CIVIL RIGHTS—Employer Had a Legitimate Business Purpose for Applying a Rule Which Precluded the Hiring of Any Applicant Who Had Prior Back Surgery, Where Medical Evidence Showed That There Was a Substantial Likelihood That Persons with Prior Back Problems Would Sustain Future Pain and Disability Due to the Requirements of the Job—*Frank v. American Freight Systems, Inc.*, 398 N.W.2d 797 (Iowa 1987).

Glen Frank, forty-nine years old, applied for a job as a truck driver for American Freight Systems, Inc.[1] At the time of his application, Frank had more than twenty years' experience as an over-the-road truck driver.[2] Frank's application was rejected when American Freight discovered he had a disqualifying back condition.[3]

All driver applicants were classified with reference to three back abnormality categories.[4] Category "A" included "abnormalities of minor importance."[5] Category "B" included "abnormalities of increased importance."[6] Category "C" included sixteen "abnormalities indicating substandard risk for sustained heavy work . . . ."[7] One of the abnormalities included in Category "C" was "prior back surgery."[8] Any applicant with a Category "C" abnormality was automatically disqualified.[9]

Glen Frank had "prior back surgery" in 1966 after he sustained an injury to his lower back.[10] Soon after the injury, a laminectomy and fusion[11] were performed on Frank's spine.[12] During the year following surgery, Frank received medical treatment for pain[13] and exercised his back in order to strengthen it.[14] Frank returned to work as a truck driver[15] throughout the

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1. Frank v. American Freight Sys., Inc., 398 N.W.2d 797, 798 (Iowa 1987).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.* Frank sustained the injury while working as a truck driver. Brief for Appellant at 1, Frank v. American Freight Sys., Inc., 398 N.W.2d 797 (Iowa 1987) (No. 85-1640).
11. A laminectomy is a surgical procedure wherein a vertebral lamina is excised. STEDMAN'S MEDICAL DICTIONARY 758 (4th ed. 1976). A fusion is another surgical procedure wherein the spine is stiffened or fixed. *Id.* at 562. *See also* 2 F. LANE, MEDICAL LITIGATION GUIDE § 22.38 (1981).
12. Frank v. American Freight Sys., Inc., 398 N.W.2d at 798.
13. Brief for Appellant at 1, Frank v. American Freight Sys., Inc., 398 N.W.2d 797 (Iowa 1987) (No. 85-1640).
14. Brief for Appellee at 2, Frank v. American Freight Sys., Inc., 398 N.W.2d 797 (Iowa 1987) (No. 85-1640).
15. Frank v. American Freight Sys., Inc., 398 N.W.2d at 798.

1970s and 1980s.[16] During the same period, Frank passed several physical examinations[17] required by the U.S. Department of Transportation.[18] Each examining physician was aware of Frank's prior back surgery.[19]

After American Freight rejected Frank's application, "Frank filed a complaint with the Iowa Civil Rights Commission alleging disability discrimination[20] under Iowa Code section 601A.6."[21] The Iowa Civil Rights Commission issued a "right to sue" letter[22] and thereafter Frank commenced an action in district court.[23]

Finding that Frank had been the victim of discrimination, the district court awarded him back pay, front pay, damages for emotional distress and mental anguish, and attorney's fees.[24] In addition, the district court ordered American Freight to hire Frank and to discontinue the challenged discriminatory practices.[25] American Freight appealed and the Iowa Supreme Court reversed and remanded for entry of an order dismissing the petition.[26] The court found that an employer has a legitimate business purpose for rejecting any applicant with a history of prior back surgeries, where medical evidence shows that there is a substantial likelihood that such an applicant will sustain future pain and injury, causing problems in job performance and interruption of the employer's business.[27]

Justice Larson, writing for the unanimous five-justice panel, began the court's opinion by considering whether Frank's allegation of discrimination

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16. Brief for Appellee at 2, Frank v. American Freight Sys., Inc., 398 N.W.2d 797 (Iowa 1987) (No. 85-1640).

17. Frank v. American Freight Sys., Inc., 398 N.W.2d at 798.

18. Brief for Appellant at 2, Frank v. American Freight Sys., Inc., 398 N.W.2d 797 (Iowa 1987) (No. 85-1640).

19. Brief for Appellee at 2, Frank v. American Freight Sys., Inc., 398 N.W.2d 797 (Iowa 1987) (No. 85-1640).

20. Frank v. American Freight Sys., Inc., 398 N.W.2d at 798.

21. Section 601A.6 states:

> It shall be an unfair discriminatory practice for any:
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> a. Person to refuse to hire, accept, register, classify, or refer for employment . . . or otherwise discriminate in employment against any applicant for employment . . . because of the . . . disability of such applicant . . . unless based upon the nature of the occupation. If a disabled person is qualified to perform a particular occupation, by reason of training or experience, the nature of that occupation shall not be the basis for exception to the unfair or discriminatory practices prohibited by this section.

IOWA CODE § 601A.6(1)(a) (1981).

22. Frank v. American Freight Sys., Inc., 398 N.W.2d at 798. A complainant suing under the Iowa Civil Rights Act of 1965 may request that the action be transferred to district court upon the "expiration of one hundred twenty days from the timely filing of a complaint with the commission . . . ." IOWA CODE § 601A.16 (1981).

23. Frank v. American Freight Sys., Inc., 398 N.W.2d at 798.

24. *Id.*

25. *Id.*

26. *Id.* at 803.

27. *Id.* at 802.

should be examined under a disparate impact analysis or a disparate treatment analysis.[28]

A disparate impact type of discrimination arises when a seemingly innocuous rule or regulation operates to the disadvantage of certain protected classes.[29] The intention or motivation of the employer who institutes the rule or regulation is immaterial; the significant factor is the impact of the practice on a protected class.[30] The trial court, although expressing doubt about the use of the disparate impact analysis, "relied on it as an alternative basis for its opinion."[31] The Iowa Supreme Court, however, agreed with American Freight that Frank's allegation must be examined under a disparate treatment analysis.[32] A disparate treatment type of discrimination arises when a rule or regulation discriminates on its face[33] as did American Freight's rule prohibiting the employment of any applicant with Category "C" abnormalities.[34]

Under either form of analysis, the complainant must first establish a prima facie case of discrimination.[35] Without extensive discussion, the court found that a prima facie case of discrimination had been established.[36]

After the complainant has established a prima facie case of discrimination, the employer must then show that it has a "legitimate, non-discriminatory reason for its conduct."[37] American Freight argued that it did in fact have a legitimate, non-discriminatory reason for its employment practice—a "nature of the occupation" defense.[38] The "nature of the occupation" defense is predicated upon the statutory language of Iowa Code section 601A.6(1)(a) which states that "[i]t shall be an unfair or discriminatory practice for any [p]erson to refuse to hire . . . any applicant for employment . . . because of the . . . disability . . . of such applicant . . . unless based upon the nature of the occupation."[39] Although not explicitly defined by the court, the "nature of the occupation" defense appears to allow a discrimina-

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28. *Id.* at 799-800.

29. *Id.* at 800. A regulation imposing minimum height and weight standards for guards in a correctional facility operates to exclude a large percentage of women applicants. Dothard v. Rawlinson, 433 U.S. 321, 329 (1977). Similarly, an employment standard which requires a high school education, or the functional equivalent, discriminates disproportionately against blacks who are educationally disadvantaged. Griggs v. Duke Power Co., 401 U.S. 424, 430-31 (1971).

30. Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).

31. Frank v. American Freight Sys., Inc., 398 N.W.2d at 800.

32. *Id.*

33. *Id.*

34. *Id.* at 798.

35. *Id.* at 800.

36. *Id.* at 800-01. The court noted that American Freight had conceded that the challenged practice discriminated against Frank. *Id.* at 800.

37. *Id.* at 800 (citing Consolidated Freightways v. Cedar Rapids Civil Rights Comm'n, 366 N.W.2d 522, 530 (Iowa 1985).

38. *Id.* at 801.

39. Iowa Code § 601A.6 (1981).

tory practice when the nature and extent of the disability and the needs of a particular job are incompatible.[40] Alternatively, the court likened the "nature of the occupation" defense to the "business necessity" defense under the federal civil rights acts.[41] The "business necessity" defense arises when "there exists an overriding, legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business."[42] Accordingly, the "nature of the occupation" defense is established when the employer shows "an overriding, legitimate business purpose" for the challenged employment practice.[43]

Prior to examining American Freight's "nature of the occupation" defense, the court evaluated American Freight's contention that it could apply the discriminatory physical classifications on a "blanket basis."[44] American Freight argued that it need not give individualized consideration to each applicant.[45] The court rejected this argument[46] relying on its implicit analysis in *Foods, Inc. v. Iowa Civil Rights Commission*[47] and on one commentator's analysis of the application of the "nature of the occupation" defense.[48] Under these analyses, a blanket application of a discriminatory hiring rule is inappropriate because the complainant may overcome the effects of a disability by showing specialized training or experience.[49] Such a showing in fact abrogates the "nature of the occupation" defense.[50]

American Freight argued that the avoidance of a future on-the-job in-

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40. Frank v. American Freight Sys., Inc., 398 N.W.2d at 801.

41. *Id.* at 802. The federal civil right act provides:

> Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to . . . admit or employ any individual . . . on the basis of his religion, sex or national origin in those certain instances where religion, sex or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business . . . .

42 U.S.C. § 2000(e)-2(e) (1982) (note that the federal civil rights act does not cover employment discrimination based on physical or mental disability. *See* 42 U.S.C. § 2000(e)-2(a)(1) & (2) (1982)).

42. Frank v. American Freight Sys., Inc., 398 N.W.2d at 802 (quoting Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir. 1971)). In *Robinson* the court invalidated a union departmental transfer and job seniority system which overtly discriminated against black employees. Robinson v. Lorillard, 444 F.2d at 795.

43. Frank v. American Freight Sys., Inc., 398 N.W.2d at 802.

44. *Id.* at 801.

45. *Id.*

46. *Id.*

47. Foods, Inc., v. Iowa Civil Rights Comm'n, 318 N.W.2d 162 (Iowa 1982).

48. Nichols, *Iowa's Law Prohibiting Disability Discrimination in Employment: An Overview*, 32 DRAKE L. REV. 273, 358 (1982-83).

49. Frank v. American Freight Sys., Inc., 398 N.W.2d at 801.

50. "If a disabled person is qualified to perform a particular occupation, by reason of training or experience, the nature of that occupation shall not be the basis for exception to the unfair or discriminating practices prohibited by this subsection." IOWA CODE § 601A.6(1)(a) (1981).

jury to Frank, with a consequent interruption of its business, was a legitimate business purpose which justified refusing to hire Frank.[51] This argument has been called the "future injury" defense, or alternatively the "safety" defense.[52] Frank had applied for a job in the perishable division;

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51. Frank v. American Freight Sys., Inc., 398 N.W.2d at 802.

52. Brief for Appellant at 23, Frank v. American Freight Sys., Inc., 398 N.W.2d 797 (Iowa 1987) (No. 85-1640). Appellant cited three cases for its support of the "future injury" or safety defense. *Id.*

In the first case, the complainant was denied employment as a welder because of three congenital back defects disclosed during a pre-employment physical examination. Bucyrus-Erie Co. v. State, 90 Wis. 2d 426, ____ , 280 N.W.2d 142, 144 (1979). The welding company's medical director testified that the complainant's ability to work as a welder was restricted by these congenital back defects because they would increase the likelihood that the complainant would injure his back in the future. *Id.* at ____, 280 N.W.2d at 145. Although the complainant's favorable award was upheld, the Wisconsin Supreme Court agreed that an employer may reject an applicant who would pose a substantial threat to his own safety or the safety of others if hired. *Id.* at ____, 280 N.W.2d at 147. The court based its findings on a Wisconsin statute which allowed an employer to discriminate against an applicant who is "unable to efficiently perform, at the standards set by the employer, the duties required in that job . . . ." *Id.* (quoting Wis. Stat. § 111.32(5)(f) (1973)).

Appellant cited a second case wherein the Wisconsin Supreme Court upheld a finding by the Wisconsin Labor Industry Review Commission that an epileptic welder did not present a reasonable probability of hazard on the date he was disqualified from employment by his employer. Chicago & N.W.R.R. v. Labor Indus. Review Comm'n, 98 Wis. 2d 592, ____ , 297 N.W.2d 819, 828 (1980). In making its determination, the court stated that "[t]he ability to perform embraces more than the physical strength and dexterity required to adequately perform at the moment of application for employment. *It embraces the ability to perform without a materially enhanced risk of death, or serious injury to the employee or others in the future . . .*" *Id.* at ____, 297 N.W.2d at 825 (quoting Bucyrus-Erie Co. v. State, 90 Wis. 2d 426, ____ , 280 N.W.2d 142, 149 (1979) (emphasis in the original)). The court evaluated medical testimony which alleged that a welder suffering from epilepsy would pose a hazard to his own health and safety, as well as to the health and safety of others. *Id.* In rejecting the employer's medical evidence, the court gave greater weight to the complainant's medical evidence that the majority of epileptics under drug therapy do not suffer recurrent seizures. *Id.* at ____, 297 N.W.2d at 826. Moreover, the court noted that the complainant had not suffered a seizure for six months prior to being released back to work. *Id.*

The appellant cited a third case wherein the Maine Supreme Court reversed a finding that an employer had established the elements necessary to assert the "safety" defense. Maine Human Rights Comm'n v. Canadian Pac. Ltd., 458 A.2d 1225, 1227 (Me. 1983). One of the three original complainants had undergone back surgery prior to applying for a job with the employer. *Id.* at 1228. The back surgery consisted of two procedures, a laminectomy and a fusion. *Id.* The employer's chief medical officer testified that the employer did not hire applicants who had undergone such procedures unless six trouble-free years had passed between the procedures and the employment application. *Id.* The employer argued that the Maine Human Rights Act allowed an employer to discriminate when an employee's disability rendered the employee unable to perform employment duties "in a manner which would not endanger the health or safety of the employee or the health and safety of others . . . ." *Id.* at 1230 (citing Me. Rev. Stat. Ann. tit. 5, § 4573 (4) (1979)). The Maine Supreme Court agreed that the statute allowed such a defense, but stated that the defense was unavailable when the employer shows only a mere possibility that the complainant's disability "might endanger his or others' health or safety at some indefinite future time." *Id.* at 1234. The employer failed to prove more than a

American Freight submitted evidence detailing the physical requirements of that job.[53] Drivers in the perishable division were required by contract to load and unload cargo, as well as drive.[54] The drivers worked in teams and were ultimately responsible for fulfilling the duties of drivers, although the drivers could hire temporary workers to help load and unload.[55] American Freight disputed Frank's contention that Frank would be able to fulfill all these duties given the nature of his back condition.[56]

Frank's back condition was undisputedly diagnosed as "prior surgery, retrospondylolisthesis[57] and disk degeneration disease."[58] Although Frank had been driving trucks and loading and unloading for fifteen years after his back surgery without any problems,[59] the court gave great weight to both the testimony of American Freight's medical expert and to documentary evidence regarding the risk of future injury to Frank.[60] The medical expert testified that the probability of future pain and disability to Frank was greater than fifty percent and possibly greater than seventy-five percent.[61] The expert based his estimations on the fact that Frank's type of back condition usually worsens over time and that it would be aggravated by heavy lifting and by sitting for prolonged periods.[62] In addition, the bouncing and vibration of truck driving would increase the possibility of injury.[63] Two medical studies introduced into evidence supported the expert's testimony by showing the relationship between the demands of truck driving and the probability of future injury.[64] Frank did not refute American Freight's medical evidence with contradictory medical evidence that he was not under an increased risk.[65] The court, therefore, found that American Freight had shown an overriding, legitimate purpose for its discriminatory practice.[66]

In so finding, the court created a new defense to discriminatory employment practices which had no obvious support in either prior Iowa Supreme

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mere possibility because it did not establish that the particular complainant's employment would pose a risk of future injury. *Id.*

53. Frank v. American Freight Sys., Inc., 398 N.W.2d at 801.

54. *Id.*

55. *Id.*

56. *Id.*

57. Retrospondylolisthesis is a condition in which a vertebra slips backward, taking it out of line with the vertebrae above and below. STEDMAN'S MEDICAL DICTIONARY 1228 (4th ed. 1976).

58. Frank v. American Freight Sys., Inc., 398 N.W.2d at 801.

59. *Id. See also* Brief for Appellee at 2-4, Frank v. American Freight Sys., Inc., 398 N.W.2d 797 (Iowa 1987) (No. 85-1640).

60. Frank v. American Freight Sys., Inc., 398 N.W.2d at 801-02.

61. *Id.*

62. *Id.* at 801.

63. *Id.*

64. *Id.* at 802.

65. *Id.*

66. *Id.*

Court decisions[67] or statutory language.[68] In *Frank*, the court relied on its decision in *Foods, Inc. v. Iowa Civil Rights Commission* [69] to require American Freight to apply its physical qualification rules on an individualized basis.[70] In addition, the court in *Frank* appeared to rely on a separate aspect of its *Foods* decision in creating the "future injury" defense.

In *Foods*, the complainant was an epileptic cafeteria worker who suffered an on-the-job seizure fourteen months after she began her job.[71] Three days after suffering the seizure she was fired.[72] The Iowa Civil Rights Commission found for the complainant but was reversed on appeal by the district court.[73] The district court reversed on the grounds that the complainant's epileptic condition "coupled with the potentially hazardous nature of the cafeteria machinery she worked near . . . posed substantial danger to [the complainant], her fellow workers, and . . . customers."[74] Accordingly, the district court found that the complainant's discharge was based upon the nature of the occupation.[75]

The Iowa Supreme Court reversed the district court's holding and upheld the finding of the Iowa Civil Rights Commission.[76] The court based its decision on two grounds: (1) "there was substantial evidence in the record to support the hearing officer's determination that [the complainant's] discharge was not based upon the nature of the occupation";[77] and (2) the employer could have accommodated the complainant's condition without undue hardship.[78]

The apparent difference between the holding in *Foods* and the holding in *Frank*[79] is both enhanced and diminished when the peculiar facts of each are analyzed. In *Foods*, the court's scope of review was to correct errors of

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67. *But see supra* note 50.

68. Rule 161-8.27(1)(b) does allow examination or assessment of an applicant in order to determine whether the applicant "[i]s physically and mentally qualified to do the work without adverse consequences such as creating a danger to life or health of fellow employees." IOWA ADMIN. CODE r. 161-8.27(1)(b) (1988). Any physical standards for employment "shall be based on complete factual information concerning working conditions, hazards and essential physical requirements of each job. *Id.* at r. 161-8.27(3). However, "examination or other assessments [of applicants] should consider the degree to which the person has compensated for [his] limitations and the rehabilitation service that [he] has received." *Id.* at r. 161-8.27(2).

69. Foods, Inc. v. Iowa Civil Rights Comm'n, 318 N.W.2d 162 (Iowa 1982).

70. Frank v. American Freight Sys., Inc., 398 N.W.2d at 801. *See also supra* notes 44-50 and accompanying text.

71. Foods, Inc. v. Iowa Civil Rights Comm'n, 318 N.W.2d at 164.

72. *Id.*

73. *Id.*

74. *Id.* at 168.

75. *Id.*

76. *Id.* at 169.

77. *Id.*

78. *Id.*

79. Frank v. American Freight Sys., Inc., 398 N.W.2d 797 (Iowa 1987).

law made by the district court.[80] The district court was obligated to uphold the agency's determination if it was supported by substantial evidence in the record.[81] The Iowa Supreme Court found substantial evidence in the record that the complainant's discharge was not based on the nature of the occupation.[82] In so finding, the court evaluated the nature and extent of the employment duties involved[83] in relation to the possibility of reassigning those duties to accommodate the complainant's disability.[84] In addition, the court reviewed the complainant's testimony regarding her epilepsy, the extent of treatment, and the medication taken to control her condition.[85] Interestingly, the complainant did not submit expert medical testimony to substantiate her own testimony about her condition.[86] The court reviewed the potential risk of future injury to the complainant but found that evidence of her prior work experience coupled with evidence of her current duties warranted a finding in her favor.[87] The court did, however, appear to accept the concept that risk of future injury justified discriminatory employment practices.[88] The Iowa Civil Rights Commission's finding was upheld because there was substantial evidence in the record to support the finding,[89] not because the "future injury" defense was disallowed.

In contrast, *Frank* went up for review in front of the Iowa Supreme Court via an alternative route. Frank received a "right to sue" letter from the Iowa Civil Rights Commission which allowed Frank to recommence the action in district court.[90] Frank filed the action in equity to force his hiring, thus enabling the Iowa Supreme Court to review the case de novo.[91] As the court itself noted, this scope of review is unusual; normally such actions are reviewable on a substantial evidence basis.[92] The court was thus free to evaluate the case on its merits without regard to the district court's findings.

After evaluating the evidence, the court reversed the district court's holding and found that American Freight had established the "nature of the occupation" defense.[93] In so holding, the court disregarded strictures it had itself down elsewhere in the opinion.[94] The court expressly required that

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80. Foods, Inc. v. Iowa Civil Rights Comm'n, 318 N.W.2d at 164.
81. *Id.* at 166.
82. *Id.* at 169.
83. *Id.* at 168.
84. *Id.* at 168-69.
85. *Id.* at 166.
86. *Id.*
87. *Id.* at 169.
88. *See id.* at 168.
89. *Id.* at 169.
90. Frank v. American Freight Sys., Inc., 398 N.W.2d at 798. *See also supra* notes 22-23 and accompanying text.
91. Frank v. American Freight Sys., Inc., 398 N.W.2d at 799.
92. *Id. See also supra* notes 76-87 and accompanying text.
93. *See supra* notes 37-50 and accompanying text.
94. *See supra* notes 44-50 and accompanying text.

American Freight apply its physical qualification rules on an individualized basis.[95]

> We believe that, in most discrimination cases based on disability, individualized consideration must be given to the job and to the applicant's particular circumstances . . . . The nature and extent of a disability, the needs of a particular job, and the impact of disability on a person's ability to perform that job, are too diverse to permit generalized application of such rules.[96]

Yet the court overlooked the fact that Frank had been able to fulfill the duties of a truck driver for fifteen years after his prior back surgery.[97] Instead, medical testimony and documentary evidence describing the usual prognosis for persons with Frank's back condition were given the greatest weight.[98] Moreover, no evidence evaluating Frank's individual risk of future injury was submitted.[99]

In light of the court's own strictures on individualized application of employment rules and of other courts' decisions on the "future injury" defense,[100] the rationale for the Iowa Supreme Court's decision is weak. The court applied general medical prognostications based on probabilities in its evaluation of the risk of future injury, and did not evaluate Frank's individualized risk.[101] In so doing, the court overlooked the statutory mandate to evaluate each person's individual training or experience.[102] Though "training or experience" is not defined in the code, rules promulgated under the code clearly require that consideration be given to the person's adaptive responses to his or her disability.[103] Frank had completed an exercise program in order to strengthen his back.[104] Moreover, Frank had not experienced additional difficulties with his back since he resumed driving trucks in the 1970s.[105] Thus, regardless of the general possibility of future injury to truck drivers with Frank's back problems, Frank himself did not appear to be clearly at risk for future injury.

It remains to be seen whether the court will further develop the law surrounding the "future injury" defense. However, participants in employ-

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95. Frank v. American Freight Sys., Inc., 398 N.W.2d at 801.
96. *Id.*
97. *See supra* note 59 and accompanying text.
98. *See supra* notes 60-64 and accompanying text.
99. *See generally* Frank v. American Freight Sys., Inc., 398 N.W.2d at 801-02.
100. *See supra* note 52.
101. Frank v. American Freight Sys., Inc., 398 N.W.2d at 802.
102. "If a disabled person is qualified to perform a particular occupation, by reason of training or experience, the nature of that occupation shall not be the basis for exception to the unfair or discriminatory practices prohibited by this subsection." IOWA CODE § 601A.6(1)(a) (1985).
103. *See supra* note 68.
104. *See supra* note 14.
105. Frank v. American Freight Sys., Inc., 398 N.W.2d at 801.

ment discrimination litigation should attempt to devise a strategy which encourages the court to evaluate risk of injury to the individual based on the individual's particular physical disability. Moreover, the participants should consider what effect the choice of forum will have on the ultimate decision. If the complaint is tried in front of the Iowa Civil Rights Commission, the reviewing court will only look for substantial evidence in the record to support the decision of the trier of fact. If, however, a complainant brings the action in district court in equity, the appellate court will review the case de novo. Other courts, however, which have considered the issue have required considerably more evidence of likelihood of future injury and an individualized evaluation of that evidence in relation to the affected applicant.[106]

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106. *See supra* note 52.