

ATTORNEY GENERAL

liberal interpretation of any legislative enactment designed to implement it.” *Levitt & Sons, Inc. v. Division Against Discrimination*, 31 N.J. 514, 524 (1960). See also *Jackson v. Concord Company*, 53 N.J. 113 (1969).

When viewed especially from the perspective of the liberal interpretation given the statute by the courts, a reading of the New Jersey definition of “physical handicap” as well as a comparison of that provision with the earlier definition contained in the Law on Human Rights of the City of New York demonstrates the intention of the New Jersey Legislature to encompass the broadest variety of disabilities. N.J.S.A. 10:5-5 (q) provides:

“ ‘Physical handicap’ means any physical disability, infirmity, malformation or disfigurement which is caused by bodily injury, birth defect or illness including epilepsy, and which shall include, but not be limited to, any degree of paralysis, amputation, lack of physical coordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment or physical reliance on a seeing eye dog, wheelchair, or other remedial appliance or device.”

Four years before the effective date of the New Jersey amendment, New York City in 1968 had amended its Law on Human Rights so as to include the physically handicapped, but with a definition whose scope is rather narrow:

“The term ‘physically handicapped’ means a person who, because of accident, illness or congenital condition may depend upon a brace, crutch, cane, seeing eye dog, hand controlled car or such other device or appliance in performance of his daily responsibilities as a self-sufficient, productive and complete human being,” N. Y., N. Y., Administrative Code, Chapter I, Title B, Section B1-2.0 (16).

The major deficiency in this definition is its apparent requirement that an individual be encompassed by it only if he can show dependence upon a physical appliance or device such as crutches, canes or hand controlled cars. In a report entitled THE PHYSICALLY HANDICAPPED CITIZEN: A HUMAN RIGHTS ISSUE, released in September 1972, the New York City Commission on Human Rights pointed out that many persons do not rely upon physical devices, yet are physically handicapped nonetheless, and said that “definitions based on reliance on devices inevitably will be ambiguous and limited, given the rate of change in rehabilitative techniques.” *Id.* at 13.

In contrast, the New Jersey statutory definition is conceptually based, not upon the fortuitous circumstances of reliance upon a physical device, but upon those physical manifestations which characterize virtually every physical handicap. This legislative philosophy and the language chosen to implement it mandate the conclusion that diabetes is encompassed. Diabetes is, of course, commonly understood to be an “infirmity”, defined as “the state. . . of poor or deteriorated vitality.” WEBSTER’S SEVENTH NEW COLLEGIATE DICTIONARY 432 (1972). “Vitality,” in turn, is defined as “capacity to live and develop,” “physical or mental vigor,” and “power of enduring or continuing.” *Id.* at 995. It is generally known that diabetes, if untreated, often results in disorientation, coma, and death. Diabetes falls also within

## FORMAL OPINION

the dictionary definition of "physical disability," for the verb "disable" means "to deprive of physical, moral or intellectual strength," *id.* at 236, obviously the condition of an individual whose diabetic condition is not properly controlled. Interestingly, one definition of "disability" is "inability to pursue an occupation because of physical or mental impairment." *Id.* Undoubtedly the dictionary writer supposed such "inability" to mean an *absolute* incapacity to pursue the occupation, but when that definition is read in light of the mandate of the New Jersey Law Against Discrimination that employers not discriminate against the physically handicapped unless the nature and extent of the handicap reasonably precludes the performance of the particular employment," N.J.S.A. 10:5-4.1, the definition obviously encompasses conditions of physical impairment which, although they do not in fact reasonably preclude performance of the employment, are seen fit by employers to justify a refusal to hire.

A distinction has been suggested between physical impairment and medical impairment, by whose terms a diabetic applicant for employment would be deemed to suffer from a lingering, degenerative illness that does not constitute a physical handicap as such. The proposed distinction is, however, difficult to justify. "Physical" is defined as "of or relating to the body," WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY 638 (1972), and it would appear conceptually impossible for a "medical" impairment involving bodily functions not to manifest itself physically in some manner; equally difficult to imagine are manifestation of bodily functions which would not be encompassed within the definition of "physical." The ultimate conclusion must be that if there are bodily manifestations fitting within the definitions of "physical disability," "infirmity," "malformation," or "disfigurement," those bodily manifestations constitute a "physical handicap."

Again, therefore, the "physical handicap" amendment is consistent with the breadth of the other provisions of the Law Against Discrimination. See *Levitt & Sons, Inc. v. Division Against Discrimination* and *Jackson v. Concord Company, supra*. Our conclusion that diabetes is encompassed within the definition does not imply, of course, that a refusal to employ a diabetic applicant must necessarily constitute unlawful discrimination, for, as noted at the outset, the Legislature was fully aware of the severity of some physical handicaps and consequently authorized employment discrimination when "the nature and extent of the handicap reasonably precludes the performance of the particular employment." N.J.S.A. 10:5-4.1. Nevertheless, that determination is one of fact which must be made by the Director of the Division on Civil Rights in the first instance when deciding the existence of probable cause and subsequently when reviewing all evidence submitted at hearing on behalf of both the complainant and the respondent. Our conclusion is, again, that diabetes is comprehended by the statutory provision and the Division may pursue complaints submitted by diabetic persons.

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