, CAL. GOV'T CODE § 11136 (West 1980) ("The head of the state agency shall cause to be instituted a hearing . . . ."), the regulations make the filing of such a complaint permissive, CAL. ADMIN. CODE tit. 22 § 98348 (1980) ("A state agency should . . . file an accusation . . . ."). Unless amended, the permissive language of the regulations may lead to additional erratic enforcement of the employment rights of protected workers.

[126] Section 12940 reaches a greater number of employers than § 11135. *See* notes 97 & 118-120 and accompanying text *supra*. In addition, the enforcement mechanism of § 12940 is better designed than that of § 11135. *See* note 122 and accompanying text *supra*.

[127] United Handicapped Fed'n v. Andres, 558 F.2d 413, 416 (8th Cir. 1977);

and 11135 may imply such an employer duty, no California statute expressly requires reasonable accommodation. Thus, those handicapped workers who require modifications before they can perform their jobs are not guaranteed equal employment opportunities by California law.[128]

1. The Need For Reasonable Accommodation

Handicap discrimination defies analogy to more familiar forms of employment discrimination based on race or sex. In these latter instances, all members of the class discriminated against possess the characteristic which defines the class.[129] More importantly, the distinguishing characteristic itself has nothing to do with a member's ability to perform work tasks.[130] By and large, minority group members are guaranteed equal job opportunity through equal treatment.[131]

In contrast, the characteristic that places disabled individuals in a minority class may affect their job performance.[132] It is not enough simply to provide the handicapped with facilities equal to those of other workers.[133] As a practical matter, some disabled employees require accommodation to their disability before they can perform work tasks. Consequently, equal treatment does not guarantee equal job opportunities to handicapped individuals.

Lloyd v. Regional Transp. Auth., 548 F.2d 1277, 1283-84 (7th Cir. 1977).

[128] *See* notes 129-134 and accompanying text *infra*.

[129] Gittler, *supra* note 54, at 967.

[130] *Id.*

[131] Saying that minority group members are guaranteed equal job opportunities through equal treatment is not to suggest that affirmative action is unnecessary. Past discrimination has left these groups with credentials inferior to those of white males with whom they must compete for jobs. Employers must consider sex or race as a criterion in hiring or balanced representation of these groups in the work force will be greatly postponed. Bleimaer, *Affirmative Action; Burden, Benefit . . . or Both,* 8 HUM. RIGHTS 17, 19 (1979). At some point however, equality will be reached and affirmative action of this type will no longer be necessary. Little, *Affirmative Action: A Measure of Inherent Transience,* 31 U. FLA. L. REV. 671, 691 (1979).

[132] Gittler, *supra* note 54, at 959, 967; *see, e.g.,* Holland v. Boeing Co., 90 Wash. 2d 384, 388, 583 P.2d 621, 623 (1978) ("Legislation dealing with equality of sex or race was premised on the belief that there were no inherent differences between the general public and those persons in the suspect class. The guarantee of equal employment opportunities for the physically handicapped is far more complex.").

[133] *See* note 148 and accompanying text *infra*.

For example, an employee confined to a wheel chair receives equal treatment if the employer provides a work area equal to that of nondisabled workers. Even so, the disabled worker will not have an equal opportunity to perform the job if the work table or tools are too high to reach from a sitting position. Once employers make reasonable accommodations, however, these disabled employees are as qualified as nondisabled persons to perform the required tasks. Thus, rectifying handicap discrimination requires a step beyond equal treatment—it requires reasonable accommodation.[134]

Fear of high accommodation costs often causes employers to resist hiring disabled workers.[135] For the most part, however, this fear is unfounded.[136] Many disabled workers require little or

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[134] Many disabled employees require no accommodation in order to perform their job tasks. *See* note 137 and accompanying text *infra*. But for those who do require accommodation, the right to have such accommodation considered *before* being compared to their fellow workers or applicants is critical. *See* Gittler, *supra* note 54, at 966.

[135] It has been argued that requiring private employers to make expensive renovations to accommodate disabled employees violates due process "taking" requirements. 10 COLUM. J. LAW & SOC. PROB. *supra* note 8, at 492. The Supreme Court has established a two-part test to determine if due process requirements are met: "First, the public's interest must require the regulation. Second, the means must be reasonably necessary to accomplish the goal and not 'unduly oppressive' to individuals." Goldblatt v. Town of Hempstead, 369 U.S. 590, 595 (1963); Penn Cent. Transp. Co. v. New York, 438 U.S. 104, 130-31 (1978). Requiring only reasonable accommodation satisfies this test. The public's interest requires that reasonable accommodation be provided by employers. Some disabled individuals will not be given the opportunity to become productive members of society unless reasonable accommodation is made. *See* Gittler, *supra* note 54, at 967. *See also* notes 12-14 and accompanying text *supra*. In addition, the accommodation requirement is limited to a means reasonably necessary to accomplish the goal of providing equal job opportunities for disabled workers and is not "unduly oppressive" to individual employers. CAL. GOVERNOR'S COMM. FOR EMPLOYMENT OF THE HANDICAPPED, REASONABLE ACCOMMODATION, ELIMINATING HANDICAPS, EMPLOYER'S GUIDE TO JOB RESTRUCTURING AND ANALYSIS 7 [hereinafter cited as REASONABLE ACCOMMODATION] (copy on file at the U.C. Davis Law Review office).

[136] For example, Sears Roebuck & Co. has provided various low cost accommodations for its employees. These include telephones with amplifiers for employees who are hard of hearing, at a cost of $18 per installation and 65 cents per month rental, and lowering desks, widening doors and installing grab bars in lavatories, at a cost ranging from $0 to $800 per person. Moreover, all new Sears facilities incorporate barrier-free features which were of virtually zero cost since they were installed during the original construction. "It appears as though almost all accommodations for handicapped personnel require minimal

no accommodation in order to perform job tasks successfully.[137] Even if alterations of the workplace[138] and job restructuring[139] are required, such accommodations are seldom costly.[140]

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expense which can be easily absorbed by a company of [Sears'] size. It has also been our experience that in most instances, employment of people with handicaps require no accommodation and no unusual expense." *Senate Hearings, supra* note 35, at 175 (letter from Sears & Roebuck Company to the President's Committee on Employment of the Handicapped). *See also* note 141 *infra*. The small employer may not be expected to make all of the accommodations that Sears found reasonable. *See* notes 141-143 and accompanying text *infra*.

[137] In August 1970, the Office of Selective Placement of the U.S. Government Civil Service Commission completed a survey of its own placement of handicapped persons in the government. The group studied did not include mildly or moderately handicapped persons but rather those whose handicaps were severe enough to preclude placement through regular competitive procedures. Despite the severity of the handicaps involved, very little job restructuring or work site modification was necessary to accommodate the employees' limitations. With respect to job restructuring (including task modification, reassignment or recombination, flexible hours, participative aides, etc.), 317 of the 397 placed (80.5%) required no accommodation, 62 required some (described as incidental) and 18 did not respond. Regarding work site modifications (including rearrangement or modification of equipment or machines, process flow modifications and organizational restructuring), 336 persons required no modification (86.9%), 44 required some (primarily minor changes, such as adjustment of work benches) and 17 did not respond. U.S. DEP'T OF LABOR AFFIRMATIVE ACTION FOR THE HANDICAPPED 74 (1980) [hereinafter cited as AFFIRMATIVE ACTION].

[138] *See* note 137 *supra*. Even though technically separable, this comment also includes accessibility modifications within workplace alterations. Accessibility refers to changes employers must undertake to make the personnel process, the work site and other ancillary services available to handicapped people. AFFIRMATIVE ACTION, *supra* note 137, at 71.

[139] *See* note 137 *supra*.

[140] A large percentage of modifications sampled were done at little or no cost, and did not create serious or lasting disruption in the workplace. In many cases, the addition of simple technical devises such as telecommunications machines (TTY's), microfilm viewers, and power tools proved successful. For example, one hearing-impaired individual at a large bank had an amplifier installed in his telephone at a cost of less than $100. In another case, a telephone company employee, who suffered from muscular dystrophy and had difficulty working with his hands, was provided with a homemade pedal device for operating a stapler. The addition cost the company less than $25, but proved far more valuable in terms of the employee's productivity.

Rougeau, *Accommodations: They are Reasonable*, at 1 (copy on file at the U.C. Davis Law Review office).

Reasonable accommodation does not require the outlay of unwarranted expense.[141] Determining whether or not an accommodation is reasonable requires the assessment of several factors, including the employee's specific disability, the duties of the job, the expense of the proposed accommodation and the financial capabilities of the employer.[142] For example, it may be unreasonable to require a small company to install an elevator to accommodate a person in a wheel chair. It may, however, be possible for the company to relocate the worker's job area to an accessible office on the first floor. At the same time, it may be reasonable to expect a large company to install an elevator if no alternative is available.[143] The ability of each company to provide the necessary accommodation must be evaluated on an individual basis.

Requiring employers to make reasonable accommodation is also justified as a matter of policy. Business shares a responsibility to enhance the well-being of the community that supports it.[144] One way to meet this responsibility is to provide a means of

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[141] REASONABLE ACCOMMODATION, *supra* note 135.

[142] 45 C.F.R. § 84.12(c) (1980). An employer may claim both federal and state tax deductions for making some modifications of the workplace to meet the needs of disabled employees. I.R.C. § 190 (deduction for costs attendant to the removal of architectural barriers); CAL. REV. & TAX CODE § 24383 (West Supp. 1981) (deductions for remodeling that provides access for disabled people). Additionally, employers can claim tax credits on the wages paid disabled employees for the first two years of employment. I.R.C. § 51; CAL. REV. & TAX CODE § 17053.7 (West Supp. 1981). Employer benefits of this type can increase the amount an employer can be expected to contribute towards the reasonable accommodation of a disabled employee in any given instance.

[143] REASONABLE ACCOMMODATION, *supra* note 135.

[144] The primary purpose of business is to earn a profit . . . with decency. This means much more than avoiding the illegal or unethical; it means contributing positively, in terms of human values, to the general welfare. To the traditional business concerns about resource availability, production costs, and market acceptance must be added the relatively new factors associated with antipollution, consumer protection and equality in employment.

John McLean, former professor at the Harvard Graduate School of Business Administration, *quoted in* S. JAMISON, EMPLOYING THE QUALIFIED HANDICAPPED—AN EMPLOYER'S PERSPECTIVE 2 (1976) (copy on file at the U.C. Davis Law Review office).

> [Corporate responsibility is] a philosophy that business must serve its employees, customers, suppliers, and the American society generally, as well as its shareholders, that business is too important a factor in society to confine its objectives simply to making as

self-support to qualified disabled employees, even if this requires contributing to the cost of reasonable accommodations.[145] For instance, the law requires that employers make reasonable accommodation to the needs of female employees by building adequate restroom facilities.[146] Disabled employees deserve no less consideration of their special needs.

2. California's Statutory Provisions

The extent to which California's statutes require reasonable accommodation is unclear.[147] Arguably, the antidiscrimination language of sections 12940 and 11135 imply a reasonable accommodation requirement.[148] But an implied reasonable accommo-

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much money as possible for its shareholders.

P. BLUMBERG, CORPORATE RESPONSIBILITY IN A CHANGING SOCIETY 92 (1972). *See also* R. LITSCHERT & E. NICHOLSON, THE CORPORATE ROLE AND ETHICAL BEHAVIOR: CONCEPTS AND CASES 49-50 (1977); F. KOCH, THE NEW CORPORATE PHILOSOPHY, HOW SOCIETY AND BUSINESS CAN PROFIT 3 (1979).

In the context of equal employment opportunities for the handicapped, the concept of corporate responsibility to society does not necessarily demand corporate philanthropy. While it may, in some instances, require the corporation or business to make a contribution to the cost of modifying the work area so that a disabled employee can perform the job tasks, *see* notes 129-134 and accompanying text *supra*, it more often only asks that the employer give the disabled individual an opportunity to perform the job without forming preconceived notions of the individual's ability to do the work. *See* notes 135-137 and accompanying text *supra*.

[145] *See* notes 141-143 and accompanying text *supra*.

[146] 41 C.F.R. § 60-20.3(e) (1980) provides:

> The employer's policies and practices must assure appropriate physical facilities to both sexes. The employer may not refuse to hire men or women, or deny men or women a particular job because there are no restroom or associated facilities, unless the employer is able to show that the construction of the facilities would be unreasonable . . . .

See 10 COLUM. J. LAW & SOC. PROB., *supra* note 8, at 492 n.199.

Employers have also been required to award "front pay" or compensation at the rate of the job which constitutes the "rightful place" of a minority worker who has suffered discrimination, prior to the time of a "rightful place" vacancy. Stamps v. Detroit Edison Co., 365 F. Supp. 87 (E.D. Mich. 1973). *See also* Edwards, *Race Discrimination in Employment: What Price Equality?*, 1976 ILL. L. FORUM 572, 614 (1976).

[147] California legislation does not contain an explicit reasonable accommodation requirement.

[148] A reasonable accommodation requirement may be implicit within a statute forbidding discrimination on the basis of disability, since accommodation is

dation requirement within section 12940 will be of little help if Government Code section 12994[149] remains in its present form.[150] That section states that an employer must make only

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necessary before some handicapped employees will have equal employment opportunities. One court, in a § 504 case concerning the right of the disabled to use public transportation, stated: "Under these federal standards there is no equality of treatment merely by providing the handicapped with the same facilities as ambulatory persons; . . . for handicapped persons who cannot gain access to such facilities are effectively foreclosed from any meaningful public transportation." Lloyd v. Regional Transp. Auth., 548 F.2d 1277, 1284 (7th Cir. 1977); *see, e.g.*, United Handicapped Fed'n v. Andre, 558 F.2d 413 (8th Cir. 1977), Hairston v. Drosick, 423 F. Supp. 180 (S.D.W.Va. 1976); Holland v. Boeing Co., 90 Wash. 2d 384, 583 P.2d 621 (1978); *cf.* Snowdon v. Birmingham-Jefferson County Transit Auth., 407 F. Supp. 394 (N.D. Ala. 1975), *aff'd*, 551 F.2d 862 (5th Cir. 1977) (public carrier cannot exclude the handicapped from riding buses but need not purchase specially equipped vehicles to accommodate the physically disabled; the physically disabled can be required to arrange for someone to help them board and alight from bus). *But see* Southeastern Community College v. Davis, 442 U.S. 397 (1979).

In *Holland*, the Washington Supreme Court expressly found that failure to accommodate was a discriminatory practice with respect to handicapped employees. The court's language is particularly illustrative of this point.

> Legislation dealing with equality of sex or race was premised on the belief that there were no inherent differences between the general public and those persons in the suspect class. The guarantee of equal employment opportunities for the physically handicapped is far more complex.
>
> The physically disabled employee is clearly different from the nonhandicapped employee by virtue of disability. But the difference is a disadvantage only when the work environment *fails* to take into account the unique characteristics of the handicapped person. Identical treatment may be a source of discrimination in the case of the handicapped, whereas different treatment may eliminate discrimination against the handicapped and open the door to employment opportunities.

90 Wash. 2d 384, 388, 583 P.2d 621 at 623 (emphasis in original).

Two additional provisions of the California Government Code imply a legislative intent that reasonable accommodation be made to the work needs of disabled employees. CAL. GOV'T CODE § 12920 (West 1980) (declaring it public policy that all persons have the right to seek, obtain and hold employment without discrimination); *id.* § 12921 (West 1980) (the opportunity to seek, obtain and hold employment without discrimination is a civil right).

[149] CAL. GOV'T CODE § 12994 (West 1980) provides: "Nothing in this part shall be construed to require an employer to alter his premises to accommodate employees who have a physical handicap or medical condition, as defined in Section 12926, beyond safety requirements applicable to other employees."

[150] Section 12994 does not restrict § 11135. The statute by its terms applies only to the Fair Employment Practices Act. *See* note 149 *supra*. The extent to

safety-related accommodations for handicapped employees.[151] Section 12994 makes optional reasonable production-related modifications which section 12940 might otherwise require. For example, section 12994 does not require even such reasonable work site accommodations as rearranging and restructuring equipment and machines. Similarly, it does not require reasonable environmental accommodations, such as improved lighting for the visually impaired. These modifications are not, in most instances, safety-related.

Although the legislature sought to limit employers' accommodation costs through section 12994,[152] there is no need to permit discriminatory practices as a consequence.[153] Section 12994 may require expensive "safety" modifications but not relatively inex-

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which § 11135 requires reasonable accommodation has not been established by the California courts. *See* notes 147 & 148 and accompanying text *supra.*

[151] CAL. GOV'T CODE § 12994 (West 1980); *see* note 149 *supra.* California law requires that the working premises be safe. "Every employer shall furnish employment and a place of employment which are safe and healthful for the employees therein." CAL. LAB. CODE § 6400 (West Supp. 1981); *see also id.* § 6401.

Section 12994 requires that employers make structural alterations to accommodate disabled employees to the same extent that they accommodate the safety needs of nondisabled employees. The author of § 12994, former Assemblyman John Dunlap, has indicated that the purpose of the statute was to limit the accommodation expenses of employers. Telephone conversation with John Dunlap (Oct. 23, 1980). He intended that the statute require employers to make reasonable accommodation to the safety needs of disabled workers comparable to those made for nondisabled employees. This includes safety accommodations of a "special" nature if required by an employee's particular disability. According to Mr. Dunlap, the statute was only meant to limit the employer's duty to make those alterations of the workplace which are required by the disabled worker in order to perform his or her job tasks, such as modifying machinery or work areas. Section 12994, however, was not meant to limit reasonable safety-related building access accommodations. For example, such modifications as wheel chair ramps are necessary for the emergency exit of a mobility-disabled worker just as wide doors and stairways are safety accommodations necessary for the nondisabled worker.

Because of § 12994, employers need not make production-related modifications. For the purposes of this comment, production-related modifications are those made at the work site which allow a disabled person to perform essential job tasks. However, section 12994 by its terms restricts alterations of an employer's premises only. *See* note 149 *supra.* Thus, it should not restrict reasonable job restructuring accommodations. *See* note 137 *supra.*

[152] Telephone interview with John Dunlap (Oct. 23, 1980); *see* note 151 *supra.*

[153] *See* notes 132-134 and accompanying text *supra.*

pensive production-related modifications. For instance, the installation of an amplifier in a telephone to aid a hearing impaired worker costs less than $100.[154] Yet section 12994 makes such an inexpensive modification optional because it is not safety-oriented. At the same time, the statute may require expensive safety-oriented access modifications, such as widening doors and installing grab rails. An arbitrary distinction between "safety" and "nonsafety" modification is not necessary to effectuate the legislature's intent to prevent excessive costs.

California should repeal section 12994 and adopt a statute that requires employers to make reasonable accommodation to the needs of disabled employees.[155] An accommodation requirement that considers cost and a particular employer's ability to pay still addresses the legislature's fiscal concerns.[156] Reasonable accommodation will require small modifications in nearly all cases. However, it will require expensive workplace modifications of only those businesses with sufficient assets to make such changes.[157]

CONCLUSION

Given the limitations in federal law, California must amend its statutory scheme to protect all disabled employees from discrimination. The shortcomings of the California statutes are obvious. California Labor Code section 12940 only prohibits discrimination on the basis of "physical handicap" or "medical condition." The mentally retarded, mentally ill and those suffering from alcohol and drug abuse are not protected from discriminatory employment practices. Moreover, some disabled employees have no protection because small employers are exempt from the present

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[154] *See* note 140 *supra*.

[155] The following jurisdictions have acknowledged the need for reasonable accommodation by adopting appropriate guidelines: Colorado, COLO. REV. STAT. § 24-34-402 (Supp. 1979), District of Columbia, D.C. CODE ANN. § 6-22-2(w) (Supp. 1980); Illinois, ILL. GUIDELINES ON DISCRIMINATION IN EMPLOYMENT § 3.2(c); Michigan, MICH. STAT. ANN. § 3.550 (207) (1978); Washington, WASH. ADMIN. CODE § 162-22-080 (1980). The language of the Michigan statute is illustrative: "Nothing in this article shall be interpreted to exempt a person from the obligation to accommodate an employee or applicant with a handicap for employment unless the person demonstrates that the accommodation would impose an undue hardship on the conduct of the business."

[156] *See* note 153 and accompanying text *supra*.

[157] *See* notes 141-43 and accompanying text *supra*.

statutory prohibitions.

California Government Code section 11135 includes all disabilities within its scope but reaches only a limited number of employers. In addition, its enforcement mechanism is far too unsure and cumbersome to provide a dependable means of resolving discrimination claims. Consequently, it does not offer the comprehensive protection necessary to eliminate discrimination against disabled workers. Only by broadening the coverage of section 11135 and placing all investigatory and enforcement powers in one agency can the legislature guarantee disabled employees their right to equal employment benefits.

California law also limits the accommodations which the employer must make to an employee's disability through section 12944. It is unnecessary to distinguish accommodations on safety and nonsafety grounds in order to protect businesses from unwarranted expense. The legislature should adopt a reasonable accommodation requirement which would enhance the employment opportunities of the disabled while protecting employers from having to make prohibitively expensive modifications.

The amendments to state law suggested by this comment must be made before all of California's disabled workers will enjoy equal employment opportunities. These changes will require employers to evaluate each worker on the basis of individual merit rather than preconceptions. Only then will disabled persons have equal opportunity to become competent workers, to support themselves and to contribute to their communities.

Michael J. Kluk