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Future Disabilities Under New York's Human Rights Law

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FUTURE DISABILITIES UNDER NEW YORK'S HUMAN RIGHTS LAW

Many disabled[1] Americans face employment discrimination.[2] Legislation prohibiting this discrimination in the private sector is largely a matter of state law.[3] In New York, the Human Rights Law (the "Law") prohibits employment discrimination against the dis-

[1] Disability has been defined in many ways. The most common approaches define disability as the existence of a condition that interferes with a person's normal activities, or that limits an individual's ability to work. See International Center for the Disabled, The ICD Survey of Disabled Americans: Bringing Disabled Americans into the Mainstream ii-iii (1986) [hereinafter ICD Survey I].

[2] The effects of employment discrimination are highlighted by comparing the number of disabled people not working with the number of disabled people desiring work. For example, one study showed that 66% of unemployed disabled persons of working age said they would like to have a job. Id. at 4. Additionally, the Presidential Committee on Employment and the Handicapped has estimated that out of the 28 million adults with physical or mental handicaps, only 42% of them are employed as compared to 59% of the rest of the work force. See Jacobs, Employment Discrimination and the Handicapped: Some New Teeth for a "Paper Tiger"—The Rehabilitation Act of 1973, 23 How. L.J. 481, 483 n.5 (1980).

[3] Forty-nine states and the District of Columbia have passed human rights or antidiscrimination legislation that includes specific provisions prohibiting employment discrimination against the disabled, leaving only the Wyoming disabled without state protection. Ala. Code § 21-7-8 (1984); Alaska Stat. §§ 18.80.2201, 47.80.010 (1986); Ariz. Rev. Stat. Ann. §§ 41-1461 to -1463 (1985); Ark. Stat. Ann. § 82-2901 (Supp. 1985); Cal. Gov't Code § 12940(a) (West Supp. 1988); Colo. Rev. Stat. §§ 24-34-401 to -406, 24-34-801 (1982 & Supp. 1986); Conn. Gen. Stat. Ann. § 46a-60 (West 1986); Del. Code Ann. tit. 16, § 9501(b) (1983); D.C. Code Ann. §§ 6-1705, 6-1709 (1981); Fla. Stat. Ann. § 760.10 (West 1986); Ga. Code Ann. §§ 34-6A-1 to -6A-6 (1988); Haw. Rev. Stat. §§ 378-1 to -9 (1985); Idaho Code § 56-707 (Supp. 1988); Ill. Ann. Stat. ch. 68, paras.1-103, 2-101 to -105 (Smith-Hurd Supp. 1986); Ind. Code Ann. §§ 22-9-1-1 to -13 (West 1981 & Supp. 1986); Iowa Code Ann. § 601D.2 (West 1988); Kan. Stat. Ann. §§ 39-1105, 44-1009 (1986); Ky. Rev. Stat. Ann. §§ 207.130 to .230 (Michie/Bobbs-Merrill 1982); La. Rev. Stat. Ann. §§ 46:1951, 46:2251 to :2256 (West 1982 & Supp. 1986); Me. Rev. Stat. Ann. tit. 5, §§ 781-90, 4551-53, 4571-73 (1979 & Supp. 1986); Md. Ann. Code art. 49B § 16 (1986); Mass. Gen. Laws Ann. ch. 151B, § 4 (West 1982 & Supp. 1988); Mich. Comp. Laws Ann. §§ 37.1202 to .1209 (West 1985); Minn. Stat. Ann. §§ 363.01 to .04 (West 1966 & Supp. 1988); Miss. Code Ann. §§ 25-9-149 (Supp. 1987), 43-6-15 (1981); Mo. Ann. Stat. § 213.010 to .126 (Vernon Supp. 1988); Mont. Code Ann. § 49-2-303 (1987); Neb. Rev. Stat. §§ 48-1101 to 1109 (1984 & Supp. 1986); Nev. Rev. Stat. §§ 613.310 to .430 (1987); N.H. Rev. Stat. Ann. §§ 354-A:1 to :14 (1984 & Supp. 1987); N.J. Stat. Ann. §§ 10:5-1 to -42 (West 1976 & Supp. 1988); N.M. Stat. Ann. §§ 28-1-1 to -15, 28-10-1 to -12 (1987); N.Y. Exec. Law §§ 290-301 (McKinney 1982 & Supp. 1988); N.C. Gen. Stat. §§ 143-422.1 to -.3 (1987), 168A-1 to -12 (Supp. 1987); N.D. Cent. Code §§ 14-02.4-01 to -21 (Supp. 1987); Ohio Rev. Code Ann. §§ 4112.01 to .99 (Page 1980 & Supp. 1987); Okla. Stat. Ann. tit. 25, §§ 1101, 1301-06 (West 1987); Or. Rev. Stat. §§ 659.010 to .121, 659.400 to .435 (1987); Pa. Stat. Ann. tit. 43, §§ 951-55 (Purdon 1964 & Supp. 1988); R.I. Gen. Laws §§ 28-5-1 to -39 (1986 & Supp. 1987); S.C. Code Ann. §§ 43-33-510 to -580 (Law. Co-op. 1985 & Supp. 1987); S.D. Codified Laws Ann. § 3-6A-15 (1985); Tenn. Code Ann. § 8-50-103 (1980 & Supp. 1987); Tex. Rev. Civ. Stat. Ann. art. 5221k (Vernon 1987 & Supp. 1988); Utah Code Ann. §§ 34-35-1 to -8 (1988); Vt. Stat. Ann. tit. 21, §§ 495-97(e) (1978 & Supp. 1985); Va. Code Ann. §§ 51.01-40 to -46 (Supp. 1987); Wash. Rev. Code Ann. §§ 49.60.010 to .330 (1962 & Supp. 1988); W.

Va. Code §§ 5-11-1 to -19 (1987 & Supp. 1988); Wis. Stat. Ann. § 16.765 (West 1986), 111.31 to .395 (West 1978).

The only federal law that protects the disabled, the Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504, 87 Stat. 355 (codified at 29 U.S.C. § 794 (1982 & Supp. IV 1986)), is limited to federally funded programs. See 29 U.S.C. § 794:

> No otherwise qualified individual with handicaps in the United States, as defined by § 706(8) 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 . . .

The scope of the Rehabilitation Act is ambiguous. At present, federal courts disagree on whether federal funds must be earmarked for the employer accused of discrimination to constitute protection under the Act. Compare Foss v. Chicago, 817 F.2d 34 (7th Cir. 1987) (dismissing complaint brought by Chicago firefighters under the Rehabilitation Act because federal funding was not earmarked for the Chicago Fire Department) with Arline v. School Bd., 772 F.2d 759, 762-763 (11th Cir. 1985) (non-earmarked impact aid constituted financial assistance within the meaning of the Rehabilitation Act), aff'd on other grounds, 480 U.S. 273 (1987). The Rehabilitation Act was recently amended in the context of persons with contagious diseases. Specifically the amendment states:

> (C) [f]or the purpose of sections 503 and 504, as such sections relate to employment, such term does not include an individual who has a currently contagious disease or infection and who, by reason of such disease or infection, would constitute a direct threat to the health or safety of other individuals or who, by reason of the currently contagious disease or infection is unable to perform the duties of the job.

The Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28, 31-32 (1988) (to be codified at 29 U.S.C. § 706); S. 557, 100th Cong., 2d Sess., 134 Cong. Rec. 256 (daily ed. Jan. 28, 1988).

This change in the law has generally been viewed as consistent with the Supreme Court decision in School Bd. v. Arline, 480 U.S. 273 (1987) (individuals with contagious diseases are covered by the Rehabilitation Act if there is not a significant risk of infecting others), and would most likely be interpreted as codifying the judicial standards applicable to the Rehabilitation Act. See Report of The Presidential Commission on the Human Immunodeficiency Virus Epidemic 122 (June 24, 1988) [hereinafter Presidential Commission]; 134 Cong. Rec. H560-61 (daily ed. Mar. 2, 1988) (statement of Rep. Coelho); id. at H571 (statement of Rep. Jeffords); id. at H574 (statement of Rep. Owens); id. at H573 (statement of Rep. Weiss); id. at H575 (statement of Rep. Waxman); id. at H583-584 (statement of Rep. Edwards). Initially, there was some ambiguity as to whether persons who have contagious conditions, such as Acquired Immune Deficiency Syndrome ("AIDS"), and are asymptomatic, were protected by the new standards. See CRS Report for Congress, Legal Implications of the Contagious Disease or Infections Amendment to the Civil Rights Restoration Act, S. 557 (Mar. 14, 1988). Nevertheless, the Department of Justice, recently issued a memorandum stating that both asymptomatic and symptomatic HIV-infected persons are protected from employment discrimination under the amendment. See Memorandum from U.S. Department of Justice for Arthur B. Culvahouse, Jr., Counsel to the President, Re: Application of Section 504 of the Rehabilitation Act to HIV-Infected Individuals (Sept. 27, 1988).

Although Title VII, 42 U.S.C. § 2000e, prohibits employment discrimination in the private sector, it does not protect the disabled. See 42 U.S.C. § 2000e(2) (1982) ("It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual . . . because of such individual's race, color, religion, sex, or national origin . . . .").

There have been several attempts to amend the statute to include disability. An Amendment to Prohibit Discrimination Against the Handicapped, H.R. 192, 100th Cong., 1st Sess. (1987), was the most recent attempt to amend Title VII. The Subcommittee on Employment Opportunities began hearings on June 17, 1987, however, the bill languished in subcommittee and was not reintroduced. The Cancer Patients Employment Rights Act, H.R. 1546, 100th

abled,[4] making it unlawful to refuse to hire[5] any applicant on the basis of disability.[6]

In defining "disability," section 292(21) of the Law covers many conditions that do not prevent the applicant from performing the activities involved in a job in a reasonable manner.[7] This definition, however, does not mention future disabilities—conditions that do not affect current job performance, but will impair acceptable job performance in the foreseeable future.[8] This Note examines whether an employer's refusal to hire an applicant based on a future disability is included under the Law's antidiscrimination provisions.[9]

While future disabilities may be covered under a broad construction of the Law, it is equally plausible that a narrow construction would not include future disabilities in the statute's rubric. Since courts may hesitate to apply an expansive definition of disability,[10] this Note concludes that the New York legislature (the "Legislature") should amend the Law to expressly cover future disabilities.

Cong., 1st Sess. (1987), was also introduced, proposing specific protection for persons with histories of cancer. The bill also was stalled in subcommittee and has not been reintroduced. See generally Note, Employment Discrimination Against Cancer Victims: A Proposed Solution, 31 Vill. L. Rev. 1549 (1986) (discussing employment discrimination against cancer victims and the proposed legislative amendments to cure that discrimination). Recently, the Presidential Commission on AIDS recommended that federal antidiscrimination law should be expanded to cover the private sector. See Presidential Commission, supra, at 123.

[4] N.Y. Exec. Law §§ 290-301 (McKinney 1982 & Supp. 1988).

[5] The Law also makes it unlawful to discharge any current employee on the basis of a handicap. Id. This Note, however, is limited in scope to hiring.

[6] The statute states: "It shall be an unlawful discriminatory practice: (a) For an employer . . . because of . . . disability . . . to discharge from employment such individual or to discriminate against such individual in . . . [the] privileges of employment." Id. § 296(1)(a).

[7] Id. § 292(21).

[8] There is no definition for a time period constituting the "foreseeable future." For the purpose of this Note, "future disability" is defined as a condition that will be incapacitating after approximately five years.

There are many diseases which would fall into the category of "future disabilities." For instance, multiple sclerosis, a degenerative disease of the central nervous system, results in disability after ten years in fifty percent of the people afflicted with it. See Harrison's Principles of Internal Medicine 2098 (R. Petersdorf, R. Adams, E. Braunwald, K. Isselbacher, J. Martin & J. Wilson eds. 10th ed. 1983). Other examples of degenerating conditions which initially allow afflicted persons to function and could be characterized as future disabilities are systemic lupus erythematous, id. at 387-91; degenerative arthritis, id. at 1980; and chronic obstructive lung diseases, id. at 1545-51.

AIDS would also be considered a future disability. AIDS is a disease caused by a virus that attacks the body's immune system, leaving its victims unable to fight off a series of infections. See Green, The Transmission of AIDS, in AIDS and the Law 28 (S. Burris & H. Dalton & Yale AIDS Law Project eds. 1987).

[9] N.Y. Exec. Law §§ 290-301; see, e.g., City Can't Deny Police Job to One Who Passes "Agility" Test by Speculating that His Back Condition Will Disable Him in Future, N.Y. State L. Dig., Aug. 1987, at 1, col. 1.

[10] See infra notes 76-80 and accompanying text.

Part I of this Note discusses the development of protection against disability discrimination under the Law, finding a growing sensitivity to the problems of the disabled, leading to broader protection. Part II evaluates the two possible interpretations of the Law—one including future disabilities, the other excluding them. Part III examines court decisions concerning future disabilities. Part IV concludes that amending section 292(21) to include future incapacitating conditions under the definition of disability is warranted because of the possibility that a restrained judiciary will not opt for the broad construction. The explicit inclusion of future disabilities is further necessitated because the Acquired Immune Deficiency Syndrome[11] ("AIDS") crisis threatens to explode the number of future disabled. Finally, in Part V an amendment to section 292(21) is suggested to include future disabilities in the Law's coverage.

I. HISTORY OF THE ANTI-DISABILITY DISCRIMINATION LAW

When enacted in 1951, the Law was primarily a civil rights statute,[12] prohibiting discrimination based on "race, creed, color or national origin."[13] The Legislature later expanded the Law's scope to include sex,[14] age, and marital status.[15] In the early 1970s, the Legislature's sensitivity to discrimination focused on the disabled.[16]

A. *Disabled Rights*

In 1974, this sensitivity to discrimination caused the Legislature

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11 In the United States, there were 67,273 cases of AIDS reported as of July 11, 1988. AIDS Surveillance Update, July 27, 1988, New York City Dep't of Health AIDS Surveillance Unit. Twenty-three percent of the country's cases have been reported in New York City. Id.

12 See Act of Apr. 13, 1951, ch. 800, §§ 290-301, 1951 N.Y. Laws 1905, 1950-57.

13 Id. at 1951.

14 Act of Mar. 29, 1964, ch. 239, 1964 N.Y. Laws 1034.

15 Act of Aug. 9, 1975, ch. 803, 1975 N.Y. Laws 1249.

16 The Bill of Rights for the Handicapped was passed in March 1973. The bill "gives the right to compete equally for . . . employment without discrimination . . . ." The Bill of Rights for the Handicapped (copy on file at the Cardozo Law Review); see Ford, "New Deal" For Handicapped in Jobs, Housing, Recreation . . ., U.S. News & World Report, July 22, 1974, at 39 (profiling the "new spirit" of the handicapped and their "push" for increased civil rights); Ford & Dyer, The Handicapped-One of Our Largest Minorities, America, Mar. 20, 1971, at 284 (discussing handicapped as minority and calling for advances in their civil rights); Louviere, The Handicapped Are an Asset, Nation's Bus., May 1970, at 17 (advocates hiring handicapped workers); Handicapped Stage a Times Sq. Protest on Health Measures, N.Y. Times, Nov. 7, 1972, at 38, col. 3 (disabled men and women protest the Nixon Administration health policies); Montgomery, 5 Groups of the Disabled Plan Citywide Alliance, N.Y. Times, June 19, 1972, at 14, col. 4 (representatives of groups formed to assert the rights of the disabled participated in umbrella group conference); Washington: For the Record, N.Y. Times, Sept. 9, 1970, at 32, col. 5 (President Nixon declared National Employ the Physically Handicapped Week).

to amend the Law by enacting the Flynn Act, which prohibits discrimination against the disabled.[17] The amendment defined disability as "a physical, mental, or medical impairment . . . which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques."[18] Discrimination was prohibited except when a disability prevents the individual "from performing in a reasonable manner the activities involved in the job or occupation" at issue.[19] Although the amendment's purpose was to protect the disabled,[20] the standard for determining how far the statute's protection extends remains ambiguous.

B. *Relatedness Standard*

To determine whether a disability fell within the statute's protection, courts initally used the "relatedness standard":[21] coverage was limited to conditions that were unrelated to the applicant's ability to perform the desired job.[22] If the disability was job-related, then it was beyond the Law's protection; an employer could use it to refuse to hire an applicant.[23] Courts applying the relatedness standard did not examine or classify the degree of interference a particular disability

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17 See The Flynn Act, ch. 988, 1974 N.Y. Laws 2389. Passage of the Flynn Act represented the culmination of a three-year effort. "Since 1971 attempts to prohibit discrimination on the basis of mental or physical disabilities or handicaps have been the subject of more than two dozen bills in the Senate and the Assembly." Memo from Louis Lefkowitz to Governor Malcolm Wilson (Apr. 17, 1974), filed with An Act to Amend The Executive Law, In Relation to Discrimination Because of Disability, S. 4524-B.

18 N.Y. Exec. Law § 292(21) (McKinney 1982 & Supp. 1988).

19 Id. The State Division of Human Rights ("Division") noted that for this exclusion to apply, the disability in question must be related to a "bona fide occupational qualification." N.Y. Exec. Dep't, Div. of Human Rights, Memorandum of Law No. 576, at 4 (1974) [hereinafter Memorandum No. 576]. To establish a bona fide occupational qualification defense, the employer must show that the job qualifications are reasonably necessary to the job, and that there is a factual basis for believing that most people within the protected class would not be able to perform the job effectively, or that it is impossible or impracticable to determine job fitness on an individual basis. See Hahn v. City of Buffalo, 770 F.2d 12, 14 (2d Cir. 1985); see also State Div. of Human Rights v. Averill Park Cent. School Dist., 59 A.D.2d 449, 452, 399 N.Y.S.2d 926, 928 (3d Dep't 1977), aff'd, 46 N.Y.2d 950, 388 N.E.2d 729, 415 N.Y.S.2d 405 (1979) (people with hearing defects are not qualified for bus driving job).

20 See Memo from Sen. John Flynn to Hon. Michael Whiteman, Counsel to the Governor (Apr. 11, 1974), filed with An Act to Amend the Executive Law in Relation to Discrimination Because of Disability, S. 4524-B [hereinafter Memo].

21 See, e.g., *Averill Park*, 59 A.D.2d 449, 399 N.Y.S.2d 926.

22 The Flynn Act, ch. 988, 1974 N.Y. Laws 2389. To be entitled to the statute's protection, a job applicant's disability had to be unrelated to the job. If an applicant had a disability making him unqualified for a job, then that would rebut a presumption of discrimination and the employer would not be obligated to hire that applicant. See N.Y. Exec. Law § 292(21); see also Memo, supra note 20, at 1 (the Act does not preclude an employer from considering a handicap related to employment).

23 The Flynn Act, ch. 988, 1974 N.Y. Laws 2389.

would have on a job.[24] In fact, it was unnecessary for an employer to demonstrate that an applicant's condition actually interfered with performance—the mere potential for interference merited exclusion from the statute's protection.[25] Even the disabled person's showing that he could perform the job was immaterial.[26]

1. Individualized Standard

Realizing that the relatedness standard did not provide enough protection, the Legislature adopted a new standard.[27] The revision described the permissible exclusions as "physical, mental or medical conditions which do not prevent *the complainant from performing in a reasonable manner the activities involved in the job or occupation*

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24 See *Averill Park*, 59 A.D.2d 449, 399 N.Y.S.2d 926; see also Westinghouse Elec. Corp. v. State Div. of Human Rights, 49 N.Y.2d 234, 401 N.E.2d 196, 425 N.Y.S.2d 74 (1980) (job applicant with dermatitis denied job as janitor because he might work with chemicals exacerbating the skin condition); State Div. of Human Rights *ex rel.* Ghee v. County of Monroe, 48 N.Y.2d 727, 397 N.E.2d 1178, 422 N.Y.S.2d 373 (1979) (upholding denial of employment to applicant for position as maintenance mechanic due to applicant's shortened right leg; job description required applicant in good physical condition).

25 See *Westinghouse*, 49 N.Y.2d at 234, 401 N.E.2d at 196, 425 N.Y.S.2d at 74.

26 Five years after passage of the Flynn Act, the court of appeals affirmed an intermediate court's construction of the Law's relatedness standard in *Averill Park*, 46 N.Y.2d at 951, 388 N.E.2d at 730, 415 N.Y.S.2d at 405. The court affirmed five years of lower court precedent and the intermediate court's holding that if a disability was job related, then the courts lacked the statutory authority to determine whether the individual was actually able to perform the job. Under that narrow reading, which the court reasoned was required by the statute's plain language, there was no room to accommodate a handicap or to allow an applicant to demonstrate that his condition did not prevent him from functioning in a reasonable manner. For example, in *Averill Park*, a school bus driver was denied employment because of a hearing impairment. Applying the relatedness standard, the court found that the hearing impairment was a job related disability because job performance as a bus driver may be impeded by the applicant's hearing condition. *Averill Park*, 59 A.D.2d at 452, 399 N.Y.S.2d at 928. As interpreted, the standard did not compel examination of the alternatives available to ensure reasonable performance, such as the ability to prevent potential safety hazards by wearing a hearing aid to restore hearing to normal. Nor was the employer required to consider whether the particular individual's hearing was impaired to the level where it adversely affected his bus driving ability.

In interpreting the statute, the court used the plain meaning rule. The plain meaning rule states that when the statute's language is apparent, there can only be one construction of the statute. See 2A N. Singer, Sutherland Statutory Construction § 46.01, at 73-74 (4th ed. 1984). Nevertheless, a court may question the plain meaning rule if one section shows that another section expands the act or if it can be shown that the legislative intent is different from the plain meaning. Id. at 75.

27 See Act of July 10, 1979, ch. 594, 1979 N.Y. Laws 1169; Memo from Robert Abrams, Attorney General to Governor Hugh Carey, filed with An Act to Amend the Executive Law in Relation to Disability Under Article 15, S. 8152 (1979) ("[T]he bill provides a clearer standard to determine whether a specific complaint can involve the statute and will undoubtedly facilitate the handling of such complaints."); see also Gross, Labor Relations Law, 32 Syracuse L. Rev. 389, 396 (1981) (discussing legislative reaction to *Averill Park*).

sought."[28] The amendment employed an "individualized" standard: the employer now must show that the applicant's disability prevents reasonable job performance. Courts view each case by examining not only the specific disability, but also whether the disability will interfere with reasonable job performance.[29] This standard assures consideration of whether a person can reasonably perform the job and allows for the use of accommodation.[30] By requiring employers to consider each applicant's potential job performance, the individualized standard ensures a disabled person's right to discrimination-free employment.[31]

2. Perceived Disability

In 1983, the Legislature continued increasing its protection of disabled rights by amending the Law again,[32] broadening the definition of disability to include conditions "regarded by others as an impairment."[33] These conditions, known as "perceived disabilities," are based on people's false perceptions of a disability where no physical or mental condition exists. The amendment protects disabled job applicants from potential employers' misconceptions about their disabilities.[34]

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28 N.Y. Exec. Law § 292(21) (McKinney 1982 & Supp. 1988) (emphasis added).

29 See Miller v. Ravitch, 60 N.Y.2d 527, 532, 458 N.E.2d 1235, 1237, 470 N.Y.S.2d 558, 560 (1983) (unless a disability prevents an applicant from performing a job, it cannot form a basis for denying him a position).

30 "Reasonable accommodation means providing or modifying devices, services or facilities or changing practices or procedures in order to match a particular program or activity. Its essence is making opportunities available to handicapped person's on an individualized basis." See U.S. Comm'n on Civil Rights, Accommodating the Spectrum of Individual Abilities 139 (1983), reprinted in Collignon, The Role of Reasonable Accommodation in Employing Disabled Persons in Private Industry, in Disability and the Labor Market 201 (M. Berkowitz & M. Hill eds. 1986).

Accommodation can range from an employee-supplied hearing aid or flexible work hours to the construction of ramps or the redesign of office space for increased accessibility. See Collignon, supra, at 207-08. Thirty-five percent of disabled workers state that their employer has had to make an accommodation for their disability. ICD Survey I, supra note 1, at 7.

31 Under the new individualized standard, the *Averill Park* facts would result in a finding of disability discrimination unless the employer demonstrated that the applicant's hearing was impaired to the extent that it precluded her from driving a bus or that use of a hearing aid could not correct the impairment. If the employer was not able to demonstrate interference with the applicant's ability to perform reasonably, then the applicant would be entitled to the Law's protection. See State Div. of Human Rights *ex rel.* Giannavola v. Le Roy Cent. School Dist., 107 A.D.2d 153, 485 N.Y.S.2d 907 (1985); *Ravitch*, 60 N.Y.2d at 528, 458 N.E.2d at 1237, 470 N.Y.S.2d at 560.

32 Act of Aug. 8, 1983, ch. 902, 1983 N.Y. Laws 2556.

33 N.Y. Exec. Law § 292(21) (McKinney Supp. 1988).

34 See Leonard, AIDS and Employment Law Revisited, 14 Hofstra L. Rev. 11, 22 (1985). The New York Legislature made the same policy choice as the federal government and other states that amended their antidiscrimination statutes, using language such as having "a record

For example, consider the person with a history of cancer.[35] Though the disease may not recur and the person does not have a lifestyle impediment[36] resulting from the disease, employers often regard cancer history as a disability.[37] The employer might use this history to deny employment.[38] Here, the history would be considered a perceived disability and the person would be protected by the Law.[39] This amendment illustrates the Legislature's continued recognition of the need to vigilantly protect the disabled from employment discrimination.[40]

II. FUTURE INCAPACITY AND THE HUMAN RIGHTS LAW

Discrimination based on a future incapacitating condition is the latest manifestation of disability discrimination.[41] The Law's defini-

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of such impairment." Leonard, Employment Discrimination Against Persons with AIDS, 10 U. Dayton L. Rev. 681, 691 n.40 (1985); see also Black v. Marshall, 497 F. Supp. 1088 (D. Haw. 1980) (amendments to Rehabilitation Act of 1973, 29 U.S.C. § 793 (Supp. III 1985), prohibit employment discrimination based on employers' perceptions).

35 See Canfield, Cancer Patients' Prognosis: How Terminal Are Their Employment Prospects?, 38 Syracuse L. Rev. 801 (1987) (employment prospects and discrimination faced by people who have survived cancer); see also Note, supra note 3, at 1551, 1565-70 (proposed amendments to federal law to protect people with cancer histories from employment discrimination).

36 For the purposes of this Note, a lifestyle impediment is a condition that (1) interferes with either a person's ability to perform a job, or (2) significantly alters a person's ability to function in society.

37 See Canfield, supra note 35, at 803-07 (employers' reasons for considering cancer history a disability).

38 Id. at 803.

39 See N.Y. Exec. Law § 292(21) (McKinney 1982 & Supp. 1988). Prior to the 1983 amendment, the First Department recognized people with cancer histories as disabled. See Goldsmith v. New York Psychoanalytic Inst., 73 A.D.2d 16, 425 N.Y.S.2d 561 (1st Dep't 1980).

Another example of perceived disability would be an applicant who has tested HIV positive for the AIDS virus. The positive test alone would not have any effect on an individual's physical condition or ability to perform a job. See Green, supra note 8, at 29-30; see also infra notes 123-24 and accompanying text (explaining AIDS). Nevertheless, employers and other employees might perceive the positive test as a disability. In this situation, an employer would be barred from refusing to hire the applicant because of the positive test.

The courts have not yet ruled on whether testing HIV positive constitutes a perceived disability. The Division has stated that AIDS is a protected disability under the Law. See Cecere, Working with AIDS, The Brief 6, 9 (Summer 1987). Further, the Divison has examined the issue in Doe v. Westchester County Medical Center, State Div. of Human Rights, No. IB-P-D-87-117683, slip op. at 3 (Oct. 23, 1987), finding that there was probable cause for unlawful discrimination when a hospital denied employment to a pharmacist who tested HIV positive. Id.; see also Leonard, Employment Law, supra note 34, at 26-27 (in jurisdictions with "perceived" disability definition, persons who are at risk for AIDS and those who test HIV positive should be considered disabled).

40 N.Y. Exec. Law § 292(21) (McKinney Supp. 1988).

41 See infra notes 77-80 and accompanying text.

tion of disability does not mention "future disability,"[42] as a result, it is questionable whether these conditions are covered by the statute.

Two interpretations of the Law are possible. Read broadly, courts could construe the current definition to protect future disabilities.[43] For instance, an applicant with AIDS would be protected for as long as the person could adequately perform the job. The broad reading considers only the applicant's current job performance. Conversely, a narrow reading would protect only present, not future disabilities.[44] This reading would bar the applicant with AIDS from protection. By demonstrating that the condition would result in a future inability to perform reasonably, the employer would have a valid reason not to hire the applicant.

A. *A Narrow Construction*

The statute's express language supports the narrow construction, as future disability is not mentioned. Based on the plain meaning rule,[45] the Law cannot be read as encompassing future disabilities. A broad reading would be tantamount to amending the statute—a legislative, not judicial, function.[46]

One can find support for a narrowing argument in section 300[47] of the Law which mandates broad construction to accomplish the Law's purposes.[48] Nevertheless, because protection against discrimination based on future incapacitating conditions is not a statutorily defined purpose of the Law, section 300's mandate may not be construed as applying to future disability.[49]

Further, lack of legislative history referring to future disabilities favors a narrow interpretation.[50] The legislative history of section

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42 The current definition states: "[t]he term disability . . . shall be limited to disabilities which do not prevent the complainant from performing in a reasonable manner the activities involved in the job or occupation sought or held." N.Y. Exec. Law § 292(21) (McKinney Supp. 1988).

43 See Memorandum No. 576, supra note 19, at 4; see infra notes 74-75 and accompanying text.

44 See State Div. of Human Rights *ex rel.* Granelle, 118 A.D.2d 3, 6, 504 N.Y.S.2d 92, 97 (1st Dep't 1986), rev'd, 70 N.Y.2d 100, 510 N.E.2d 799, 517 N.Y.S.2d 715 (1987).

45 2A N. Singer, supra note 26, § 46.01, at 73-74.

46 Id. at 74 (Supp. 1988).

47 N.Y. Exec. § 300 (McKinney 1982 & Supp. 1988).

48 The Law's purposes are to eliminate and prevent discrimination in employment, places of public accommodation, education, and housing. N.Y. Exec. Law § 290(3).

49 See N.Y. Exec. Law § 292(21) (defines statute's protection regarding employment law). But see infra notes 55-70 (arguing for broad interpretation of the Law using § 300 mandate).

50 See, e.g., 2A N. Singer, supra note 26, § 48.01, at 278 (when legislative history is ambiguous or scant, a court should look to a statute's plain language).

292(21) is limited to the sponsor's memorandum[51] and additional bill memoranda filed with the Flynn Act.[52] Some authorities argue that these sources are of limited aid in interpreting legislation.[53] Nevertheless, although the sponsor's bill memorandum does discuss the protection for the disabled from employment and other types of discrimination, it does not mention future disability.[54] A thorough search of additional bill memoranda filed with the Flynn Act provides no further insight into the question of whether future disability was ever considered. Therefore, because the legislature did not provide such protection it would thus be beyond the court's authority to protect people with future incapacitating conditions.

B. *A Broad Construction*

Despite the arguments for a narrow interpretation, construction of the Law does not proceed in a vacuum. First, since the Law is remedial,[55] courts should liberally construe it.[56] Second, disabilities

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51 When a bill is introduced in the New York Legislature, its sponsor must include a memorandum stating the purposes and intent of the bill. See Lane, Legislative Process and Its Judicial Renderings: A Study in Contrast, 48 U. Pitt. L. Rev. 639, 646 (1987). Some authorities question the reliability of these memos. Id. Additionally, such memos are sometimes vague and unspecific—the goal is principally to give general notice of the bill's purpose. Id.

52 Additional memoranda filed with the bill jacket and any floor debates also constitute the official legislative history. These memoranda are from legislators, divisions of government, and concerned constituents. Yet because the documents are often vague, their reliability is questionable. Id. The other materials filed with the Flynn Act include letters from constituents and memos from the different divisions of government. See Bill Jacket for S. 4524. Further, the legislature did not hold a floor debate when deciding this bill.

53 Some authorities believe that in New York legislative intent can only be determined by the statutory language. "Very rarely will a bill memo, committee report, or floor speech offer reliable insight into legislative intent." See Lane, supra note 51, at 651.

54 Memo, supra note 20. "Persons with a physical handicap are often unjustifiably denied employment, housing accommodations and other rights in society because of a handicap which does not justify such denial." Id. at 2.

55 See N.Y. Exec. Law §§ 290-300 (McKinney 1982 & Supp. 1988). This bill was enacted primarily as a civil rights law. See supra notes 12-20 and accompanying text. Civil rights acts that are remedial should be liberally construed so that their objectives may be realized to the fullest possible extent. Courts generally favor broad and inclusive application of statutory language. This policy has been applied in determining questions such as what activities or circumstances were subject to prohibition against discrimination, which persons were protected against discrimination, and what acts violated a given statute. See 3A N. Singer, Sutherland Statutory Construction § 72.05, at 591 (4th ed. 1986 & Supp. 1988).

56 N.Y. Statutes § 92 (McKinney 1971 & Supp. 1988); see, e.g., All Seasons Resorts, Inc. v. Robert Abrams, 68 N.Y.2d 81, 86-87, 497 N.E.2d 33, 35, 506 N.Y.S.2d 10, 12-13 (1986) (to give effect to its "remedial purpose," statute protecting the public from fraudulent exploitation of securities must be liberally construed); Klonowski v. Department of Fire, 58 N.Y.2d 398, 403, 448 N.E.2d 423, 425, 461 N.Y.S.2d 756, 758 (1983) (disability retirement statute for firemen found to be remedial and therefore should be construed liberally); Brabaw v. Robert Miller Constr. Inc. (*In re* Burns), 55 N.Y.2d 501, 508, 435 N.E.2d 390, 393, 450 N.Y.S.2d 173, 176 (1982) (liberally construing workmen's compensation law because it is "a remedial statute

from many diseases often develop gradually.[57] Unless the statute is read broadly, employers would be able to deny employment based on an existing condition that had not yet produced any job-related incapacitation.[58] Third, section 300 of the Law mandates liberal construction to accomplish its purposes,[59] codifying the legislative intent that the Law should be interpreted broadly to remedy discrimination.[60] Thus, future disabilities should be included in the realm of the Law's protection.

This third argument is supported by the State Division of Human Rights ("Division")[61] guidelines, released just two weeks after the Flynn Act's promulgation, which explicitly included future incapacitating conditions within the statutory meaning of disability.[62] The guidelines stated: "The Human Rights Law does protect an individual with a disease involving future risk so long as the disease does not presently interfere with his ability to perform."[63] While these guidelines are not statutorily mandated, their contemporaneous release is indispensable in determining the Law's coverage, especially in the absence of a reliable legislative record.[64] If the Legislature had not intended the Law to encompass future disability, then the Division would not have specifically included future disability within its guidelines.

Fourth, while the legislative history is limited, the amendments to the Law indicate a trend toward increasing protection of the dis-

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serving humanitarian purposes"); Gaines v. City of New York, 215 N.Y. 533, 539, 109 N.E. 594, 596 (1915) (when a statute is remedial "[i]ts broad and liberal purpose is not to be frittered away by any narrow construction").

57 See supra note 8 and accompanying text; see, e.g., infra notes 123-25 and accompanying text (describing development of AIDS).

58 See State Div. of Human Rights v. Xerox Corp., 65 N.Y.2d 213, 219, 480 N.E.2d 695, 698, 491 N.Y.S. 2d 106, 109 (1985).

59 N.Y. Exec. Law § 300 (McKinney 1982 & Supp. 1988); see id. § 290(3) (describing the Law's purposes).

60 Id. § 290(3).

61 The Division is an agency empowered to implement and administer the Law. "The division shall formulate policies to effectuate purposes of this article and may make recommendations . . . in aid of such policies and purposes." N.Y. Exec. Law § 294 (McKinney 1982). The Human Rights Division also has powers "[to] develop human rights plans and policies for the state. . . ." Id. § 295(9).

62 Memorandum No. 576, supra note 19, at 4. The Flynn Act was passed on June 15, 1974 and signed into law on June 30, 1974. See The Flynn Act, ch. 988, 1974 N.Y. Laws 2389. The Division Guidelines were released July 10, 1974. See Memorandum No. 576, supra note 19, at 11. Both became effective Sept. 1, 1974.

63 Memorandum No. 576, supra note 19, at 4.

64 Although statutory construction is a judicial function, the court can be aided by "the way a statute is interpreted" and enforced by those "public officers charged within its administration." See N.Y. Statutes § 129 (McKinney 1971).

abled's rights.[65] The Law's scope has been broadened twice since the Flynn Act.[66] Both amendments demonstrate a heightened awareness to changing needs of disabled New Yorkers.[67] Since the needs of the disabled have once again changed,[68] interpreting the Law to include future incapacitating conditions is another step forward in protecting against employer discrimination.

The arguments favoring a broad construction, especially when viewed in light of the statutory language mandating it,[69] are more forceful than arguments for a narrow construction. The contemporaneous release of the Division's guidelines, supporting a broad construction, and the legislative trend toward expanding the statute,[70] also indicate that future disabling conditions should be included within the definition of disability.

III. JUDICIAL INTERPRETATION

Initial judicial comment on the Law supported broad interpretation. The New York Court of Appeals examined the issue of future disability in *State Division of Human Rights v. Xerox Corp.*,[71] a case in which a job applicant was denied employment as a computer programmer because of "a statistical likelihood that her obese condition would produce impairments in the future."[72] While it decided the case on other grounds,[73] the court indicated that future disability was not a ground for job denial under the 1974 statute. The court of appeals observed that:

> Fairly read, the statute covers a range of conditions varying in degree from those involving the loss of a bodily function to those which are merely diagnosable medical anomalies which impair bodily integrity and thus may lead to more serious conditions in the future. Disabilities, particularly those resulting from disease, often develop gradually and, under the statutory definition, an employer cannot deny employment simply because the condition has been detected before it has actually begun to produce deleterious

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65 See supra text accompanying notes 27-40.

66 See Act of July 10, 1979, ch. 594, 1979 N.Y. Laws 1169; Act of Aug. 8, 1983, ch. 902, 1983 N.Y. Laws 2556.

67 See supra notes 27-40 and accompanying text.

68 See infra notes 123-25 and accompanying text (AIDS epidemic is new development meriting continued expansion of the Law).

69 N.Y. Exec. Law § 300 (McKinney 1982).

70 See supra notes 27-40 and accompanying text.

71 65 N.Y.2d 213, 480 N.E.2d 695, 491 N.Y.S.2d 106 (1985).

72 Id. at 217-18, 480 N.E.2d at 697, 491 N.Y.S.2d at 108.

73 Applying the "relatedness standard," see supra notes 21-26 and accompanying text, the court held that obesity was not related to the applicant's job. *Xerox*, 65 N.Y.2d at 218, 480 N.E.2d at 697-98, 491 N.Y.S.2d at 108-09.

effects.[74]

This affirmed the Division's interpretation of the Law.[75]

Two years later, in *City of New York v. State Division of Human Rights ex rel. Granelle*,[76] the appellate division adopted a narrow view of the Law, excluding people with future incapacitating conditions from protection.[77] The intermediate court upheld the New York City Police Department's refusal to hire an applicant with an asymptomatic, potentially degenerative back condition.[78] The court of appeals, however, reversed the intermediate court, finding that there was insufficient proof that the applicant's condition would result in his being unable to reasonably perform his police duties in the future.[79] It did not decide whether a reasonable expectation of a future incapacitating condition would be valid grounds for denial of employment under the Law.[80] Nor did the court comment on the appellate division's interpretation of the Law.

Though reversed for insufficient proof,[81] the appellate division's argument merits attention. The court's ruling was based on a broad construction of section 50(4)(b) of the Civil Service Law which the court interpreted as permitting municipal entities to discriminate on the basis of future disability.[82] Applying an *in pari materia* analysis[83]

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74 Id. at 219, 480 N.E.2d at 698, 491 N.Y.S.2d at 109.

75 Three years later, the First Department also broadly construed the Law, stating that an "unspecified future" incapacity did not constitute grounds for job denial. Carrero v. New York City Hous. Auth., 116 A.D.2d 141, 146, 500 N.Y.S.2d 246, 250 (1st Dep't 1986).

76 118 A.D.2d 3, 504 N.Y.S.2d 92 (1st Dep't 1986), rev'd on other grounds, 70 N.Y.2d 100, 510 N.E.2d 799, 517 N.Y.S.2d 715 (1987).

77 *Granelle*, 118 A.D.2d at 9, 504 N.Y.S.2d at 96. Specifically, the First Department stated that it was not bound by the court of appeals's interpretation of § 292(21) in *Xerox* because that language was dictum. Id. at 8-9, 504 N.Y.S.2d at 95-96.

78 Id. at 9, 504 N.Y.S.2d at 96. At a hearing before an Administrative Law Judge ("ALJ"), the Police Department argued that Granelle should be refused employment because his back condition could interfere with performance of a policeman's job in the future. See State Division of Human Rights *ex rel.* Granelle v. City of New York, Index No. E-D-68698-80, at 5 (New York State Div. of Human Rights 1983), rev'd, 118 A.D.2d 3, 504 N.Y.S.2d 92, rev'd, 70 N.Y.2d 100, 510 N.E.2d 799, 517 N.Y.S.2d 717 (1987).

79 *Granelle*, 70 N.Y.2d at 107, 510 N.E.2d at 802, 517 N.Y.S.2d at 718.

80 "We find it unnecessary to consider whether a reasonable expectation that Granelle will be unfit to continue to perform the duties of a police officer, if established, would be a valid basis for employment disqualification under the Human Rights Law." 70 N.Y.2d at 107 n.2, 510 N.E.2d at 802 n.2, 517 N.Y.S.2d at 718 n.2.

By avoiding the question, the court of appeals left the problem of future disability unresolved. If the *Granelle* court had analyzed the intermediate court's decision, then it would have alerted the legislature to the statute's vagueness. Unfortunately, the court dismissed the issue. Id. Even though the court of appeals refused to address the question of future disability, the *Granelle* case highlights the ambiguities in the Law.

81 *Granelle*, 70 N.Y.2d 100, 510 N.E.2d 799, 517 N.Y.S.2d 715.

82 The Civil Service Law stated:

The state civil service department and municipal commissions may refuse to ex-

to avoid potential conflict, the court held that the Law must be read as "recognizing [an employer's] right to consider the risk of future disability" as grounds for job denial.[84] This ruling reversed the Administrative Law Judge's finding that the Law had implicitly repealed this section of the Civil Service Law.[85] It also was in direct conflict with the court of appeal's dictum in *Xerox* that the statute protected disabled persons with future incapacitating conditions.

The appellate division's reliance on an *in pari materia* analysis fundamentally flaws its finding.[86] This rule of statutory construction states that when two statutes have a like purpose and contain language that is identical or nearly identical, the interpretation of one statute guides the interpretation of the other.[87] Section 50(4)(b) of the Civil Service Law was enacted to provide parameters for hiring civil service employees,[88] while section 292(21) of the Law was enacted to protect disabled persons seeking employment. These statutes do not serve a common purpose, nor is the statutory language identical.[89] Thus, applying an *in pari materia* analysis is inappropriate. Consequently, the appellate division's reasoning does not provide support for a narrow construction of the Law.

The court of appeals could resolve the future disability issue by affirming its prior support of the Division's interpretation of the Law.[90] If the court of appeals conclusively construes the statute, then its interpretation may have a significant adverse economic impact on employers and their ability to hire at will,[91] as well as a favorable impact on the disabled.[92] Considering the issue to be one that is more

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> amine an applicant, or after examination to certify an eligible . . . who is found to have a physical or mental disability which renders him unfit for the performance or duties of the position in which he seeks employment, or which *may reasonably be expected to render him unfit to continue to perform the duties of such position*
> . . . .

N.Y. Civ. Serv. Law § 50(4)(b) (McKinney 1983) (emphasis added).

83 See infra note 87 and accompanying text.

84 State Divison of Human Rights *ex rel.* Granelle, 118 A.D.2d 3, 9, 504 N.Y.S.2d 92, 96 (1st Dep't 1986).

85 The ALJ found that the Police Department's reliance on the Civil Service Code was in conflict with the Law. *Granelle*, 118 A.D.2d at 6-7, 504 N.Y.S.2d at 94.

86 Id. at 9, 504 N.Y.S.2d at 96.

87 See 2A N. Singer, supra note 26, §§ 51.02 to .03.

88 N.Y. Civ. Serv. Law § 50(4)(b) (McKinney 1983 & Supp. 1988).

89 Compare N.Y. Exec. Law § 292(21) (McKinney 1982 & Supp. 1988) (quoted supra note 42) with N.Y. Civ. Serv. Law § 50(4)(b) (McKinney 1973 & Supp. 1988) (quoted supra note 82).

90 See supra text accompanying notes 63-64 & 74-75.

91 See infra notes 103-19 and accompanying text.

92 Some courts might be reluctant to infringe the disabled's rights by definitively narrowing section 292(21), as the appellate division did in *Granelle*. Nevertheless, many courts find that

appropriately addressed by the Legislature,[93] the court may either hesitate to construe the Law conclusively, or it may construe it narrowly.

This hypothesis is bolstered by the Legislature's prior action to amend a court's conservative construction of section 292(21).[94] In 1979, the Legislature expanded the court's plain meaning construction of the Law (the relatedness standard),[95] amending the statutory exclusion to include those disabilities that could be shown "to prevent the complainant from performing [the job] in a reasonable manner."[96] This amendment changed the court-made relatedness standard to an individualized standard which provided broader coverage.[97] Faced again with a restrained judiciary,[98] the legislature must act to increase protection.

IV. PREVENTING FUTURE DISABILITY DISCRIMINATION

A. *Arguments Favoring Broad Construction*

Preventing future disability discrimination under the Law benefits society in two ways. First, disabled workers, as productive mem-

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construing a statute only by its plain meaning and interpreting it narrowly comports with the separation of powers doctrine. See, e.g., People v. Marrero, 69 N.Y.2d 382, 507 N.E.2d 1068, 515 N.Y.S.2d 212 (1987) (mistake-of-law statute, narrowly construed); Ball v. State, 52 A.D.2d 47, 382 N.Y.S.2d 835 (3rd Dep't 1976), aff'd, 41 N.Y.2d 617, 363 N.E.2d 323, 394 N.Y.S.2d 597 (1977) (absent clear legislative intent, statute should be narrowly construed).

93 Courts often consider extending a statute to be a legislative, not judicial function:

> [Courts] are confined by the nature and scope of the judicial function in its particular exercise in the field of interpretation. They are under the constraints imposed by the judicial function in our democratic society. . . . To go beyond it is to usurp a power which our democracy has lodged in its elected legislature.

F. Frankfurter, Some Reflections on the Reading of Statutes 13 (1947).

94 See supra notes 27-31 and accompanying text (discussing amendment of relatedness standard to individualized standard).

95 See supra note 26.

96 N.Y. Exec. Law § 292(21) (McKinney 1982 & Supp. 1988).

97 State Div. of Human Rights v. Averill Park Cent. School Dist., 46 N.Y.2d 950, 388 N.E.2d 729, 415 N.Y.S.2d 405 (1979); see Governor's Program Bill Memorandum, filed with An Act to Amend the Executive Law, in Relation to Disability Employment Under Article Fifteen, A. 8151 (June 1979); see also Letter from Harold Unterburg, State Advocate for the Disabled, to Richard A. Brown, Counsel to the Governor, filed with An Act to Amend the Executive Law, in Relation to Disability Employment Under Article Fifteen, A. 8151 (June 22, 1979) (change in law is required because the court's interpretation of 1974 Law was too conservative); Gross, supra note 27, at 394-96 (amendment of § 292(21) viewed as legislative reaction to *Averill Park*).

98 The court's restraint in the future disability area is demonstrated by *Xerox* and *Granelle*. In the first case, the court of appeals addressed the issue in dictum. Divison of Human Rights v. Xerox Corp., 65 N.Y.2d 213, 219-20, 480 N.E.2d 695, 698-99, 491 N.Y.S.2d 106, 109-10 (1985). In the second case, the court addressed the issue in a footnote. State Div. of Human Rights *ex rel.* Granelle, 70 N.Y.2d 100, 107 n.2, 510 N.E.2d 799, 802 n.2, 517 N.Y.S.2d 715, 718 n.2. (1987).

bers of society, assist in stimulating the economy, rather than tapping it. Second, keeping disabled people in the work force and out of the welfare system for a longer time decreases taxes or, at least, allows for the reallocation of revenues.[99] In addition, the legislature has already expanded the definition of disability on two occasions,[100] indicating its support of a policy that keeps the disabled as functioning participants in the economy.

This policy commitment stems not only from economic considerations, but also from a sociological concern: Employment creates a vast, qualitative difference in the lives of the disabled, fostering personal fulfillment and development.[101] Disabled workers are therefore more productive citizens than disabled persons who do not work.[102]

B. *Employers' Arguments*

Employers argue that it is unfair to force them to hire an applicant who will be disabled sometime in the foreseeable future,[103] because they invest time and money in training employees who will soon be incapable of performing the job. Employee turnover rates, however, reveal that these concerns are unfounded. The employers' argument assumes that an employee without a future incapacitating

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[99] Tax-supported programs currently assisting disabled people range from medical care and home services to general financial assistance. Programs available to disabled persons in New York are:

> Social Security: Monthly cash payments based on duration of prior employment and amount of money withheld . . . .
> Supplemental Security Income (SSI): Monthly cash payment, based on income and whether [disabled] individual lives alone or with others . . . .
> Medicaid: Comprehensive coverage for drug prescriptions, hospital, physicians . . . [and] home care.

Institute on Law and Rights of Older Adults, Brookdale Center on Aging of Hunter College, Benefits Checklist at 1 (1986) (on file at the Cardozo Law Review). A variety of other programs are available to disabled persons based solely on financial need. Id.

Many unemployed disabled people depend on government programs for support. Approximately sixty percent of unemployed disabled persons receive income support from either insurance or government benefit programs. See ICD Survey I, supra note 1, at 5.

[100] See supra notes 27-40 and accompanying text (amendments to statute include changing relatedness standard to individualized standard and inclusion of perceived disability within definition of disabled).

[101] A recent study found that most employed disabled people (eighty percent) are satisfied with their lives, while most unemployed disabled people are unsatisfied. Six out of ten unemployed disabled people surveyed felt that their disability had prevented them from reaching their full potential as a person. See ICD Survey I, supra note 1, at 5.

[102] Disability can influence every aspect of a person's life. Id.

[103] State Div. of Human Rights v. Xerox Corp., 65 N.Y.2d 213, 217-18, 480 N.E.2d 695, 697, 491 N.Y.S.2d 106, 108 (1985) (Xerox argued that being forced to hire applicant with future disability would have adverse impact on employer's disability and life insurance programs).

condition will remain working for a given employer for a longer period of time than an employee with a future incapacitating condition.[104] Yet, the job tenure of a worker between the ages of sixteen and sixty-four—4.2 years[105]—is actually slightly less than the average five-year tenure of an employee with a future disability.[106] Thus, the cost of training an employee with a future incapacity closely parallels that of a "normal" worker.

Employers also argue that hiring people with future incapacitating conditions will subject employers to the costs of accommodation.[107] Employers claim that these costs will cause them to raise the price of their goods and services, making them less competitive.[108] The premise of this argument is flawed as there have been consistent findings that expensive job modification or accommodation is rarely needed by disabled workers.[109] The diminished-competitiveness argument is weakened when one realizes that all employers will be subject to the same standard: costs will rise proportionately and the competitive edge will not be lost.[110] It has also been shown that the average cost of employing a disabled person is about the same as employing a nondisabled person.[111]

Yet, if accommodation is needed, the extra cost can be justified because handicapped persons are generally more stable workers with less absenteeism, lower risks of accidents, and greater loyalty to their

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104 Id.

105 Bureau of Labor Statistics, U.S. Dep't of Labor, News, at 2 (Oct. 22, 1987).

106 The employee with a future disability will be able to perform a job for approximately five years because most types of future disabilities are insidious conditions. See, e.g., supra note 8 and accompanying text.

107 Accommodation may include special or new equipment, ramps for wheelchairs, and flexible work schedules. Collignon, supra note 30, at 205-07.

108 Id. at 207. The argument would be based on the premise that in a competitive market, the employer cannot raise the price of the firm's product to pass along the costs of accommodation to consumers.

109 See Collignon, supra note 30, at 211. When accommodation is needed it is often inexpensive and does not escalate the costs of employment. The International Center for the Disabled, The ICD Survey II: Employing Disabled Americans 9 (1987) [hereinafter ICD Survey II]. "Eighty-one percent of top managers, 79% of [Equal Opportunity Employment] officers, and 75% of department heads and line managers say that it costs about the same amount to employ either a disabled or non-disabled person." Id.

110 If all employers have an equal probability of hiring disabled employees needing accommodation, then in a competitive market they would be able to pass the extra expense of accommodation on to consumers as a general cost of production. Collignon, supra note 30, at 210.

The argument for weakened competitiveness could be extended, in theory, to the international marketplace. A further consequence of general accommodation could be that prices of American industry would be raised in comparison to foreign industries. "However, our principal foreign competitors (e.g., England, Germany, and Japan) have more extensive, restrictive, and potentially more costly programs for employing disabled workers." Id. at 210 n.10.

111 See ICD Survey II, supra note 109, at 9.

employers than other nondisabled workers in similar jobs.[112] Employers should also consider that certain types of accommodation may provide more efficient ways of production and improve the productivity of nondisabled workers.[113]

Last, employers argue that small employers who self-insure will face overwhelming costs by hiring the future disabled.[114] This is unlikely to happen as it is usually the large employers who self-insure.[115] Because these major companies have a larger insurance pool, they can distribute the risk of increased costs.[116] Further, the health-care costs of the future disabled are already being absorbed by society.[117] Combined with the costs of lost productivity of presently employable but unemployed workers, this creates a far greater cost to society as a whole than any expense that might be incurred by expanding coverage.[118] Thus, although employers might suffer increased expense as a result of expanding the prohibition against discrimination, the costs of allowing discrimination are greater.[119]

C. *A Future Consideration: AIDS*

The importance of the future disability question is intensified by the AIDS crisis.[120] There are now 13,874 reported cases of AIDS in New York State;[121] the Department of Health estimates that there

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112 Collignon, supra note 30, at 208; see also ICD Survey II, supra note 109, at 45-49 (the great majority of managers say that disabled employees work as hard or harder than nondisabled employees).

113 See Collignon, supra note 30, at 207-08.

114 See, e.g., Note, Asymptomatic Infection with the AIDS Virus as a Handicap Under the Rehabilitation Act of 1973, 88 Colum. L. Rev. 563, 577 (1988).

115 Arno, The Economic Impact of AIDS, 258 J. A.M.A. 1376, 1377 (1987).

116 Id.

117 See supra note 99 and accompanying text.

118 See, e.g., Note, supra note 114, at 577-78.

119 Id. (discussing the costs of expanding protection under the Rehabilitation Act).

120 Genetic testing also brings the future disability issue into the fore. This testing can uncover specific genetic traits of the job applicant that indicate high potential for occupational disease. Although in its formative stage, some employers currently use genetic testing for on-the-job exposure to cancer causing chemicals: "[a] 1982 survey of the Fortune 500 companies showed that some companies have already used genetic screening programs, and nearly one in seven is considering the use of genetic screening in the future." McConnell, Genetic Testing's Conflict with Discrimination Laws, Nat'l L.J., Feb. 9, 1987, at 14, col. 1. Genetic screening could result in increased employment discrimination. Labor lobbyists on a federal level have invoked the Rehabilitation Act, 29 U.S.C. 794 (1973 & Supp. IV 1986), and Title VII, 42 U.S.C. § 2000e (1982), to argue that employers cannot refuse an applicant because of a genetic trait. Nevertheless, when this testing becomes more established, future disability determinations will abound.

121 Telephone interview with Sue Cane, Research Scientist, New York Dep't of Health (Apr. 5, 1988).

will be 47,147 cases of AIDS in New York by 1991.[122] The magnitude of these projections creates a need for the legislature to address the future disability issue. AIDS fits the definition of future disability because there is often a latency period between diagnosis and the onset of actual incapacitating symptoms.[123] Further, the disease has a long-term incubation period—on average between four and seven years.[124] During this interim between infection and onset of the debilitating condition, the individual will most likely be able to reasonably perform the job.[125]

V. PROPOSED LEGISLATIVE SOLUTION

The Legislature should amend section 292(21) to prohibit an employer from refusing to hire an applicant with a disability which at the time of his application does not prevent him from reasonable performance, even if there is a statistical likelihood that the disability will result in a future inability to perform the job. Specifically, the proposed amendment should read:

> The term "disability" means (a) a physical, mental, or medical impairment resulting from anatomical, physiological or neurological conditions which prevents the exercise of a normal bodily function or (b) a record of such an impairment or (c) a condition regarded by others as such an impairment, provided, however, that in all provisions of this article dealing with employment the term shall be limited to disabilities which do not prevent the complainant from performing in a reasonable manner the activities involved in the job or occupation sought or held. *Regarding hiring, the standard for reasonable job performance shall apply at the time of application for employment and future inability to perform reasonably shall not be considered.*[126]

This amendment would protect persons with future incapacities, yet would allow employers discretion in hiring and the freedom to dis-

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122 Id.

123 See Osborn, The AIDS Epidemic: Discovery of a New Disease, in AIDS and the Law, supra note 8, at 19.

> The clinical illness . . . starts with vague, debilitating symptoms including drenching night sweats, sustained fevers, chronic diarrhea, and weight loss, sometimes associated with generalized enlargement of lymph nodes . . . . Over time, some AIDS patients also develop confusion and other signs of progressive neurologic degeneration . . . .

Id.

124 See Green, supra note 8, at 30; Mueller, The Epidemiology of the Human Immunodeficiency Virus Infection, 14 Law, Med. & Health Care 250, 254 (1986).

125 See Ricklefs, Living with AIDS, Wall St. J., Sept. 2, 1988, at 4, col. 3.

126 The italicized words indicate the proposed changes to N.Y. Exec. Law § 292 (21) (McKinney 1982 & Supp. 1988).

charge an employee when that person is unable to perform the job reasonably.

CONCLUSION

The Law's statutory history reflects a continuing effort to protect disabled people from employment discrimination. The Legislature should amend the Law to cover discrimination based on future incapacitating conditions—conditions that have a statistical likelihood of resulting in a disability after approximately a five-year period. This solution addresses the problems caused by employment discrimination against the disabled more effectively than waiting for judicial interpretation of the Law to include future incapacitating conditions. Arguments based on the language of the statute and administrative and judicial interpretation of the Law further support this amendment.

Andrea Lisa Leeb