House Legislative Analysis Section

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HANDICAPPERS' CIVIL RIGHTS

House Bill 4764 as enrolled
Second Analysis (6-27-90)

Sponsor: Rep. H. Lynn Jondahl
House Committee: Mental Health
Senate Committee: Education and Mental Health

THE APPARENT PROBLEM:

In 1976, the legislature enacted the Michigan Handicappers' Civil Rights Act (Public Act 20 of 1976) to prohibit discrimination on the basis of handicap in the areas of employment, housing, public accommodations, public services, and education. However, disagreement has arisen over what exactly the handicappers' civil rights act (sometimes referred to as the "HCRA") protects: whether it protects only handicaps unrelated to a handicapper's ability to perform a job (use a service, etc.) or whether it protects handicaps, related to the job or not, which can be accommodated without "undue hardship" by an employer (or service provider, etc.).

The act defines "handicap" to mean "a determinable physical or mental characteristic of an individual or a history of the characteristic which may result from disease, injury, congenital condition of birth, or functional disorder which . . . for purposes of [employment] is unrelated to the individual's ability to perform the duties of a particular job of position, or is unrelated to the individual's qualifications for employment or promotion." Throughout the act, in fact, when describing prohibited practices the act stipulates that a "handicap" be "unrelated to ability to perform."

However, the act also contains an "accommodation" provision which originally applied only to employers (and not to the other areas of education, public accommodation, and so forth). This provision held that nothing in the section covering employment discrimination could be interpreted to exempt employers from the obligation to accommodate an employee (or person applying for a job) with a handicap unless the employer demonstrated that the accommodation would impose an "undue hardship" in the conduct of the business. A 1980 amendment to the act (Public Act 478 of 1980) changed this "accommodation provision," extending it beyond employment to include public accommodation, public service, education, and housing as well. The act does not define "undue hardship."

Disagreement over the interpretation of the act was spelled out in a series of court decisions over a case in which James Carr, an employee with the General Motors Corporation, charged that he had been discriminated against by General Motors due to a handicap and in violation of the handicappers' civil rights act. The facts of the case were not disputed. Carr began working for General Motors in 1963. In 1972 he underwent back surgery for a ruptured disk, and, as a result, both his physician and the General Motors' physician placed a fifty pound weight lifting restriction on him. In 1974, Carr was laid off due to a reduction in the work force, but continued to hold two different salaried positions at General Motors until 1976, when he was recalled to a regular salaried position as an associate analyst. He held this position for three years, and then requested a transfer to a job which required lifting in excess of his medical restriction. General Motors denied the transfer, and Carr sued, alleging discrimination under the HCRA.

General Motors argued that the HCRA did not protect everyone with handicaps, but only those with handicaps "unrelated to the individual's ability to perform the duties of a particular job or position" (as the definition of "handicap" in the act stipulates). Since Carr's back condition with the weight lifting restriction was clearly related to the particular job position in question, General Motors argued, Carr's condition was not a handicap under the HCRA. On April 22, 1983, the trial court agreed with General Motors and granted summary judgment in its favor.

However, upon appeal by Carr, the Wayne County Circuit Court reversed the trial court's decision, arguing that if no obligation on the part of an employer existed to accommodate a handicap unless the handicap was unrelated to the job, no accommodation would be needed at all. Quoting from another decision (Wardlow v. Great Lakes Express Co.), the court noted that if it ruled that an employer need not accommodate to a handicap whenever the handicap was related in any way to the job, it would be ruling that the employer need accommodate only if the handicap was not related to the work. But if a handicap is not related to the work, then no accommodation would be needed in the first place, with the paradoxical result that the HCRA would require accommodation only when no accommodation was needed.

General Motors successfully appealed the circuit court's decision to the Michigan Supreme Court, which reversed the circuit court's decision and held that Carr's disability, which admittedly was related to his ability to perform the duties of the position for which he requested a transfer, was not a "handicap" within the meaning of the handicappers' civil rights act, and therefore was not protected under the act.

Though the Carr decision applied specifically to job discrimination, many handicappers now feel that they have lost much of the protection that they thought they had been guaranteed under the handicappers' civil rights act. At their request, legislation has been introduced which would clarify under what circumstances handicappers' rights would be protected.

THE CONTENT OF THE BILL:

The bill would amend the Michigan Handicapper's Civil Rights Act to protect handicaps that required some accommodation in the areas of employment, education, housing, and public accommodations and services. The bill also would define "undue hardship" for employers by putting specific caps on the amounts that employers would be required to spend to accommodate a handicap and limit

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when an employer would have to restructure a job to accommodate a handicap.

Definitions. The bill would expand the definition of "handicap" (a) to include handicaps that did require some kind of accommodation, (b) to include in the definition the perception of handicaps, and (c) to specifically exclude certain kinds of drug-related impairment.

Presently, "handicap" is defined in terms of "determinable" mental and physical characteristics (or a history of such a characteristic) unrelated to an individual's ability to perform a particular job (or to use and benefit from public accommodations or services, or education, or to acquire, rent, or maintain property). The act further defines "mental characteristic" to mean, basically, either mental retardation or "a mentally ill restored condition."

The bill would redefine "handicap" to mean:

(1) a determinable mental or physical characteristic which, with or without accommodation, would not prevent a handicapper from doing a particular job (using public accommodations and services, and so forth);

(2) a history of such a characteristic; or

(3) "being regarded as having" such a characteristic.

The bill also would:

- specify that, with regard to employment, the mental or physical characteristic would have to "substantially limit" one or more of the handicapper's "major life activities,"
- delete the definition of "mental characteristic,"
- define "unrelated to the individual's ability" to mean that peoples' handicaps, "with or without accommodation," would not prevent them from doing their job, using and benefiting from public accommodations, services, education, or housing; and
- specifically exclude from the definition of "handicap" impairment resulting either from using illegal drugs or, in the case of employment, from using alcohol.

Accommodation by employers. Presently the handicappers' civil rights act says only generally that people must "accommodate" a handicapper (for employment, housing, education, public accommodation or services) unless the person can demonstrate that the accommodation would impose an "undue hardship." The act does not define "undue hardship" or "accommodation," though the definition section of the employment part of the act does refer to "adaptive devices or aids." The act also applies only to employers with four or more employees.

The bill would redefine "employer" to include anyone who had one or more employees (retaining under the definition of "employee" the exemption of people who work in domestic service) and would in effect define "undue hardship" for smaller employers by putting a cap (based on a formula involving the number of employees and the state average weekly wage) on the amount that employers would be required to spend on an accommodation. The bill also would set a lower limit below which larger employers could not claim undue hardship, but would not set an upper limit above which the larger employer could automatically claim undue hardship.

The bill would recognize two kinds of accommodation (equipment or devices and readers or interpreters) and would set different multiples of the state average weekly wage (SAWW) for each. In the case of an accommodation requiring the hiring of a reader or interpreter, the amount that an employer would have to spend before triggering the bill's "undue hardship" provisions would be higher for the first year and lower for subsequent years.

Accommodations in the form of job restructuring or altering work schedules would be limited to "minor or infrequent duties" and would not be required of employers with fewer than 15 employees. Public employers (state or local) and federally tax-exempt organizations would be exempted from the caps (so that undue hardship would continue to be decided on a case to case basis). For the purposes of the act, the bill would specify that a required accommodation could not be construed as preferential treatment or an employee benefit, and nothing in the bill could be construed to conflict with the state civil rights act (the Elliott-Larsen Civil Rights Act, Public Act 453 of 1976).

The bill also includes provisions that would tie the bill to the passage of federal legislation regarding handicappers (the so-called "Americans with Disabilities Act," or "ADA"). The costs of "reasonable routine maintenance or repair" of equipment or devices needed to accommodate a handicapper would not be part of the cap, and the accommodation caps for temporary employees (defined in the bill as those hired for less than 90 days) would be 50 percent of the caps for full-time employees.

The formula for "undue hardship." Basically, employers would be divided into four groups: those with fewer than 4 employees, those with between 4 and 14 employees, those with between 15 and 24 employees, and those with 25 or more employees.

For each class of employer with fewer than 25 employees, the bill would establish a cap on how much an employer would have to spend before the amount would constitute an undue hardship. The cap would be figured as a multiple of the state average weekly wage (SAWW), and in each case the bill would specify that if the amount spent on accommodating a handicapper did not exceed the limitation set in the bill for that accommodation, the accommodation would not impose an undue hardship on the employer. For employers with 25 or more employers, the bill would not set an upper limit but instead would say that if the employer spent an amount equal to or less than certain specified amounts, then the accommodation would not impose an undue hardship. For accommodations involving readers or interpreters, the bill also would specify that if the cost to the employer exceeded the limitation, then the accommodation would impose an undue hardship on the employer.

An accommodation would not impose an undue hardship on employers:

(1) with fewer than 4 employees, if the employer spent up to the SAWW to buy equipment or devices, and up to 7 times the SAWW on readers or interpreters during the first year a handicapper was hired (up to 5 times the SAWW thereafter);

(2) with 4 to 14 employees, if the employer spent up to 1.5 times the SAWW on equipment or devices and up to 10 times (up to 7 times after the first year) the SAWW on readers or interpreters;

(3) with 15 and more employees, if the employer spent up to 2.5 times the SAWW on equipment or devices and up to 15 times (up to 10 times after the first year) the SAWW on readers or interpreters;

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(4) with 25 or more employees, if the employer spent an amount less than or equal to 2.5 times the SAWW on equipment or devices and 15 times (10 times after the first year) the SAWW on readers or interpreters.

These numbers can be summarized in chart form as follows:

Number of employees	Amount spent on equipment or devices	Amount spent on readers or interpreters
1-3	Up to the SAWW	7x (then 5x) SAWW
4-14	Up to 1.5x SAWW	10x (then 7x) SAWW
15-24	Up to 2.5x SAWW	15x (then 10x) SAWW
25 and up	At least 2.5x SAWW	At least 15x (then 10x) SAWW

That is, for smaller employers (those with fewer than 25 employees), there would be a ceiling on how much they would have to spend for accommodations; after that ceiling had been reached, any additional amounts spent on accommodations would automatically be considered an undue hardship on the employer. For larger employers (those with 25 or more employees), the bill would instead set a lower limit below which an employer could not claim undue hardship, but would not set any upper limit on what the larger employer might have to spend on an accommodation before being able to claim undue hardship.

Employers' rights. The bill would explicitly allow employers to:

- regulate the use of alcohol or illegal drugs at the workplace;
- apply different standards of compensation (or terms of employment) under a seniority or merit system (or transfer system, scheduling system, etc.), so long as it was not just an attempt to avoid meeting the bill's accommodation requirements;
- require employees absent from work because of illness or injury to submit evidence of their ability to return to work (but employers could not single out only handicappers for this requirement); and
- either prohibit an employee receiving worker's disability compensation from returning to work in a restructured job or else require that employee to return to work if the employer provided an accommodation.

Legal action. The bill would put the burden of proof on handicappers who wished to sue an employer for failure to accommodate. If the handicapper proved a prima facie case, then the employer being sued would have to prove that an accommodation would impose an undue hardship. If the employer produced evidence that an accommodation would impose an undue hardship, the burden of proof would once again shift to the handicapper to show ("by a preponderance of evidence") that an accommodation would not impose an undue hardship on the employer.

Under the bill, there could be no civil action against an employer for failure to accommodate unless the handicapper had notified the employer in writing of the need for accommodation within 182 days after the handicapper knew that one was needed. Employers would be required to appropriately notify all employees and job applicants about the bill's requirement that written notice be given of the need for accommodation (and if they failed to do so, the prohibition against civil action without notification would be waived).

Presently under the handicappers' civil rights act, someone alleging a violation of the act can sue for both appropriate injunctive relief or damages for injury or loss (including reasonable attorney fees). The bill would specify that any amount of compensation awarded for lost wages would be reduced by the amount received for lost wages under the Worker's Disability Compensation Act (Public Act 317 of 1969).

Other provisions. The bill would require the Department of Civil Rights to offer educational and training programs to employers, labor organizations, and employment agencies to help them understand the requirements of the bill.

MCL 37.1102 et al.

FISCAL IMPLICATIONS:

According to the House Fiscal Agency, the bill has no fiscal implications for the state. (4-3-90)

ARGUMENTS:

For:

Accommodation is a basic premise of handicapper civil rights legislation. The bill would reinstate this basic right and undo the devastating effects of the Carr decision.

From the time of its enactment in 1976 until the Carr decision in 1986, the handicappers' civil rights act operated to protect handicappers from discrimination in acquiring and keeping jobs. Employers had a responsibility to allow and provide for accommodations, including adaptive aids or devices which enabled handicappers to perform a job, provided that these accommodations did not pose an undue hardship for the employer.

Since the Carr decision, however, many handicapper organizations and their supporters believe that the civil rights of handicappers have been seriously eroded. Certain statistics seem to bear this belief out. For example, claims against employers under the Michigan Handicappers' Civil Rights Act have reportedly dropped 90 percent and there is anecdotal evidence that the decision has deterred many handicappers from filing complaints in the first place. The Michigan Department of Civil Rights reports an 11 percent drop in handicapper complaints filed since the Carr decision (from 486 in 1985 to 432 in 1986, the year following the ruling), while handicapper complaints in other states continue to rise (from 17 percent in California since 1985 to 67 percent in Minnesota during the same time). At the same time, the department reports that complaints of all types filed with the department have risen 2.5 percent during this same period.

The bill would restore to handicappers rights to reasonable accommodation that they lost under the Carr decision.

For:

By using language that parallels that in the proposed federal Americans with Disabilities Act, and by including effective dates that take the proposed federal act into consideration, the bill would put Michigan handicappers' civil rights' legislation into accord with nationally recognized trends in handicappers' civil rights.

For:

At present, the handicappers' civil rights act actually allows people under treatment for mental or psychological disorders to be discriminated against because the act's definition of "handicap" includes a definition of "mental characteristic" that limits legally protected characteristics to mental retardation and a "mentally ill restored

condition." Under present law, people currently under treatment for conditions such as organic brain syndrome, emotional illness, mental illness, or specific learning disability have no legal protections against discrimination since their situation is neither that of mental retardation nor that of a mentally ill restored condition. Yet like people with diabetes or epilepsy, whose physical condition can be controlled while under treatment, people who are undergoing treatment by a psychiatrist, psychologist, or therapist, or who are receiving medication to control a mental condition, can function as productive members of society. For too long, mentally ill people have been excluded from the protections of the handicappers' civil rights act. This exclusion was never based on any relevant policy considerations and it is time to extend the act's protections to all of our handicapped citizens. The bill, by striking the definition of mental characteristic, would ensure that the civil rights of all mentally ill people would be fully protected by the law.

For:

By tying the costs to businesses of providing accommodation to the state average weekly wage (which presently is about $470) and to the number of employees, the bill addresses the business community's worry about the possibility that the cost of accommodation would be prohibitively high. The caps include elements both of relative certainty of costs (without falling into the trap of setting flat rates) and of flexibility with regard to the relative size of the workplace. The exemption of public employers and charitable organizations leaves them with the flexibility of case by case determinations, while the qualifications put on job restructuring and altering work schedules clarify how and when this kind of accommodation can be applied.