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Mentally Retarded Employees in Day Care Centers in North Carolina: The 1983 Amendments

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Mentally Retarded Employees in Day Care Centers in North Carolina: The 1983 Amendments

The 1983 North Carolina General Assembly changed the carefully delineated requirements for workers at North Carolina day care centers.[1] North Carolina General Statutes sections 110-90.1 and 110-91 originally barred employment of those "mentally retarded or mentally ill to an extent that may be injurious to children"; this wording was changed in 1983 to prohibit the employment of those "mentally or emotionally impaired to an extent that may be injurious to children."[2] Although this change appears merely to clarify the language,[3] the amendment's title indicates a broader legislative intent: "An Act to Remove Mental Retardation From the Conditions Prohibiting a Person From Work in a Day-Care Center."[4]

As the Day Care Committee explained:

> The Committee recommends legislation rewriting the term "mentally retarded" from the conditions prohibiting individuals from being proprietors of day care plans and facilities. There is no reason to stigmatize the mentally retarded who are not dangerous. Those who are, of course, remain excluded.[5]

Thus, this amendment represents another measured step toward the equal protection and "normalization"[6] of the mentally retarded, or, more broadly, the handicapped. Considered with North Carolina's statute protecting the employment rights of the handicapped, this amendment further erodes the em-

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1. An Act to Remove Mental Retardation From the Conditions Prohibiting a Person From Work in a Day-Care Center, 1983 N.C. Adv. Legis. Serv. 277 (codified at N.C. GEN. STAT. §§ 110-90.1, -91(8) (Cum. Supp. 1983)).

2. N.C. GEN. STAT. § 110-90.1 (Cum. Supp. 1983) provides:

> No day-care plan shall be registered if that plan is operated by or employs any person who has been convicted of a crime involving child abuse, child neglect, or moral turpitude, or who is an habitually excessive user of alcohol or who illegally uses narcotics or other impairing drugs, or who is mentally or emotionally impaired to an extent that may be injurious to children.

N.C. GEN. STAT. § 110-91(8) (Cum. Supp. 1983) repeats these qualifications and prescribes age limits for employees and supervisors.

3. The original wording of the statute ("mentally retarded or mentally ill to an extent that may be injurious to children") was somewhat ambiguous, since it might ban either all the mentally retarded or only those who might be injurious to children.

4. 1983 N.C. Adv. Legis. Serv. 277 (codified at N.C. GEN. STAT. §§ 110-90.1, -91(8) (Cum. Supp. 1983)).

5. LEGISLATIVE RESEARCH COMMISSION, DAY CARE—REPORT TO THE 1983 GENERAL ASSEMBLY 7 (1983).

In 1979 the statute was amended to remove the upper age limit of 70, presumably out of concern for employment of the aged. The legislature apparently has developed a similar concern for the mentally retarded.

6. The principle of normalization, as established by the President's Committee on mental retardation, entails " 'making available to the mentally retarded, patterns and conditions of everyday life which are as close as possible to the norms and patterns of the mainstream of society.' " A. JACOBS, HANDBOOK FOR JOB PLACEMENT OF MENTALLY RETARDED WORKERS 16 (3d ed. 1979) (quoting B. NIRJE, THE NORMALIZATION PRINCIPLE AND ITS HUMAN MANAGEMENT IMPLICATIONS. CHANGING PATTERNS IN SERVICES FOR THE MENTALLY RETARDED (President's Committee on Mental Retardation, 1969)).

ployer's common-law discretion to hire and discharge whomever he pleases.[7] Removal of the ban against employing mentally retarded day care workers brings North Carolina's statutes closer to principles of federal law,[8] but also introduces some uncertainty over the extent to which an employer may choose between mentally retarded job applicants and those of normal intelligence. Although any initial, broad exclusion of the mentally retarded now is prohibited, the amendment's symbolic effect probably will outweigh its practical effect.

Recent antidiscrimination laws and other types of labor regulations have restricted an employer's discretion in hiring and discharging employees;[9] historically, however, courts treated the employment relationship like any other contractual relation.[10] Absent statutory or contractual restrictions, the public or private employer has the exclusive right to determine job qualifications for various positions, and to hire and discharge employees at will.[11] Unless the employer's decisions violate the rights of a member of a protected class or labor union, or the constitutional rights of an employee, courts tend to afford the employer wide latitude in basic employment decisions.[12] Thus, at common law an employer generally had no obligation to hire handicapped applicants. Furthermore, an employer may discharge an employee with or without cause absent statutory, contractual, or constitutional restrictions.[13]

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7. At common law, the employer was free to hire whomever he desired, and to discharge "at will" employees who did not have written employment contracts, with or without cause, hearing, or explanation. *See infra* notes 10-13 and accompanying text.

8. The Rehabilitation Act of 1973, 29 U.S.C. §§ 701-796i (1976 & Supp. V 1981), forbids discrimination against the handicapped by any federally subsidized program. *See infra* notes 18-23 & 50-51 and accompanying text.

9. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1976 & Supp. V 1981), forbids employment discrimination on the basis of race, color, religion, sex, or national origin. The Civil Rights Act of 1866, 42 U.S.C. § 1981 (1976), and the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1976 & Supp. V 1981), also forbid employment discrimination based on race. The Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-34 (1982), prohibits employment discrimination against individuals between the ages of 40 and 70. The National Labor Relations Act, 29 U.S.C. §§ 151-69 (1982), particularly § 158(a)(3), forbids discrimination against employees for engaging in union activities. Finally, the Rehabilitation Act of 1973, 29 U.S.C. §§ 701-796i (1982), *see infra* notes 18-23 & 50-51 and accompanying text, forbids discrimination on the basis of handicap. *See* B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1-2 (2d ed. 1983).

10. Alliance Co. v. State Hosp., 241 N.C. 329, 332-33, 85 S.E.2d 386, 389 (1955) stated: "The relation of employer and employee is essentially contractual in its nature, and is to be determined by the rules governing the establishment of contracts, express or implied."

11. *See, e.g.*, Charles City Educ. Ass'n v. Public Employment Relations Bd., 291 N.W.2d 663 (Iowa 1980); Burton v. Crawford & Co., 89 N.M. 436, 553 P.2d 716, *cert. denied*, 90 N.M. 7, 558 P.2d 619 (1976); Mumford v. Hutton & Bourbonnais Co., 47 N.C. App. 440, 267 S.E.2d 511 (1980); Tatum v. Brown, 29 N.C. App. 504, 224 S.E.2d 698 (1976).

Statutory restrictions on the employer's discretion to hire and fire employees usually are drawn narrowly to address specific problems and not interfere unduly with the employer's right to select or discharge employees. *See, e.g.*, NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45-46 (1936). *See also* Sioux Quality Packers, Div. of Armour & Co. v. NLRB, 581 F.2d 153 (8th Cir. 1978).

12. *See, e.g.*, Percival v. General Motors Corp., 539 F.2d 1126, 1130 (8th Cir. 1976) ("A large corporate employer such as General Motors, except to the extent limited by statute or contractual obligations, must be accorded wide latitude in determining who it will employ and retain in employment in high and sensitive managerial positions.").

13. *See, e.g.*, Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972); Prince v.

Federal and state laws, however, increasingly have restricted this broad power, and recently the rights of the handicapped have been recognized and protected.[14] Constitutional challenges to employment discrimination against the handicapped generally have been unsuccessful. Although the Supreme Court has not spoken directly on the subject, the lower federal courts generally have not treated the handicapped as a suspect class.[15] Thus, any equal protection claims of discrimination are subject to the rational-basis test, which merely requires an employer to show some rational, nonarbitrary basis for his actions.[16] Given the many potential difficulties and inconveniences of employing the handicapped, employers ordinarily have satisfied this test, and thus equal protection claims usually have failed to enhance the employment rights of the handicapped.[17] Furthermore, only state action can violate the equal protection clause, rendering most employers' decisions immune to constitutional challenge.

Bridges, 537 F.2d 1269 (4th Cir. 1979); Hodgin v. Noland, 435 F.2d 859 (4th Cir. 1970), *cert. denied*, 408 U.S. 942 (1972); Nantz v. Employment Sec. Comm'n, 290 N.C. 473, 226 S.E.2d 340 (1976); Still v. Lance, 279 N.C. 254, 182 S.E.2d 403 (1971); Wilkinson v. Erwin Mills, 250 N.C. 370, 108 S.E.2d 673 (1959).

A growing doctrine, accepted by some courts, prohibits an employee's discharge for activities that public policy encourages, for example, objecting to an employer's illegal actions, filing a worker's compensation claim or serving on a jury. *See* Percival v. General Motors Corp., 539 F.2d 1126, 1130 (8th Cir. 1976), and cases cited therein.

14. For a general history of the treatment of the handicapped in society, see Allen, *Historical Overview: From Charity to Rights*, 50 TEMPLE L.Q. 953 (1977) (excerpted from R. ALLEN, LEGAL RIGHTS OF THE DISABLED AND DISADVANTAGED 1 (1969)).

15. *See, e.g.*, Simon v. St. Louis County, 656 F.2d 316, 322 (8th Cir. 1981), *cert. denied*, 455 U.S. 976 (1982); Brown v. Sibley, 650 F.2d 760 (5th Cir. 1981); Carmi v. Metropolitan St. Louis Sewer Dist., 620 F.2d 672, 675-76 (8th Cir. 1980), *cert. denied*, 449 U.S. 892 (1980). *See also* B. SCHLEI & P. GROSSMAN, *supra* note 9, at 280 and cases cited therein.

One lower court has held that the handicapped are a suspect class, *In re* G.H., 218 N.W.2d 441, 447 (N.D. 1974), and another has suggested it in dicta. Fialkowski v. Shapp, 405 F. Supp. 946, 958-59 (E.D. Pa. 1975).

16. The Warren and Burger Courts have developed a three-tier system of equal protection analysis. A discriminatory practice is subject to strict scrutiny if it: interferes with the exercise of a fundamental right, or affects a suspect class, a "discrete and insular minority." United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938). Employment has been held not to be a fundamental right, so in employment discrimination cases the focus must be on the screened-out class. Race, nationality, and alienage have been treated as suspect classes. In such cases, there is a presumption against the discriminatory practice.

The second tier of scrutiny bars discriminatory practices that are not related substantially to an important governmental objective. It is applied in cases involving a "semi-suspect" class, such as women or illegimates.

The third tier of scrutiny determines whether a rational relationship exists between the practice and a legitimate governmental objective, and it applies to all other groups. *See* Burgdorf & Burgdorf, *A History of Unequal Treatment: The Qualifications of Handicapped Persons as a "Suspect Class" Under the Equal Protection Clause*, 15 SANTA CLARA L. REV. 855, 899-910 (1975); Comment, *The Equal Protection and Due Process Clauses: Two Means of Implementing "Integrationism" for Handicapped Applicants for Public Employment*, 27 DEPAUL L. REV. 1169, 1174-89 (1978). The handicapped usually are considered in this category. *See* cases cited *supra* note 15. For commentaries advocating that all or some of the handicapped should be considered a suspect class, see Burgdorf and Burgdorf, *supra*, and Comment, *supra*.

17. *See* cases cited *supra* note 15. One of the reasons for the Rehabilitation Act of 1973, 29 U.S.C. §§ 701-796i (1976 & Supp. V 1981), was "the lack of action in areas related to rehabilitation which limit a handicapped individual's ability to function in society, *e.g.*, employment discrimination, ..." S. REP. NO. 318, 93d Cong., 1st Sess. 3 (1973), *reprinted in* 1973 U.S. CODE CONG. & AD. NEWS 2076, 2078.

In 1973, however, Congress passed the Rehabilitation Act of 1973,[18] providing handicapped plaintiffs a statutory basis for pursuing discrimination claims. The Act states:

> No otherwise qualified handicapped individual in the United States, . . . , 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 . . . .[19]

"Handicapped individual" is defined as one who "(i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment . . . ."[20] The Act requires employers to make "reasonable accommodation"[21] for an otherwise qualified applicant or employee, including restructuring physical facilities, modifying job duties, and altering work schedules.[22] The employer is encouraged to consider each applicant individually, and although free to consider disability limitations, he may not exclude categorically on the basis of handicap.[23]

This federal legislation has been accompanied by corresponding state leg-

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18. Pub. L. No. 93-112, 87 Stat. 357 (codified as amended at 29 U.S.C. §§ 701-796i (1976 & Supp. V 1981)).

19. 29 U.S.C. § 794 (1982).

20. 29 U.S.C. § 706(7)(B) (1982).

21. Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving or Benefiting From Federal Financial Assistance, 45 C.F.R § 84.12(a) (1983).

22. *Id.* § 84.12(b).

The Supreme Court interpreted "reasonable accommodation" in Southeastern Community College v. Davis, 442 U.S. 397 (1979). In *Davis* plaintiff had been denied admission to a nursing program because of a severe hearing disability. *Id.* at 402. The Court determined that the individual attention plaintiff would require exceeded the "modification" required under the Act. *Id.* at 410. The Supreme Court cautioned against the precedential value of *Davis*, however, *id.* at 412-13, and courts have interpreted it to require a great deal of modification to accommodate the handicapped. For example, in Stutts v. Freeman, 694 F.2d 666 (11th Cir. 1983), the court held that the employer had to accommodate the dyslexic plaintiff in administering a preemployment test, usually given in written form. In Dopico v. Goldschmidt, 687 F.2d 644 (2d Cir. 1982), the court indicated that New York City must provide some type of accommodation for the handicapped in its mass transit system. A North Carolina federal district court, while requiring plaintiffs to exhaust their administrative remedies before continuing the litigation, implied that requiring a school board to offer a summer school program for children with cerebral palsy would not be unreasonable. Phipps v. New Hanover County Bd. of Educ., 551 F. Supp. 732, 734 (E.D.N.C. 1982). ("*Davis* has been read as not prohibiting all affirmative action but only that which would entail extensive modification of some existing program.") In Majors v. Housing Auth., 652 F.2d 454 (5th Cir. 1981), the court remanded the case to determine whether a low income housing authority should be required to break its rule barring pets to accommodate plaintiff's emotional disability that required the companionship of her dog. *But see* American Pub. Transit Ass'n v. Lewis, 655 F.2d 1272 (D.C. Cir. 1981) (holding that a regulation requiring every mode of mass transit to accommodate the handicapped was beyond the scope of § 504 of the Rehabilitation Act of 1973).

23. According to B. SCHLEI & P. GROSSMAN, *supra* note 9, at 282-83, employers practicing categorical exclusion have not prevailed under federal and state statutes without showing either:

> (1) "[T]hat all or substantially all persons in the handicap category could not do the job," or
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> (2) That the exclusion was "justified by a high degree of human or economic risk, and the potential for creating the risk be readily determined" by a less exclusionary handicap or on an individual basis.

islation. Most states[24] have enacted legislation protecting the rights of the handicapped, although the laws differ as to the types of handicapped people protected,[25] the extent of accommodation required,[26] the type of preemployment inquiry or test allowed,[27] and whether a private cause of action is created.[28] Generally, however, the state laws supplement and reinforce the federal antidiscrimination legislation.

North Carolina has adopted antidiscrimination legislation for the handicapped. The overriding philosophy of the statutory scheme is to "encourage and enable handicapped persons to participate fully in the social and economic life of the State and to engage in remunerative employment."[29] The statute specifically addressing employment states:

> Handicapped persons shall be employed in the State service, the service of the political subdivisions of the State, in the public schools, and in all other employment, both public and private, on the same terms and conditions as the ablebodied, unless it is shown that the particular disability impairs the performance of the work involved.[30]

Handicapped persons are defined broadly as those with "physical, mental and visual disabilities."[31]

The North Carolina statute has been involved in significant litigation only once. In *Burgess v. Joseph Schlitz Brewing Co.*[32] the North Carolina Supreme Court held that glaucoma, a potentially disabling condition, was not a visual disability under the statute, and thus the statute did not bar the employer from

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24. According to B. SCHLEI & P. GROSSMAN, *supra* note 9, at 277 n.87, as of 1983, 48 states had adopted laws restricting discrimination against the handicapped.

25. *E.g.*, CAL. GOV'T CODE § 12920 (West 1980 & Supp. 1983) forbids discrimination based on a physical handicap or medical condition, such as cancer. VA. CODE § 40.1-28.7 (1981) forbids only discrimination based on physical handicap.

26. Georgia's statute explicitly states that the employer need not modify his physical facilities or grounds to accommodate handicapped individuals. GA. CODE ANN. § 34-6A-4 (1981).

27. Texas bars all preemployment tests with a disproportionate impact on handicapped applicants unless the test has been validated specifically for the job, or no other tests exist. TEX. HUM. RES. CODE ANN. § 121.010(e) (Vernon Supp. 1984). Georgia's statute specifically permits preemployment inquiry as to handicap, and rejections based on medical examinations, as long as there is a "good faith reliance" on a doctor's evaluation. GA. CODE ANN. § 34-6A-3(c) (1981).

28. Although some statutes clearly provide a private cause of action, others are less clear. In Dillon v. Great Atl. & Pac. Tea Co., 43 Md. App. 161, 403 A.2d 406 (1979) the Maryland Court of Special Appeals held that Maryland's statute did not create a private cause of action. The West Virginia Appeals Court, however, in Hurley v. Allied Chem. Corp., 262 S.E.2d 757, 765 (W. Va. App. 1980), found an implied private cause of action in the West Virginia statute. The court rejected the argument that a private cause of action on the state level would invade an area delegated exclusively to the federal government. *Id.* at 764-65.

29. N.C. GEN. STAT. § 168-1 (1982). The North Carolina statutes were passed in 1973, presumably to complement the federal Rehabilitation Act.

30. *Id.* § 168-6 (1982). The statute could be construed to restrict discrimination only in the "terms and conditions" of employment after hiring already has occurred, as opposed to restricting discrimination in the hiring decision itself. The statute states, "Handicapped persons shall be employed . . . on the same *terms and conditions* as the ablebodied," (emphasis added) with no mention of hiring. In *Burgess v. Joseph Schlitz Brewing Co.*, 298 N.C. 520, 259 S.E.2d 248 (1979), however, *discussed infra* notes 32-35 and accompanying text, the North Carolina Supreme Court applied the statute to a hiring decision without mentioning that hiring was not treated specifically in the statute.

31. N.C. GEN. STAT. § 168-1 (1982).

32. 298 N.C. 520, 259 S.E.2d 248 (1979).

refusing to hire any individual with glaucoma.[33] Despite this somewhat unsettling result, the court suggested that the statute should be interpreted broadly: "[T]his statute, being remedial, should be construed liberally, in a manner which assures fulfillment of the beneficial goals for which it is enacted and which brings within it all cases fairly falling within its intended scope."[34] Given the apparent contradiction between the court's statement and its result, the ultimate scope of the statute remains uncertain.[35]

Aside from the apparent social benefits of employing the mentally retarded, categorically excluding them from day-care centers might violate federal or state law. The federal statute[36] forbids discrimination against the handicapped by any program receiving federal financial assistance. A previous interpretation of the Act by the United States Court of Appeals for the Fourth Circuit limited its applicability to those programs receiving federal funds for which the primary purpose was to provide employment.[37] The United States Supreme Court recently rejected this view, however, holding that the Act, by its own terms, applies to any program receiving federal aid, for whatever purpose.[38] Under this interpretation, North Carolina day-care centers' federal aid clearly would be threatened by policies that discriminate against the handicapped in violation of the Rehabilitation Act of 1973.[39]

An employer might argue that the mentally retarded are unqualified to work in day-care centers, and thus the discrimination is justified for business reasons.[40] This argument is weak, however, considering the extent to which the retarded already are employed in day-care centers to some extent.[41] Also,

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33. *Id.* at 528, 259 S.E.2d at 253.

34. *Id.* at 524, 259 S.E.2d at 251.

35. The only other case arising under the statute is GASP v. Mecklenburg County, 42 N.C. App. 225, 256 S.E.2d 477 (1979), a class action to restrict smoking in public places brought on behalf of all those with pulmonary problems. The court of appeals held that the class involved—all those with any pulmonary problem—was too broad to come under the definition of "handicapped." This decision, while also restricting the definition of "handicapped," arguably is less questionable than *Burgess* because the class that the court declined to label "handicapped" included many people with minor pulmonary problems, as opposed to the discrete groupd of those with potentially disabling glaucoma in *Burgess*.

For a view that the North Carolina supreme court's definition of "handicapped" was too restrictive in *Burgess*, and that the broader definition of the federal statute should apply, see Note, *Employment Discrimination—Judicial Identification of the "Handicapped Person" in North Carolina*—Burgess v. Joseph Schlitz Brewing Co., 16 WAKE FOREST L. REV. 836 (1980).

36. *See supra* notes 18-23 and accompanying text.

37. Trageser v. Libbie Rehabilitation Center, 590 F.2d 87 (4th Cir. 1978), *cert. denied*, 442 U.S. 947 (1979).

38. Consolidated Rail Corp. v. Darrone, 104 S. Ct. 1248 (1984).

39. According to a study of North Carolina day-care centers, 554 of the sample 2248, or approximately 25%, of North Carolina day-care centers are labeled "subsidized" and 1694 of 2248, about 75%, are "nonsubsidized." Subsidized centers receive approximately 39% of their income from government agencies and 12% from the federal Child Care Food Program. Nonsubsidized centers receive approximately 2% of their income from government agencies and 2% from the Child Care Food Program, and to the extent that their actions might violate the federal law, would be subject only to losing that small amount. NORTH CAROLINA DEPARTMENT OF ADMINISTRATION FOR DAY CARE STUDY COMMITTEE, LEGISLATIVE RESEARCH COMMISSION, NORTH CAROLINA DAY CARE COST STUDY, Day Care Centers, Final Report 53-58 (April 1983).

40. *See infra* notes 51-52 and accompanying text.

41. The frequency of jobs held by the mentally retarded are ranked as follows: (1) food

given the number and variety of tasks required in a day-care center,[42] the requirement of "reasonable accommodation"[43] under the federal law almost certainly would require an employer to restructure his division of tasks to place mentally retarded workers in positions for which they are unquestionably qualified.[44]

Presumably, the North Carolina legislature originally barred employment of the mentally retarded to ensure high quality day care. Compared with the day-care statutes of other states, North Carolina's legislative requirements are remarkably specific, and set very high standards.[45] The North Carolina law basically adopts the somewhat controversial high staff-child ratios of the Federal Interagency Day Care Requirements of 1968.[46] It bars the employment in day-care centers of excessive users of alcohol, users of illegal drugs, and those who have committed certain crimes.[47] The statute even states that: "Each operator or staff member shall truly and honestly show each child in his care true love, devotion and tender care."[48] The legislature's concern for high quality day-care is commendable at one level.

This concern, however, probably was misplaced to the extent that it led the legislature to bar the mentally retarded from working in day-care centers. Of the few state laws that specify any requirements for day-care centers, few or none bar the employment of the handicapped or the mentally retarded.[49] Even

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services; (2) building services (custodial); (3) domestic services; (4) groundskeeping; (5) office occupations; (6) merchandising occupations; (7) building trades; (8) helpers in hotels; (9) helpers in nursery schools; (10) helpers in hospitals. A. JACOBS, *supra* note 6, at 20.

42. A. JACOBS, *supra* note 6, at 193-94, 147-48, 174-75. The Nursery School Aide is listed as having the following specific skill requirements: ability to coordinate work with other employees; knowledge and observance of hazards to children; knowledge of basic rules and equipment for indoor and outdoor games for children; knowledge of simple arts and crafts techniques and equipment; ability to use simple cleaning equipment and supplies; ability to enforce simple rules; knowledge of locations of equipment and supplies; ability to determine when to seek help in an emergency; ability to handle food in a neat, sanitary manner; ability to interact well with young children and adults; and ability to observe routines and procedures. *Id.* at 194. For example, food preparation, maintenance, and clerical work, as well as child care, are all necessary in day care centers.

43. *See supra* notes 21-22 and accompanying text.

44. *See supra* note 22 and accompanying text.

45. *See, e.g.*, the following statutes, in which the legislature merely delegates responsibility for establishing standards and requirements for day-care centers to an administrative agency or board: CAL. HEALTH & SAFETY CODE § 1527 (West 1979 & Supp. 1983); D.C. CODE ANN. § 3-312 (1981); GA. CODE § 49-5-12 (1981); MD. ANN. CODE art. 14, § 104 (1981); MICH. STAT. ANN. § 25.358(12) (Callaghan 1974); N.Y. SOC. SERV. LAW § 390 (West 1983); S.C. CODE ANN. § 59-3-80 (Law. Co-op. 1976); TEX. STAT. ANN. art. § 4442a(1) (Vernon 1976); VA. CODE § 63.1-196 (1980); W. VA. CODE § 49-2B-4 (Supp. 1983).

46. 45 C.F.R. § 71 (1970) (no longer in effect). N.C. GEN. STAT. § 110-91(7) (1978) requires one staff member for every eight children under the age of two, one for every twelve children ages two to three, one for every fifteen children ages three to four, one for every twenty children ages four to five, and one for every twenty-five children over the age of five. *See also infra* note 50 and accompanying text.

47. N.C. GEN. STAT. §§ 110-90.1, 110-91(8) (1978 & Supp. 1983).

48. *Id.* § 110-91(10) (1978).

49. *See, e.g.*, D.C. CODE ANN. § 3-311 (1981) (establishing specific standards for in-home care, requiring that staff members be between 21 and 70, in good health and have prior experience in child care); VA. CODE § 63.1-196.3(3)(C) (1980) (requiring, for religious institution child care centers, that supervisors be certified by physicians as free from any disability that would prevent them from caring for children).

the strict federal requirements for day-care centers receiving federal aid[50] did not bar the mentally retarded. Those standards merely stated: "Staff of the facility and volunteers must have periodic assessments, . . . of their physical and mental competence to care for children."[51] Mental "competence" could refer to emotional stability or intelligence. This loose definition, therefore, permitted flexibility in determining a standard of competence—mental retardation could have been one of many factors taken into account. Thus, although the North Carolina legislature undoubtedly meant well in originally barring the mentally retarded from working in day-care centers, it seems to have acted alone.

Given the competing policies—the broad common-law discretion of the employer to hire and discharge his employees, the statutory rights of the handicapped to equal opportunities in employment, and the desire to provide a high level of child care—the change in the North Carolina law was a good one. Removing the bar on employment of the mentally retarded would be meaningless without the nondiscrimination requirement of the North Carolina handicap law and the federal law. Taken together, however, the statutes require employers to consider each applicant individually. Rather than establishing a broad, bright-line test barring employment of the mentally retarded, or requiring affirmative action in hiring them, considering applicants individually will provide more flexible accommodation of the competing interests involved.

Removing this bright-line principle, however, will leave a vacuum of uncertainty in individual employment decisionmaking. Consider an employer faced with two applicants: one mentally retarded and one not, otherwise equally qualified. Given that the employee could affect the intellectual development of the children in the day-care center, may the employer justifiably hire the applicant of normal intelligence on the grounds that he is more qualified to develop the minds of the children? Arguably, unlike a qualification such as race or, in most instances, physical handicap, mental retardation may affect the quality of the work performance. Presumably, a careful evaluation of the job position involved and the actual effect on the children should precede any decision not to hire the handicapped applicant. A position that primarily involves supervision and playing with children probably would require less intelligence than, for example, a teaching position. It is particularly difficult to draw this line in the day-care situation, as opposed to other occupa-

50. The Federal Interagency Day Care Requirements, established in 42 U.S.C. § 1397(a) (1976) and 45 C.F.R. § 71.1-71.20 (1970), required high staff-child ratios (few children per caregiver) in all day-care centers receiving Social Security Title XX funds. The standards provoked a "storm of controversy" because of the costs of hiring additional staff. U.S. DEPT. OF HEW, NATIONAL DAY CARE STUDY, PRELIMINARY FINDINGS AND THEIR IMPLICATIONS 1 (1978). In Stiner v. Califano, 438 F. Supp. 796 (W.D. Okla. 1977), a suit brought to enjoin enforcement of the standards, parents argued that the standards would produce prohibitive costs, forcing them to quit work to care for their children. *Id.* at 801. The standards were considered "wholly unnecessary" for the care of children, imposing "severe financial burdens needlessly . . . ." *Id.* at 800. Although the standards were upheld in *Stiner*, Congress eventually repealed the requirements. Omnibus Reconciliation Act of 1980, § 1001, Pub. L. No. 96-499, 94 Stat. 2655 (1980).

51. 45 C.F.R. § 71.16(i) (1970).

tions, given the uncertainty inherent in the emotional and intellectual development of children, and the employer's subjective evaluation of who will work effectively with children.

The effect of removing the ban on mentally retarded day-care workers will depend on the ultimate judicial interpretation of the North Carolina handicap statute. Some state laws prohibiting discrimination against the handicapped have been broadly interpreted and have had a significant effect, while other state laws have been emasculated by the judiciary.[52] The North Carolina courts should construe the North Carolina handicap statute broadly, requiring significant accommodation similar to that ordered in liberal interpretations of the federal law.[53] The courts should require an employer to restructure his division of duties to take advantage of the mentally retarded worker's skills. A mentally retarded worker who is interested in children has as much to offer as any other employee, and should be as fully integrated into the day-care system as possible. As noted by the North Carolina Supreme Court in *Burgess*, the handicap statute was adopted after years of undue discrimination, and thus should be interpreted broadly to remedy any harmful lingering effects.[54]

Although the practical effect of the change in the day-care law in conjunction with the handicap law is uncertain, the symbolic effect of further including the mentally retarded in society probably will exceed the statute's practical effect. The removal of any stigma of the mentally retarded, however, is, in itself, a worthwhile accomplishment.[55]

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52. *Compare* Panettieri v. C.V. Hill Refrigeration, 159 N.J. Super. 472, 388 A.2d 630 (1978) (burden on employer to articulate legitimate, nondiscriminatory reason for his action) and Kimmel v. Crowley Maritime Corp., 23 Wash. App. 78, 596 P.2d 1069 (1979) (plaintiff's knee injuries held to be a handicap) *with* Advocates for the Handicapped v. Sears, Roebuck and Co., 67 Ill. App. 3d 512, 385 N.E.2d 39 (1978) (plaintiff's kidney transplant made him uninsurable under defendant's self-insurance program, and thus defendant could discriminate legitimately against plaintiff) and Providence Journal Co. v. Morgan, 116 R.I. 614, 359 A.2d 682 (1976) (plaintiff's whiplash not a physical handicap within the Rhode Island statute).

53. *See supra* note 22.

54. *See supra* note 34 and accompanying text.

55. *See supra* note 5 and accompanying text. Representative Jeanne Fenner, from the Eighth District of North Carolina, the sponsor of the amendment, stated that she did not consider the amendment to be a jobs bill, but rather the removal of discriminatory language that perpetuated the myth that the retarded were completely incompetent or dangerous.