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OPINION	:	No. CV 78-95
of	:	April 17, 1979
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SUBJECT: PUBLIC EMPLOYMENT OF THE DISABLED—Disability or physical imperfection may be criteria for denying an applicant public employment if it can be shown that such criteria are reasonably related to successful job performance and an employer's legitimate and essential business purposes.

The Honorable Ronald M. Kurtz, Executive Officer, State Personnel Board, has requested an opinion on the following questions:

1. May an applicant for public employment be disqualified on the basis of probable disability within an unacceptably short period of time? If so, what would constitute an unacceptably short period of time?

2. May an applicant for public employment be disqualified on the basis of probable excessive time loss? If so, would use of sick leave in excess of the amount earned, repeated lack of punctuality, or the necessity for frequent breaks in work routine constitute excessive time loss?

3. May the selection of applicants for employment in public safety classes be limited to those who are in perfect physical condition, regardless of the ability of others to perform the job?

The conclusions are:

1. An applicant for public employment may be disqualified on the basis of probable disability within an unacceptably short period of time. However, where such an employment criterion operates to disqualify a greater proportion of applicants who are physically handicapped than of all other applicants, such criterion may be used only if the term "unacceptably short" can be defined as that period of employment which would fail to meet the employer's legitimate and essential business purposes.

2. An applicant for public employment may be disqualified on the basis of probable excessive time loss due to the use of sick leave in excess of the amount earned, the repeated lack of punctuality, or the necessity for frequent breaks in work routine. However, where such an employment criterion operates to disqualify a greater proportion of applicants who are physically handicapped than of all other applicants, such criterion may be used only where excessive time loss would result in the failure to meet the employer's legitimate and essential business purposes.

3. In the absence of additional facts, the selection of applicants for employment in public safety classes may not be limited to those who are in perfect physical condition, regardless of the ability of others to perform the job. However, any physical standard for employment in such classes which is demonstrably related to successful job performance may be adopted.

ANALYSIS

The first inquiry is whether an applicant for public employment may be disqualified on the basis of probable disability within an unacceptably short period of time. The situation envisioned by the inquiry is that an applicant has a presently existing medical or physical condition which would either be aggravated by the job or which is degenerative It is emphasized at the outset that the inquiry is predicated upon certain premises the validity or basis for which we are not called upon to examine. Thus, it will be assumed as established that the applicant has a medical or physical condition, that the condition would be aggravated by the job or is degenerative, that the condition will probably result in disability, and that such probable disability would occur within an unacceptable period of time. The term "disability" in the context of this inquiry is understood to mean total inability to perform the essential functions of the job. The term "probable" in the context of this inquiry is understood to mean that the prediction of future disability is based on or

arises from adequate, fairly convincing, though not absolutely conclusive, intrinsic or extrinsic evidence or support. (See Webster's Third New Internat. Dict. (1961) p. 1806.) The phrase "unacceptably short period of time" requires definition. It is assumed that the phrase pertains to the reasonable expectations of the employer. For purposes of this analysis, a period of employment will be deemed unacceptably short where employment for such period would fail to meet the employer's legitimate and essential business purposes. For example, where a minimum period is required to achieve the particular skills or knowledge necessary to perform safely and efficiently the duties of the job, employment for less than the minimum period would be unacceptably short. Moreover, employment for a period which would not justify the costs of recruitment and training would be unacceptable. Finally, it is assumed that the applicant is fully capable at the time of application of performing the job.

It is well established that no person may be denied government employment because of factors unconnected with the responsibilities of that employment. (*Morrison v. State Board of Education* (1969§ 1 Cal. 3d 214, 234; *Vielebr v. State Personnel Board* (1973) 32 Cal. App. 3d 187, 192; *Hetherington v. State Personnel Board* (1978) 82 Cal. App. 3d 582, 592.) Similarly, a number of federal cases have held that there must be some reasonably foreseeable specific connection between the disqualifying quality or conduct of an individual and the efficiency of the public service. (*Mindel v. United States Civil Service Commission* (N.D. Cal. 1970) 312 F. Supp. 485, 488; *Norton v. Macy* (D.C. 1969) 417 F.2d 1161, 1164; *Society for Individual Rights, Inc. v. Hampton* (N.D. Cal. 1973) 63 F.R.D. 399, 401; *Beazer v. New York City Trans. Auth*. (S.D.N.Y. 1975) 399 F. Supp. 1032, 1057.) However, the probable inability of an applicant for employment to work for an acceptable period of time is clearly not a factor unconnected with the responsibilities of employment or the efficiency of the public service. Moreover, since probable disability, for purposes of this discussion, is an assumed fact, we are not concerned here with the constitutional sufficiency of any such determination made on the basis of any presumptions or stereotypical assumptions regarding the handicapped. (See *Gurmankin v. Costanzo* (3 Cir. 1977) 556 F.2d 184, 187; *Beazer v. New York Trans. Auth*., *supra*, 399 F. Supp. 1032, 1057–1058.) Consequently, rejection on the basis of probable inability to work for an acceptable period of time would not violate the due process guarantees of the state or federal constitutions. It is further assumed that the criterion is applied generally to all applicants, i.e., that rejection on the grounds of limited availability is not applied only where the limitation is the result of physical handicap. Thus, the classification is not between those who are physically handicapped and those who are not, but rather between those who will be available for employment for an acceptable period of time and those who will not. The fact that this neutral criterion may have, although not designed to do so, a disproportionate impact against the physically handicapped, does not offend equal protection. (*Washington v. Davis* (1976) 426 U.S. 229, 242; *Hardy v. Stumph* (1978) 21 Cal. 3d 1, 7.) Nor does the classification impinge upon a fundamental right. We know of

no explicit or implicit constitutional right to employment with any governmental agency. (*Cf. NAACP v. Allen* (5 Cir. 1974) 493 F.2d 614, 618; *Bridgeport Guardians, Inc. v. Bridgeport Civil Service Commission* (2 Cir. 1973) 482 F.2d 1333, 1337; *Massachusetts Board of Ret. v. Murgia* (1976) 427 U.S. 307, 313; *Townsend v. County of Los Angeles* (1975) 49 Cal. App. 3d 263, 267; *Hetherington v. State Personnel Board*, *supra*, 82 Cal. App. 3d 582, 589.) In the absence of a suspect classification and a fundamental right, the constitutional right to equal protection requires that the subject classification heat some rational relationship to a legitimate governmental purpose. (*Schwalbe v. Jones* (1976) 16 Cal. 3d 514. 5 17–518; *Dandridge v. Williams* (1970) 397 U.S. 471, 485.) Clearly, the probable inability to work for an acceptable period does bear a rational relationship to legitimate governmental purposes. Consequently, rejection on that basis would not violate the equal protection guarantees of the state or federal constitutions. We turn to the state statutory provisions relating to discrimination based on physical handicap. Labor Code section 1420 (part of the California Fair Employment Practice Act, commencing with section 1410, hereinafter "the Act") 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, 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.
>
> "(1) Nothing in this part shall prohibit an employer from refusing to hire or discharging a physically handicapped employee, or subject an employer to any legal liability resulting from the refusal to employ or the discharge of a physically handicapped employee, where the employee, because of his physical handicap, is unable to perform his duties, or he cannot perform such duties in a manner which would not endanger his health or safety or the health and safety of others.
>
> "(2) Nothing in this part shall prohibit an employer from refusing to hire or discharging an employee who, because of his medical condition, is unable to perform his duties, or cannot perform such duties in a manner which would not endanger his health or safety or the health or safety of

> others. Nothing in this part shall subject an employer to any legal liability resulting from the refusal to employ or the discharge of an employee who, because of his medical condition, is unable to perform his duties, or cannot perform such duties in a manner which would not endanger his health or safety or the health or safety of others."[1]

The Act applies to the state and any political or civil subdivision thereof and cities. (Lab. Code, § 1413, subd. (d).) The term "physical handicap" is defined in subdivision (h) of section 1413 as follows:

> "'Physical handicap' includes 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."

The term "medical condition" is defined in subdivision (i) of that section as follows:

> "'Medical condition' means any 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."

Inasmuch as the term "medical condition" is limited to a diagnosis of cancer for which a person has been rehabilitated or cured, it does not fall within the notion of probable disability within an unacceptably short period of time. Therefore, the following discussion is focused upon the prohibition against discrimination on the basis of physical handicap.

Labor Code section 1420 must be construed together and harmonized with other statutes relating to the same subject matter. (*Cf. Steilberg v. Lackner* (1977) 69 Cal. App. 3d 780, 785; *Tripp. v. Swoap* (1976) 17 Cal. 3d 671, 679; 20 Ops. Cal. Atty. Gen. 266, 267 (1952).) The public policy of this state regarding employment of the physically handicapped by the state and its political subdivisions is expressly set forth in Government Code section 19230:

> "The Legislature hereby declares that:
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> "(a) It is the policy of this state to encourage and enable disabled persons to participate fully in the social and economic life of the state and to

[1] The opportunity to seek, obtain and hold employment without discrimination because of physical handicap is a civil right, the protection of which is the public policy of this state. (Lab. Code, §§ 1411, 1412.)

engage in remunerative employment.

> "(b) It is the policy of this state that qualified disabled persons shall be employed in the state service, the service of the political subdivisions of the state, in public schools, and in all other employment supported in whole or in part by public funds on the same terms and conditions as the nondisabled, unless it is shown that the particular disability is job related."

In the context of this section, the term "disabled" refers to the physically handicapped. Government Code section 19231 provides:

> "As used in this article, 'disabled person' means any person who (1) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (2) has a record of such impairment, or (3) is regarded as having such an impairment.
>
> "A disabled individual is 'substantially limited' if he or she is likely to experience difficulty in securing, retaining, or advancing in employment because of a disability."

(This definition is derived from the definition of the term "handicapped individual" in title 29, United States Code, section 706 (6), the Rehabilitation Act of 1973, *infra*.) 'With respect to the state specifically, each state agency, with the assistance of the State Personnel Board, is required to establish and implement an effective affirmative action program for the employment of "disabled" persons. (Gov. Code, §§ 19232–19237.) Finally, Government Code section 11135 provides that no person shall, on the basis, inter alia, of 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. This section applies to local agencies. (Gov. Code, § 11136.)

We begin with the observation that an applicant for employment who is fully capable at the time of application of performing the job, but who, because of a presently existing medical or physical condition, will probably become disabled, falls within the purview of the statutes referred to above. The definitions contained in Labor Code section 1413, subdivision (h), and Government Code section 19231 do not require expressly or by implication that the "impairment" be of such a nature that it constitutes a present limitation upon the applicant's ability to perform the job. It does not follow, however, that an applicant for employment who is rejected because of probable disability within an unacceptably short period of time, is rejected on the grounds of physical handicap. (*Cf. Hardy v. Stumph*, *supra*, 21 Cal. 3d 1, 7.) Rather, the salient factor is probable disability

resulting in a limited period of availability. Nothing in the Act or in the expressed policy of the state requires a public employer to hire or to retain an applicant or employee who is unable to perform the duties of the job. (See Lab. Code, § 1420, subd. (a) (1); *cf. Hardy v. Stumph*, *supra*, 21 Cal. 3d 1, 8.) Such an individual is clearly not qualified" within the meaning of Government Code section 19230 subdivision (b), *supra*. Thus, an employer is justified in discharging an employee who is unable to perform the duties of the job. The remaining issue, then, is whether rejection on the grounds of an unacceptably short period of availability constitutes discrimination against the physically handicapped. It may be assumed that such an employment criterion would result in a disproportionate rejection of the physically handicapped as a group, as compared to all others. Under principles well established under title VII of the Civil Rights Act of 1964, title 42, United States Code, section 2000e such a disproportionate effect constitutes a prima facie case of discrimination.[2] (*Hardy v. Stumph*, *supra*, 21 Cal. 3d 1, 11; *Albermarle Paper Co. v. Moody* (1975) 422 U.S. 405, 425.) Thus, in *Griggs v. Duke Power Co.* (1971) 401 U.S. 424, 431, the Supreme Court enunciated the principle as follows:

> "Congress has now provided that tests or criteria for employment or promotion may not provide equality of opportunity merely in the sense of the fabled offer of milk to the stork and the fox. On the contrary, Congress has now required that the posture and condition of the jobseeker be taken into account. It has—to resort again to the fable—provided that the vessel in which the milk is proffered be one all seekers can use. The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."[3]

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[2] Title VII does not include the physically handicapped among the groups therein designated. A physical standard may, nevertheless, violate title VII where such standard correlates with race, color, religion, sex, or national origin. (*Cf. Smith v. Olin Chemical Corp.* (5 Cir. 1977) 555 F.2d 1283.) No such correlation is envisioned in the inquiries presented.

[3] The fable of the stork and the fox was cited to demonstrate the effect of "neutral" employment standards

The fable is even more illustrative in the context of discrimination on the basis of physical condition.

> "The Fox invited the Stork to dinner, and, being disposed to divert himself at the expense of his guest, provided nothing for the entertainment but a soup, in a wide, shallow dish. This himself could lap up with a great deal of case, but the Stork, who could but just dip in the point of his bill, was not a bit the better all the while however, in a few days after, he returned the compliment, and invited the Fox; but suffered nothing to be brought to table but some minced meat in a glass)at, the neck of which was so deep and so narrow, that, though the Stork with his long bill made a shift to fill

Upon such a showing of disproportionate impact, the employer must establish that the employment criterion is necessary to the conduct of its business; if it is, title VII is not violated. *(Nashville Gas Co. v. Satty* (1977) 434 U.S. 136, 143; *Dothard v. Rawlinson* (1977) 433 U.S. 321, 331–332.) Thus, no violation occurs where the employer can demonstrate that the criterion is manifestly related to the requisite qualifications for the job. (*Dothard v. Rawlinson*, *supra*, 433 U.S. 321, 329; *Hardy v. Stumph*, *supra*, 21 Cal. 3d 1, 6, 11.) Rather, such qualifications have become "the controlling factor." (*Griggs v. Duke Power Co., supra*, 401 U.S. 424, 436.) What is required is the removal of "artificial, arbitrary, and unnecessary barriers" to employment which operate invidiously to discriminate on the basis of an impermissible classification. (*Id*. at p. 431; *McDonnell Douglas v. Green* (1973) 411 U.S. 792, 806.) Nevertheless, even assuming that an employment criterion is job related, it is unlawful if used as a pretext for discrimination (*McDonnell Douglas v. Green*, *supra*, 411 U.S. 792, 804, 806; *Nashville Gas Co. v. Satty, supra*, 434 U.S. 136, 144) or if other selection devices without a similar discriminatory effect would also serve the employer's legitimate interests (*Dothard v. Rawlinson*, *supra*, 433 U.S. 321, 329; *Albemarle Paper Co. v. Moody*, *supra*, 422 US. 405, 425).

Since the federal statute (which is essentially patterned after the state Act and relates to the same subject matter, i.e., employment discrimination) has been made applicable to the state and its political subdivisions as a matter of state law (Gov. Code, §§ 19702.1, 19702.2, 50084, 50085), the state Act should be construed together and harmonized therewith. (*Cf. Steilberg v. Lackner, supra*, 69 Cal. App. 3d 780; *Tripp. v. Swoap*, *supra*, 17 Cal. 3d 671.) Thus, the principles hereinabove set forth interpreting title VII are pertinent to the present issue. Specifically, rejection on the grounds of an unacceptably short period of availability does not constitute discrimination against the physically handicapped if the employer can demonstrate that the criterion is job related. (This job relatedness standard is expressly indicated in Gov. Code, § 19230, *supra*.) Clearly, failure to meet the employer's legitimate and essential business purposes is job related. (*Griggs v. Duke Power Co., supra*, 401 U.S. 424, at 431.) Consequently, rejection of an applicant on the grounds of probable disability within an unacceptably short period of time does not discriminate against the physically handicapped within the meaning of the Act or related state statutes.

As previously noted with respect to the state specifically, however, each state agency is required to implement an effective affirmative action program, including goals

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his belly, all that the Fox, who was very hungry, could do, was to lick the brims, as the Stork slabbered them with his earing. Reynard was heartily vexed at first, but, when he came to take his leave, owned ingenuously, that he had been used as he deserved, and that he had no reason to take any treatment ill, of which himself had set the example." (Aesop, *The Fables of Aesop* 1865), at p. 251.

and timetables. Government Code section 19232 provides:

> Each state agency shall be responsible for establishing an effective affirmative action program to ensure disabled persons, who are capable of remunerative employment, access to positions in state service on an equal and competitive basis with the general population.
>
> "Each state agency shall develop and implement an affirmative action employment plan for disabled persons which shall include goals and timetables. Such goals and timetables shall be set annually for disabilities identified pursuant to guidelines established by the State Personnel Board, and shall be submitted to the board no later than June 1 of each year beginning in 1978, for review and approval or modification. Goals and timetables shall be made available to the public upon request."

While affirmative action requires more than mere nondiscrimination (*cf*. 59 Ops. Cal. Atty. Gen. 87, 90–91 (1976)), it does not require selection except "on an equal and competitive basis" with all other applicants. Thus, nothing in Government Code section 19232 *et seq*., requires the selection of an applicant with a job related disability.

We turn next to two provisions of the federal Rehabilitation Act of 1973. Title 29, United States Code, section 794 provides:

> "No otherwise qualified handicapped individual in the United States, as defined in section 706(6) of this title, 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. . . ."

This section is limited to recipients of federal aid and applies only to such programs or activities receiving such aid. However, it also applies to participants in federal revenue sharing under the State and Local Fiscal Assistance Act of 1972. (31 U.S.C., § 1242(a).) Title 29, United States Code, section 793(a) provides:

> "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 our such contract the party contracting with the United States shall take affirmative action to employ and advance in employment qualified handicapped individuals as defined in section 706(6) of this title. 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 for the procurement of personal property and nonpersonal services (including construction) for the United States. The President shall implement the provisions of this section by promulgating regulations within ninety days after September 26, 1973."

The latter section is limited to federal contractors and applies only to employment of persons to carry our such contracts. For purposes of the Rehabilitation Act the term "handicapped individual" is defined as follows (29 U.S.C., § 706):

> "For the purposes of this chapter:
>
> " . . . . .
>
> "(6) The term 'handicapped individual' means any individual who (A) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and (B) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services provided pursuant to subchapters I and III of this chapter. For the purposes of subchapters IV and V of this chapter, such term means any person who (A) has a physical or mental impairment which substantially limits one or more of such person s major life activities, (B) has a record of such an impairment, or (C) is regarded as having such an impairment."

(29 U.S.C., §§ 793 and 794 fall within subchapter V of ch. 16, tit. 29 U.S.C.) We turn first to the provisions of title 29, United States Code, section 794.[4] Disqualification on the basis of probable disability within an unacceptably short period of time does not constitute

[4] Title 29, United States Code, section 794 is patterned after title VI of the Civil Rights Act of 1964, title 42, United States Code, section 2000d, pertaining to discrimination on the basis of race, color, or national origin. Section 2000d-3 provides that title VI shall not be construed to authorize action by any department or agency with respect to any employment practice of any employer except where a primary objective of the federal financial assistance is to provide employment. Employment discrimination on such grounds is the subject of title VII of the 1964 Civil Rights Act, title 42, United States Code, section 2000e. However, no exemption with respect to employment practices is contained in the Rehabilitation Act, nor is employment discrimination on the basis of physical handicap the subject of other comprehensive federal legislation. It may be noted that title 29, United States Code, section 701 sets forth as one of the purposes of the Rehabilitation Act the promotion and expansion of employment opportunities in the public and private sectors for handicapped individuals and the placement of such individuals in employment. In any event, it is sufficient for purposes of this analysis to note that the conduct in question would not constitute discrimination on the basis of physical handicap.

rejection "solely by reason of his handicap" within the meaning of that section. However, we again look to see whether rejection on the basis of an objectively neutral criterion which operates to disqualify a disproportionate percentage of physically handicapped as compared to all other applicants constitutes discrimination against the physically handicapped. In this regard, while Congress has nowhere defined the term "discrimination" either in the context of the Rehabilitation Act or of title VII of the Civil Rights Act of 1964, *supra*, (*cf. General Electric Co. v. Gilbert* (1976) 429 U.S. 125, 133), we regard the interpretive decisions under title VII to be equally pertinent under the Rehabilitation Act. Based upon the same analysis as hereinabove set forth in connection with the state Act and related provisions, it is determined that rejection of an applicant on the grounds of probable disability within an unacceptably short period of time does not discriminate against the physically handicapped within the meaning of the Rehabilitation Act of 1973.

It is noted, however, that title 29, United States Code, section 794 has been administratively interpreted to require something more than nondiscrimination. The President, by Executive Order No. 11914 (April 28, 1976, 41 F.R. 17871), has authorized the Secretary of Health, Education and Welfare to adopt rules and regulations coordinating the implementation of title 29, United States Code, section 794 by all federal departments and agencies empowered to extend federal financial assistance to any program or activity, and establishing standards for determining who are handicapped individuals and guidelines for determining what are discriminatory practices within the meaning of that section. Although title 29, United States Code, section 794 does not expressly require or provide for rulemaking, it has been held that the Secretary is required to promulgate regulations effectuating that section. (*Cherry v. Mathews*, *et al.* (D.D.C. 1976) 419 F. Supp. 922, 924.) Accordingly, the Secretary has promulgated regulations applicable to each recipient of federal financial assistance from the Department of Health, Education and Welfare and to each program or activity that receives or benefits from such assistance. (45 C.F.R., part 84.) The term "qualified handicapped person," with respect to employment is defined therein, as "a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question." (45 C.F.R., § 84.3, subd. (k).) The regulations provide that an employer shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of its program. (45 C.F.R., § 84.12.) Such reasonable accommodation may include alteration of facilities, job restructuring, modified work schedules, acquisition or modification of equipment, provision of readers or interpreters, and other similar actions. (45 CER., § 84.12(b).) In determining whether an accommodation would impose an undue hardship, such factors as the number of employees, the number and type of facilities, the size of the budget, the type of operation, and the nature and cost of the accommodation should be considered. (45 C.F.R., § 84.12(c).) Thus, these regulations require the employer to take affirmative measures to accommodate the physically handicapped. Under these

regulations the issue would be whether the employment of an applicant for an unacceptably short period of time would constitute a reasonable accommodation, and whether the employer could demonstrate that the accommodation would impose an undue hardship on the operation of its programs. In our view, any requirement that an applicant be employed where such employment would fail to meet the employer's legitimate and essential business purposes would be unreasonable and would impose an undue hardship. (*Cf. Trans World Airlines, Inc. v. Hardison* (1977) 432 U.S. 63, 84.)

Unlike title 29, United States Code, section 794, title 29, United States Code, section 793 expressly requires the employer to take affirmative action to employ qualified handicapped individuals. Pursuant to the authority expressly provided in the latter section, the Secretary of Labor has promulgated regulations applicable to all government contracts and subcontracts for the furnishing of supplies or services or for the use of real or personal property (including construction) for $2,500 or more. (41 C.F.R., part 60–741.) The term "qualified handicapped individual" is defined therein as a handicapped individual who is "capable of performing a particular job, with reasonable accommodation to his or her handicap." (41 C.F.R., § 60–741.2.) The regulations provide that to the extent that qualification requirements tend to screen out qualified handicapped individuals, they shall be job related and consistent with business necessity and the safe performance of the job. (41 C.F.R., § 60–741.6(c).) Section 60–741.6(d) further provides:

> "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."

As previously stated, any requirement that an applicant be employed where such employment would fail to meet the employer's legitimate and essential business purposes would be held to be unreasonable and an undue burden. Rejection on such grounds is job related and consistent with business necessity. The regulations set forth in detail the employer's affirmative action obligations in terms of outreach, positive recruitment, and internal and external dissemination of policy. (41 C.F.R., § 60–741.6(f), (g).) None of these affirmative action obligations requires an employer to engage in any practice which is not consistent with business necessity. Consequently, rejection of an applicant on the grounds of probable disability within an unacceptably short period of time does not violate the provisions of title 29, United States Code, section 793 or 794.

In view of the foregoing, it is concluded that an applicant for public employment may be disqualified on the basis of probable disability within an unacceptably short period of time. Where such an employment criterion operates to disqualify a greater proportion of applicants who are physically handicapped than of all other applicants, such criterion may be used only if the term "unacceptably short" can be defined as that period of employment which would fail to meet the employer's legitimate and essential business purposes. This requirement is satisfied where the criterion is demonstrably related to the requisites of the job. It is not possible to specify in the abstract what period of time would be unacceptable under this standard. Such a determination depends upon the particular facts and circumstances of each case. In a given case, the prescribed standard may be so obviously related to business necessity as to preclude the need for further proof. (*Cf. Smith v. Olin Chemical Corp*. (5 Cir. 1977) 555 F.2d 1283, 1286–1287.) In other cases, the requirement may be patently artificial and arbitrary.

The second inquiry is whether an applicant for public employment may be disqualified on the basis of probable excessive time loss. Again, the term "probable" is understood to mean that the prediction as to time loss is based on or arises from adequate, fairly convincing, though not absolutely conclusive, intrinsic or extrinsic evidence or support. It is assumed that the phrase "excessive time loss" pertains to the reasonable expectations of the employer. For purposes of this analysis, time loss will be deemed excessive where it would result in the failure of an employee to meet the employer's legitimate and essential business purposes. For example, where the use of sick leave in excess of the amount earned, the repeated lack of punctuality, or the necessity for frequent breaks in work routine would result in the impairment of normal production or in extraordinary administrative cost or inconvenience, it would constitute excessive time loss. It is further assumed that the probability of excessive time loss arises from some presently existing medical or physical condition.

The analysis set forth in connection with the first inquiry applies to the present inquiry. In summary, an applicant for employment who is rejected because of probable excessive time loss is not rejected on the grounds of physical handicap. Nevertheless, where the application of the objective employment criterion would result in a disproportionate rejection of the physically handicapped as a group, as compared to all others, such criterion would be discriminatory unless the employer can establish that it is demonstrably related to the requisite qualifications for the job. The inability to meet the employer's legitimate and essential business purposes is clearly job related. Consequently, rejection of an applicant on the grounds of probable excessive time loss[5] does not

[5] In the context of discrimination based on race, the Supreme Court has observed that the broad, overriding interest shared by employer, employee, and consumer is efficient and trustworthy workmanship assured through fair and neutral employment practices. *(McDonnell Douglas*

discriminate against the physically handicapped assuming, of course, that such criterion is applied generally to all applicants.

It is concluded that an applicant for public employment may be disqualified on the basis of probable excessive time loss due to the use of sick leave in excess of the amount earned, the repeated lack of punctuality, or the necessity for frequent breaks in work routine. Where such an employment criterion operates to disqualify a greater proportion of applicants who are physically handicapped than of all other applicants, such criterion may be used only where excessive time loss would result in the failure to meet the employer's legitimate and essential business purposes. This requirement is satisfied where the criterion is demonstrably related to the requisites of the job.

The third inquiry is whether the selection of applicants for employment in public safety classes may be limited to those who are in perfect physical condition, regardless of the ability of others to perform the job. Since the term "ability of others to perform the job" is not limited or modified, it will be assumed for purposes of this analysis that physical perfection as an employment criterion would disqualify applicants who are able to perform as safely and efficiently as those who are selected. This criterion far exceeds the requirements of Government Code section 1031:

> "Each class of public officers or employees declared by law to be peace officers shall meet at least the following minimum standards:
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> ". . . . .
>
> "(f) Be found, after examination by a licensed physician and surgeon, to be free from any physical, emotional, or mental condition which might adversely affect his exercise of the powers of a peace officer.
>
> "This section shall not be construed to preclude the adoption of additional or higher standards, including age."

Included among those who would be disqualified by the criterion are the physically handicapped. Although Government Code section 1031 does not preclude the adoption of higher standards, the physically handicapped are a specifically protected group under the provisions of Labor Code section 1420 subdivision (a), *supra*. Since the physically handicapped would be disqualified regardless of their ability to perform the job, the exception provided in subdivision (a) (1) of that section is not applicable. Moreover, unlike the criteria which are the subjects of the first and second inquiries, the criterion of physical

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Corp. v. Green (1973) 411 U.S. 792, 801.)

perfection disqualifies the physically handicapped precisely because of the stated characteristic. Consequently, we do not predicate this analysis upon the notion of job relatedness of an objectively neutral standard. Rather, the criterion may be justified only if it is determined to be a bona fide occupational qualification within the meaning of Labor Code section 1420. Since the term "bona fide occupational qualification" is not defined in the state Act, we again turn to federal precedents and decisions. The term has been construed in connection with employment discrimination based on sex (tit. VII, Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*.; *Diaz v. Pari American World Airways, Inc.* (5 Cir. 1971) 442 F.2d 385, 388–389; *Weeks v. Southern Bell Tel. & Tel. Co.* (5 Cir. 1969) 408 F.2d 228, 235; and see *Long v. State Personnel Board* (1974) 41 Cal. App. 3d 1000, 1016) and on the basis of age (Age Discrimination In Employment Act of 1967, 29 U.S.C., § 621 et seq.; *Arritt v. Grisell* (4 Cir. 1977) 567 F.2d 1267, 1271). Essentially, the burden is on the employer to show that the qualification is reasonably necessary to the essence of its business, and that there is reasonable cause and factual basis for belief that all or substantially all persons within the excluded class would be unable to perform safely and efficiently the duties of the job or that it would be impossible or impractical to make individualized determinations as to the competence of such persons to perform such duties. We have been presented with no factual basis whatever which would support a determination that the criterion is a bona fide occupational qualification. In the absence of such facts it is concluded that the selection of applicants for employment in public safety classes may not be limited to those who are in perfect physical condition, regardless of the ability of others to perform the job. This conclusion does nor, of course, preclude the adoption of any physical standard for employment in such classes which is demonstrably related to successful job performance.

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