Holland v. Boeing Co.: Extending Protection Against Employment Discrimination To Transfers Of Handicapped Employees

In *Holland v. Boeing Co.*,[1] the Washington Supreme Court considered for the first time a handicap discrimination case under the unfair employment practices section of the Washington Law Against Discrimination.[2] In construing the statute, the *Holland* court emphasized that the handicapped are inherently different from other classes antidiscrimination legislation traditionally protects. The court then imposed upon the defendant-employer a high duty of accommodating the disabilities of handicapped employees. Thus, the decision provides important recognition of disabled workers' civil rights.

In *Holland,* a physically handicapped technician sought re-

1. 90 Wash. 2d 384, 583 P.2d 621 (1978).

2. WASH. REV. CODE § 49.60.180 (1976). The statute does not include a definition of the term "handicapped." The state supreme court, however, has ruled the law is not constitutionally vague and accepted the term as meaning a condition which prevents the full and normal use of one's faculties. Chicago, M., St. P. & Pac. R.R. v. Washington Human Rights Comm'n, 87 Wash. 2d 802, 557 P.2d 307 (1976).

A recent Washington Court of Appeals decision has further refined the definition. Noting that whether a person is "handicapped" is a question of law, the court cited a Human Rights Commission regulation, WASH. AD. CODE § 162-22-040(1)(a) (1977), providing that "for enforcement purposes a person will be considered to be *handicapped* by a sensory, mental, or physical condition if he or she is *discriminated against because of the condition* and the condition is abnormal." Kimmel v. Crowley Maritime Corp., 23 Wash. App. 78, 82, 596 P.2d 1069, 1071 (1979). The court then ruled that the plaintiff, who had suffered previous injuries to his knees, had been unlawfully refused employment because of the condition. *Id.* at 87, 596 P.2d at 1074.

The *Crowley* court has thus given a broad interpretation to the term "handicapped." Theoretically, this decision should extend protection to persons with conditions one might not otherwise consider a "handicap." While Washington courts have not yet reached the issue, such conditions might include obesity and alcoholism. *See* Gittler, *Fair Employment and the Handicapped: A Legal Perspective,* 27 DE PAUL L. REV. 953, 985 (1978).

Such broadened protection would be just. Protection of the law should not hinge on the source of the physical or mental condition when the same elements of discrimination exist in all kinds of handicaps, whether temporary or permanent, voluntary or involuntary. *Id.* at 982-86. The evil that antidiscrimination law seeks to eliminate is employment decisions based on employers' stereotyped assumptions and personal prejudices rather than on individual merit and ability of the employee. Therefore, the law should not make formalistic distinctions among subclasses of the handicapped. *Id.*

3. 90 Wash. 2d at 386, 583 P.2d at 622. At trial, the quality of Holland's performance was a fact at issue. The defendant contended plaintiff was removed from his job at least partly because his work was not satisfactory. Brief for Appellant at 4, Holland v. Boeing Co., 90 Wash. 2d 384, 583 P.2d 621 (1978). The trial court, however, specifically found that Holland's performance was adequate and that Boeing had never undertaken procedures indicating otherwise before his transfer. Findings of Fact at 7.

lief against Boeing for employment discrimination. The plaintiff, suffering from cerebral palsy, had worked at Boeing for more than twenty years, successfully[3] achieving a Grade 9 position.[4] In 1974, because of a reduced workload, Boeing reassigned the plaintiff to a job entailing tasks he could not perform satisfactorily.[5] Eventually, a supervisor recommended the plaintiff accept a lower grade position—a move the plaintiff resisted. Boeing then attempted to locate a different position of equal grade, but these efforts were unsuccessful because of negative reports about the plaintiff's performance in his new job.[6] Finally, the plaintiff's supervisor gave him the choice of accepting a lower grade position or being fired. The plaintiff reluctantly accepted a Grade 5 position, and then brought suit for employment discrimination.

Holland asserted that Boeing committed an unfair employment practice, in violation of section 49.60.180 of the Washington Revised Code,[7] by reassigning him to a job Boeing knew, or rea-

---

4. The plaintiff was an experimental electronics technician, a job that required considerable electronics knowledge and some manual skill. His duties consisted of troubleshooting and setting up electronics systems. Brief for Respondent at 2, Holland v. Boeing Co., 90 Wash. 2d 384, 583 P.2d 621 (1978).

5. 90 Wash. 2d at 386, 583 P.2d at 622. The new job required greater manual dexterity, including certified soldering. The court charged the defendant with knowledge of the plaintiff's limitations because plaintiff had previously failed to receive certification in soldering. *Id.* at 391, 583 P.2d at 624.

6. *Id.* at 386, 583 P.2d at 622. Supervisors had placed letters in the plaintiff's personnel file reporting his lack of ability. In addition, the results of a dexterity test, which plaintiff had to take without the special tools he customarily used, further emphasized his handicap.

7. The law states:

> It is an unfair practice for any employer:
>
> (1) To refuse to hire any person because of such person's age, sex, marital status, race, creed, color, national origin, or the presence of any sensory, mental, or physical handicap, unless based upon a bona fide occupational qualification: *Provided,* That the prohibition against discrimination because of such handicap shall not apply if the particular disability prevents the proper performance of the particular worker involved.
>
> (2) To discharge or bar any person from employment because of such person's age, sex, marital status, race, creed, color, national origin, or the presence of any sensory, mental, or physical handicap.
>
> (3) To discriminate against any person in compensation or in other terms or conditions of employment because of such person's age, sex, marital status, race, creed, color, national origin, or the presence of any sensory, mental, or physical handicap: *Provided,* That it shall not be an unfair practice for any employer to segregate washrooms or locker facilities on the basis of sex, or to base other terms and conditions of employment on the sex of employees where the board by regulation or ruling in a particular instance has found the employment practice to be appropriate for the practical realization of equality of opportunity between the sexes.

WASH. REV. CODE § 49.60.180 (1976).

sonably should have known, he could not perform. He also contended Boeing had a number of nondiscriminatory alternatives to the alleged discriminatory transfer. The employer could have either transferred an able-bodied technician instead of Holland or tranferred Holland to another equally suitable job classification. Alternatively, Boeing could have declared a surplus in the plaintiff's job category and downgraded or laid off employees in inverse order of seniority.[8] The trial court agreed with the plaintiff's arguments.

The defendant argued unsuccessfully that the transfer was necessary because of a reduced shop workload. Moreover, the defendant asserted that reasonable accommodation required only a *de minimus* effort and that defendant's efforts exceeded this standard.[9] The trial court disagreed, finding that the employer could have used other nondiscriminatory transfer procedures. The court held that, under the employment practices statute, an employer reassigning handicapped personnel must make reasonable accommodations for their disabilities and that the defendant failed to meet this standard.[10] The court awarded plaintiff back pay and directed defendant to reinstate plaintiff at his former grade of employment.[11] On appeal, the Washington Supreme Court unanimously affirmed.

The decision in *Holland* was the supreme court's first interpretation of the relatively new statutory protection of the handicapped. In 1973, the state legislature amended the Washington Law Against Discrimination[12] to prohibit employment discrimination because of any sensory, mental, or physical handicap. This amendment resulted, in part, from a growing awareness of the grave difficulties the handicapped encounter in the job market.[13]

---

8. Brief for Respondent at 31-37, Holland v. Boeing Co., 90 Wash. 2d 384, 583 P.2d 621 (1978).

9. Reply Brief for Appellant at 5-6.

10. 90 Wash. 2d at 387, 583 P.2d at 622.

11. The court also awarded vacation pay and $22,473 in attorney's fees. *Id.* at 392-93, 583 P.2d at 625.

12. Ch. 214, §1, 1973 Wash. Laws 1st Ex. Sess. 1648 (appears as amended at WASH. REV. CODE § 49.60.010 (Supp. 1978)).

13. Discrimination against the handicapped has taken many other forms as well. Public school systems have denied equal educational opportunity to handicapped children. Note, *Abroad in the Land: Legal Strategies to Effectuate the Rights of the Physically Disabled,* 61 GEO. L.J. 1501 (1973). By their very design, public buildings and transportation systems restrict or exclude access by the physically disabled. *Id.* at 1506-12. Moreover, the handicapped have had to fight discriminatory laws impairing their rights to marry, have children, travel on airplanes, and even to appear in public. Burgdorf & Burgdorf, *A History of Unequal Treatment: The Qualification of Handicapped Persons*

The obstacles include outright refusal by employers to hire handicapped persons, rigid physical examinations required by many employers,[14] and physical and structural barriers in the work environment.[15] Employment discrimination has been widespread, with the unemployment rate among the disabled as high as fifty percent.[16] Thus in 1973, attempting to solve these problems, the Washington Legislature included the handicapped as a protected class in the antidiscrimination statute.[17]

In construing this statutory protection, the court emphasized the unique character of the handicapped as a class. Persons in other protected classifications, such as racial minorities and women, have no inherent job-related differences from the general

---

as a "Suspect Class" Under the Equal Protection Clause, 15 SANTA CLARA LAW. 855, 861-65 (1975).

14. Comment, *Equal Employment and the Disabled: A Proposal*, 10 COLUM. J. L. & SOC. PROB. 457, 458 (1974).

15. *Id.* at 488. In addition, these societal obstacles often create further problems for the disabled, by instilling self-doubt, which in turn undermines their efforts to find employment.

16. Note, *supra* note 13, at 1512 n.78. Estimates place the number of physically disabled at 22 million in the United States. Comment, *Potluck Protections for Handicapped Discriminatees: The Need to Amend Title VII to Prohibit Discrimination on the Basis of Disability*, 8 LOY. CHI. L.J. 814, 815 (1977). One estimate, extrapolating from 1970 census figures, is that there are probably 400,000 handicapped in Washington. Seattle Post-Intelligencer, Dec. 1, 1978, at C7, col. 3.

Statistics in this area, however, are meaningful only if the class is clearly defined. The most diverse of the protected classes, the "handicapped" include persons with visible and invisible handicaps, temporary and permanent disabilities, the mobility-disabled and persons otherwise able-bodied but with medical problems such as epilepsy. This great diversity also complicates litigation of employment discrimination cases. For example, whether an employer hires epileptics has no bearing on the question of that employer's discrimination against blind persons. Gittler, *supra* note 2, at 972.

17. The statute provides in pertinent part:

> (1) The right to be free from discrimination because of race, creed, color, national origin, sex, or the presence of any sensory, mental, or physical handicap is recognized and declared to be a civil right. This right shall include, but not be limited to:
>
> (a) The right to obtain and hold employment without discrimination
>
> . . . .

WASH. REV. CODE § 49.60.030 (1976). The law also prohibits discrimination in financial institutions, credit transactions, insurance transactions, places of public resort, accommodations, assemblage and amusement, and real estate transactions. WASH. REV. CODE §§ 49.60.175, .176, .178, .215, .222 (1976). The law, however, has some puzzling inconsistencies. Although WASH. REV. CODE § 49.60.010 (1976) prohibits discrimination because of race, creed, color, national origin, sex, marital status, age, or the presence of any sensory, mental, or physical handicap, various sections of the law omit one or more of the protected classes in the areas covered. For example, only the section defining unfair employment practices specifically protects the handicapped; the other unfair practices sections do not. These differences are apparently attributable to legislative oversights. *See* Comment, *RCW § 49.60: A Discriminating Look*, 13 GONZ. L. REV. 190, 200 (1977).

population, whereas handicapped persons are different because of their disabilities.[18] Therefore, the court reasoned, legislation to eliminate handicap discrimination flows from the need for special treatment of the handicapped. The court concluded that the legislature, in amending the law against discrimination, intended employers to take positive steps toward eliminating handicap discrimination.[19] The court noted a contrary interpretation would only perpetuate work conditions presently discriminating against the handicapped.[20]

The *Holland* court, perceiving the special nature of handicap discrimination, required employers to accommodate disabled workers. In so doing, the court adopted as its rule of decision a State Human Rights Commission regulation.[21] The regulation states it is an unfair employment practice to fail to reasonably accommodate handicapped employees unless the employer can show such accommodation would cause undue hardship.[22] The court found support in this regulation for its interpretation of the statute as requiring positive action by employers.[23] Thus, the su-

---

18. 90 Wash. 2d at 388, 583 P.2d at 623.

19. The court emphasized the statute's strong statements of policy. *Id.* A provision of the statute declares that discrimination is a matter of state concern and "threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundations of a free democratic state." WASH. REV. CODE § 49.60.010 (1976).

20. 90 Wash. 2d at 389, 583 P.2d at 623.

21. WASH. AD. CODE § 162-22-080 (1977). WASH. REV. CODE §§ 49.60.010, .051 (1976) charge the commission with enforcing the law.

22. The regulation provides in full:

> (1) It is an unfair practice for an employer to fail or refuse to make reasonable accommodations to the sensory, mental, or physical limitations of employees, unless the employer can demonstrate that such an accommodation would impose an undue hardship on the conduct of the employer's business.
>
> (2) It is an unfair practice for an employer to refuse to hire or [to] otherwise discriminate against an able handicapped worker because the employer will be subject to the requirements of this section if the worker is hired, promoted, etc.
>
> (3) The cost of accommodating an able handicapped worker will be considered to be an undue hardship on the conduct of the employer's business only if it is unreasonably high in view of the size of the employer's business, the value of the employee's work, whether the cost can be included in planned remodeling or maintenance, the requirements of other laws and contracts, and other appropriate considerations.

WASH. AD. CODE § 162-22-080 (1977).

23. 90 Wash. 2d at 389, 583 P.2d at 623. The court noted that subsection (1) seems to address physical barriers in the workplace. *Id.* at 389 n.2, 583 P.2d at 623 n.2. Subsection (3), in its reference to "remodeling or maintenance," also clearly addresses physical environment. The court, however, broadly interpreted the regulation as a whole to support other types of accommodation. *Id.* at 389, 583 P.2d at 623.

preme court held that Boeing's efforts to place the plaintiff in an equal grade position after the initial discriminatory transfer did not meet the reasonable accommodation test.

In requiring the employer to make reasonable accommodation of an employee's disability, the court expressly rejected the defendant's argument that accommodation requires only a *de minimus* effort.[24] The defendant argued that the *de minimus* test, used by the United States Supreme Court in *Trans World Airlines, Inc. v. Hardison,*[25] a religious discrimination case arising under Title VII of the 1964 Civil Rights Act,[26] applied in *Holland.*[27] This test requires employers to undertake only such moderate efforts as attempting to resolve the problem by meeting with the employee, attempting to find him another job, or authorizing a union representative to seek another job for the employee.[28] But, according to the *Holland* court, such efforts are not adequate in the case of handicap discrimination.

The court refused to apply the *Hardison* test by noting that Congress has not included the handicapped as a protected class under the Civil Rights Act.[29] Congress, however, had passed the Rehabilitation Act of 1973[30] to protect handicapped Americans. The United States Department of Labor Regulations, issued pursuant to section 503 of the Rehabilitation Act, require affirmative measures in accommodating the handicapped.[31] The court concluded this federal statutory and regulatory scheme recognizes that *de minimus* accommodation efforts do not adequately protect the handicapped.[32] The court reemphasized that the special nature of handicap discrimination requires affirmative measures to alleviate its harms[33] and implied that closer scrutiny is required in this area than in other kinds of discrimination.[34]

---

24. *Id.* at 390, 583 P.2d at 624.

25. 432 U.S. 63, 77 (1977).

26. 42 U.S.C. §§ 2000e to 2000e-17 (1976).

27. Reply Brief for Appellant at 2-3.

28. 432 U.S. at 77.

29. 90 Wash. 2d at 390, 583 P.2d at 624.

30. 29 U.S.C. §§ 701-794 (1976).

31. 41 C.F.R. § 60-741.6(d) (1979).

32. 90 Wash. 2d at 390, 583 P.2d at 624.

33. *Id.*

34. *Id.* at 390 n.4, 583 P.2d at 624 n.4. Yet another important reason existed for the court to distinguish *Holland* from *Hardison.* A case of alleged religious discrimination, *Hardison* presented a problem not arising in *Holland.* The *Hardison* Court was very concerned about the reverse discrimination effort of imposing a higher standard than *de minimus* effort on the employer. In their view, accommodating Hardison might well in-

To implement this scrutiny, the court enunciated several criteria for evaluating employment practices. First, the court formulated a test for establishing a *prima facie* case of discrimination.[35] The test for employee transfers is whether business conditions necessitate the move. Second, the court stated that once the plaintiff showed that his employer had alternatives to the disputed transfer, the employer had the burden of showing the move was necessary because of a reduced workload.[36] The court implied the existence of reasonable alternative transfer methods precluded the showing of conditions justifying the transfer. Thus, because Boeing could have transferred someone else in place of Holland or undertaken other alternatives,[37] the alleged reduced workload did not necessitate the disputed transfer, and Boeing failed to carry its burden of showing nondiscrimination.

The *Holland* court drew a clear distinction between the criteria for deciding transfer cases and those for deciding discriminatory hiring practices cases.[38] In the failure-to-hire cases, the plaintiff must show he qualifies for an available position denied him. But when an employer transfers a handicapped employee from a job he was performing satisfactorily, the employee need only show that the employer had other options.[39] This is an important holding for the employee because the burden of showing the employer's options is much less than the burden of proving his qualifications for other existing jobs.

In establishing its criteria, the *Holland* court repeatedly emphasized the inherent difference between handicapped persons and other protected classes. Protected classes, such as racial minorities and women, face competitive disadvantages primarily because of societal prejudices[40] rather than inherent job-related

---

fringe on the religious freedom of other employees, an impermissible result under the Civil Rights Act. *See* 432 U.S. at 81. Because Washington explicitly recognizes a higher than *de minimus* standard, however, the reverse discrimination problem does not arise in correcting handicap discrimination. *See* WASH. AD. CODE § 162-22-080 (1977), note 22 *supra*; note 55 *infra*. *See generally* Comment, *Defining Religious Discrimination in Employment: Has Reasonable Accommodation Survived* Hardison?, 2 U. PUGET SD. L. REV. 343 (1979). *But see* text accompanying notes 53-55 *infra*.

35. Although the court's opinion did not speak of a test or *prima facie* case, this analytical framework describes the effect of the *Holland* decision.

36. 90 Wash. 2d at 391, 583 P.2d at 624-25.

37. *See* text accompanying notes 7-8 *supra*.

38. 90 Wash. 2d at 391, 583 P.2d at 624-25. The court distinguished *Holland* from McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), a failure-to-hire case.

39. 90 Wash. 2d at 391, 583 P.2d at 624-25.

40. Baker, *Affirmative Action Toward Hiring Qualified Handicapped Individuals*, 49 S. CAL. L. REV. 785, 802 (1976).

capabilities. Handicapped persons as a protected class face a unique difficulty: the very trait bringing them into a protected class, their disabilities, can affect job performance. Thus, in a job market not taking into account their disabilities, the handicapped will usually lose out in competition with nonhandicapped persons. Identical treatment of handicapped and nonhandicapped employees will perpetuate discrimination; different treatment, such as compensating for a disability,[41] may eliminate discrimination. As the *Holland* court recognized, elimination of the competitive disadvantage necessarily involves accommodation of the disability.

The critical point of the *Holland* decision, and its importance in Washington law, is the nature of the reasonable accommodation the court requires of employers. The majority opinion transformed the accommodation requirement into a test establishing *prima facie* discrimination when the employer has alternatives to the disputed transfer. The concurring opinion, however, would place on the plaintiff the burden of proving another job exists for which he qualifies. Under the concurring rationale, Boeing's efforts to find a similar-grade position after the transfer would have met the reasonable accommodation obligation.[42]

The concurring opinion, however, did not recognize that the crucial discriminatory act was Boeing's initial removal of the plaintiff from his job, not the company's later attempt to find a job replacement. The plaintiff should not have the burden of locating another position after already demonstrating his qualifications in the original job. The concurring justices also overlooked a crucial fact in the majority's evaluation of Boeing's actions: the employer knew that Holland had previously failed a test of skill required in the new job.[43] This knowledge was indicative of the employer's failure to try to accommodate the plaintiff's disability.

Of necessity, under either opinion, the extent of the employer's duty of accommodation must await some clarification in future cases.[44] Nevertheless, the *Holland* decision indicates the

---

41. Some measures to compensate for disability include: restructuring jobs, modifying work schedules, acquiring special equipment or devices, and providing readers or interpreters. Linn, *New Trends in Employment Discrimination Litigation*, 14 TRIAL 32, 34-35 (1978).

42. 90 Wash. 2d at 394, 583 P.2d at 626.

43. *Id.* at 391, 583 P.2d at 624.

44. To some extent, the case-by-case approach adopted by both the majority and concurring opinions is necessary. The great variation in type and severity of handicaps

accommodation standard will be stringent. The court's rejection of the *de minimus* test demonstrates that employers will have to make more than nominal efforts to accommodate handicapped employees.[45] The only formal check on the reasonable accommodation requirement is the proviso of the agency regulation the court adopted.[46] The regulation requires the employer to reasonably accommodate the disabled unless the employer can show this will result in undue hardship. In analogous federal regulations, undue hardship provides a yardstick for measuring the employer's accommodation effort. In judging such efforts, courts consider primarily the expense involved and the employer's resources.[47]

Pleading undue hardship as a defense would not have been persuasive under the *Holland* facts. Indeed, the *Holland* court did not expressly consider hardship although the trial court indicated that requiring Boeing to choose one of the alternative transfer procedures[48] imposed no economic hardship or serious inconvenience. The supreme court's reiteration of the strong policy embodied in the antidiscrimination statute indicates, however, that even if inconvenience or substantial expense resulted, the court would have required the employer to use alternative transfer methods.

---

plus the wide range of size and capabilities of employers require the courts to be flexible in dealing with each new case.

45. Some cases arising under federal law have imposed significant burdens of accommodation. *See, e.g.*, Barnes v. Converse College, 436 F. Supp. 635 (D.S.C. 1977) (court granted preliminary injunction requiring college to hire sign language interpreter for deaf student); Gurmankin v. Costanzo, 411 F. Supp. 982 (E.D. Pa. 1976), *aff'd*, 556 F.2d 184 (3d Cir. 1977) (while court did not base its decision on express reasonable accommodation requirement, opinion enumerated ways schools could have overcome various problems associated with having blind teacher in the classroom). For more extensive coverage of federal and state laws in this area, see NATIONAL CENTER FOR LAW AND THE HANDICAPPED, SELECTED LITIGATION AND LEGISLATION AFFECTING THE HANDICAPPED (1978).

46. For the pertinent regulatory language see note 22 *supra*, subsection (1).

Within the context of the unfair practices statute itself there are two other bases for an employer lawfully refusing to hire a handicapped person. *See* note 7 *supra*. One is that the handicap prevents the "proper performance" of the worker. The second is that the handicap prevents the worker from fulfilling a bona fide occupational qualification (BFOQ). Kimmel v. Crowley Maritime Corp., 23 Wash. App. 78, 83, 596 P.2d 1069, 1072 (1979). *See generally* Gittler, *supra* note 2, at 977-80 (a discussion of the BFOQ as it should apply to handicap discrimination).

47. Subsection (3) of the regulation prescribes consideration of these factors. This has also been the approach of federal regulations establishing the reasonable accommodation standard. *See* Guy, *The Developing Law on Equal Employment Opportunity for the Handicapped: Overview and Analysis of the Major Issues*, 7 U. BALT. L. REV. 183, 270-71 (1978).

48. *See* text accompanying notes 7-8 *supra*.

The court's imposition of a heavy burden on employers will undoubtedly evoke protest. Some people will question whether employers, and society as a whole, should bear such costs to benefit a small minority.[49] On a societal level at least, this criticism is refutable. First, society will bear an even greater cost to support the unemployed handicapped. The number of employable handicapped is large.[50] From a strictly economic viewpoint, it is inefficient and expensive to pay people to remain unemployed or underemployed because of unnecessary barriers. Moreover, it is economically wasteful to neglect such a store of skilled and willing workers.[51] Second, our society has long espoused a policy of integration of the handicapped into our society.[52] Recent passage of antidiscrimination statutes and affirmative action requirements reflect attempts by the nation's legislatures to finally effectuate this policy. The *Holland* decision furthers this objective by specifying the employer's responsibility for nondiscriminatory practices.

The decision's accommodation requirement will have ramifications beyond the employer-employee relationship. *Holland* will probably create some on-the-job problems for the handicapped. The court clearly stated that in accommodating a handicapped employee, an employer may have to act to the detriment of other

---

49. *See* NEWSWEEK, Jan. 15, 1979, at 36. Although it may be expensive to remodel public structures to make them accessible to the handicapped, it is important to note that the cost will be negligible when the accommodations are designed into the structure. *Hearings on a Barrier-Free Environment for the Elderly and the Handicapped Before the Special Comm. on Aging*, 92d Cong., 1st Sess. 39, 136 (1971) [hereinafter cited as *Hearings*]. Net costs of building barrier-free environments are further reduced by lowered insurance rates. Comment, *Access to Buildings and Equal Employment Opportunity for the Disabled: Survey of State Statutes*, 50 TEMP. L.Q. 1067, 1079 n.71 (1977).

Moreover, improving access to public facilities benefits the general population, including the elderly, children, the temporarily ill, and pregnant women, all of whom suffer when access is difficult and awkward. As an example, long flights of stairs create problems for all but the most able-bodied and unencumbered. *Hearings*, *supra*, at 27, 32; Comment, *supra*, at 1067.

50. *See* Comment, *supra* note 16, at 815; Gittler, *supra* note 2, at 954 n.3. Of the estimated 14 million employable physically handicapped, only 800,000 are working. Of the 5.6 million mentally retarded, 90% could work if properly trained. *Id.*

51. The handicapped, like the rest of the population, need and desire work for the independence and the stimulation it provides. Moreover, studies indicate that properly placed handicapped workers have performance and safety records as good as or better than nonhandicapped workers. Comment, *supra* note 16, at 821; Note, *supra* note 13, at 1513.

52. tenBroek, *The Right to Live in the World: The Disabled in the Law of Torts*, 54 CAL. L. REV. 841, 843-47 (1966). This article provides a very valuable overview of the difficulties the handicapped have encountered in passing and enforcing antidiscrimination legislation. In one eloquent passage, the author, himself disabled, equates barriers to the handicapped with house arrest. *Id.* at 848.

employees.[53] Some alternatives to the disputed *Holland* transfer would require shifting or even laying off other employees.[54] While legally valid,[55] this approach may create considerable resentment among nonhandicapped employees. This attitude may cause a problem for handicapped employees until society adjusts to the new protected status of the handicapped. This is a cost the disabled will undoubtedly consider outweighed by the benefit in allowing them to lead full, independent lives.

Although *Holland* addresses only the problem of a discriminatory transfer, several factors support extending the reasonable accommodation standard to discriminatory hiring practices. First, the antidiscrimination statute the court broadly interpreted expressly forbids discrimination in hiring.[56] Moreover, the Human Rights Commission regulation the court adopted makes it illegal for an employer to refuse to hire a disabled worker to avoid being subject to the regulation.[57] Finally, the court's perception of the special nature of handicap discrimination will necessarily apply to hiring practices.

Under *Holland*, the principal difference between hiring and transfer practices is the method of establishing a *prima facie* case of discrimination. The court recognized that transfer procedures can have as discriminatory an impact on the employment prospects of the handicapped as hiring and firing practices. In *Holland,* the employer arbitrarily and unnecessarily removed the employee from a job he was already performing satisfactorily and placed him in a position where it was inevitable he would fail.[58] The plaintiff had successfully demonstrated his qualification for

---

53. *See* Guy, *supra* note 47, at 273.

54. *See* text accompanying notes 7-8 *supra.*

55. The handicapped are unique among protected classes. They have no counterpart who may challenge affirmative action in their favor as discriminatory. For example, sex discrimination legislation forbids preferential treatment of one sex over the other. The Washington statute on handicap discrimination, however, is not worded to forbid consideration of a physical *condition.* Rather, it forbids discrimination against one who has a *handicap.* Guy, *supra* note 47, at 269 n.313. Moreover, in Washington, a Human Rights Commission regulation states explicitly that preferential treatment of the handicapped in employment practices does not constitute discrimination against nonhandicapped employees. WASH. AD. CODE § 162-22-060 (1977).

Under Washington law only one other protected class has selective protection similar to that of the handicapped. WASH. REV. CODE § 49.44.090 limits age discrimination protection to the "mature worker"—the person aged 40 to 65. Gross v. Lynnwood, 90 Wash. 2d 395, 399, 583 P.2d 1197, 1200 (1978).

56. For the text of subsection (1), see note 7 *supra.*

57. For the text of subsection (2), see note 22 *supra.*

58. 90 Wash. 2d at 391, 583 P.2d at 624.

a position denied him and thus did not need to prove his qualifications for some other available job. A contrary result would severely weaken the disabled worker's statutorily guaranteed right to nondiscriminatory job opportunities. A disabled worker successfully surmounting the hiring obstacles could find his job threatened by arbitrary transfers. Thus, while the plaintiff's burden is greater in hiring cases, it is nevertheless similar to that of transfer cases. The major difference is that where reassignments are involved, the plaintiff has already established his qualifications by satisfactorily performing the job.

In *Holland,* the Washington Supreme Court correctly gave a broad construction to the Washington Law Against Discrimination. Requiring employers to make reasonable accommodation in job transfers to the limitations of disabled employees effectively carries out the state's legislative policy. The court's application of the reasonable accommodation standard and its explicit rejection of a *de minimus* effort test indicate that Washington employers will have to comply with stringent accommodation requirements. In some cases this may involve significant expenditure of time and money. But the special nature of handicap discrimination necessitates these costs if we are to integrate the disabled fully into society and foster full human development.

Joanne Whitehead