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BALANCING THE RIGHTS OF THE ALCOHOLIC EMPLOYEE WITH THE LEGITIMATE CONCERNS OF THE EMPLOYER: REASONABLE ACCOMMODATION VS. UNDUE HARDSHIP

Roger M. Sullivan, Jr.

I. INTRODUCTION

Over the course of the last two decades, assumptions regarding the causes of alcoholism have gradually changed. As a result of this process, alcoholism has generally come to be regarded as an illness as opposed to a volitionally inflicted problem. During this same time, both the federal government and the State of Montana have passed legislation intended to protect handicapped individuals from employment discrimination. Largely as a result of the developing notion that alcoholism is a disease, alcoholic employees have begun to avail themselves of the provisions of these laws. Moreover, in Montana the emerging tort of wrongful discharge now


Changing attitudes towards the use of alcohol, with attendant legal ramifications, are nothing new to American society. Recall the adoption of the eighteenth amendment to the United States Constitution in 1919, forbidding the “manufacture, sale, or transportation of intoxicating liquors,” and its subsequent repeal in 1933 by the ratification of the twenty-first amendment.


4. While the primary focus of this comment is on the alcoholic employee, it should be noted that similar legal rights and remedies exist for the drug addicted or mentally ill employee. Dubbed “hidden handicaps,” all three conditions cause similar problems for the employer. First, since such conditions are not readily apparent to employers, it can be difficult to make a threshold determination as to whether the employee is in fact a handicapped individual as contemplated by the employment discrimination laws. Second, such conditions often result in only sporadic problems, making it difficult to determine if such a handicap is significantly interfering with job performance. Thus, although each of the “hidden handicaps” raise considerations unique unto themselves (e.g., illegality of use of illicit drugs vs. legality of use of alcoholic beverages), the general framework for analysis set forth in this comment is largely applicable to all three conditions. See generally Spencer, supra note 1. For that reason, this comment examines cases in which the courts have construed the employment rights of both alcoholic and drug addicted employees.
provides such employees with an additional safeguard against employment discrimination.5

The protection from employment discrimination thus accorded the alcoholic employee is not, however, without limits. Both federal and state laws recognize the legitimate business concerns of the employer as a defense to a charge of employment discrimination. The employer is thereby protected from having to assume an undue hardship in accommodating the problems experienced by the alcoholic employee. Thus, in ruling on claims brought by alcoholic employees under these laws, the courts have developed methods of balancing the rights of employee and employer.

This comment examines the protections from employment discrimination that are afforded the alcoholic employee under federal and state law, as well as the legitimate business concerns that an employer can assert in defense of employment decisions affecting an alcoholic employee. In addition, this comment examines court decisions construing these laws.

II. EMPLOYMENT DISCRIMINATION CLAIMS BY ALCOHOLIC EMPLOYEES UNDER FEDERAL LAW

Initial efforts by the federal government to prohibit employment discrimination did not address discrimination of the handicapped. Title VII of the Civil Rights Act of 19646 prohibited employment discrimination only on the basis of sex, color, race, religion, or national origin.7 Likewise, the Age Discrimination in Employment Act of 19678 prohibited such discrimination against individuals between the ages of forty and seventy.9 Although the rights of the handicapped have been a long-term federal concern,10 not until the passage of the Rehabilitation Act of 1973 (Act)11 were

handicapped individuals protected by the federal government from employment discrimination.

A. The Rehabilitation Act of 1973

Dubbed the "civil rights act for the handicapped," Title V of the Act contains the major substantive employment discrimination provisions. Section 503 of the Act mandates that federal contractors and subcontractors take affirmative action "to employ and advance in employment qualified handicapped individuals." Even broader in scope, and thus relied on more often by handicapped persons, section 504 of the Act provides in relevant part: "No otherwise qualified handicapped individual in the United States, as defined in section 7(B) of this Act, 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."

While the Act on its face was not clear as to whether alcoholics and drug addicts were covered by the Act, regulations promulgated pursuant to the Act included alcoholism and drug addiction within the definition of "handicapped individual." Like-


14. Codified at 29 U.S.C. § 793(a) (1982), Section 503 of the Act 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 for the procurement of personal property and nonpersonal services (including construction) for the United States.

15. 29 U.S.C. § 794 (1982). Section 7(B) of the Act defines the scope of coverage afforded alcoholics and drug abusers. See 29 U.S.C. § 706(7)(B); see also text accompanying note 20, infra. It should be noted that under both sections 503 and 504, the receipt of federal assistance by the employer is a jurisdictional prerequisite for a claim under the Act. See Simpson v. Reynolds Metals Co., Inc., 629 F.2d 1226 (7th Cir. 1980).

16. The Department of Health, Education and Welfare promulgated regulations including alcoholics and drug addicts within the definition of "handicapped individual." See 45 C.F.R. pt. 84, app. A, at 404 (1978). Later in 1981, the Department of Labor also promulgated regulations which included alcoholics and drug addicts in the definition of "handicapped individual." Those regulations remain substantially the same today:

(a) "Handicapped individual" means any person who

(1) Has a physical or mental impairment which substantially limits one or
wise, the U.S. Attorney General in 1977 issued an opinion which concluded, after reviewing the legislative history of the Act, that Congress did intend to include alcoholics and drug addicts in the definition, thereby protecting them from discrimination. The implications of such inclusion had an unsettling effect on employers. In response, Congress in 1978 amended the Act to more specifically address the coverage provided alcoholics and drug addicts under sections 503 and 504:

For purposes of sections 503 and 504 as such sections relate to employment, such term does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others.

By explicitly excluding certain kinds of alcoholics and drug addicts, Congress implicitly recognized others as qualified for coverage under the Act. Even after amendment, however, the Act is not free of ambiguity in terms of the scope of coverage afforded alcoholic and drug addicted employees.

Assuming that the employee or job applicant qualifies under the definitional prerequisites of a “handicapped individual,” and also assuming that the employer is the recipient of the requisite federal assistance, then under regulations promulgated pursuant to the Act a qualified duty of reasonable accommodation devolves upon the employer. Such accommodation may range from modifi-

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29 C.F.R. § 32.3(a), (b)(iii) (1984).
18. See Comment, supra note 10, at 516 n.59.
21. See New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979), where, although the Supreme Court declined the opportunity to interpret § 504, the Court noted that "the language of the statute, even after its amendment, is not free of ambiguity." Id. at 581.
22. 45 C.F.R. § 84.12(a) (1984): "A recipient shall make reasonable accommodation to
cation of the employer's facility, to the restructuring of the handicapped employee's job. In determining whether a particular accommodation would impose an undue hardship on an employer, thereby rendering it an unreasonable accommodation, the regulations set forth the following considerations: "(1) The overall size of the recipient's program with respect to number of employees, number and type of facilities, and size of budget; (2) The type of the recipient's operation, including the composition and structure of the recipient's workforce; and (3) The nature and cost of the accommodation needed."

While under these regulations the reasonableness of a particular accommodation is made dependent on the relative size of the employer's operation, the Supreme Court in *Southeastern Community College v. Davis* made it clear that, under section 504 itself, no major accommodation can be implied. The *Davis* Court did, however, recognize that reasonable accommodations are within the contemplation of the Act. In light of *Davis*, the scope of the employer's duty to accommodate a handicapped employee remains unclear.

**B. The Elements of a Section 504 Case**

Before examining specific cases in which the federal courts

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23. 45 C.F.R. § 84.12(b) (1984): "Reasonable accommodation may include: (1) Making facilities used by employees readily accessible to and usable by handicapped persons, and (2) job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, the provision of readers or interpreters, and other similar actions."


25. 442 U.S. 397 (1979). *Davis* involved a section 504 claim by a hearing impaired individual, who was denied admission to the defendant's program on the basis of her handicap. *Id.* at 400. In rejecting the plaintiff's claim, the Court held that since the plaintiff was not able to meet all of the program's requirements in spite of her handicap she was not an "otherwise qualified" handicapped individual. *Id.* at 406. Moreover, the *Davis* Court ruled that under section 504 the defendant was under no obligation to make extensive modifications in its program in order to accommodate the plaintiff. *Id.* at 410.

26. *Id.* at 411.

27. While the *Davis* Court held that the defendant was under no obligation to make major modifications in its program in order to accommodate the plaintiff, the court did not rule out regulations which encompassed a reasonable duty to accommodate:

> It is possible to envision situations where an insistence on continuing past requirements and practices might arbitrarily deprive genuinely qualified handicapped persons of the opportunity to participate in a covered program. . . . Thus, situations may arise where a refusal to modify an existing program might become unreasonable and discriminatory.

*Id.* at 412-13.

have attempted to construe the effect of the Act on the employment rights of alcoholic and drug addicted individuals, this comment first briefly outlines the elements of a section 504 case.

Section 504 provides only conditional protection of handicapped individuals from employment discrimination. As such: "The pivotal issue is not whether the handicap was considered but whether under all of the circumstances it [the handicap] provides a reasonable basis for finding the plaintiff not to be qualified or not as well qualified as other applicants." To decide this issue, the courts have developed the following three-step process of analysis:

1) The plaintiff must establish a prima facie case by showing that he was an otherwise qualified handicapped person apart from his handicap, and was rejected under circumstances which gave rise to the inference that his rejection was based solely on his handicap;

2) Once plaintiff establishes his prima facie case, defendants have the burden of going forward and proving that plaintiff was not an otherwise qualified handicapped person, that is one who is able to meet all of the program's requirements in spite of his handicap, or that his rejection from the program was for reasons other than his handicap;

3) The plaintiff then has the burden of going forward with rebuttal evidence showing that the defendants' reasons for rejecting the plaintiff are based on misconceptions or unfounded factual conclusions, and that reasons articulated for the rejection other than the handicap encompass unjustified consideration of the handicap itself.

Under section 504, employers can assert several affirmative defenses in support of their decision either not to hire or to fire an unrehabilitated alcoholic or drug addict. First, the employer can argue that the "individuals current use prevents such individual from performing the duties of the job." Second, the employer can

29. The employment discrimination protections of section 504 apply only to an "otherwise qualified handicapped individual." 29 U.S.C. § 794 (1982). Excluded from that definition is "any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job or ... would constitute a direct threat to property or to the safety of others." 29 U.S.C. § 706(7)(B) (1982).


31. Pushkin v. Regents of the Univ. of Colo., 658 F.2d 1372, 1387 (10th Cir. 1981). This method of analysis is similar to, but not as strict as, that used by the courts in analyzing claims brought under Title VII. Id. at 1385, 1386. See also Dothard v. Rawlinson, 433 U.S. 321, 329 (1977).

32. Section 7(b) of the Act, 29 U.S.C. § 706(7)(B) (1982), provides these defenses by excluding from the definition of "handicapped individual" persons whose current use of alcohol or drugs either interferes with or is likely to interfere with job performance.

33. Id.
argue that the individual's current use "would constitute a direct threat to property or the safety of others." Finally, even if the employer cannot successfully assert either of the above defenses, the employer can avoid liability under the Act by demonstrating that the employment of the individual would require an accommodation which "would impose an undue hardship on the operation of its program."

C. Cases Construing the Application of Section 504 to Alcoholics and Drug Addicts

Davis v. Bucher was a significant early case construing the application of section 504 to drug addicts and to alcoholics by implication. The plaintiffs in Davis were recovered drug addicts to whom employment had been denied by the City of Philadelphia solely on the basis of their prior drug use. Thus, the key issue that emerged under the plaintiffs' section 504 claim was whether or not the plaintiffs were qualified handicapped individuals under the statute.

Although decided before the 1978 amendments to the Act, the Davis court used a definition of "qualified handicapped individual" that was consistent with the amended Act:

I emphasize... that the statute and regulation apply only to discrimination against qualified handicapped persons solely by reason of their handicap. If in any individual situation it can be shown that a particular addiction or prior drug use prevents successful performance of a job, the applicant need not be provided the employment opportunity in question.

After considering the Attorney General's Opinion and Department of Health, Education and Welfare regulations promulgated under

34. Id.
35. 45 C.F.R. § 84.12(a) (1984). Recall that in Davis the Supreme Court made it clear that any major modification of a program would constitute undue hardship. 442 U.S. at 410.
36. 451 F. Supp. 791 (E.D. Pa. 1978). Another early section 504 case of interest is Whitaker v. Board of Educ., 461 F. Supp. 99 (E.D.N.Y. 1978). In Whitaker the plaintiff was a college professor who was an admitted alcoholic, but who contended that his alcoholism was under control and not interfering with his assigned teaching responsibilities. The Whitaker court found these allegations sufficient to state a claim under section 504, and denied the defendant's motion to dismiss. Id. at 106-09.
37. The regulations at issue excluded both alcoholics and drug addicts from consideration for employment: "The name of an eligible shall be removed from an eligible list for any of the following reasons: . . . addiction to the intemperate use of intoxicating liquors or to the use of harmful drugs." City Civil Service Regulation 10.0910, quoted in Davis, 451 F. Supp. at 795.
39. Id. at 797 n.4.
section 504, the court concluded "that persons with histories of drug use, including present participants in methadone maintenance programs, are 'handicapped individuals' within the meaning of the statutory and regulatory language." On this basis, as well as on the basis of constitutional claims, the court enjoined the city from further use of the employment policy at issue and remanded the case to a neutral hearing examiner for the determination of damages.

In Simpson v. Reynolds Metals Company, Inc., the Seventh Circuit Court of Appeals used the Davis definitional analysis in evaluating the section 504 claim of the alcoholic plaintiff: "Individuals with current problems or histories of alcoholism or drug abuse qualify as 'handicapped individuals' under this definition unless their addiction or prior use can be shown to prevent successful performance of their jobs." Noting that the employer had made no showing that the plaintiff's alcoholism prevented the successful performance of his job, the court concluded that the plaintiff qualified as a "handicapped individual." Fatal to the plaintiff's section 504 claim, however, was the court's determination that he failed to establish any nexus between his discharge and federal financial assistance received by the employer as required under the Act. Hence, a necessary jurisdictional element was missing from the plaintiff's case, and on this basis the Simpson appellate court upheld the lower court's dismissal.

40. Id. at 796.
41. For a discussion of the Davis court's treatment of the plaintiffs' constitutional claims, see infra notes 50-53 and accompanying text.
42. Davis, 451 F. Supp. at 803-04. The appointment of the hearings examiner was necessitated by the plaintiffs' successful motion for class certification. Id.
43. 629 F.2d 1226 (7th Cir. 1980). The plaintiff in Simpson had been employed by the defendant for 29 years, during the entirety of which he suffered from alcoholism. Following unsuccessful treatment, the plaintiff was discharged after several unexcused absences. Id. at 1228.
44. Id. at 1231 n.8 (citing Davis, 451 F. Supp. at 796-97 n.4; Whitaker, 461 F. Supp. at 106 n.7).
45. Simpson, 629 F.2d 1232. In order for a federal court to have jurisdiction over an employer under section 504, the employment discrimination must occur under a "program or activity receiving Federal financial assistance." 29 U.S.C. § 794 (1982).
46. 629 F.2d 1232. In addition to asserting a claim under section 504, the plaintiff asserted a claim under section 503(a) of the Act, which requires that the contractor in any federal contract in excess of $2,500 "take affirmative action to employ and advance in employment qualified handicapped individuals." 29 U.S.C. § 793(a) (1982). Noting that section 503(b) provides for the administrative enforcement of section 503(a), the appellate court ruled that no private cause of action exists under section 503(a). Simpson, 629 F.2d at 1243-44.
D. Federal Constitutional Claims

An examination of several leading cases dealing with the due process and equal protection claims of alcoholic or drug addicted employees illustrates the problems and prospects of asserting such claims. Beyond its ruling based on section 504, the Davis court found that the city's policy of excluding alcoholics and drug addicts from consideration for employment violated the plaintiffs' constitutional rights to equal protection and due process. Applying the rational basis test to the plaintiffs' equal protection claim, the court found that the exclusion of the plaintiffs on the basis of their classification as former drug addicts served no legitimate governmental purpose. Thus, the court had "no hesitancy in terming a regulation which bars former users and addicts from city employment, without any consideration of the merits of each individual case, overbroad and irrational."

Likewise, the Davis court found the city's broad policy of exclusion violative of the plaintiff's due process rights since "the City had an obligation to at least give plaintiffs an opportunity to show that their former drug use would not have affected their ability to work to the City's satisfaction." However laudible the Davis court's decision to extend the mantle of constitutional protections to the plaintiffs, both the court's equal protection analysis and due process analysis are questionable.

1. Due Process

By its very terms, in order to sustain a claim under the due process clause there must be state action which deprives a "person of life, liberty, or property." The Davis court, however, did not identify any protected interest that was being denied the plaintiffs without due process. An examination of the Supreme Court decision relied on by the Davis court in making its due process deter-

47. As authority for the use of the rational relationship test the Davis court cited Johnson v. Robison, 415 U.S. 361 (1974), where the Supreme Court explained that under this test a classification must be reasonable and have a substantial relation to the object of the legislative action. The Johnson Court also stated that where a constitutional right of a suspect class is abridged by legislation, then the legislation would have to pass a strict scrutiny test, whereby the legislation must be justified by demonstrating that it serves a compelling state interest. Johnson, 415 U.S. at 374, 375 n.14.
49. Id. at 800.
50. U.S. CONST. amend. XIV, § 1 provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."
mination, *Cleveland Board of Education v. La Fleur,* emphasizes this deficiency in the *Davis* court's rationale. In *La Fleur* the Supreme Court ruled that the mandatory termination provisions contained in a school district's teacher maternity regulations violated the due process clause "because of their use of unwarranted conclusive presumptions that seriously burden the exercise of protected constitutional liberty." Unlike *Davis,* in *La Fleur* the Supreme Court clearly identified a protected liberty interest that was at stake: "The Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause."  

An opinion which stands in contrast to the flawed due process analysis used in *Davis* is *Whitaker v. Board of Higher Education of City of New York.* In *Whitaker* an alcoholic professor asserted a due process claim after he was denied tenure and his employment contract was not renewed. In denying the defendant's motion to dismiss, the *Whitaker* court noted that the plaintiff alleged facts which if proven could establish that he had been denied, in an arbitrary or capricious manner, both protected property and liberty interests. The property interest was premised on the plaintiff's allegation that he had a reasonable expectation of tenure, while the liberty interest was based on the allegation that the em-

51. 414 U.S. 632 (1974). By citing *La Fleur* the implication would naturally seem to be that a liberty interest was being denied. The *Davis* court, however, by making an oblique reference to employment status, seems to have assumed that a property interest was at stake. See *Davis,* 451 F. Supp. at 800.

52. 414 U.S. at 651.


55. *Id.* at 101.

56. In analyzing the plaintiff's claim of a protected property interest, the *Whitaker* court began by quoting from *Board of Regents v. Roth,* 408 U.S. 564 (1972), where the Supreme Court, in rejecting the claim asserted by a nontenured professor that he had a property interest in his job, noted: "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Id.* at 577. The *Whitaker* court, however, went on to note that in a companion case to *Roth,* *Perry v. Sindermann,* 408 U.S. 593 (1972), the Supreme Court recognized that the absence of . . . an explicit contractual provision may not always foreclose the possibility that a teacher has a "property" interest in reemployment. . . . A teacher . . . who has held his position for a number of years, might be able to show from the circumstances of this service—and from other relevant facts—that he has a legitimate claim of entitlement to job tenure."

*Id.* at 601-02. On the basis of *Perry,* the *Whitaker* court recognized that the plaintiff alleged that he had a property interest in his job. *Whitaker,* 461 F. Supp. at 105.
ployer’s action harmed his reputation and attached a stigma. The plaintiff contended that the defendant’s employment decision was arbitrary or capricious, because it was based on the mistaken belief that since the plaintiff was an alcoholic, he was unfit to teach. Thus, the Whitaker court properly found that the plaintiff had set forth a prima facie claim for the denial of due process.

2. Equal Protection

While the Davis court’s equal protection analysis is on firmer ground than its due process analysis, in light of subsequent case law developments it is not without problems. In support of its equal protection determination, the Davis court cited the federal district court opinion in Beazer v. New York Transit Authority. The plaintiffs in Beazer were recovering drug addicts, maintained on methadone, who were either discharged or not hired by the Transit Authority. In upholding the plaintiffs’ equal protection claim, the Beazer court concluded that a public entity such as the Transit Authority could not bar persons from employment on the basis of criteria which had no rational relationship to the demands of the jobs to be performed.

Although the Second Circuit Court of Appeals upheld the district court opinion, the United States Supreme Court reversed. In rejecting the lower court’s equal protection analysis, the Su-

57. The Whitaker court cited Roth in support of the recognition of such a liberty interest, noting that:
Roth made clear “that where [an individual’s] ‘good name, reputation, honor, or integrity is at stake’ or ‘the State, in declining to re-employ [that individual], imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities,’ . . . he may claim a deprivation of ‘liberty’ under the due process clause of the fourteenth amendment. Lombard v. Board of Educ., 502 F.2d 631, 637 (2d Cir. 1974), cert. denied, 420 U.S. 976, 95 S. Ct. 1400, 43 L.Ed.2d 656 (1975), quoting Board of Regents v. Roth, 408 U.S. at 573.”

Whitaker, 461 F. Supp. at 105.

58. Whitaker, 461 F. Supp. at 103.


60. Id. at 1033-35. In light of the Supreme Court’s subsequent reversal, this stands as an important factual distinction between Beazer and Davis. Compare New York City Transit Auth. v. Beazer, 440 U.S. 568, 572 n.3 and Davis, 451 F. Supp. at 794.

61. 399 F. Supp. at 1057. On this same basis, the Beazer court found a violation of the plaintiffs’ due process rights. Apparently lacking confidence in this theory, the plaintiffs later dropped this claim on appeal. See infra note 67. The acts complained of in Beazer arose before the passage of the Rehabilitation Act of 1973, thus foreclosing an action under section 504.


The Supreme Court noted the fact that the plaintiffs were still under treatment at the time that they were either discharged or denied employment,\textsuperscript{64} as well as the fact that the Transit Authority had a legitimate concern for safety.\textsuperscript{65} In light of these facts the Supreme Court found a rational basis to the employment policy at issue:

\textit{[T]he “no drugs” policy now enforced . . . is supported by the legitimate inference that as long as a treatment program (or other drug use) continues, a degree of uncertainty persists. Accordingly, an employment policy that postpones eligibility until the treatment program has been completed, rather than accepting an intermediate point on an uncertain line, is rational. It is neither unprincipled nor invidious in the sense that it implies disrespect for the excluded subclass.}\textsuperscript{66}

The Supreme Court in \textit{Beazer} limited its opinion to addicts still undergoing drug treatment.\textsuperscript{67} Thus, recovered addicts such as the plaintiffs in \textit{Davis}, could still conceivably prevail on an equal protection claim by arguing that the fact of their recovery would remove the legitimate inference of a rational basis from the employer’s policy.

\section*{III. Employment Discrimination Claims By Alcoholic Employees Under Montana Law}

Unlike the federal effort to combat employment discrimination,\textsuperscript{68} the State of Montana has addressed this problem through a unified scheme of antidiscrimination statutes contained in the Montana Human Rights Act.\textsuperscript{69} The comprehensive nature of the discrimination ban is reflected in the list of conditions which are protected by the Act: “The right to be free from discrimination because of race, creed, religion, color, sex, physical or mental handicap, age, or national origin is recognized as and declared to be a civil right.”\textsuperscript{70}

\begin{itemize}
\item \textsuperscript{64} \textit{Id.} at 572 n.3, 588 n.32.
\item \textsuperscript{65} \textit{Id.} at 593 n.40.
\item \textsuperscript{66} \textit{Id.} at 591-92. Noting that the plaintiffs below did not pursue their due process argument before the Supreme Court, the Court rejected it as meritless. \textit{Id.} at 592 n.38.
\item \textsuperscript{67} The Supreme Court explicitly limited its opinion to current users of drugs. \textit{Id.} at 573 n.3. Although \textit{Beazer} arose before the passage of the Rehabilitation Act of 1973, the Supreme Court in \textit{Beazer} did not rule out the possibility of section 504 providing employment discrimination protection for such individuals in the future. 440 U.S. at 581 n.20.
\item \textsuperscript{68} See supra notes 6-11 and accompanying text.
\item \textsuperscript{69} MONT. CODE ANN. tit. 49 (1983). Although not statutorily denominated as such, the antidiscrimination statutes contained in Title 49 of the Montana Code Annotated are commonly referred to as the “Montana Human Rights Act.” See, e.g., Martinez v. Yellowstone County Welfare Dep’t, --- Mont. ---, 626 P.2d 242, 245 (1981).
\item \textsuperscript{70} MONT. CODE ANN. § 49-1-102 (1983) (emphasis added). See also MONT. CODE ANN.
This section of the comment first examines the Montana statutory scheme as it relates to employment discrimination against alcoholics. This is followed by an examination of actions that have been brought by alcoholic employees under these statutes. Finally, this comment explores the implications of these actions for future claims brought by alcoholic employees under the emerging tort of wrongful discharge.

A. Montana's Statutory Framework

Montana's recognition as a civil right of freedom from discrimination based on physical or mental handicap explicitly includes "the right to obtain and hold employment without discrimination." In support of this right, employment discrimination on the basis of mental or physical handicap has been made unlawful, except when the reasonable demands of the position require that the employer make a distinction on the basis of the handicap. When such an exemption is claimed by an employer, however, it must be based on bona fide occupational qualifications, which are strictly construed. Further, under regulations promulgated pursuant to these statutes, employers in this state are under an affirmative obligation to make reasonable accommodations in the job in order to permit the hiring of otherwise qualified handicapped individuals.

§§ 49-2-303, -308 (1983). While the Montana Constitution also protects individuals from discrimination on the basis of most of the factors listed above, handicap discrimination is not among those factors listed in the constitution. See MONT. CONST. art. II, § 4, which provides in relevant part: "Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas."

None of these cases have been heard by the Montana Supreme Court. Nor are there any reported cases in which the state supreme court has dealt with due process or equal protection claims asserted by an alcoholic employee. In the employment context in general, however, the Montana Supreme Court has analyzed the state and federal due process claims of discharged employees on the basis of the United States Supreme Court's analysis in Board of Regents v. Roth, 408 U.S. 564 (1972) and Perry v. Sindermann, 408 U.S. 593 (1972). See Reiter v. Yellowstone County, ___ Mont. ___, 627 P.2d 845, 848 (1981). Likewise, the Montana Supreme Court merges state and federal precedent in analyzing equal protection claims. See, e.g., Johnson v. Sullivan, 174 Mont. 491, 498-99, 571 P.2d 798, 802 (1977). Hence, the Montana courts likely would be receptive to the federal court's analysis of constitutional claims brought by alcoholic employees discussed earlier. See supra notes 47-67 and accompanying text.

76. MONT. ADMIN. R. §§ 24.9.1404, -1405 (1980). See also J. REYNOLDS & L. TAYLOR, RIGHTS OF DEVELOPMENTALLY DISABLED MONTANANS FROM A TO Z (undated), distributed by the Developmental Disabilities/Montanans from A to Z (undated), distributed by the Developmental Disabilities/Montana Advocacy Program, Inc.
Similar to federal statutes and regulations, these state regulations recognize financial hardship and job safety as legitimate employer considerations in hiring a handicapped individual.

Although alcoholics are not explicitly included in the statutory definitions of either mental handicap or physical handicap the Montana Commission for Human Rights [Commission] has found alcoholism to be included under both definitions. On this basis, the Commission has accorded alcoholics protection from employment discrimination.

B. Montana Commission for Human Rights Cases

In In the Matter of the Application of American Indian Action Council, an Indian organization from Great Falls sought a declaratory judgment from the Commission on the status of alcoholics under Montana discrimination statutes. In analyzing this issue, the Commission first looked to the Alcoholism and Drug Dependence Act to discern state policy regarding alcoholics:

PHYSICAL HANDICAP DISCRIMINATION AS A REASONABLE DEMAND OF EMPLOYMENT

(1) (a) Bona fide occupational qualification exceptions as to physical handicaps, allowed as a reasonable demand of employment, will be interpreted narrowly.

The following situations do not warrant the application of a bona fide occupational qualification exception.

(i) The refusal to hire an individual because his/her physical handicap would require the employer to make some physical adjustments to accommodate the handicap, e.g., install a ramp for a wheel chair.

(ii) The refusal to hire an individual because of the preferences of co-workers, the employer, clients, or customers.

(b) Where the physical requirements of a physically handicapped person would force an extraordinary financial hardship upon an employer, a bona fide occupational qualification exception may exist.

(c) Where an individual's physical handicap would endanger the safety of himself or fellow workers a bona fide occupational qualification exception may exist.

See MONT. CODE ANN. § 49-2-101(13) (1983): "'Mental handicap' means any mental disability resulting in subaverage intellectual functioning or impaired social competence."

See MONT. CODE ANN. § 49-2-101(16) (1983), which provides in relevant part: "'Physical handicap' means a physical disability, infirmity, malformation, or disfigurement which is caused by bodily injury, birth defect, or illness, including epilepsy."


A second issue, on which the Commission made no ruling, was whether under the antidiscrimination statutes a hospital is required to render medical services to an alcoholic. American Indian Action Council, Order at 2-3.

It is the policy of the State of Montana to recognize alcoholism as an illness and that alcoholics and intoxicated persons may not be subjected to criminal prosecution because of their consumption of alcoholic beverages but rather should be afforded a continuum of treatment in order that they may lead normal lives as productive members of society. 84

Next, the Commission looked at the Act's definition of "alcoholic," which at that time was defined as "a person who habitually lacks self-control as to the use of alcoholic beverages, or uses alcoholic beverages to the extent that his health is substantially impaired or endangered or his social or economic function is substantially disrupted." 85 On the basis of these statutory provisions, the Commission determined that alcoholism is an illness and that an alcoholic suffers from both a mental and a physical handicap within the meaning of the antidiscrimination statutes. 86

In subsequent cases the Commission has relied on this determination in evaluating employment discrimination claims filed by alcoholics. In Ferres v. Granite County Sheriff's Department, 87 the Commission found that an applicant for a deputy sheriff position was denied employment on the basis of his alcoholism. Relying on its earlier ruling in American Indian Action Council, the Commission found this act violative of section 49-2-303 of the Montana Code Annotated. 88

In Fullerton v. Flathead County Commissioners, 89 the Com-


85. Formerly codified at MONT. REV. CODE § 80-2709 (1947). American Indian Action Council, Findings and Conclusions at 2. The statutory definition has been modified, and now provides: "'Alcoholic' means a person who has a chronic illness or disorder of behavior characterized by repeated drinking of alcoholic beverages to the extent that it endangers the health, interpersonal relationships, or economic function of the individual or public health, welfare, or safety." MONT. CODE ANN. § 53-24-103(1) (1983).

86. American Indian Action Council, Findings and Conclusions at 3-4, Order at 1-2.


88. Id. at 3-4. Although not denominated as such, the Commission applied an analysis similar to the three-step process used under federal law. See supra text accompanying note 31. The Commission first noted that the applicant established a prima facie case of employment discrimination; second, the Commission noted that the employer attempted to establish that the applicant was not hired for a legitimate nondiscriminatory reason; and finally, the Commission found that the employers' attempt to articulate a nondiscriminatory reason failed to overcome the applicant's prima facie case of discrimination. On judicial review, the District Court for the Third Judicial District affirmed the Commission's determination of discrimination, but remanded the case for the redetermination of damages. See Ferres v. Granite County Sheriff's Dep't, Case No. HpE 80-1289, Order Respecting Damages (Sept. 24, 1982).

89. Case No. SMsHpE 82-1683 (1983). Rulings on Exceptions, Findings of Fact, Con-
mission explicitly applied the three-step analysis used under federal discrimination law in evaluating an alcoholic employee's discrimination claim. Again relying on American Indian Action Council, the Commission first found that the discharged employee established a prima facie case by alleging discharge on the basis of her alcoholism. Next, the Commission noted that the burden shifted to the employer who articulated a legitimate nondiscriminatory reason for its action. Finally, the Commission found that the employee was able to prove that the reasons for discharge put forth by the employer were pretextual. On this basis, the Commission found that the employer engaged in unlawful employment discrimination.

In the three cases discussed above, the Commission has developed a sound methodology for evaluating the discrimination claims of alcoholic employees. Since Montana statutes clearly reflect the public policy determination to classify alcoholism as an illness, the Commission is on solid ground in treating alcoholism as a mental and physical handicap. Likewise, the methodology used by the Commission incorporates consideration of the employer's legitimate reasons for not hiring the handicapped individual. In the balance hangs the Commission's determination of whether the employer committed an act of unlawful discrimination. With the recent emergence of the tort of wrongful discharge, however, such a case is increasingly unlikely to end there.

90. Id. at 7-9. The Commission relied on McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1972) for this analysis. In McDonnell Douglas the Supreme Court used the three-step analysis in upholding the claim of racial discrimination filed by a black employee under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-17 (1982). Noting the similarity between Title VII and the antidiscrimination statutes contained in Title 49 of MONT. CODE ANN., the Montana Supreme Court has relied on federal employment discrimination case law, and specifically McDonnell Douglas, in construing Title 49. See Martinez v. Yellowstone County Welfare Dep't, , 626 P.2d 242, 245 (1981). Although Title VII is limited to prohibiting discrimination on the basis of race, color, religion, sex, or national origin, the physically and mentally handicapped are protected from discrimination under Title 49. Thus, use of federal precedent is appropriate in the handicapped discrimination context under Montana law.

91. Fullerton, Case No. SMsHpE 82-1683, at 7. The employer, a recovered alcoholic, alleged that she was discharged from her job as a clerk because of the employer's presumption that her reassociation with her ex-husband, also an alcoholic, would inevitably lead to renewed drinking problems.

92. Id. at 7-8. The employer alleged that the employee's discharge was due to her poor work history.

93. Id. at 8. This determination was reached by weighing the competing evidence.

94. Id. at 9.
C. Wrongful Discharge and the Alcoholic Employee

The tort of wrongful discharge was first recognized by the Montana Supreme Court in *Keneally v. Orgain*, where the court explained that:

[A] discharge by an employer in a contract terminable at will does not give rise to a claim for wrongful discharge in the ordinary sense, though the firing or the termination may have been unjustified. It is only when a public policy has been violated in connection with the wrongful discharge that the cause of action arises.

Although the Montana Supreme Court has subsequently indicated that standards of public policy may be derived from an array of sources, the court has explicitly recognized administrative rules and statutes as sources of public policy in wrongful discharge actions. Hence, both the Montana Human Rights Act and the regulations promulgated pursuant to it could be used by a discharged employee in bringing an action against the employer for wrongful discharge.

The leading case in this regard is *Owens v. Parker Drilling Co.* In *Owens* the supreme court not only found that the discrimination in employment statutes provided a solid basis for a wrongful discharge action by a physically handicapped individual, but the court also found that punitive damages could be recovered from such an action:

These statutes were specifically designed to protect handicapped persons from the denial of a substantial right to fair treatment in the employment relationship; such denial would result in economic harm to such persons and their families, as well as damage to their sense of self esteem. Violation of this statute warrants a claim for punitive damages if such violation is shown to be intentional or reckless.

Assuming that the Montana Supreme Court sustains the Commission's treatment of alcoholics as handicapped individuals under the Human Rights Act, alcoholics who are either discharged or not hired for nonlegitimate discriminatory reasons now can bring

95. 186 Mont. 1, 606 P.2d 127 (1980).
96. 186 Mont. at 6, 606 P.2d at 129.
98. See Nye, ___ Mont. at ___, 639 P.2d at 502.
99. See Owens, ___ Mont. at ___, 676 P.2d at 165.
101. Id. at ___, 676 P.2d at 165.
wrongful discharge actions against such employers.

IV. Conclusion

Under both federal and state law, alcoholism is now considered a handicap. Whether an alcoholic is thereby protected from discrimination in hiring or discharge depends on the consideration of competing legitimate employer concerns, including the capabilities of the individual to perform the job, safety, and undue hardship caused by accommodation. While in the first instance employers balance the competing considerations required under these laws, an aggrieved alcoholic can seek both administrative and judicial review of adverse employer decisions. Moreover, in Montana employers must now be wary of liability under the tort of wrongful discharge.

On one level, these laws saddle employers with yet another legal responsibility that is extraneous to their primary economic function. More fundamentally, however, these laws reflect a spirited attempt by our political system to resolve a significant human problem in a manner that seeks to strike a viable balance between the gainful employment of troubled individuals on the one hand, and the legitimate business concerns of the employer on the other.